

COMPETITION COMMITTEE



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Vertical Relations in
Gasoline Retailing

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COMPETITION POLICY FOR VERTICAL RELATIONS IN GASOLINE RETAILING

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition Policy for Vertical Relations in Gasoline Retailing held by the Competition Committee (Working Party No. 2 on Competition and Regulation) in October 2008.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la Séparation Verticale des Points de Vente d'Essence au Détail qui s'est tenue en octobre 2008 dans le cadre du Comité de la concurrence (Groupe de Travail No. 2 sur la Concurrence et la Réglementation).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

Considering the discussion at the roundtable, the delegates' submissions, and the background paper, several key points emerge.

- (1) *Distribution and retailing in the gasoline industry operate under a wide variety of vertical relationships with refiners, ranging from full integration to complete vertical separation. In recent years, the structure of gasoline retailing has changed significantly in many jurisdictions.*

Vertical relationships between retailers and refiners range from full vertical integration to complete independence of gasoline retailers. In some jurisdictions, refiners continue to own a large portion of retailers or have strong, restrictive contractual relationships with most gasoline retailers. Two examples are Portugal and Italy. The jurisdictions with a preponderance of strong vertical relationships appear to be those with regulation of the location of gasoline retailers or those with continued regulation of retail gasoline prices. South Africa is an example of the latter. Government subsidies of retail gasoline prices have an important impact on vertical integration in Chinese Taipei and in Indonesia, for example. Although once common, explicit government control of retail prices and entry is now a rarity.

Often changes in the degree of vertical integration occur during a process of modernisation and consolidation of retail outlets. Many jurisdictions report dramatic declines in the number of retail outlets and in the number of outlets that offer the services of a mechanic. At the same time, many more outlets have diversified by offering convenience store items such as snacks, soft drinks, and chewing gum. Gasoline stations tend to have more pumps than in the past.

- (2) *Proponents of mandatory vertical unbundling of gasoline retailers point to opportunistic behaviour by refiners and contend that unbundling is a means to resolve recurring contract disputes.*

Relationships between refiners and retailers are reportedly contentious in many jurisdictions. One element that can create tension is incomplete contracting between retailers and refiners. Complications can arise from local market power at the retail level, long exclusive supply agreements, and contrasting interpretations of franchise agreements.

Independent gasoline retailers sometimes complain about price squeezes or about "predatory pricing" by vertically integrated retailers aimed at appropriating the investments in better service and customer relationships made by individual retailers. At times, organisations of retailers push for legislation that restricts the authority of refiners to influence the behaviour of gasoline retailers. One form of legislation mandates divestiture of gasoline retail outlets owned by refiners. Gasoline retailers in a number of jurisdictions have requested mandated divestitures, but typically not with success. In the United States, six states have passed such legislation. Jurisdictions including Turkey and Argentina have placed restrictions on the number or proportion of retail outlets that refiners can own. Some provinces of Canada have adopted

pricing restrictions in lieu of vertical unbundling. Australia previously limited downstream vertical integration by oil refineries.

Some jurisdictions place restrictions on the duration of exclusive supply contracts between retailers and refiners. The policy objective of these limitations is to facilitate entry at the refinery level.

Norway noted a potential source of competitive concern based on refinery subsidies. If retail outlet managers exaggerate the extent of local price competition that they report to refiners, refiners may provide subsidies intended for areas with intense retail competition. With the subsidies, a retailer may be able to drive out local retail competitors that do not have access to such subsidies even if these competitors are more efficient. Once the local retail competitors have been eliminated, the manager may be able to exercise local market power. Ireland investigated a refiner's special discount or price support program more generally and determined that it had the effect of discouraging retail price competition by lessening the incentives of independent retailers to offer lower prices. The refiner subsequently agreed to end such pricing support.

- (3) *Opponents of required vertical unbundling point to benefits of vertical integration such as achieving operating efficiencies and avoiding double marginalisation. They warn that mandatory unbundling will lead to higher retail price/cost margins for gasoline.*

There are few recent studies of mandatory vertical unbundling because such regulations are very rare. But those studies show that vertical integration can result in cost savings that benefit customers. Outlawing vertical integration is associated with increased retail prices.

Portugal reports that complaints from retailers often involve terms in supply contracts that support refiners' efforts to keep retail margins low. Retailers' desires to increase margins above those encouraged by refiners could reflect either locational market power at some retail gasoline outlets or double marginalisation.

- (4) *Resolving the vertical integration controversy to the satisfaction of the opposing parties is probably not possible because of their fundamentally different economic interests.*

Independent sellers of branded gasoline focus on alleged unfair practices of refiners that are believed to result in appropriation of profits by refiners that are only available because of investments, innovations, and efforts of retailers. Discriminatory pricing by refiners is alleged by retailers. Some of these prices are alleged to be predatory. In contrast, the refiners express concern about exercise of local market power by retailers and double marginalisation by retailers.

Recent research suggests that the effects of vertical integration are complex. These studies find that efficiency gains from vertical integration by refiners into retailing are more than offset by associated weakening of competition at the refining stage of production. An amicable resolution of the vertical unbundling controversy requires that (i) supporters of vertical integration address the problems of contract enforcement opportunism and (ii) proponents of mandatory unbundling examine whether concerns about opportunism and cross-subsidisation can be addressed under the general laws against abuse of dominance and unfair competition.

- (5) *An important complicating factor in assessing the effects of banning vertical integration is the rapid expansion of large retailers into gasoline retailing.*

Many jurisdictions report major entry by large retailers into independent gasoline retailing. Australia, Great Britain, France, Canada, and the United States are examples. Japan and others report movement in the same direction, but to a lesser extent. Large retailers typically use low gasoline prices as a marketing tool to attract customers into their stores. This form of entry can put financial pressure on vertically integrated and stand-alone gasoline retailers. Traditional gasoline retailers have generally experienced initial share losses to these entrants. More recently, however, Australia, for example, reports that stand-alone gasoline retailers have slowed or reversed these share losses by adopting new modes of operation themselves. Typically, the response by pre-existing gasoline stations to large retailer entry is to carry a wide variety of snack and beverage food items that are sold at higher margins than the gasoline. Further, stand-alone gasoline retailing firms have consolidated into larger outlets. These new outlets typically emulate the operations of the large retailers by including many more pumps, on average, than in the past.

The competition authority in Australia studied the effects of entry by large retailers and found the effects to be beneficial for consumers. Gasoline prices are lower as a result and there is little evidence of compensating higher grocery prices. Other competition authorities report that retail gasoline prices offered by large retailers are lower than those of traditional outlets. Lower costs of the large, low-service gasoline operations of the large retailers contribute to these lower retail gasoline prices.

- (6) *Extensive entry of major independent retailers into the retail gasoline industry has largely displaced earlier concerns about excessive vertical integration by gasoline refiners into gasoline retailing.*

Except in jurisdictions with restrictions of retail entry, entry by larger retailers has removed much of the concern about lack of independent gasoline retailers. Residual competition concerns focus on entry conditions at the wholesale level. Particularly in Europe, entry conditions at the wholesale level also are burdened by tax policies based on production rather than sales of refined products. Production-based taxes require that refinery entrants have financial resources sufficient to cover payment of taxes before they make any sales.

Many jurisdictions report that concerns about excessive vertical integration have dissipated because major refiners have voluntarily divested substantial numbers of retail gasoline stations, reportedly because of the low profit margins at the retail level.

- (7) *Market monitoring and antitrust enforcement in the gasoline industry remain high-profile tasks for competition agencies.*

Public interest in motor fuels was galvanised by extreme price changes for these fuels during 2008. Motor fuel prices are well known to consumers. In addition, motor fuel price changes impact the prices of many other goods and services. Consumer awareness is reinforced by media coverage and highly visible posted retail gasoline prices. The combination of media attention and consumer complaints generates political interest in motor fuel prices. These forces generate questions about whether competition works well in the gasoline industry.

Many competition agencies have been required to study gasoline price changes in depth in order to assess whether market power or contractual problems have contributed to the price increases consumers have faced from time to time. For example, the Competition Bureau in Canada

completed several studies of gasoline price movements. In some instances, studies have led to investigations of alleged collusive behaviour between gasoline retailers. Australia's competition authority has prepared multiple gasoline studies. Australia has been investigating a seemingly unique weekly retail gasoline price cycle in its major metropolitan areas. In the United States, the Federal Trade Commission has an ongoing market monitoring responsibility and conducts studies of gasoline prices in specific time periods. Portugal's competition authority also has an ongoing market monitoring responsibility. Germany has examined whether regulations that require frequent updates in the public posting of retail prices contribute to retail price collusion in gasoline/diesel sales. Generally, it appears that the benefits of stronger consumer search behaviour exceed the risks of increased collusion. In general, competition authorities have not found sufficient evidence to prosecute complaints of price squeezing in retail gasoline markets.

Competition authorities have led a variety of investigations into potentially illegal behaviour. While some competition law investigations of the gasoline industry examine retail pricing behaviour, others focus on competition at the refinery level.

- Merger investigations become more serious because of increases in the minimum efficient scale of refining and lapses in previous policies that favoured small refineries.
- Other competition inquiries have focused on entry conditions at the refinery level and the limited number of efficient scale refineries that can be supported by small economies.
- Still others have investigated swap arrangements in which refineries agree to supply each other based on the physical proximity of a customer to the production facilities of the firms. Such arrangements can be efficient because they reduce transportation costs and delays, but they also can facilitate coordination by revealing competitively sensitive information about competitors' customers, quantities, and prices.
- Agencies also have been called upon to study the relative speed with which oil price increases and decreases pass through to retail prices. Retail prices tend to rapidly follow increases in oil prices but only gradually follow decreases in oil price. Various explanations have been tendered including the influence of inventories, consumer search behaviour, and anticompetitive conduct. In carrying out these studies, one role of the competition agencies is to educate consumers and legislators about fuel markets and impacts of potential regulatory steps.
- In Japan, concerns have been expressed about the reportedly widespread purchases of non-branded gasoline by branded gasoline outlets. Under the trademark license agreements, wholesalers require their affiliated agencies and affiliated stores to refrain from selling non-branded gasoline at wholesaler affiliated SSs. On the other hand, if the wholesaler exercises its trademark rights in an arbitrary and discriminative way and has a serious effect on the competitiveness of affiliated agencies treated in a disadvantageous way, the practice could be a problem under Japanese competition law as an unfair trade practice.
- In Brazil, the competition agency observes a convergence between gasoline and ethanol retailing. This phenomenon is interesting from a competition viewpoint because the concentration level in ethanol production is much lower than in oil refining. Competitive concerns about market power in oil refining seem likely to fade as ethanol producers increase their share of the motor fuel market.

SYNTHÈSE

Par le Secrétariat

Les débats lors de la table ronde, les contributions des Délégués et le document de référence font ressortir plusieurs points fondamentaux :

- (1) *La distribution et la vente d'essence au détail s'inscrivent dans un large éventail de relations verticales avec les raffineurs, allant de l'intégration totale à la dissociation absolue. Ces dernières années, la structure de la vente d'essence au détail a subi de profondes mutations dans de nombreux pays.*

Les relations verticales entre distributeurs et raffineurs vont de l'intégration totale à l'indépendance complète des points de vente. Dans certains pays, les raffineurs continuent de posséder nombre de détaillants ou entretiennent des relations contractuelles restrictives fortes avec eux. L'Italie et le Portugal en sont deux exemples. Les pays où des relations verticales fortes prédominent sont visiblement ceux qui réglementent l'implantation des distributeurs d'essence ou qui continuent de fixer les prix de l'essence au détail. L'Afrique du Sud illustre ce second cas de figure. À titre d'exemple, les subventions publiques du prix de l'essence à la pompe influent largement sur l'intégration verticale au Taipei chinois et en Indonésie. Jadis fréquent, le contrôle public explicite des prix au détail et de l'entrée est aujourd'hui rare.

L'intégration verticale se produit souvent à la faveur d'un processus de modernisation et de concentration des points de vente. Dans bien des pays, le nombre de stations et de celles avec pompiste a fortement chuté. Parallèlement, de nombreux points de vente ont diversifié leurs activités en proposant des articles que l'on trouve dans les magasins de proximité, comme des encas, des sodas ou de la confiserie. Les stations d'essence sont généralement équipées de plus de pompes qu'avant.

- (2) *Les partisans du dégroupage vertical obligatoire mettent en avant l'opportunisme des raffineurs et affirment que la dissociation permettrait de résoudre des différends contractuels récurrents.*

Les relations entre raffineurs et détaillants passent pour difficiles dans de nombreux pays. L'absence de relations contractuelles clairement définies entre distributeurs et raffineurs peut être une cause de tension. L'existence d'une emprise sur le marché local au détail, des contrats d'approvisionnement exclusifs sur une longue durée et les divergences d'interprétation d'accords de franchise peuvent compliquer la situation.

Les distributeurs d'essence indépendants déplorent parfois la compression des prix ou les prix d'éviction pratiqués par leurs concurrents intégrés verticalement qui cherchent à s'approprier les investissements que ces distributeurs ont réalisés pour améliorer le service et les relations avec les clients. Parfois aussi, des organisations de distributeurs font pression en faveur de l'adoption d'une législation qui restreigne la capacité des raffineurs d'influer sur le comportement des revendeurs d'essence. Cette législation peut imposer la cession de points de vente d'essence au détail possédés par les raffineurs. Dans plusieurs pays, les distributeurs d'essence ont demandé que cette cession soit rendue obligatoire, mais généralement en vain. Aux États-Unis, six États

ont adopté une telle législation. Des pays comme l'Argentine et la Turquie ont limité le nombre ou le pourcentage de points de vente que les raffineurs peuvent posséder. Certaines provinces du Canada ont mis en place des restrictions tarifaires au lieu d'opter pour une séparation verticale. L'Australie avait déjà restreint l'intégration verticale en aval par les raffineries de pétrole.

Certains pays limitent la durée des contrats d'approvisionnement exclusifs entre détaillants et raffineurs, avec pour objectif de faciliter l'entrée au niveau des raffineurs.

La Norvège estime que les subventions versées par les raffineurs peuvent fausser la concurrence. Si les gérants des points de vente au détail exagèrent l'importance de la concurrence locale au niveau des prix qu'ils déclarent aux raffineurs, ces derniers peuvent octroyer des subventions dans les zones où la concurrence est la plus rude. Grâce à ces subventions, un revendeur peut être en mesure d'évincer des concurrents locaux qui n'y ont pas accès, même s'ils sont plus efficaces. Une fois les concurrents locaux éliminés, le gérant peut se retrouver en position dominante sur le marché local. L'Irlande a analysé le programme spécial de rabais ou de soutien des prix pratiqué par un raffineur et a conclu qu'il avait pour effet de freiner la concurrence par les prix parmi les détaillants en diminuant les incitations des distributeurs indépendants à baisser leurs prix. Par la suite, ce raffineur a accepté de mettre un terme à ce soutien des prix.

- (3) *Ses opposants soulignent les avantages de l'intégration verticale, qui permet notamment des gains d'efficacité opérationnelle et d'éviter la double marginalisation, et mettent en garde contre l'augmentation des prix à la pompe/des marges de détail qui en découlerait.*

Les études récentes sur les effets du dégroupage vertical obligatoire sont peu nombreuses parce que très rares sont les pays à avoir adopté une telle réglementation. Néanmoins, ces études montrent que l'intégration verticale peut entraîner des économies de coûts dont les consommateurs sont les bénéficiaires. Proscrire l'intégration verticale ferait monter les prix à la pompe.

Le Portugal indique que les plaintes de détaillants portent souvent sur les clauses de contrats d'approvisionnement qui participent des efforts déployés par les raffineurs pour maintenir les marges au détail à un bas niveau. La volonté des détaillants de dégager des marges supérieures à celles préconisées par les raffineurs peut refléter l'emprise de certaines stations sur le marché local ou un phénomène de double marginalisation.

- (4) *Il apparaît difficile de trancher la controverse entre partisans et opposants en raison de leurs intérêts économiques fondamentalement divergents.*

Les vendeurs indépendants d'essence de marque se focalisent sur les pratiques prétendument déloyales des raffineurs qui permettraient à ces derniers de s'adjuger des avantages disponibles uniquement grâce aux investissements, innovations et efforts des distributeurs. Les distributeurs accusent les raffineurs de pratiquer des prix discriminatoires, parfois même d'éviction. Pour leur part, les raffineurs reprochent aux distributeurs d'exercer un pouvoir sur le marché local et de pratiquer une double marginalisation.

Des études récentes tendent à montrer que l'intégration verticale a des effets complexes. Elles révèlent que les gains d'efficacité découlant de l'intégration verticale des raffineurs dans la distribution sont largement compensés par l'affaiblissement connexe de la concurrence au stade du raffinage. Pour que la question de la séparation verticale puisse être réglée à l'amiable, il faut que (i) les partisans de l'intégration verticale traitent les problèmes induits par l'opportunisme dans l'exécution des contrats et que (ii) les partisans du dégroupage obligatoire vérifient si les

lois générales sur l'abus de position dominante et la concurrence déloyale peuvent résoudre les problèmes d'opportunisme et de subventions croisées.

- (5) *Le développement rapide de la distribution d'essence par les grandes surfaces vient compliquer l'évaluation des effets d'une interdiction de l'intégration verticale.*

Dans de nombreux pays, les grandes surfaces s'implantent dans le secteur de la distribution indépendante d'essence. L'Australie, le Canada, les États-Unis, la France et la Grande-Bretagne en sont des exemples. Le Japon et d'autres pays connaissent des évolutions similaires, mais moins marquées. En général, les grands distributeurs vendent de l'essence à bas prix pour attirer les clients dans leurs magasins. Cette forme d'entrée peut exercer une pression financière sur les revendeurs d'essence indépendants et verticalement intégrés. Les points de vente traditionnels subissent, dans un premier temps, des pertes de marché au profit de ces nouveaux venus. Néanmoins, l'Australie indique que les détaillants d'essence indépendants ont freiné leurs pertes ou ont même regagné des parts de marché en révisant leur mode d'exploitation. En général, les stations d'essence traditionnelles réagissent à l'incursion de grands distributeurs en vendant une large gamme d'encas et de boissons qui dégagent une marge plus élevée que l'essence. En outre, des stations indépendantes se regroupent en pôles de vente. Ces nouvelles entités fonctionnent sur le même modèle que les grands distributeurs en s'équipant de pompes beaucoup plus nombreuses qu'auparavant.

L'autorité australienne de la concurrence a étudié les effets de l'entrée de grands distributeurs et a conclu qu'ils étaient positifs pour le consommateur. Les prix de l'essence baissent et cette diminution est rarement compensée par une hausse des prix alimentaires. D'autres autorités de la concurrence signalent que les prix de l'essence à la pompe pratiqués par les grands distributeurs sont inférieurs à ceux des points de vente traditionnels. Les économies de coûts (peu de personnel et de services) réalisées sur la vente d'essence à grande échelle contribuent à cette baisse des prix au détail.

- (6) *L'entrée en masse de grands distributeurs indépendants sur le marché de la vente d'essence au détail a largement pris le pas sur les inquiétudes antérieures relatives à l'intégration verticale excessive pratiquée par les raffineurs sur ce marché.*

Sauf dans les pays qui restreignent l'entrée sur le marché de la vente au détail, l'implantation de grands distributeurs a dissipé les craintes de voir les revendeurs indépendants disparaître. Les problèmes de concurrence qui subsistent concernent les conditions d'entrée sur le marché de la vente en gros. En Europe notamment, ces conditions pâtissent de politiques fiscales basées sur la production plutôt que sur les ventes de produits raffinés. Dans les régimes où les impôts sont calculés sur la production, les nouveaux venus sur le marché du raffinage doivent avoir des ressources financières suffisantes pour s'acquitter des impôts avant de réaliser leurs premières ventes.

Dans de nombreux pays, les craintes relatives à une intégration verticale excessive se sont dissipées du fait que de grands raffineurs ont volontairement revendu de nombreuses stations d'essence, pour des raisons qui tiendraient aux faibles marges réalisées sur les ventes au détail.

- (7) *La surveillance des marchés et l'application de la législation antitrust dans le secteur de l'essence restent des tâches très en vue pour les autorités de la concurrence.*

La volatilité extrême des prix des carburants automobile en 2008 a attiré l'intérêt du public pour cette question. Les consommateurs sont très au fait de ces prix. En outre, leurs variations se

répercutent sur les prix de nombreux autres biens et services. L'attention accordée par les médias et l'affichage très visible des prix de l'essence au détail renforcent la sensibilisation des consommateurs. La couverture médiatique, associée aux plaintes des consommateurs, rendent les responsables politiques très attentifs aux prix des carburants automobiles. Tous ces éléments conduisent à se demander si la concurrence s'exerce correctement sur le marché de l'essence.

De nombreuses autorités de la concurrence ont reçu pour mandat d'étudier en profondeur les variations des prix de l'essence afin de déterminer si l'exercice d'un pouvoir de marché ou des problèmes contractuels ont contribué aux hausses de prix subies périodiquement par les consommateurs. À titre d'exemple, le Bureau de la concurrence au Canada a réalisé plusieurs études sur l'évolution des prix de l'essence. Dans certains cas, ces études ont conduit à des enquêtes sur des allégations de collusion entre distributeurs d'essence. L'Autorité australienne de la concurrence a réalisé de nombreuses études dans ce domaine. Elle a notamment enquêté sur un cycle hebdomadaire de prix de l'essence au détail dans les grandes zones urbaines du pays qui semble être sans équivalent. Aux États-Unis, la *Federal Trade Commission* est tenue d'opérer un suivi constant du marché et examine les prix de l'essence sur des périodes spécifiques. L'Autorité portugaise de la concurrence est elle aussi investie d'une responsabilité de suivi permanent du marché. L'Allemagne cherche à déterminer si les réglementations qui imposent une actualisation fréquente de l'affichage public des prix au détail favorisent la fixation concertée des prix de l'essence et du gazole à la pompe. D'une manière générale, il semble que les avantages induits par une recherche plus poussée du consommateur l'emportent sur les risques de collusion accrue. Globalement, les autorités de la concurrence n'ont pas trouvé de preuves suffisantes pour faire suite aux plaintes de compression des prix sur les marchés de la vente d'essence au détail.

Les autorités de la concurrence ont mené une série d'enquêtes portant sur des comportements potentiellement illégaux. Alors que certaines enquêtes examinent les comportements en matière de fixation des prix de l'essence au détail, d'autres se concentrent sur la concurrence au niveau du raffinage.

- Les enquêtes dans les affaires de fusion deviennent plus complexes en raison de l'augmentation de l'échelle minimale d'efficacité du raffinage et les lacunes des politiques antérieures qui favorisaient les petites raffineries.
- D'autres enquêtes relatives à la concurrence se concentrent sur les conditions d'entrée au niveau des raffineries et sur le faible nombre de raffineries atteignant l'échelle d'efficacité que les petites économies peuvent prendre en charge.
- D'autres encore portent sur des contrats d'échange en vertu desquels des raffineries s'approvisionnent mutuellement en fonction de la proximité physique du client des sites de production respectifs. Ces contrats peuvent être efficaces en réduisant les coûts et les délais, mais peuvent aussi favoriser la coordination en divulguant des informations concurrentielles sensibles sur les clients, les quantités et les prix de concurrents.
- Les autorités ont également été sollicitées pour analyser la rapidité relative avec laquelle les hausses et les baisses du cours du pétrole se répercutent sur les prix à la pompe. Les prix au détail ont tendance à suivre rapidement les hausses du cours du pétrole, alors qu'en cas de baisse, le suivi est plus progressif. Diverses explications ont été avancées, comme l'influence des stocks, le comportement de recherche du consommateur et les conduites anticoncurrentielles. En réalisant ces études, les autorités de la concurrence s'emploient notamment à sensibiliser le consommateur et le législateur aux caractéristiques des marchés du carburant et à l'incidence des mesures réglementaires potentielles.

- Au Japon, les ventes massives d'essence sans marque par des stations de marque suscitent des préoccupations. En vertu de contrats de licence de marque, les grossistes demandent à leurs agences et points de vente affiliés de s'abstenir de vendre de l'essence sans marque dans les stations services qui leur sont affiliées. En revanche, si le grossiste exerce ses droits conférés par la marque de façon arbitraire et discriminatoire et pèse lourdement sur la compétitivité des agences affiliées ainsi pénalisées, la pratique peut s'avérer problématique aux termes de la législation japonaise sur la concurrence et relever d'un comportement commercial déloyal.
- Au Brésil, l'autorité de la concurrence observe une convergence entre la vente au détail d'essence et d'éthanol. Ce phénomène est intéressant du point de vue de la concurrence parce que le degré de concentration dans la production d'éthanol est beaucoup plus faible que le raffinage de pétrole. Les craintes relatives à l'exercice d'un pouvoir de marché nuisible à la concurrence dans le secteur du raffinage de pétrole devraient s'estomper à mesure que les producteurs d'éthanol accroissent leur part du marché des carburants automobiles.

BACKGROUND NOTE

*By the Secretariat**

1. Introduction

Retail gasoline prices¹ are a frequent object of public attention. Gasoline is a substantial element in the spending of many consumers and firms. Further, gasoline is purchased frequently and prices often are prominently posted so that consumers are aware of price trends for gasoline between purchases. Price elasticity of demand is often low, and prices fluctuate significantly and rapidly.² When retail prices go up, consumers complain and legislators look into the causes. The causes might include supply disruptions due to natural disasters, armed conflicts in petroleum producing areas or other security issues, faster growth in demand than in supply either locally or internationally, inefficiencies in the supply chain and market power. Market power might appear at several stages of the industry. At the extraction stage, OPEC tries to manage a cartel. The refinery stage is often characterized by relatively few producers and severe entry impediments. At the distribution and retail stages, market power could be due to locational advantages or to anticompetitive coordination.³

Unbundling retail gasoline outlets from refineries has often been promoted as a remedy for inefficiencies and market power. The promoters of mandatory unbundling are often independent retailers, including dealer-owned seller's of branded products, and their trade associations. Several jurisdictions have followed their advice and prohibit refiners from owning or operating retail outlets. Yet empirical analysis often finds that mandatory unbundling is associated with higher retail prices.

This background paper discusses the arguments for and against mandatory unbundling, first in the context of vertical integration into gasoline retailing (Section III) and then in terms of other effects on competition and consumer welfare (Section IV). Then it reviews experiences with mandatory unbundling of retail gasoline outlets (Section V) and studies about the impact of independent retailers on price (Section VI). Section VII concludes that the long-standing controversy about unbundling is tangential to current developments affecting competition in motor fuel retailing.

Vertical unbundling in this industry raises issues about vertical integration that have also been addressed in other OECD work, such as the roundtables on access to transportation infrastructure,⁴

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¹ The term "gasoline" includes motor fuels in general. Many of the empirical studies are of markets where gasoline is the principal fuel.

² Deck and Wilson (2004) and Deck and Wilson (2008).

³ One such assessment, by staff of the U.S. FTC, is concluded that supply disruptions, not collusive withholding of supply, were responsible for a period of unusually high retail gasoline prices in the mid-western states in the Spring of 2000.. Bulow, Fischer, Creswell and Taylor (2003).

⁴ OECD (2006).

regulation of sales below cost,⁵ predation,⁶ and integration and restructuring in electricity⁷ and other utility services.⁸

This paper makes a number of observations:

- Distribution and retailing operate under a wide variety of vertical relationships with refiners, ranging from full integration to complete separation.
- Proponents of mandatory vertical unbundling point to opportunistic behaviour by refiners and contend that unbundling is a means to resolve recurring contract disputes.
- Opponents of unbundling point to benefits of vertical integration such as achieving operating efficiencies and avoiding double marginalization, and warn that mandatory unbundling would lead to higher retail price/cost margins.
- Resolving the controversy between the opposing parties is difficult, in part because proponents and opponents rely on different measures of success.
- Research suggests that the effects of vertical integration here are complex. Some studies find that efficiency gains from vertical integration by refiners into retailing are more than offset by associated weakening of competition at the refining stage.
- An important complicating factor is the rapid expansion of grocery stores and mass merchants into gasoline retailing, using low gasoline prices as a marketing tool to attract customers to buy other things. This entry puts pressure from a new source on the independent dealers, while integrated firms might try to cut off this new type of competition if it threatened their own retail outlets.
- Supporters of vertical integration need to address the problems of contract enforcement resulting from opportunism. Proponents of mandatory unbundling should examine whether concerns about opportunism and cross-subsidization can be addressed under the general laws against abuse of dominance and unfair competition.

2. Production and distribution stages in the industry

In order to provide context for the discussion of vertical and horizontal effects, it is useful to identify the range of vertical and horizontal arrangements at the various stages of the industry, with a focus on retailing.

Retail motor fuel is derived mostly from petroleum, although some comes from corn or other biofuels. Once the petroleum is extracted, it is transported and refined. Motor fuel is one of several distillates that result. Gasoline typically receives additives such as detergents before it is ready for retail distribution. Additives and their associated formulations can be proprietary to individual refiners, and these differences are a major basis for differentiation between brands. Retailers of unbranded gasoline cannot legally claim

⁵ OECD (2005).

⁶ OECD (2004).

⁷ OECD, Restructuring Public Utilities for Competition (2001b), OECD (2002a) and OECD (2002b).

⁸ OECD (2001a) and OECD (2002b).

to have the same proprietary additives as a particular branded gasoline, and they cannot claim that the additives in their gasoline are consistent if they buy from a variety of refiners.

Transportation to retail outlets can either be direct from the refiner or through intermediaries called jobbers.⁹ Jobbers may have detailed contracts with refiners. Supply agreements of jobbers with refiners may include restrictions on who the jobber can sell to, volume discounts for the jobber or retailer, or other terms that can change the incentives and authorizations to sell to specific retailers at specific prices. Wholesale prices often include the product as well as the transportation, and accounting between these two components of the price involves an element of discretion. The bundled pricing of transportation and product means that the wholesale prices paid by retailers differ, and the bundling can make it more difficult for retailers to determine the extent to which refiners or wholesalers are basing price differences entirely on cost differences. In some instances, refiners explicitly offer lower wholesale prices in certain areas because competition is declared to be more intense in these regions.

Retail gasoline outlets can be:

- owned and operated by refiners;
- owned by the refiner but leased to an operator;
- operated but not owned by the refiner;
- owned as an independent franchisee of the refiner; or
- owned and operated as an independent and unaffiliated business.

Some franchisees, independent operators or independent owner/operators also may be jobbers.

Retail prices are also subject to a variety of vertical arrangements. Generally, if the retail location is owned by the refiner, the refiner sets the retail price. Where the retailer determines the price, the refiner can influence the price through wholesale prices or the retail prices that it sets at nearby company-owned retail locations.

Borenstein and Bushnell's¹⁰ 2005 policy review of potential regulation of vertical relationships in the retail gasoline trade, commissioned by regulators in California, describes the tension that often flows from the complexity and variety of vertical arrangements:¹¹

⁹ For example, see Borenstein and Bushnell (2005).

¹⁰ Borenstein and Bushnell (2005).

¹¹ Potentially, independent retailers could vertically integrate by investing in jobbing or refining, but this does not appear to be common, and laws and regulations mandating vertical unbundling do not appear to consider the possibility of groups of retailers jointly controlling refiners rather than refiners controlling retailers. Presumably, if the retailers controlled the refiners, the retailers would not object to such integration because they would not fear actions by refiners that would involuntarily reduce retailers' profits. Upstream vertical integration of this sort by coalitions of independent retailers does exist in other sectors, such as food processing and grocery retailing. Joint ventures by small retailers to reduce their supply costs do not generally raise competition concerns. Several countries have antitrust exemptions for cooperatives or production joint ventures even if there are potential competitive concerns about joint supply activities.

The relationship between refiners and their lessee-dealers is frequently contentious. Some tension is to be expected, given the fact that both sides would prefer to keep as much of the retail margin as possible. We could not conclude whether disputes were more or less common in gasoline than in other retail franchising businesses, such as fast food.

Narrowly defined, mandatory vertical unbundling laws or regulations preclude refiners from owning and operating retail gasoline outlets. Some jurisdictions do not prohibit vertical integration completely, but instead they limit the proportion of retail outlets that refiners can own or otherwise directly control.¹² Mandatory vertical unbundling is not the only policy approach advocated by dissatisfied gasoline retailers. Other regulations against vertical restrictions maintained by refiners address the same concerns as mandatory vertical unbundling. Examples include rules against restrictions by refiners on who jobbers can sell to or rules against restrictions by refiners on the jobbers that retailers can buy from. As discussed later, laws against sales below cost, either specific to gasoline or more general, are sometimes viewed as substitutes for mandatory unbundling of retail gasoline outlets as well.¹³ In some instances, jurisdictions have explicitly switched from one approach to another approach in regulating retail gasoline outlets. The U.S. state of Florida is an example.¹⁴

3. Economic arguments about vertical integration

3.1 Retailers' arguments for mandatory unbundling

The central contention of advocates of mandatory vertical unbundling is that refiners pursue a holdup strategy against their independent-dealer and lessee-dealer gasoline retailer customers if the refiners are partially vertically integrated into retailing. Retailers contend that the holdup strategy is implemented through a price squeeze – according to some retailer groups, so deep that competition laws would treat the prices as predatory,¹⁵ as alleged by some gasoline retailer groups. Other ways to hold up a retailer could be refusing to renew a franchise agreement or demanding terms that do not allow a competitive rate of return on the investments of the retailer. A holdup in economics refers to a situation in which two parties would benefit from cooperating, but in which that cooperation is threatened by an asymmetry in their bargaining power once one party has made an investment that benefits both parties.¹⁶

¹² Australia until 2007 and Argentina are examples.

¹³ Anderson and Johnson (1999).

¹⁴ Kamerschen (2001).

¹⁵ Standards for defining or identifying predatory pricing include prices below average costs, average variable costs, or marginal costs. These standards are adopted in an effort to distinguish when prices are so low that the intent of the price is predation rather than vigorous competition. Economic evaluation of predation typically puts great weight on potential and actual recoupment of the losses from engaging in predatory pricing. Extensive discussion is available at OECD (2005) and OECD (2004).

¹⁶ Tirole (1988), pp. 24-29. The argument is strongest when the value of the investment is sunk, so the value cannot be recovered if the investor is no longer operating the business. For a more extended treatment, see Viscusi, Harrington, and Vernon (2005) at Chapter 13. Williamson (1975) applies the term “opportunism” to such holdups. The object of the underlying concern is the vulnerability of parties who have invested in highly specific, immobile or difficult-to-measure assets. Human capital associated with building consumer loyalty to a specific gasoline retail outlet could be such an asset. Other situations or conditions making contracting difficult and making ex post hold ups more likely include specialized equipment, site-specific equipment, uncertainty about the durability of equipment, information asymmetries, network coordination issues, uncertainty about the reliability of supply sources, externalities, and regulatory risk. Carlton and Perloff (2005) at Chapter 12.

Box 1. Canadian Investigation of Charges Price Squeezing

In 2006, the competition law enforcement agency of Canada, the Competition Bureau, investigated allegations by independent retailers that refinery suppliers were engaged in margin squeezing predation. These claims followed the increases in gasoline prices that in turn followed Hurricane Katrina. Here are the Bureau's conclusions, from its closing press release:

Ottawa, March 30, 2006 – The Competition Bureau has concluded its examinations of high gasoline prices following Hurricane Katrina and allegations by independent retailers of predation and margin squeezing in the Canadian gasoline industry.

“We have found no evidence of a national conspiracy to fix gasoline prices,” said Richard J. Taylor, Deputy Commissioner of Competition, Civil Matters Branch. “Severe damage to North American refining capacity caused by Hurricane Katrina forced gasoline prices to spike in September 2005. This dramatic reduction in supply forced wholesale prices to jump, resulting in higher prices at the pumps.”

While crude oil prices remained relatively stable, the Bureau found that gasoline supply was significantly reduced following Hurricane Katrina. The supply reduction caused a spike in the New York Harbour spot price for gasoline, which Canadian refiners use to determine their wholesale prices. This spike forced wholesale, and ultimately retail prices, to increase in Canada and the United States.

The Bureau also examined allegations from independent retailers of predatory pricing and margin squeezing in the gasoline industry especially in Ontario and New Brunswick. The complainants alleged that the refinery-owned retailers were reducing gasoline prices below their cost in these areas during certain periods and also charging higher wholesale prices to independent retailers who compete with their outlets at retail, causing profit margins to shrink.

The Bureau investigated these matters under section 79 of the *Competition Act* and found no evidence that pricing resulted from an attempt by a group of majors to discipline or eliminate the independent retailers in these markets, either through predation or margin squeezing.

In conducting its examination, the Bureau gathered information from publicly available resources, as well as direct contact with market participants who provided proprietary data. The Bureau also retained a consulting firm to understand the key determinants of profitability for retail gasoline stations. The independent report, *What Determines the Profitability of a Retail Gasoline Outlet? A Study for the Competition Bureau of Canada*, found that retailers are relying on higher volumes and ancillary services such as convenience stores and car washes to earn profits.

Source: Canadian Competition Bureau (2006).

Independent gasoline retailers and lessee-dealers with medium or long-term contract agreements¹⁷ with refiners often claim that refiners try to force them out of business because that will increase the profitability of the retail locations owned and operated by the refiner. Independent gasoline retailers and lessee-dealers also often contend that they build up location-specific customer loyalty through better service, a better choice of complementary services, wiser marketing investments, or facilities improvements. Once a consumer perceives that a retail location provides better service on any or all of these dimensions, the customer is more likely to return and the consumer is more likely to be willing to pay a price premium in order to obtain these services at the next fill-up. The investment in providing better service could result in abnormal returns for the retailer if other retailers do not quickly compete them away. Subsequently, refiners could have incentives to expropriate the retailer's abnormal returns from these investments by terminating the franchise and reselling it at a higher price or by charging higher wholesale prices to this retailer in order capture the supra-competitive retail margins. These arguments might have

¹⁷ Absent medium- or long-term supply contracts, an independent, unbranded retailer is less subject to these concerns if there are other refiners willing and able to supply the retailer at competitive terms.

been more plausible when more gasoline retailers commonly repaired cars or provided services such as pumping fuel, washing windshields and checking oil. As self-service takes over fuel sales, the arguments might shift to claims about services quality at the associated convenience store.

The final component of the retailers' position is that as long as refiners have their own captive retailers (the underlying cause of incentives to hold up independent gasoline retailers) or opportunities to terminate franchises without cause, enforcement of supply contracts by independent gasoline retailers is not sufficient to prevent ongoing efforts of refiners to hold up independent gasoline retailers.

The position of independent gasoline retailers is nicely summarized in a submission of the Independent Petroleum Marketers Association of Australia (PMAA) to the Senate Legal and Constitutional References Committee.¹⁸

The retail petroleum industry is unique in that it is the only industry where small business participants must directly compete with their own petroleum suppliers. ... As a result, manipulation and predatory behaviour in this unique industry is a reality. It is only within this industry that the discount prices available for retail petroleum purchases from the oil companies' chains are truly predatory to the wholesale cost prices for the same product available from the same oil companies to the independent operators.

Borenstein and Bushnell (2005)¹⁹ describe the wholesale pricing concerns of independent and leasee-owned gasoline retailers as follows:

Most of the controversy centers around the degree to which refiners can charge different prices to different retailers rather than a uniform price to all retailers whose gasoline comes from a given wholesale rack location. In other words, the degree to which wholesalers can price discriminate among their retail customers. In general, refiners are considered to be better able to price discriminate among direct supplied stations as the delivery charge can be varied down to the individual station level. Retailers have complained that these delivery charges sometimes bear little resemblance to the actual cost of taking the gasoline to the station.²⁰

Some opponents of mandatory vertical unbundling of gasoline retailing might contend that there is no economic rationale for these restrictions, however, the holdup argument is a well-recognized possibility.²¹ It could be argued that the discovery of persistent discrimination in electric power transmission services in both the United States and Europe, despite severe behavioural rules against transmission discrimination,²² should cause opponents of mandatory unbundling in gasoline markets to pause and think about the subtleties of detecting and documenting discrimination in supplying gasoline retailers as well. The argument of proponents of mandatory vertical unbundling of retail gasoline outlets is that neither

¹⁸ PMAA (2002).

¹⁹ Borenstein and Bushnell (2005).

²⁰ Borenstein and Bushnell (2005) also observe that although direct supply allows refiners more scope for price discrimination, these practices are not limited to retail deliveries alone. Individual stations may have performance related incentives, such as discounts or penalties related to the volume of gasoline sold at the station. Further, even if the gasoline is distributed by a jobber, a refiner can still restrict the ability of the jobber to shop around for wholesale gasoline. Much of the fuel purchased by jobbers is sold under the terms of long-term contracts that could restrict the jobber's purchases to specific racks and could also include volumetric discounts in the marginal price.

²¹ Vita (2000), Carlton and Perloff (2005) at Chapter 12.

²² FERC (1999), Section III.

enforcement of contractual terms against supply discrimination nor antitrust law enforcement actions against anticompetitive price discrimination are sufficient to protect independent gasoline retailers from hold-up strategies instituted by refiners against them.

A detailed understanding of the subtleties and costs of detecting and documenting discrimination in supplying gasoline retailers could help to resolve this assertion, but there does not appear to be a definitive literature in this regard.

In summary, retailers, both independents and lessee-dealers, are concerned about opportunism by refiners and anticompetitive terminations of supply relationships that are motivated by partial downstream vertical integration of refiners. The opportunism involves expropriation of returns (both abnormal and normal) on the investments of retailers. This can take the form of either terminations of supply relationships (so that that the expropriation can be capitalized by the refiner in reselling or re-leasing the location) or discrimination in wholesale prices charged to the retailers (capturing more of the retail margin for the refiner). The retailers contend that anticompetitive terminations benefit refiners by increasing margins at owned retail outlets. They attribute increased retail margins at vertically integrated retailers to resulting reduced intra-brand competition facing refiner owned and operated retail outlets.

3.2 *Arguments against mandatory unbundling*

Opponents of mandatory vertical unbundling can support their position by appealing to the economic literature on potential gains from vertical integration. Mandatory vertical unbundling can make it impossible or at least more difficult or costly to realize economies of vertical integration, including elimination of double marginalization and curtailment of free riding.²³ Contractual substitutes for vertical integration may be imperfect. This generally applies, for example, when monitoring of compliance with the terms of a contract is costly and the retailer has incentives not to comply.²⁴ Economies of vertical integration can include such operational advantages as:

- coordination of investments between stages of production,
- realization of economies of scale when similar operations subject to economies of scale occur at both the upstream and downstream stages of production,
- realization of economies of scope when vertically separate processes have operating or investment complementarities,
- reductions in transactions costs,
- prevention of some forms of opportunism, and
- avoidance of some forms of distortion in inputs.²⁵

²³ Concerns about free riding could include the deleterious effects on overall customer perceptions of the quality of the brand when discretion amongst retailers leads some to delay or reject improvements in the quality of service or in facilities that other retailers are undertaking to improve consumer perceptions of the brand. New Zealand Institute of Economic Research (2005).

²⁴ Shepard (1993).

²⁵ The latter three are discussed in Vita (2000).

Double marginalization occurs when multiple stages of production have some degree of market power and the lack of coordination between stages of production results in retail prices higher than the joint profit maximizing price.²⁶ Double marginalization can cause even greater harm to consumers than monopolization because the resulting retail price exceeds even the monopoly price and this leads to larger dead weight losses as well as larger transfer effects that are contrary to the interests of consumers.

Although mandatory vertical unbundling could in theory be used to force a refiner that is fully vertically integrated to sell all of its retail gasoline outlets, in practice, political pressure for mandatory vertical unbundling occurs when some retail outlets are vertically integrated with the refiner while others are owned or operated by independent entities.²⁷ Only when some or all retailers are not vertically integrated do disputes arise between refiners and retailer outlets over the size of retail margins relative to wholesale margins.

Despite the potential benefits of vertical integration from the refiner's perspective, there is no consensus, even among refiners, about the optimum vertical structure. One explanation is that gasoline retailing can involve significant effort and investment by the retailer that is difficult to monitor by the refiner.²⁸ This argument is probably strongest when the retailer offers complementary services at the same location. Historically, car repair services were commonly offered by gasoline retailers. More recently, sale of convenience foods has become common.²⁹ If retail effort and investment are significant elements in retail sales, making the retailer the residual claimant may be advantageous to the refiner as well as to the retailer.³⁰ A similar argument could be made regarding risk sharing. From an economic perspective, risk should generally be borne by the party best able to hedge it or respond to it effectively at the least cost.³¹ Hence, if the forms of risk applicable to gasoline retailing are best dealt with by gasoline retailers, it would be efficient for these retailers to be residual claimants. These arguments could be raised, but they are not the central focus of advocates of mandatory vertical unbundling in the gasoline industry.

4. Potential horizontal and consumer welfare effects

The discussion to this point has focused on potential efficiencies of vertical integration and of the persistence of vertical supply contract disputes in the retail gasoline business. However, the effects of regulations pertaining to vertical integration and supply contracts might not be limited to the refiners and retail gasoline outlets that are directly involved or to vertical unbundling. There are several types of concerns that extend beyond the level and division of retail margins.

²⁶ Viscusi, Harrington, and Vernon (2005), pp. 238-241.

²⁷ In this sense, advocates of mandatory vertical unbundling might not object to an exemption for refiners that already own and operate the stations that, in the aggregate, dispense all of the refiner's output.

²⁸ New Zealand Institute of Economic Research (2005) reported that refiners cite this reason in explaining the variety of arrangements between refiners and gasoline retailers.

²⁹ Some empirical research links repair services to independent outlets and vertical integration to sale of snack foods. Bello and Cavero (2008), Shepard (1993), Blass and Carlton (2001), for example. However, it could be that these patterns are a result of changes in preferred vertical relationships that coincide with shifts in preferred complementary services.

³⁰ Blass and Carlton (2001).

³¹ Williamson (1975), Chapter 5, spearheaded the discussion of the fundamental concepts as they relate to vertical integration. For a more recent discussion, see Tetrel (2007).

4.1 *Effects of other regulations and diversified retailers*

One indirect effect of precluding mandatory vertical unbundling regulations could be adoption of other regulations as a substitute for mandatory vertical unbundling. Substitute laws and regulations would target behaviour of refiners that would be moot under a mandatory unbundling approach or under full vertical integration. Examples include laws forbidding price discrimination against independent franchisees, laws forbidding retail prices that are less than wholesale prices, laws requiring minimum mark-ups over wholesale prices, laws against predatory pricing of gasoline, laws preventing involuntary termination of franchisees, laws limiting the maximum duration of supply contracts, and laws restricting wholesale pricing zones or preventing refiners from restricting arbitrage by retailers between jobbers or between wholesale pricing zones.³² The minimum pricing provisions are intended to prevent refiner-owned stations from driving independents out of business. The open supply provisions are intended to prevent price discrimination based on geographic location.³³ The effects of these substitutes on efficiency and consumer welfare might be more or less intensive than mandatory unbundling of retail outlets and could apply to horizontal and well as vertical practices.

One of the most detailed economic defences of gasoline retailing regulations is a report for the Petroleum Marketers Association of America prepared by economist David Kamerschen.³⁴ However, Kamerschen (2001) favours laws and regulation against below-cost selling rather than mandatory unbundling of retail outlets. He observes that mandatory unbundling eliminates a segment of competitors and, thereby, is likely to reduce the diversity of retail outlets and restrict competition.

Instead, Kamerschen (2001) focuses on the long-term benefits of diversity in gasoline retail outlets. He concludes that cross-subsidization is the real concern and that cross-subsidization by mass merchandisers is just as much of a threat to the diversity of gasoline retailers as is cross-subsidization by refiners. The former is not treated at all by mandatory vertical unbundling because retailers rather than refiners are responsible for this type of cross-subsidization. Kamerschen portrays loss-leader selling by mass merchandisers as predation with simultaneous recoupment and sees prohibitions of sales below cost as the most appropriate remedy. Because simultaneous recoupment might not be reliably recognized in antitrust cases, he fears that the antitrust prohibitions against predation are not sufficient to address the cross-subsidization issue in gasoline retailing.

But the weaknesses and drawbacks of laws and regulations against retail sales “below cost” are well documented.³⁵ Reduced prices for selected items can be a lower-cost alternative to conventional media advertising for grocery stores and mass merchandisers. Loss leader pricing can be an effective store draw because consumers are well acquainted with the quality and regular prices of this subset of items.³⁶ Gasoline can be one element of an array of effective loss leader products.³⁷ To a traditional gasoline retailer, use of discounts on gasoline as a substitute for advertising or other promotional activities looks like cross-subsidization by grocers and mass merchants. But the large retailer sees it as a one-stop shopping option that attracts customers who would then buy other products. Prohibiting its use for this purpose could

³² Borenstein and Bushnell (2005).

³³ Borenstein and Bushnell (2005).

³⁴ Kamerschen (2001).

³⁵ OECD (2005).

³⁶ OECD (2005) and Hilke and Nelson (1991). Frequent purchase of these products acquaints customers with typical prices. The presence of the same brand(s) in all outlets allows customers to be assured of equivalent quality across outlets.

³⁷ ACCC (2007).

force affected retailers to revert to more costly forms of promotion with resulting higher prices for their customers and less competitive pressure on other retailers.³⁸

The possibility of prohibitions against loss-leader sales raises more general questions that policy makers might wish to consider about variations in retail margins on different items. For example, are consumers harmed or deceived when low margins on some items are used to attract them to a store? Is it qualitatively different for a mass merchandiser to sell gasoline at low retail margins to attract customers who might buy something else too, than it is for a gasoline retailer to sell fuel at low retail margins and then make higher margins on selling soft drinks and coffee to the customers attracted by the low gasoline prices?³⁹

4.2 *Effects on entry conditions*

Another indirect effect of policies about vertical integration in gasoline retailing could be to change entry conditions at the retail level or the refining level. In a world where all incumbent gasoline stations are owned and operated by refiners, retail entry would require the endorsement of a refiner that agrees to supply the new retailer. Profitable coordination among refiners could centre around agreements to increase market power by reducing existing competition⁴⁰ or by eliminating entry at the retail level in support of a geographic allocation of territories, for example. Absence of unaffiliated retail outlets also could slow or discourage entry of new refiners because refinery entry would require concurrent retail entry – simultaneous entry at two stages of production rather than one.

Borenstein and Bushnell (2005)⁴¹ summarize much of the considerable economic literature on vertical integration:

Vertical control is not necessarily always in consumers' interests. From research of the last 20 years, it has become increasingly clear that vertical integration or close control can be used in some circumstances to raise barriers to entry and reduce competition. In the best known examples, which are also widely accepted in antitrust analysis, vertical control can be used to deprive a competitor of access to some critical input. If entry into gasoline retailing is difficult, for instance, a refiner might integrate downstream in order to reduce the number of outlets that competing refiners (or importers) might have through which they could sell their product. Concern has indeed been expressed by some in the California gasoline market that the low number of unbranded stations makes entry of new gasoline suppliers (through imports from other regions) more difficult.

There are also many theories of the interaction between vertical integration and collusion among producers, most suggesting that integration increases the stability of collusion. For instance, if two refiners wish to collude on price, but cannot easily monitor one another's wholesale prices, vertical integration in some situations can allow monitoring of retail prices (at much lower cost) to substitute for wholesale price

³⁸ OECD (2005).

³⁹ In the U.K., for example, margins on gasoline sales in 2007 were roughly half as large at high volume gasoline retailers with a forecourt shop compared to fuel-only retailers with similar volumes of gasoline sales. "The profitability of a filling station is improved by a forecourt shop, which can help to offset lower margins on fuel." UKIPA (2008), Chart 8.6.

⁴⁰ Nocke and White (2007).

⁴¹ Also see Hastings (2004).

monitoring. Clearly, these incentives for vertical integration or control may benefit firms, but harm consumers.⁴²

Full vertical integration at the retail level could also have adverse effects on the evolution of gasoline retailing itself.⁴³ New forms of gasoline retailing could be retarded both in terms of origination and rate of diffusion if all or nearly all refiners sell only to affiliated retail outlets. Refiners with investments at risk in retailing might find it profitable to delay retail innovation by independent retailers for this reason. Arguably, the most prominent innovations in gasoline retailing at present are from grocery and big box general retailers. These firms sometimes operate at low or even negative margins in selling gasoline because they sell very large volumes (which results in low per unit overhead costs), use low gasoline prices as a store draw or because they rely on membership fees for their profit margins on gasoline as well as on all of the products that they sell.⁴⁴ Refiners that are not part of a general merchandising conglomerate are generally not in a position to compete on this basis in retail gasoline sales. One concern about high levels of vertical integration by refiners is that it might enable them to limit or prevent low-margin gasoline retailing by supermarkets and mass merchants, to protect the retail margins of refiner-owned retail outlets or in order to appease retailer groups with monopsony power. In many markets, gasoline retailing by grocery chains and mass merchants may be too well established for this threat to be plausible.

Box 2. Alliances between Supermarkets and Oil Refiners in Australia

‘Shopper docket,’ where grocery customers at supermarkets receive a discount voucher for petrol purchases from particular petrol retailers, commenced in Australia in mid 1990s. Woolworths, one of Australia’s two leading supermarket chains, entered into petrol retailing by establishing its own Petrol Plus brand. While any customers could buy petrol from a Petrol Plus outlet, customers who purchased more than \$30 of groceries at Woolworths would also be eligible to receive a four cent per litre discount at Petrol Plus.

In October 1996, the Woolworths arrangement was cleared and welcomed by the Australian Competition and Consumer Commission (ACCC).

In May 2003, the Coles supermarket, Woolworth’s largest competitor, and Shell, a major petroleum company, announced an alliance covering 584 Australian petrol stations. A key feature of the alliance was the bundling of petrol and groceries. Customers who purchased \$30 or more at Coles supermarkets would receive a four cent per litre discount on petrol purchases from Shell.

The Shell/Coles alliance differed from the Woolworths/Petrol Plus scheme in that it combined a major supermarket chain with one of the four largest petrol players in Australia. The deal did not facilitate new entry into either petrol retailing or wholesaling, unlike Petrol Plus. Further, the bundling-aspect of the Shell/Coles alliance could not be justified on the basis of complementarities between the products. While a consumer’s demand for groceries might be related to their purchase of petrol, there is no particular reason to expect that a Coles supermarket customer will gain any intrinsic value by also buying petrol from Shell. In addition, unlike the United Kingdom, there was little development of co-located supermarkets and petrol outlets. While the alliance involves Coles taking over the management of Shell’s retail petrol station network and establishing ‘Coles Express’ outlets at these stations, the

⁴² Concerns about the effects of limited wholesale competition on adjustments to international oil prices at the retail level are part of this literature. For example, see Delpachitra (2002) regarding the case of New Zealand. The author concludes that retail prices do not follow changes in international oil prices because competition between refiners is weak. Entry at the refinery level would likely require government assistance in the author’s view.

⁴³ The general topic of the effects of vertical restraints on the evolution of retailing has been the focus of numerous articles by economist Robert Steiner. Steiner’s work and related articles were the subject of a symposium special edition of the Antitrust Bulletin. See Harbour (2004).

⁴⁴ COSTCO, a high-volume, low-price retailer, is an example. Boyle (2006)

discount vouchers would be provided by regular supermarkets, regardless of their proximity to a Shell retail outlet. Indeed, grocery purchases made at Coles Express located in a Shell petrol station were explicitly excluded from the discount scheme.

In August 2003, Woolworths responded to the Coles/Shell alliance by announcing plans for a joint-venture with Caltex to deliver similar bundled discounts for fuel and groceries. The Woolworths/Caltex agreement covered more than 450 retail petrol outlets across Australia.

The agreements between two of Australia's largest supermarket chains and two of the four major petrol companies created considerable consternation in their respective industries. The Service Stations Association has predicted that the bundling schemes could result in the closure of 3000 independent petrol stations. In November 2003, IGA, one of Australia's smaller supermarket chains, announced that it would be "offering customers discounts on their grocery bills for fuel bought at any service station." Although these schemes are relatively new, anecdotal evidence suggests that smaller supermarkets and petrol companies other than Shell and Caltex are suffering a loss of sales due to these shopper docket schemes. At the same time, it appears that the two schemes have largely 'canceled each other out' in terms of profit, simply leaving the unassociated supermarkets and petrol companies the losers.

One set of economists examining this type of vertical integration argue that these alliances between retail grocery chains and refiners can cause social welfare reductions through distortions in consumer behaviour as well as through reduction in long-term competition as entry barriers are raised.⁴⁵ However, the ACCC found that prices were lower because of the emergence of grocery retailers as gasoline retailers. The ACCC understands that the shopper docket discount schemes are considered by the supermarket chains to be promotional and marketing tools. It may be that the costs of the shopper docket discount schemes provided to petrol consumers represent a substitution of promotional expenditure by the grocery division of the supermarket chain.

Source: ACCC (2006).

Critics of this form of unbundling assume that independent retailers are benefiting from either increasing retail margins or retaining a high proportion of these margins. However, the retailers claim that mandatory vertical unbundling cuts litigation costs and other costs of contract disputes (both monetary and personal) by reducing the incentives and ability of refiners to engage in opportunistic behaviour. Disputes between retailers and refiners about vertical integration have persisted for decades without clear resolution, by legislation or otherwise. By contrast, disputes in the United States between soft drink bottlers and concentrate manufacturers, which resulted in industry-specific legislation against discrimination between independent and vertically integrated bottlers, was ultimately resolved by the concentrate manufacturers buying up nearly all of the bottlers.⁴⁶ In the coal industry, where contracts between coal mines and generators have long been subjects of dispute, analysis suggests that contracting patterns are markedly different in different regions based on the vulnerability of coal mines or generators to opportunistic behaviour.⁴⁷

In summary, there are potential procompetitive and anticompetitive theories to explain mandatory vertical unbundling in gasoline retailing. Often the only available means to resolve the issue is empirical evidence from various nations or regions within nations. However, this is one instance where the use of statistical inferences from natural markets can be supplemented with results from controlled experimental markets, as discussed in Box 3.

⁴⁵ Summarized from Gans and King (2004) unless otherwise footnoted.

⁴⁶ Saltzman, Levy, and Hilke (1999), Table III.5.

⁴⁷ Tirole (1988), pp. 24-29.

Box 3. Evidence of Double Marginalisation in Economic Laboratory Gasoline Markets

Economists Cary Deck and Bart Wilson created and analyzed results for a series of experimental economics retail gasoline markets involving variations in the degree of vertical integration between retailers and refiners. The experimental setup focused on direct relationships between refiners and branded retail gasoline dealers and involved a geography for the experimental markets with two types of locations. One type of location was at the center of the territory, close to retailers with competing brands. The other type of location was a corner location in the territory where there were no other close-by retailers. There were four brands available in the markets and each brand had one station in a corner location and one station at the center.

The information conditions in the markets included access to all information on retail prices by all participants (retailers and refiners), but each retailer only knew the wholesale price offered by his or her refiner. The automated consumers had full retail price information, but no wholesale price information. Retailers could set station-specific prices in the initial scenario, but faced costs in serving each customer and in obtaining gasoline inventory to sell. Refiners obtained raw materials and processed them before selling the consumer-ready gasoline to retailers. Refiners could offer different prices to different retailers if they chose to do so. Refiners received revenues from sales to retailers that were offset by refining costs, including crude oil acquisition costs. Each consumer had the same maximum willingness to pay unless purchasing the consumer's preferred brand. In that case, the maximum willingness was slightly (about 10%) higher. There was a 20% probability that any particular consumer preferred one of the four brands and a 20% chance that the consumer had no brand preference. The maximum price included a consumer drive-time calculation. The consumers purchased from the retail outlet that provided the greatest consumer surplus.

Full vertical unbundling resulted in higher prices for consumers for nearly all transactions in the experimental markets. Average retail prices were 13.2% lower in the centre areas and 16.5% lower in the corner locations under the vertical integration scenario. The benefit to consumers from vertical integration stemmed from the elimination of double markups. The authors also found that vertical integration eliminated asymmetries in the way that retail prices respond to upward versus downward shocks in oil prices, but vertical integration increased the length of the adjustment lags.

The experimental design also examined the effects of zonal versus uniform pricing by refiners and other territorial pricing restrictions that are sometimes proposed as alternatives to mandatory vertical unbundling. In these experimental markets, zonal pricing definitely lowered retail prices in the central location, but did not appreciably change the prices for consumers in the corner locations. Further, under uniform wholesale pricing, there were lower incentives for consumers located near a corner to travel to the center to obtain lower gasoline prices. Hence, the results in these experimental markets indicated that uniform wholesale pricing is more profitable for retailers, but harmful to consumers. Zonal prices hurt the corner retailers because the refiners increase wholesale prices to capture more of the locational rents at isolated retailers.

Source: Deck and Wilson (2008) and (2004).

5. Experiences with vertical integration or unbundling

5.1 Argentina

Argentina provides an interesting example of an intermediate policy on mandatory vertical unbundling. Argentina limits the proportion of retail outlets that can be vertically integrated and limits the length of supply contracts. The latter is designed to address the concern about foreclosing entry of new refiners.

In 1991, the Argentine gasoline market was deregulated and restrictions on prices, refining capacity, location and quantity of retail outlets were eliminated. The gasoline market is highly concentrated with four firms accounting for more than 85% of the market. During the 1990s, observers complained the retail gasoline prices stayed high, despite dramatic decreases in oil prices. Economic studies during this period

resulted in contradictory findings.⁴⁸ In 2000, the new competition authority, the Secretariat of Consumer Affairs and Defence of Competition, made the following recommendations.

- limit the duration of contracts between oil companies and dealers that operate gasoline stations and
- establish a ceiling on vertical integration, measured as the percentage of the network of gasoline stations that an oil company (refiner) can own and operate.

These recommendations were reviewed by the President and he subsequently issued a decree that implemented them. Serebrisky (2003), reviewed the evidence developed by the agency in support of its recommendations. Because there was little evidence or experience with alternative structures and the structure of the refinery sector was highly concentrated (four-firm concentration = 85%) even after the government's privatization initiative, the agency relied to a considerable extent on international comparisons. Competitive concerns focused on the refining and retail sectors because there are several oil producers operating in Argentina as well as many sources of imported, market-ready motor fuel. The inquiries about the effectiveness of competition at the refinery and retail levels concentrated on structural indicators (as described above, adjusted to changes in international oil prices, and entry conditions). Argentine retail gasoline prices were static compared to those in the U.S. in the 1990s and adjustments to oil prices were shallower in the early years of the new millennium. For example, diesel fuel prices in Argentina were nearly flat in the 1990s, despite fluctuations of more than 40% in the U.S. In 2001, diesel prices in the U.S. fell by approximately 35% compared to less than 5% in Argentina. Competitive concerns also arose from comparisons of market-ready gasoline import prices with retail prices. Data for the 1994 to 2001 period showed a widely varying premium for domestically produced gasoline which is difficult to explain through a product differentiation or a nationalistic demand preference amongst Argentine consumers. Sebrisky concludes that this evidence indicates that Argentine retail gasoline is isolated from changes in gasoline price internationally. Serebrisky (2003) also found that until major currency disruptions in 2002, relative retail prices of different brands remained stagnant after 1995. During the 1995 to 1999 period, the average retail prices of the four major brands stayed in lockstep relationships to each other.

The investigation by the competition agency examined retail conditions because oil extraction was considered competitive and oil refining was as competitive as it was likely to become under the government's privatization efforts. The focus on retail competition led to inquiries about entry conditions, including opportunities for entry at the refinery stage of production. The agency found that entry or expansion of a small refinery likely would be difficult because, although there were many independent dealers, very few operated without very long supply contracts from the major incumbent refineries. Serebrisky (2003) suggests that the preponderance of dealer owned and operated retail gasoline outlets is due to the restrictions on refiners closely monitoring the work effort of their employees. He suggests that the principal/agent problem drives firms to use supply contracts instead of vertical integration in response to the principal/agent issues they face. The length of these relationships is, however, a separate decision. Serebrisky (2003) posited that long-term supply contracts serve the purpose of raising impediments against entry by new refineries. A refinery entrant needs access to a distribution network. The refiner could build this from scratch, but getting established retailers to switch suppliers could be faster, less risky, and less costly absent high switching costs. Long-term supply agreements with retailers can effectively preclude building distribution by getting retailers to switch.

Consistent with this concern, the competition agency found that refiners were moving decisively toward longer supply contracts in the later 1990s. In the early 1990s, supply contracts in excess of 14 years

⁴⁸ Serebrisky (2003).

accounted for about 22% of the contracts. In the late 1990s, supply contracts in excess of 14 years accounted for about 38% of the contracts. Considering that the Argentine gasoline markets were served by the same largest firm as those in Spain, the 1999 decision of the EU to set a maximum duration for retail gasoline supply agreements spurred the decision to make a similar recommendation in Argentina. The Argentine competition agency also considered the 1998 study of the U.K. Office of Fair Trading that found that the average duration of retail gasoline supply contracts was less than three years in the U.K. and that competition is driven by the entry into gasoline retailing by supermarkets and big box stores.

Argentina decided that its higher costs of capital warranted a longer contract period and it settled on eight years instead of five. The second recommendation, to limit the proportion of outlets that can be owned and operated by the refiners, was adopted as a fencing in provision to preclude refiners from all totally vertically integrating to create a barrier to future entry by a new refinery. The proportion that was adopted, 40%, may have derived from European statistics about the existing level of vertical integration, or it may have represented a compromise between retailers promoting mandatory vertical unbundling and refiners promoting unlimited vertical integration and contractual controls.

5.2 *Australia*

Australia recently removed restrictions on vertical integration of gasoline retailing, but gasoline retailers continue to be concerned about low retail margins at grocery and mass merchant gasoline outlets. The Australian gasoline markets are served by four oil refinery majors (Mobil, Shell, BP and Caltex) and a small group of competing independent retailers plus recent entrants, notably supermarket chains. For instance, as described in Box 3, the supermarket Woolworths entered Australian gasoline retailing markets in 1996 and built a national network of nearly 300 gasoline retail sites by 2003, but initially it had no alliance with a refiner. Subsequently, there have been a number of alliances between oil companies and supermarkets with gasoline retailing locations. For instance, Woolworths later partnered with Caltex, which was a response to the Coles/Shell gasoline retailing alliance strategy. The latter was initiated in 2003 and it aimed to extend a discount gasoline offer to customers nationwide at up to 450 service stations.⁴⁹ By 2006, supermarket alliances handled 40% of retail fuel sales.⁵⁰ Hundreds of supermarket shopper docket discounts were in place and consumers responded actively to these programs. With these large partnerships so widely accepted by consumers, the refiners have been less actively involved in operating their own retail outlets.⁵¹ Approximately 5% of retail outlets are directly operated by refiners compared to 64% that are independently operated. As a result of the introduction into petroleum retailing of Coles Express and the Woolworths/Caltex joint venture in 2003 and 2004, there have been lower petrol prices for consumers. The ACCC examined retail prices in the five largest metropolitan areas over similar periods before and after Coles Express began operating in those areas. Relative to an independent benchmark (i.e. the ACCC's import parity indicator, which reflects movements in the Singapore price for refined petrol and the Australian/US dollar exchange rate), petrol prices were lower after the entry of Coles Express and the Woolworths/Caltex joint venture into the retail petrol market. The extent to which prices were lower varied with cities and time. It ranged from around 0.5 cents per litre to over 3.0 cents per litre.⁵²

Independent retail outlets have expressed concern regarding these types of alliances. They are afraid that the discounts offered by the alliances, which sometimes involve retail prices that are below wholesale prices, would have the effect of forcing independents from the market, thus substantially reducing

⁴⁹ Roarty and Barber (2004).

⁵⁰ ACCC (2006).

⁵¹ BP is an exception because it has not partnered with any retail grocery chain.

⁵² ACCC (2006).

competition in the long-term. The competition authority, on the other hand, believes that the introduction of such schemes has encouraged competition and lowered prices in Australia's retail fuel markets.⁵³

The business structures currently observed in the Australian retail markets largely reflect the operation of two pieces of recently repealed legislation:

- the Petroleum Retail Marketing Sites Act 1980 (the Sites Act), which placed a quota on the number of retail sites that the refiner-marketers could operate directly or on a commission agent basis.
- the Petroleum Retail Marketing Franchise Act 1980 (the Franchise Act), which specified minimum terms and conditions for franchise arrangements.

The Acts were passed to address an imbalance in market power between the oil majors on the one hand, and their commission agents, on the other hand. The latter alleged that the majors had abused their market power. The solution was to require the majors to adopt franchises at most of the sites they owned. To do this, the Sites Act set a quota for each refinery major. The Franchise Act, in turn, contained provisions that sought to secure the positions of franchisees and thus encourage the entry of small businesses into the retail petroleum markets.

Under the Downstream Petroleum Reform Package, the Sites Act and the Franchise Act were repealed and a mandatory code (the Oilcode) under the Trade Practices Act was introduced as a substitute. The Oilcode, among other things, provides wholesalers and fuel resellers with specific rights and obligations in relation to fuel reselling arrangements.⁵⁴

5.3 *Canada*

Canada sets no legal restrictions on vertical integration. Retail gasoline markets in Canada have been the subject of several economic studies, including studies of the effects of fringe firms on retail prices and of changes in the structure of gasoline retailing. Examinations of retail pricing have provided some indications of coordinated behaviour between retailers.

According to Sen (2005), the structure of Canadian gasoline markets fits in a framework of dominant vertically integrated firms with a competitive fringe of independent retailers. In 1991, vertically integrated firms served 65% to 97% of the markets in the eleven Canadian cities analysed in this study. Sen used monthly data on average retail gasoline prices and individual market shares across eleven Canadian cities between 1991 and 1997 to examine the effects on prices of the competitive fringe and the efficiency of retailers. The author found that although an increase in the aggregate market share of smaller firms is positively, but insignificantly, correlated with trends in retail prices (because small retailers may be less efficient relative to larger vertically integrated retailers), these effects are outweighed by lower prices resulting from a dilution in market concentration (interpreted as less market power) among vertically integrated firms – which is also a result of the increase in aggregate market share of smaller firms. Specifically, a 1% point increase in the aggregate market share of smaller firms is associated with a 1.0091 cent per litre drop in average retail prices. The author concludes that policies that strengthen or protect smaller retail firms are likely to reduce retail prices on net.

⁵³ A less positive view of lower prices offered by supermarket gasoline retailers is presented in Gans and King (2004).

⁵⁴ ACCC (2007) contains more details and updates.

Eckert and West (2005a) examined the consolidation of gasoline retailing in Canada. In particular, the number of outlets declined from 35,703 in 1970 to 23,952 in 1980, 22,000 in 1989, and 13,250 in 2000. The authors argue that this rationalisation process could have been triggered by new market conditions. They observe that many companies converted to a network with fewer stations but higher capacity stations with no service bays. The remaining stations typically have other features such as convenience stores and car washes. At the same time, the authors find that this rationalisation process is also consistent with the alternative explanation of tacit collusion. In a separate review of retail pricing in Vancouver, Eckert and West (2005b) find that pricing patterns are consistent with tacit collusion.

Eckert and West (2004) studied retail price behaviour in two Canadian cities: Ottawa and Vancouver. In Ottawa, casual empiricism suggests that retail gasoline prices are subject to significant price dispersion and volatility. Conversely, in Vancouver, casual empiricism suggests that prices tend to greater stability and uniformity. Using station-specific retail gasoline price data, they find that these patterns are consistent with an economic theory in which firms in Vancouver are tacitly colluding while firms in Ottawa are engaged in an ongoing battle for market share.

Two findings from antitrust enforcement actions in Canada are particularly noteworthy. First, there was a case of predatory pricing in the Chatham gasoline market. An independent retailer complained that a vertically integrated company, Pioneer, was charging wholesale prices above prevailing retail prices. Using daily prices for February and March, the Canadian Competition Bureau⁵⁵ found that there was no evidence to support these allegations because wholesale prices were above retail prices only one day in the whole period. Second, in June, 2008, the Competition Bureau announced criminal collusion charges against retail gasoline station operators in several areas of Quebec and stated that the evidence suggests that the overwhelming majority of gasoline retailers in these areas participated in the retail cartel.⁵⁶

5.4 *Japan*

In Japan, the gasoline industry is highly divided between the stages in the gasoline chain of supply, so vertical integration between retailers and refiners has historically been less of a policy focus in Japan than in countries where vertical integration has been more widespread. In particular, exploration and pumping of crude oil historically has been separated from the refining and distribution stages. The origin of this structure dates back to the period after World War II, when the Petroleum Industry Law was enacted in order “to achieve a stable supply of oil by controlling downstream oil refining, effectively authorizing the separation of upstream and downstream operations.”⁵⁷ Moreover, complete vertical integration does not occur between the refining and distribution stages because the gasoline stations owned by the oil companies are often managed by special agents⁵⁸ or retail firms.⁵⁹ The end to prohibitions against self-serve retailing in 1998 resulted in rapid conversion to that format along with new retail entry. However, some partnerships have been formed between refiners and grocery retailers who sell gasoline and consolidation at the exploration and refining stages has increased since 2000.⁶⁰

⁵⁵ Competition Bureau (1999).

⁵⁶ Canadian Competition Bureau (2008).

⁵⁷ Kikkawa (2002). Also see Masaki (2006).

⁵⁸ Special agents are distribution companies that operate gasoline retail outlets and often sell to retailers.

⁵⁹ Oyama (1998).

⁶⁰ Masaki (2006) and Hofman (2003).

5.5 *Netherlands*

The Netherlands has examined vertical integration issues in gasoline retailing, but decided not to intervene. In 2001, the competition authority suspected that the system of vertical agreements between oil companies and retail gasoline operators was undermining the incentive to compete. To address the problem, the authority considered the possibility of rescinding the European block exemption for vertical agreements. After carrying out further research and calling for the market players' opinions on this issue, the authority decided not to intervene because there was insufficient evidence that such an intervention would result in lower retail prices. It decided instead to monitor the sector closely.⁶¹

5.6 *New Zealand*

Rationalization of the retail gasoline industry has been going on for many years in New Zealand. According to New Zealand Institute of Economic Research (2005), the number of gasoline stations declined from more than 4,000 stations prior to 1976 to approximately 1,600 stations in 2002. Most of closures were low-volume independent retailers, and the refiners have bought up most of the higher-volume locations from independent dealers. Most new retail locations are owned by refiners. Consequently, the structure of the retail markets is becoming more vertically integrated.

The New Zealand Institute of Economic Research (2005) concluded that increased vertical integration of gasoline wholesaling and retailing is unlikely to waste resources or harm consumers unless it leads to increased barriers to entry. The last two major entrants in recent years have focused primarily on newly constructed, high volume sites, rather than existing independent stations. Vertical integration by wholesalers into retailing has resulted in efficiencies in stock management and distribution, and increased price and non-price competition.

5.7 *Spain*

Spain's retail gasoline sector has experienced a great deal of regulatory change and subsequent restructuring during the past 15 years. Recently, litigation has been used to revise terms of vertical contracting in the industry. Until 1992, the Spanish gasoline industry at the retail level was operated by a state monopoly, which was supplied by several private and public refiners. That year, the monopoly was split up and the retail network was divided among the refineries. However, the distribution activities continued to be a monopoly. In 1990, the government replaced price regulation with a system of price ceilings. They remained in force until 1998.

The restructuring of the oil sector resulted in a highly concentrated oligopoly at the retail level in Spain. Bello and Cavero summarize the structure of gasoline retailing, using contemporaneous press coverage, in this way:

In 1993, the Spanish-based refiners controlled about 85% of the 5,983 service stations: Repsol, 54.8%, Cepsa-Elf, 23.8%, and BP, 6.3%. The low density of the Spanish retail network, as compared to other European countries, and the consequent high throughput of the outlets encouraged the construction of new service stations. Since 1993, the number of service stations increased by more than 200 outlets per year to 8,155 in 2003, although the rate of growth has slowed down over the most recent period. From the early 1990s onwards, about 30 new operators entered the market, involving Petrogal, Agip, Esso, Shell, Avanti, outlets operated by large supermarkets, independent service stations, etc. Hence, between 1993 and 2003, the market share of the new operators increased from 15% to 30%. The Spanish-based refiners currently control about 70% of the service stations: Repsol-YPF, 43.8%; Cepsa-Elf, 18.7% and BP, 6.9%.

⁶¹ Netherlands Competition Authority (2002) report, 2002 (<http://www.nmanet.nl>)

Virtually all (95%) of the service stations which are not owned and managed directly by an oil company are operated through exclusive selling contracts with their suppliers, which establish prices and the fees for the stations' operators (Cinco Días, 24/2/1997). In this respect, the Spanish gasoline markets are distinctly different from those in many countries, where vertical integration is much less prevalent and where suppliers do not fully control final retail prices.

Bello and Cavero (2008) analysed the structure of the markets and the degree of brand differentiation across Spain. The authors found that the prices in independent stations are lower than in branded ones and that this difference is more prominent when the stations belong to minor brands. Furthermore, the authors find that independent non-branded retailers compete more directly with branded vertically integrated retail outlets than with branded leased retail outlets, at least in the region of Navarra. The authors view this as confirmation of a double marginalization problem and as confirmation of product differentiation between brands. They conclude that vertical differentiation means that the best choice of contractual format (from the refiner's perspective) between refiners and branded stations is one that features some degree of double marginalization as this enables refineries to weaken price competition in the retail market. Bellow and Cavero (2002) find that branded stations offer a higher number of services aimed at consumers while independent stations offer more services regarding vehicle maintenance and repair.⁶²

There have been antitrust cases in the sector regarding whether retailers are commissioned agents or independent retailers. The most prominent court decision characterized retailers as independent entities and subjects vertical supply agreements to additional vertical pricing regulations. In particular, there was an intervention by the Court for the Defense of Competition in Decision 490/00 y 501/00 REPSOL-CEPSA. The case involved two complaints against the main two national petroleum undertakings for restrictive agreements (Art.1 National Law and Art. 81 European Community Treaty) consisting of vertical fixing of prices to their retailers and for the violation of Commission Regulation 1983/84, which establishes the conditions for the categorical exemptions concerning certain exclusive purchasing agreements.

The Court for the Defence of Competition found that there was vertical fixing of prices because petrol stations are resellers rather than commissioned agents. The latter was the contention of both petroleum company defendants. The Court determined that the retailers incurred several commercial and financial risks. This determination requires that petroleum retailers be classified as independent entrepreneurs, making Articles 1 and 81 applicable. Concerning the extension of the supply contract time periods, the Court did not find that the firms committed fraudulent practices with the objective of lengthening contract terms excessively.⁶³ However, half of the members of the court in both cases dissented in whole or in part on this aspect. The Court imposed fines against both firms, but the levels have been criticized as not large enough.⁶⁴

There was also a case pertaining to Spain's petroleum retailing markets brought by the European Commission.⁶⁵ This case resulted in a settlement under which gasoline supply contracts with retailers cannot exceed five years. The case is described in Box 4.

⁶² Overall, these results are in line with the findings by Shepard (1993) and Blass and Carlton (2001).

⁶³ Spain (2001).

⁶⁴ Lloreda and Sanz (2001).

⁶⁵ Case COMP/B-1/38348 – Repsol CCP SA.

Box 4. EU Intervention in Spain to Limit the Duration of Retail Gasoline Supply Contracts

“The European Commission adopted a formal decision under EC Treaty competition rules which renders commitments entered into by REPSOL to open up its long term agreements with service stations legally binding. REPSOL will free hundreds of service stations from long-term exclusive supply contracts. This will bring a wider choice and scope for reduced prices to the benefit of the consumer. The Commission had been investigating whether REPSOL’s supply contracts violated EC Treaty rules on restrictive business practices (Article 81) but has now closed its investigation in the light of the commitments submitted by REPSOL.” European Commission (2006a).

“According to the contracts signed with Repsol CPP, land owners granted a “right in rem” for a long period (from 25 to 40 years) to Repsol CPP on their land or on their land and building: Repsol CPP would then finance the construction/refurbishment of the station, rent the station back to the owner and, for the duration of the “right in rem” be the exclusive supplier of motor fuel to the station.” European Commission (2006b).

These contracts were a problem because of the high degree of vertical integration in the market:

“The Commission’s investigation has shown that access to the market is rather difficult because of its structure and in particular the vertical integration of all operators. Exclusivity contracts signed between the operators and the remaining independent service stations tie these stations for long periods of time to the operators, thereby further hampering competition. The contracts signed by Repsol CPP, in particular the long-term contracts which were based on “rights in rem” owned by Repsol CPP (see above), particularly contribute to close off the market. This diminishes ultimately the pressure to reduce prices and improve quality, to the detriment of consumers.” European Commission (2006b).

Source: European Commission Case COMP/B-1/38348 – Repsol CCP SA.

5.8 United Kingdom

The gasoline industry is one of the most investigated industries in the UK. It has experienced in the past 20 years, three Monopolies (and Mergers) Commission (MC, 1965; MMC, 1979, 1990) industry investigations, two investigations by the House of Commons Trade and Industry Select Committee (1988 a, b), and one enquiry by the Price Commission (1979 a, b, c). In each of the investigations since 1979, the various committees have found that there is nothing evident in the industry’s conduct which is against the public interest. Driffard (1999), however presents less sanguine interpretation of short-run pricing dynamics and entry conditions in the UK gasoline industry.

There is not a high degree of vertical integration in the U.K., so that there are few issues regarding potential foreclosure.⁶⁶ Cook (1997) examined vertical integration in the U.K.’s gasoline and brewing industries. His conclusions, after review and analysis of public materials and interviews, parallel the conclusions of the Monopolies and Mergers Commission. The Commission found that vertical integration in the gasoline industry was largely driven by efforts to gain efficiencies that would benefit consumers.⁶⁷ No remedies were recommended.⁶⁸

Like many countries, the entry of supermarkets as gasoline retailers is a major form of upheaval in U.K. retail gasoline markets. Between 1994 and 2007, the share of gasoline sold by supermarket gasoline

⁶⁶ See for instance “Competition in the supply of petrol in the UK”, A report by the Office of Fair Trading, (May 1998).

⁶⁷ Also see Cook (1998).

⁶⁸ In contrast, vertical integration in the brewing industry was found to be driven by market power incentives and warranted “radical” structural remedies.

retailers rose from less than 20% to over 40% in the U.K.⁶⁹ Shopper docket are common in the UK, similar to the Australian shopper docket described in Box 1.

5.9 *United States*

Industrial organization economists have conducted several empirical studies of retail gasoline vertical integration and vertical unbundling in the United States. This area of research has been attractive because individual states have adopted quite different policies toward vertical integration in this industry, yet many troubling variables required in international comparisons can be controlled for or have the same values across states. Many states have no laws or regulations about vertical integration aside from application of federal and state general antitrust laws. However, regulations requiring vertical unbundling of retail gasoline outlets have been in place in a few states for several years.⁷⁰ Research has focused on whether retail prices are different in the states with mandatory vertical unbundling, controlling for other factors that are likely to impact retail gasoline prices. Based on this literature, the U.S. Federal Trade Commission has filed comments opposed to mandatory vertical unbundling of retail gasoline outlets in several states.⁷¹ Indeed, FTC staff economists have contributed to the literature on this topic.⁷²

The literature on mandatory vertical unbundling of retail gasoline outlets in the United States is nearly unanimous in concluding that mandatory unbundling is associated with higher retail gasoline prices rather than lower prices. In a review of competition in petroleum refining and marketing, Moss (2007) examined four relatively recent studies of the effects of mandatory unbundling⁷³ and two studies of the effects of open supply requirements.⁷⁴ All but one of these studies employed empirical analyses. Moss concluded: “The search appears to show that forced deintegration of refiners and retailers is associated with higher costs and/or consumer prices.” The summary table from Moss is reproduced below. The coefficients on the variables representing mandatory vertical unbundling show price increases due to this policy or two to five cents per gallon, roughly two to five percent of average prices at the time of the studies. Earlier studies reached similar conclusions.⁷⁵

⁶⁹ UKPIA (2008).

⁷⁰ Maryland was the first state to mandate vertical unbundling.

⁷¹ A recent example is U.S. FTC (2007). This is one of several competition advocacy comments filed on this subject.

⁷² Vita (2000) and Taylor, Kreisle, and Zimmerman (2007) are examples.

⁷³ Spears (1991), Slade (1998), Blass and Carlton (1999), and Vita (2000).

⁷⁴ Marvel (2003) and Barron, Taylor, and Umbeck (2004).

⁷⁵ Barron and Umbeck (1984) reported increases of 1.7 cents to 5.3 cents per gallon for full-service and self-service retail gasoline outlets respectively. Shephard (1993) found prices 1.5 cents to nearly 10 cents lower per gallon at refiner-owned gasoline retail outlets.

Table 1. Results of Studies on Divorcement and Open Supply

Study authors, year	Results
Divorcement findings	
Spears (1991)*	Divorcement laws result in subsidisation of gasoline product middlemen, at the expense of consumers.
Slade (1998)	Divorcement is associated with high retail gasoline prices.
Blass and Carlton (1999)	Vertical integration is motivated by efficiency, not predation. Costs of divorcement are high.
Vita (2000)	Divorcement policies raise retail gasoline prices.
Open supply findings	
Marvel (2003)	Enforceable open supply requirements can increase inventory holding, protect against price volatility, and reduce gasoline transportation costs.
Barron, Taylor and Umbeck (2004)	Retail stations with the most sources of supply have higher retail prices.

*Based on non-empirical analysis

Most commentators have interpreted these findings as being directly contradictory to the claims of mandatory unbundling proponents. Rather than lowering risk and lowering costs and prices, mandatory unbundling leads to higher prices according to several empirical research papers. Commentators generally conclude from this line of research that consumers are harmed by mandatory vertical unbundling laws.

There are several potential qualifications that stand between finding a price increase associated with mandatory vertical unbundling and concluding that such unbundling harms consumers in retail gasoline markets. One qualification is that the price increase could represent refiners discontinuing predatory strategies because the mandatory vertical unbundling laws preclude recouping the losses from predation. Blass and Carlton (2001) seek to address this concern by examining whether the mix of vertical integration and vertical separation in states without rules against vertical integration can be explained by characteristics of retail gasoline outlets that accord with efficiency explanations for vertical integration and separation. In particular, the authors suggest that retail outlets that provide automobile repair services and have a low volume of gasoline sales are outlets where monitoring the effort of the operator is particularly difficult. From an efficiency viewpoint, refiners should find it more profitable not to vertically integrate these retail outlets. Conversely, monitoring should be easier with retail locations that do not offer repair services and that have a high sales volume. The actual pattern of lessee versus refiner-owned retail locations corresponds to these predictions, according to Blass and Carlton. Further, refiners tended to use a lessee arrangement when establishing new locations with associated repair services and relatively low sales volume. The authors contend that if refiners were focused on forcing lessees out of business through predation, the refiners would not be expected to establish more such relationships at new locations and vertical efficiency variables should not significantly explain the pattern of actual vertical relationships.

Another important caution in examining the available literature is its predominant reliance on gasoline prices as the only relevant measure of consumer welfare. There are some major drawbacks to focusing exclusively on retail prices as a measure of consumer benefits. The principal complication is the familiar possibility that there is a significant quality-of-service dimension that is important to consumer welfare and that is not represented by the retail price. It could be, for example, that consumers prefer a bundle that consists of better service along with higher prices rather than a bundle that consists of poorer service and lower prices. Quality of service in gasoline retailing could be broader than the cleanliness of restrooms or the smile on the attendants' faces. In particular, a reduction in the population of retail outlets could increase the effective price of gasoline by increasing both drive times to refuel and fuel used to search for a retail

gasoline outlet. These increases in consumer search and access costs could exceed the benefits of any lower prices at the pump that can be attributed to the consolidation of retail outlets.⁷⁶ Fewer and more dispersed retail gasoline outlets could also have indirect price effects by curbing customer search and, consequently, reducing the price elasticity of demand as described in a tourist trap model of consumer search behavior.⁷⁷ On the other hand, both Barron and Umbeck (1984) and Slade (1998) found that mandatory vertical unbundling led to fewer hours of operation by retailers rather than more hours of operation, one known measure of service quality.

6. Influence of independent retailers on prices

The economic literature on direct effects of mandatory unbundling of retail gasoline outlets generally suggests that the effect of these rules has been to raise retail prices. But other empirical work, focusing on potential indirect effects of these rules finds that retail gasoline prices in an area are appreciably lower if the market share of unbranded, independent gasoline outlets is higher. The study by Hastings (2004), for example,⁷⁸ examined the effect of differences in vertical contract types at retail gasoline outlets and found that vertical integration, at the expense of independent gasoline retail outlets, raised prices by five cents per gallon.⁷⁹ The context of the study was the purchase of a chain of independent gasoline retail sites by ARCO (a major petroleum refiner). The purchase resulted in substantial changes in the share of the market served by independents and branded stations and allowed an effective means to control for station-level and city-level variables that are often omitted in empirical research because they are difficult to identify or quantify. Hastings (2004) concluded:

Results indicate that a decrease in the market share of independent stations has a significant positive impact on local retail price. However, a change in the market share of refiner owned and operated branded stations does not have a significant impact on local market price. These results have important implications as policy makers consider the regulation of vertical contracts as a means to increase competition in gasoline markets. The research design and detailed data also allow for inference on the underlying nature of retail gasoline competition.

The results reported by Hastings (2004) may not be the last word on these vertical effects in general or even in specific. For example, Taylor, Kreisel, and Zimmerman (2007) found much smaller effects, less than a tenth as great, while using a similar, but not identical data set, in an attempt to replicate Hastings' (2004) findings.

Borenstain and Bushnell (2005) concluded their advice to regulators in California:

⁷⁶ The significance of this factor will depend on individual consumer driving patterns and might be expected to be the most significant in rural areas where the density of retail outlets is already lower. Note that arguments that vertical integration is being undertaken for internal efficiency reasons and will reduce prices at the pump, as suggested in the report of the New Zealand Institute of Economic Research (2002) does not necessarily mean that vertical integration and associated consolidation benefits consumers are better off.

⁷⁷ Carlton and Perloff (2005), Chapter 13.

⁷⁸ Similar results are reported by Moss (2007) for Adymir and Buehler (2002), Hastings and Gilbert (2005). A controversy between the Federal Trade Commission and the Government Accountability Office in 2004 revolved around interpretation of ex post merger analyses in the retail gasoline industry. Moss (2007)

⁷⁹ Gilbert and Hastings (2002) similarly report that both retail and wholesale prices rose by three cents or nearly so per gallon when the degree of vertical integration of retail outlets in an area is above the median level.

In sum, previous work has demonstrated the importance of independently owned stations that are not marketed under one of the major brands. The presence of unbranded stations lowers retail margins and likely lowers wholesale margins also. The impact of independent branded owners is much less clear, as is the impact of the distribution method. Yet it is the latter effect that is most likely to be impacted by a branded-open supply proposal. ... To date, there is much more empirical evidence on the efficiency enhancing aspects of vertical controls at the retail level. But it should be noted that because of data and other factors, it is much more difficult to estimate the impact of such policies on wholesale competition than it is on the retail prices at specific stations. ... [P]roposals to regulate vertical policies could likely produce unexpected side-effects. The banning of specific pricing practices or contractual arrangements, for example, could spur a move toward greater direct vertical integration or spawn a new set of contractual arrangements that prove more damaging than the practices they are replacing.

Their conclusion about the lack of relationship between the salutary effects associated with a strong presence of independent non-branded retailers and proposals for branded-open supply regulations appears equally true of proposals for mandatory vertical unbundling. Faced with mandatory vertical unbundling, it seems unlikely that refiners would convert these outlets to unbranded independent retailers if the rise of such retailers will hurt them by intensifying competition generally.

Given the previous discussion of the potential negative relationship between vertical integration and independent, non-branded retail outlets, a potential conflict between direct and indirect effects of mandatory unbundling of retail gasoline outlets may be present. Unfortunately, the available economic literature does not appear to address this potential confounding of effects as definitively as policy makers might hope. Perhaps the closest approximations are Chouinard and Perloff (2007), Aydemir and Buehler (2003), and Sen (2005).

Chouinard and Perloff (2007) find that both retail and refinery mergers increase retail prices, but that prices are negatively related to the percent of retail outlets that are company operated and positively related to the percent of retail outlets that are lessee-operated. Hence, this research does not resolve the opposing concerns.

In contrast, Aydemir and Buehler (2003), focus on separating efficiency from foreclosure effects of vertical integration. In their empirical model, conduct and unknown cost parameters are inferred from the responsiveness of prices to changes in demand elasticities and various known cost parameters (instrumental variables). Their results are more nuanced than other research in this area. They find both efficiency and foreclosure effects, but the relative importance of the two varies greatly based on the regional position of specific firms. The efficiency incentive predominates for refiners with relatively small market shares in regions with relatively low concentration. The foreclosure incentives predominate for refiners with relatively large market shares in regions with relatively high concentration. While this result could help to improve understanding of the relationship between vertical integration and wholesale prices of individual refiners, it does not resolve the question of overall effects of vertical integration across all refiners or the question of retail effects on average.

Sen (2005) reports countervailing effects from a larger aggregate market share of independent retailers. On one hand, independents foster increased competition at the refinery level. On the other hand, independents foster higher retail margins. The former predominates in Sen's data, but this might not be the case in other locations or in other time periods.

7. Concluding Observations

There are several conflicting propositions about the effects of mandatory vertical unbundling and vertical integration more generally in gasoline markets. On the narrow question of mandatory vertical unbundling, empirical evidence generally supports the proposition that such laws and regulations are of little or no benefit to consumers. However, the general policy issue of vertical integration in gasoline retailing is more complicated. Principally, there is evidence that the newest strong force for competition in gasoline retailing is the presence of independent retailers selling unbranded gasoline. The counterpoint to the ill effects of mandatory vertical unbundling is that entry of novel independent retailers (often grocery retailers) could be impeded and incumbent independent non-branded retailers could be forced to exit if refiners predominantly vertically integrate and sell only to branded retailers.

Laws and regulations about vertical integration in this sector are only tangentially related to relevant competitive concerns. Instead, they are focused on recurring and vigorous contractual disputes between refiners and franchisees regarding price discrimination and opportunism. Supporters of vertical integration need to address the problems of contract enforcement resulting from opportunism. Proponents of mandatory unbundling should examine whether concerns about opportunism and cross-subsidization can be addressed under the general laws against abuse of dominance and unfair competition.

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NOTE DE REFERENCE

*Par le Secrétariat**

1. Introduction

Les prix de vente au détail de l'essence¹ suscitent fréquemment l'attention du public. Ce produit est un poste important du budget de nombreux consommateurs et entreprises. De plus, il fait l'objet d'achats fréquents et ses prix sont souvent affichés bien en vue, les consommateurs étant ainsi amenés à connaître leur évolution. L'élasticité-prix de la demande est d'ordinaire faible et les prix fluctuent fortement et rapidement². Lorsque les prix de détail flambent, les consommateurs se plaignent et le législateur en recherche les causes : ruptures d'approvisionnement dues à des catastrophes naturelles, conflits armés dans les régions productrices ou autres problèmes de sécurité, croissance plus rapide de la demande que de l'offre à l'échelle locale ou internationale, inefficiences de la chaîne d'approvisionnement ou encore pouvoir de marché. Ce dernier facteur peut se manifester à plusieurs stades de l'industrie pétrolière. À l'extraction, l'OPEP s'efforce d'administrer son cartel. Le raffinage se caractérise souvent par un nombre relativement faible de producteurs et de solides barrières à l'entrée. Enfin, aux stades de la distribution et de la vente au détail, le pouvoir de marché peut découler d'avantages géographiques ou d'une coordination anticoncurrentielle³.

On a fréquemment préconisé le dégroupage des points de vente d'essence et des raffineries pour remédier aux problèmes d'inefficience et de pouvoir de marché. Les partisans du dégroupage obligatoire sont souvent des distributeurs indépendants, notamment des concessionnaires distribuant des produits de marque, et leurs associations professionnelles. Plusieurs pays ont suivi leur avis et interdisent aux raffineurs de détenir ou d'exploiter des points de vente. Cependant, l'analyse économétrique montre que le dégroupage obligatoire implique souvent une hausse des prix de détail.

Cette note de référence examine les arguments pour et contre le dégroupage obligatoire, d'abord en étudiant l'intégration verticale de la distribution (section III), puis les autres effets sur la concurrence et le bien-être du consommateur (section IV). Il passe ensuite en revue les expériences de dégroupage obligatoire des points de vente d'essence (section V) et analyse les répercussions sur les prix de l'indépendance des distributeurs (section VI). La section VII explique pour conclure que la controverse qui entoure depuis longtemps le dégroupage n'entretient qu'un rapport indirect avec les évolutions actuelles de la concurrence dans le domaine de la distribution de carburants pour moteur.

* Préparé par John C. Hilke et Marta Troya-Martinez.

¹ Le terme « essence » englobe ici l'ensemble des carburants pour moteur. Souvent, les études économétriques concernées portent sur des marchés où l'essence est le principal carburant.

² Deck et Wilson (2004) ; Deck et Wilson (2008).

³ Une évaluation menée par des experts de la Federal Trade Commission (États-Unis) conclut que ce sont des perturbations du côté de l'offre, et non des pratiques collusives de rétention de l'offre, qui ont conduit à l'augmentation des prix de l'essence vers des niveaux inhabituels dans les États du Middle West, au printemps 2000. Bulow, Fischer, Creswell et Taylor (2003)

Le dégroupage vertical du secteur soulève des questions relatives à l'intégration verticale qui ont déjà été abordées dans d'autres travaux de l'OCDE, par exemple lors de tables rondes sur l'accès aux infrastructures de transport⁴, la réglementation des ventes à perte⁵, la prédation⁶ et sur l'intégration et la restructuration dans les secteurs de l'électricité⁷ et des autres services publics⁸.

Ce document formule plusieurs observations :

- La distribution et la vente au détail s'inscrivent dans un large éventail de relations verticales avec les raffineurs, allant de l'intégration totale à la dissociation absolue.
- Les partisans du dégroupage vertical obligatoire mettent en avant l'opportunité des raffineurs et affirment que la dissociation permettrait de résoudre des différends contractuels récurrents.
- Ses opposants soulignent les avantages de l'intégration verticale, qui permet notamment des gains d'efficacité opérationnelle et d'éviter la double marginalisation, et mettent en garde contre l'augmentation des prix à la pompe/des marges de détail qui en découlerait.
- Il apparaît difficile de trancher la controverse entre partisans et opposants, notamment du fait qu'ils emploient des critères d'appréciation différents.
- La recherche montre qu'en ce domaine, les effets de l'intégration verticale sont complexes. D'après certaines études, les gains d'efficacité découlant de l'intégration verticale des raffineurs dans la distribution sont largement compensés par l'affaiblissement connexe de la concurrence au stade du raffinage.
- Le développement rapide de la distribution par les petits magasins et les grandes surfaces, qui usent de prix bas pour attirer les clients et les inciter à acheter d'autres produits, vient encore compliquer le problème. L'arrivée de ces intervenants exerce une pression supplémentaire sur les revendeurs indépendants et les entreprises intégrées pourraient chercher à éliminer ces nouveaux concurrents s'ils venaient à menacer leurs propres points de vente.
- Les partisans de l'intégration verticale doivent traiter les problèmes d'exécution des contrats résultant de l'opportunité. Les partisans du dégroupage obligatoire doivent examiner si les lois d'ordre général sur l'abus de position dominante et la concurrence déloyale peuvent s'appliquer aux affaires d'opportunité et de concurrence déloyale.

2. Les stades de la production et de la distribution dans l'industrie pétrolière

Pour resituer le débat sur les effets verticaux et horizontaux, il apparaît utile de présenter l'éventail de mécanismes verticaux et horizontaux susceptibles d'intervenir aux différents stades de l'industrie pétrolière, en se concentrant tout particulièrement sur la distribution.

⁴ OCDE (2001b), OCDE (2002a) et OCDE (2002b).

⁵ OCDE (2005).

⁶ OCDE (2004).

⁷ OCDE (2001b), OCDE (2002a) et OCDE (2002b).

⁸ OCDE (2001a) et OCDE (2002b).

Les carburants pour moteur vendus au détail sont essentiellement dérivés du pétrole, mais aussi du maïs ou d'autres biocarburants. Une fois le pétrole extrait, il est transporté et raffiné. Le carburant pour moteur est un de ses différents distillats. Des additifs, par exemple des détergents, sont généralement ajoutés à l'essence avant sa distribution. Les additifs et leurs formules peuvent être la propriété de raffineurs et ils constituent un facteur important de différenciation entre marques. Les distributeurs d'essence sans marque ne peuvent légalement affirmer que leur produit contient les mêmes additifs brevetés qu'une marque d'essence donnée, ni que ceux ajoutés à leur essence sont uniformes s'ils s'approvisionnent auprès de différents raffineurs.

Le transport vers les points de vente peut être réalisé directement par le raffineur ou passer par des intermédiaires (appelés « jobbers » en anglais)⁹. Ceux-ci peuvent avoir conclu des contrats de fourniture détaillés avec les raffineurs. Ces accords peuvent imposer des restrictions à la clientèle de l'intermédiaire, prévoir des remises sur quantités au bénéfice de l'intermédiaire ou du distributeur ou d'autres conditions qui pourraient modifier les incitations et les autorisations à vendre à certains distributeurs en pratiquant certains prix. Les prix de gros englobent souvent le produit et son transport et une certaine latitude existe pour pondérer ces deux éléments. Du fait de ce regroupement, les distributeurs paient des prix de gros variables et il leur est plus difficile de déterminer dans quelle mesure les différences de prix entre raffineurs ou grossistes s'expliquent par des différences de coût. Dans certains cas, les raffineurs proposent explicitement des prix de gros plus bas dans certaines régions, là où la concurrence est réputée plus vive.

Un point de vente d'essence peut être :

- détenu et exploité par un raffineur ;
- détenu par le raffineur mais loué à un exploitant ;
- exploité mais non détenu par le raffineur ;
- détenu sous la forme d'une franchise indépendante du raffineur ; ou
- détenu et exploité sous la forme d'une activité indépendante non affiliée.

Certains franchisés, des exploitants ou des concessionnaires indépendants peuvent également intervenir en qualité d'intermédiaires.

Les prix de détail font également l'objet de divers mécanismes verticaux. Généralement, si le point de vente est détenu par le raffineur, c'est lui qui fixe le prix de détail. Lorsque c'est le distributeur qui fixe le prix, le raffineur peut l'influencer par ses prix de gros ou par les prix de détail pratiqués aux points de vente voisins lui appartenant.

En 2005, les autorités de tutelle californiennes ont demandé à Borenstein et Bushnell¹⁰ un rapport sur les principes de réglementation des relations verticales dans le commerce de détail d'essence. Ce document évoque les tensions qui, souvent, découlent de la complexité et de la diversité de tels mécanismes¹¹ :

⁹ Voir par exemple Borenstein et Bushnell (2005).

¹⁰ Borenstein et Bushnell (2005).

¹¹ Les distributeurs indépendants pourraient s'intégrer verticalement en investissant dans l'intermédiation ou le raffinage, mais cela est assez peu courant et les lois et règlements obligeant au dégroupage vertical ne semblent pas envisager que des groupes de distributeurs puissent contrôler conjointement les raffineurs plutôt que ce soient les raffineurs qui contrôlent les distributeurs. Selon toute vraisemblance, si les

La relation entre raffineurs et revendeurs locataires fait souvent l'objet de litiges. Des tensions sont prévisibles, les deux parties préférant s'accaparer la plus grande part possible de la marge de détail. Nous n'avons pu déterminer si les différends sont plus fréquents dans le secteur de l'essence que dans d'autres franchises de détail comme la restauration rapide.

Dans leur plus stricte acception, les lois et règlements de dégroupage vertical obligatoire interdisent aux raffineurs de détenir et d'exploiter des points de vente d'essence. Certaines juridictions n'interdisent pas complètement l'intégration verticale mais limitent plutôt la part de points de vente que les raffineurs peuvent détenir ou contrôler directement par d'autres voies¹². Le dégroupage vertical obligatoire n'est pas la seule politique préconisée par les distributeurs d'essence mécontents. D'autres règles contre les restrictions verticales des raffineurs permettent de traiter les mêmes problèmes. Certaines visent par exemple à empêcher que les raffineurs n'interdisent aux intermédiaires de fournir certains distributeurs ou aux distributeurs de faire appel à certains intermédiaires. Comme on le verra plus loin, les lois contre la vente à perte, spécifiques à l'essence ou plus générales, passent aussi parfois pour des substituts du dégroupage vertical obligatoire des points de vente d'essence¹³. Certaines juridictions sont explicitement passées d'une approche à l'autre, comme l'État de Floride¹⁴.

3. Arguments économiques associés à l'intégration verticale

3.1 Arguments des distributeurs en faveur du dégroupage obligatoire

Le principal argument des partisans du dégroupage vertical obligatoire est que, lorsque les raffineurs sont en partie intégrés verticalement à la distribution, ils emploient une stratégie de « hold-up » envers leur clientèle de distributeurs indépendants ou locataires. Les distributeurs affirment que cette stratégie consiste à recourir à une compression des prix – si importante selon certains d'entre eux que, au regard du droit de la concurrence, il s'agirait de prix d'éviction¹⁵. Dans une telle stratégie, les distributeurs peuvent également se voir refuser le renouvellement d'un contrat de franchise ou imposer des conditions les empêchant de dégager de leurs investissements un taux de rendement concurrentiel. En économie, un « hold-up » fait référence à une situation où deux parties auraient intérêt à coopérer mais où, après qu'une partie ait réalisé

distributeurs contrôlaient les raffineurs, les premiers ne s'opposeraient pas à cette intégration car ils n'auraient pas à craindre des raffineurs d'actions susceptibles de réduire involontairement leurs bénéfices. Cette intégration verticale en amont est pratiquée par des coalitions de distributeurs indépendants dans d'autres secteurs, comme la transformation alimentaire ou la distribution de produits de consommation courante. Les coentreprises engagées par les petits distributeurs pour réduire leurs coûts d'approvisionnement ne soulèvent généralement pas de problèmes de concurrence. Plusieurs pays appliquent des exemptions au regard du droit de la concurrence aux coopératives ou coentreprises de production, même si les activités d'approvisionnement conjoint sont susceptibles d'être anticoncurrentielles.

¹² Par exemple l'Australie (jusqu'en 2007) et l'Argentine.

¹³ Anderson et Johnson (1999).

¹⁴ Kamerschen (2001).

¹⁵ Les prix d'éviction sont notamment définis comme inférieurs aux prix moyens, aux coûts variables moyens ou encore aux coûts marginaux. Ces critères servent à reconnaître les situations où les prix sont si bas qu'il s'agit non pas de se livrer une forte concurrence mais bien d'évincer les concurrents. L'évaluation économique de l'éviction accorde généralement une grande importance à la récupération potentielle et effective des pertes découlant de la fixation de tels prix. OCDE (2005) et OCDE (2004) examinent en profondeur ces questions.

un investissement profitant aux deux, cette coopération est menacée du fait d'une asymétrie de pouvoir de négociation¹⁶.

Encadré 1. Enquête du Canada sur des allégations de compression des prix

En 2006, le Bureau de la concurrence (l'organisme chargé de l'application du droit de la concurrence au Canada) a enquêté sur les allégations de distributeurs indépendants (appelés ici « détaillants indépendants ») selon lesquelles leurs fournisseurs raffineurs pratiquaient l'éviction par compression des marges. Ces réclamations ont fait suite à l'augmentation des prix de l'essence consécutive à l'ouragan Katrina. Voici les conclusions du Bureau, tirées de son communiqué de presse :

Ottawa, le 30 mars 2006 – Le Bureau de la concurrence a terminé ses examens sur les prix élevés de l'essence qui ont suivi l'ouragan Katrina et les plaintes de détaillants indépendants alléguant des pratiques d'éviction et des compressions de la marge bénéficiaire dans l'industrie canadienne de l'essence.

« Nous n'avons trouvé aucune preuve suggérant un complot national afin de fixer les prix de l'essence », a déclaré Richard J. Taylor, Sous-commissaire de la concurrence, Direction générale des affaires civiles. « La hausse des prix de l'essence était attribuable à la diminution notable de la capacité de raffinage nord-américaine causée par le passage de l'ouragan Katrina. La brusque baisse de l'offre a provoqué une hausse des prix de gros et, du coup, des prix à la pompe. »

Bien que les cours du pétrole brut soient restés relativement stables, le Bureau a constaté que l'approvisionnement d'essence s'était considérablement réduit dans la foulée de l'ouragan Katrina. Cette réduction de l'offre a provoqué une hausse du prix de l'essence au comptant au port de New York, sur lequel les raffineries canadiennes se basent pour établir leur prix de gros. Cette hausse a fait bondir le prix de gros et, au bout du compte, les prix de détail au Canada et aux États-Unis.

L'examen du Bureau a également porté sur des allégations de pratiques d'éviction et de compressions de la marge bénéficiaire dans l'industrie de l'essence qui lui ont été présentées par des détaillants indépendants, en particulier en Ontario et au Nouveau-Brunswick. Les plaignants ont allégué que les détaillants appartenant à des raffineries ont réduit le prix d'essence à un prix inférieur à leurs coûts dans ces régions au cours de certaines périodes et qu'ils imposaient par ailleurs des prix de gros plus élevés aux détaillants indépendants qui livraient concurrence à leurs propres stations-service, ce qui avait pour effet de réduire les marges bénéficiaires.

Le Bureau a examiné ces affaires en vertu de l'article 79 de la Loi sur la concurrence et n'a pas trouvé de preuve que l'établissement des prix était une tentative d'un groupe de grandes pétrolières désireuses de mettre au pas ou d'éliminer de ces marchés les détaillants indépendants, soit en pratiquant des prix d'éviction soit en comprimant les marges bénéficiaires.

Dans le cours de son examen, le Bureau a rassemblé des renseignements publics disponibles et a obtenu des données auprès d'intervenants du marché. Le Bureau a également demandé à un cabinet d'experts-conseils

¹⁶ Tirole (1988), pp. 24-29. Cette thèse est plus probante encore lorsque la valeur de l'investissement ne peut être récupérée si l'investisseur cesse d'exploiter l'affaire. Pour plus de détails, voir Viscusi, Harrington et Vernon (2005), chapitre 13. Williamson (1975) désigne ces situations de « hold-up » par le terme d'« opportunisme ». Ces opérations visent à exploiter la vulnérabilité de parties qui ont investi dans des actifs très spécifiques, immobiles ou difficiles à mesurer, par exemple le capital humain employé pour fidéliser les clients d'une station essence donnée. Parmi les autres situations ou conditions qui rendent difficile de contracter et augmentent les possibilités de « hold-ups » *ex post* figurent l'existence d'équipements spécialisés ou particuliers au site, les incertitudes sur la durabilité du matériel, les asymétries d'information, les problèmes de coordination de réseau, les incertitudes quant à la fiabilité des sources d'approvisionnement, les externalités et le risque réglementaire. Carlton et Perloff (2005), chapitre 12.

d'identifier les facteurs clés de la rentabilité des détaillants d'essence. Le rapport du cabinet indépendant, intitulé *What Determines the Profitability of a Retail Gasoline Outlet? A Study for the Competition Bureau of Canada* (« Déterminants de la rentabilité des détaillants d'essence – Étude pour le compte du Bureau de la concurrence Canada »), a fait ressortir que les détaillants misent sur la vente de grandes quantités d'essence et la prestation de services accessoires, tels que des dépanneurs et des lave-auto, pour enregistrer des bénéfices.

Source : Bureau de la concurrence du Canada (2006).

Les distributeurs d'essence indépendants et les revendeurs locataires liés aux raffineurs par des contrats à moyen ou long terme¹⁷ allèguent souvent que les raffineurs cherchent à les éliminer pour accroître la rentabilité des points de vente qu'eux-mêmes détiennent ou exploitent. Ils expliquent également qu'ils fidélisent leurs clients en offrant un meilleur service et un plus grand choix de services complémentaires, en procédant à des investissements promotionnels plus judicieux et en améliorant leurs installations. Quand il semble à un client qu'un point de vente fournit tout ou partie de ces avantages, il sera plus enclin à revenir et à payer un supplément de prix pour en profiter. Les investissements engagés dans la qualité du service peuvent permettre au distributeur de réaliser des rendements anormaux si ses concurrents ne s'alignent pas rapidement. Les raffineurs pourraient donc être incités à exproprier ces rendements en mettant fin au contrat de franchise pour le revendre à un prix plus élevé ou en pratiquant à l'égard du revendeur des prix de gros supérieurs afin de s'accaparer les marges de détail supraconcurrentielles ainsi dégagées. Ces arguments auraient été plus probants lorsqu'il était courant que les distributeurs d'essence réparent les véhicules ou fournissent des services tels que plein des réservoirs, lavage de vitres et vérification du niveau d'huile. À l'heure où le libre-service se généralise, c'est plutôt la qualité des services offerts à la boutique de la station qui pourrait être invoquée.

Le dernier argument avancé par les distributeurs est que, tant que les raffineurs ont leurs propres distributeurs captifs (facteur à l'origine des incitations à exproprier les distributeurs d'essence) ou ont la possibilité de mettre fin sans raison aux contrats de franchise, il ne suffit pas aux distributeurs d'essence indépendants de faire valoir les contrats de fourniture pour empêcher les raffineurs de vouloir les exproprier.

Une communication de l'Independent Petroleum Marketers Association of Australia (PMAA) au Comité des références juridiques et constitutionnelles du Sénat australien résume bien la position des distributeurs indépendants¹⁸.

Ce n'est que dans le secteur de la distribution d'essence que les petites entreprises doivent entrer en concurrence directe avec leurs propres fournisseurs. (...) Il s'ensuit que la manipulation et les pratiques d'éviction y sont une réalité. Il s'agit du seul secteur où les rabais accordés par les sociétés pétrolières aux distributeurs de leurs propres chaînes ont véritablement un effet d'éviction au regard des prix de gros facturés aux opérateurs indépendants pour les mêmes produits par les mêmes sociétés pétrolières.

Borenstein et Bushnell (2005)¹⁹ présentent les inquiétudes des distributeurs indépendants et locataires sur les prix pratiqués par les grossistes :

¹⁷ En l'absence de contrats d'approvisionnement à moyen ou long terme, un distributeur indépendant sans marque est moins soumis à ces difficultés s'il existe d'autres raffineurs ayant la capacité et la volonté de l'approvisionner à des conditions concurrentielles.

¹⁸ PMAA (2002).

¹⁹ Borenstein et Bushnell (2005).

La polémique consiste essentiellement à savoir dans quelle mesure les raffineurs peuvent pratiquer des prix différents selon les distributeurs plutôt qu'un même tarif à tous ceux qui s'approvisionnent auprès d'un terminal donné ; en d'autres termes, elle porte sur la latitude des grossistes pour pratiquer une discrimination par les prix à l'égard de leurs clients distributeurs. On estime généralement qu'il est plus facile aux raffineurs de le faire à l'égard des stations qu'ils approvisionnent directement, car ils peuvent moduler les frais de livraison selon le point de vente. Les distributeurs se sont plaints que ces frais de livraison soient parfois très éloignés du coût effectif de transport de l'essence vers la station²⁰.

Même si certains opposants au dégroupage vertical obligatoire de la distribution d'essence estiment que ces restrictions ne sont pas justifiées d'un point de vue économique, l'argument du « hold-up » est largement reconnu²¹. On pourrait soutenir que la découverte de pratiques permanentes de discrimination dans les services de transport d'électricité, aux États-Unis et en Europe, en dépit de diverses règles contre ces comportements²², devrait amener les opposants au dégroupage obligatoire des marchés de l'essence à réfléchir aux difficultés qu'il y a également à détecter et prouver les discriminations associées à l'approvisionnement des distributeurs. Selon les partisans du dégroupage vertical obligatoire, ni l'application des conditions contractuelles contre la discrimination à l'approvisionnement ni les actions engagées au titre du droit de la concurrence contre la discrimination par les prix ne suffisent à protéger les distributeurs d'essence indépendants des stratégies de « hold-up » établies par les raffineurs.

Comprendre précisément quels sont les difficultés et les coûts nécessaires pour détecter et prouver les discriminations à l'encontre des distributeurs d'essence pourrait permettre de résoudre ce problème, mais il ne semble pas que les travaux en la matière aient abouti à des conclusions définitives.

Pour résumer, les revendeurs indépendants et locataires craignent que les raffineurs ne se montrent opportunistes et ne mettent fin de manière anticoncurrentielle aux relations d'approvisionnement en vue d'une intégration verticale partielle. Cet opportunisme implique l'expropriation des rendements (normaux et anormaux) générés par les investissements des distributeurs. À cette fin, les raffineurs peuvent soit mettre un terme aux relations d'approvisionnement (de manière à pouvoir revendre ou relouer le point de vente) soit différencier les prix de gros appliqués aux distributeurs (et capter ainsi une part plus importante de la marge de détail). Les distributeurs affirment que les raffineurs profitent des ruptures anticoncurrentielles des contrats d'approvisionnement pour accroître leurs marges sur leurs propres points de vente. Ils attribuent l'augmentation des marges de détail des distributeurs verticalement intégrés à la réduction de la concurrence intra-marque sur les points de vente détenus et exploités par les raffineurs.

3.2 Arguments contre le dégroupage obligatoire

Les opposants au dégroupage vertical obligatoire peuvent s'appuyer sur les recherches économiques consacrées aux gains potentiels de l'intégration verticale. Le dégroupage vertical obligatoire peut rendre impossible, ou au moins plus difficile ou coûteux, de réaliser des économies d'intégration verticale,

²⁰ Borenstein et Bushnell (2005) observent également que si c'est l'approvisionnement direct qui offre aux raffineurs la plus grande latitude en termes de discrimination des prix, ces pratiques ne se restreignent pas à la livraison aux distributeurs. Les stations peuvent être engagées dans un système d'incitation adossé à la performance, des réductions ou des sanctions s'appliquant par exemple en fonction du volume d'essence acheté. En outre, même si l'essence est distribuée par un intermédiaire, le raffineur pourra toujours restreindre sa capacité à faire jouer la concurrence sur le marché de gros. Les intermédiaires achètent l'essentiel de leur carburant dans le cadre de contrats à long terme qui peuvent les obliger à s'approvisionner auprès de terminaux donnés et inclure des rabais pour quantités dans le prix marginal.

²¹ Vita (2000), Carlton et Perloff (2005), chapitre 12.

²² FERC (1999), section III.

notamment en éliminant la double marginalisation et en empêchant le parasitisme²³. Les substituts contractuels à l'intégration verticale sont sans doute imparfaits. C'est généralement le cas par exemple lorsqu'il est coûteux de veiller à la bonne application des conditions du contrat et que le distributeur est incité à ne pas les respecter²⁴. Les économies d'intégration verticale peuvent englober les avantages opérationnels suivants :

- coordination des investissements entre les différentes étapes de production,
- réalisation d'économies d'échelle lorsque des opérations similaires qui y sont sujettes interviennent en amont et en aval du processus de production,
- réalisation d'économies de gamme lorsque des processus séparés verticalement présentent des complémentarités opérationnelles ou d'investissement,
- réduction des coûts de transaction,
- prévention de certaines formes d'opportunisme et
- prévention de certaines formes de distorsion d'intrants²⁵.

On parle de double marginalisation lorsque, en raison de l'existence d'un pouvoir de marché à plusieurs stades de la production et de l'absence de coordination de ces stades de production, les prix de détail sont supérieurs au prix conjoint de maximisation des bénéfices²⁶. La double marginalisation peut pénaliser les consommateurs encore plus fortement que la monopolisation : en effet, le prix de détail qui en résulte est encore supérieur au prix de monopole et elle aboutit à des pertes sèches pour l'économie, et à une amplification d'effets de transfert contraires aux intérêts des consommateurs.

Même si le dégroupage vertical obligatoire peut théoriquement servir à forcer un raffineur totalement intégré verticalement à revendre tous ses points de vente d'essence, les pressions politiques en faveur du dégroupage vertical obligatoire interviennent en pratique lorsque certains des points de vente sont verticalement intégrés avec le raffineur alors que les autres sont détenus ou exploités par des entités indépendantes²⁷. Ce n'est que lorsque tous les distributeurs ou certains d'entre eux ne sont pas intégrés verticalement que des différends les opposent aux raffineurs sur l'importance des marges de vente au détail par rapport aux marges de gros.

En dépit des avantages potentiels de l'intégration verticale du point de vue des raffineurs, il n'existe aucun consensus (même parmi ces derniers) concernant la structure verticale optimale. Une explication en est que la distribution d'essence peut nécessiter des efforts et des investissements significatifs du

²³ Les craintes relatives au parasitisme peuvent avoir trait aux effets délétères sur la perception globale de la qualité d'une marque par le consommateur qui s'exercent lorsque la latitude dont jouissent les distributeurs en conduit certains à retarder ou à rejeter des améliorations de la qualité de service ou des installations que d'autres mènent à bien en vue d'améliorer la perception de la marque. New Zealand Institute of Economic Research (2005).

²⁴ Shepard (1993).

²⁵ Les trois derniers avantages sont abordés par Vita (2000).

²⁶ Viscusi, Harrington et Vernon (2005), pp. 238-241.

²⁷ Ainsi, les partisans du dégroupage vertical obligatoire pourraient ne pas s'opposer à une exemption s'appliquant aux raffineurs qui possèdent et exploitent déjà les stations qui écoulent toute leur production.

distributeur, que le raffineur pourra difficilement contrôler²⁸. Cet argument est peut-être plus probant encore lorsque le revendeur propose des services complémentaires sur un même point de vente. Dans le passé, les pompes à essence offraient souvent des services de réparation. Plus récemment, il est devenu courant qu'on y vende de l'alimentation²⁹. Si la distribution nécessite des efforts et des investissements significatifs, faire du distributeur le créancier résiduel peut être avantageux pour ce dernier comme pour le raffineur³⁰. Un argument similaire peut être avancé s'agissant du partage des risques. D'un point de vue économique, le risque doit généralement être supporté par la partie la mieux à même de s'en protéger ou d'y répondre efficacement au moindre coût³¹. En conséquence, si ce sont les distributeurs qui peuvent le mieux assumer les risques pesant sur la revente d'essence, il serait efficient qu'ils soient les créanciers résiduels. Ces arguments peuvent être invoqués mais ils ne sont pas primordiaux pour les partisans du dégroupage vertical obligatoire dans ce secteur.

4. Effets horizontaux et sur le bien-être du consommateur

On s'est jusqu'ici attaché aux efficacités potentielles de l'intégration verticale et à la persistance des différends contractuels liés à l'approvisionnement vertical dans la distribution d'essence. Toutefois, les effets des règlements relatifs à l'intégration verticale et aux contrats de fourniture pourraient ne pas se limiter aux raffineurs et points de vente d'essence directement impliqués ni au dégroupage vertical. Plusieurs motifs de préoccupation vont au-delà des questions de niveau et de répartition des marges de détail.

4.1 Effets des autres réglementations et des distributeurs diversifiés

Le fait d'écarter les règlements prévoyant un dégroupage vertical obligatoire pourrait avoir comme effet indirect l'adoption d'autres règlements de substitution. Ces lois et règlements viseraient les comportements des raffineurs qui apparaîtraient discutables en vertu d'une approche de dégroupage obligatoire comme d'une intégration verticale complète. Il s'agirait par exemple de textes visant à interdire la discrimination par les prix à l'encontre des franchisés indépendants ou l'application de prix de détail inférieurs aux prix de gros, l'imposition de marges minimales par rapport aux prix de gros, à s'opposer aux prix d'éviction dans le secteur de l'essence, à empêcher les résiliations involontaires des contrats de franchise, à limiter la durée maximale des contrats de fourniture, à restreindre les zones de tarification de gros ou à empêcher les raffineurs de restreindre les arbitrages opérés par les distributeurs entre intermédiaires ou zones de tarification de gros³². Les dispositions sur les prix minimums visent à éviter que les stations détenues par les raffineurs n'acculent les indépendants à la faillite. Celles sur la liberté d'approvisionnement entendent faire obstacle aux discriminations des prix fondées sur la situation géographique³³. Les effets de ces mesures de substitution sur l'efficacité et le bien-être des consommateurs

²⁸ Selon le New Zealand Institute of Economic Research (2005), c'est ainsi que les raffineurs expliquent la diversité des arrangements entre raffineurs et distributeurs d'essence.

²⁹ Certaines études économétriques associent les services de réparation aux points de vente indépendants et la vente d'en-cas à l'intégration verticale, par exemple Bello et Cavero (2008), Shepard (1993), Blass et Carlton (2001). Il est toutefois possible que ces tendances résultent d'une évolution parallèle des préférences en termes de relations verticales et de services complémentaires.

³⁰ Blass et Carlton (2001).

³¹ Williamson (1975), chapitre 5, a ouvert la voie au débat sur ces notions fondamentales associées à l'intégration verticale. Pour un exposé plus récent, voir Tetrel (2007).

³² Borenstein et Bushnell (2005).

³³ Borenstein et Bushnell (2005).

pourraient être plus ou moins marqués que ceux du dégroupage obligatoire des points de vente et concerner les pratiques horizontales aussi bien que verticales.

Le rapport préparé par l'économiste David Kamerschen (2001) à la demande de la Petroleum Marketers Association of America (PMAA) présente les arguments économiques parmi les plus complets en faveur de la réglementation de la distribution d'essence³⁴. Toutefois, l'auteur favorise les lois et règlements contre la vente à perte plutôt que le dégroupage obligatoire des points de vente. Il observe que cette dernière solution élimine un segment de concurrents et pourrait par conséquent réduire la diversité des points de vente et restreindre la concurrence.

David Kamerschen souligne plutôt les avantages que présenterait à long terme une multiplicité de revendeurs d'essence. Il explique pour conclure que les subventions internes sont le véritable problème et que celles opérées par les grandes surfaces menacent autant la diversité des distributeurs que celles des raffineurs. Le dégroupage vertical obligatoire ne permet pas du tout de traiter les premières, car ce sont des distributeurs plutôt que des raffineurs qui en sont responsables. Selon David Kamerschen, la vente promotionnelle à perte par les grandes chaînes de distribution est une forme d'éviction avec récupération simultanée des pertes, contre laquelle l'interdiction de la vente à perte constituerait le meilleur remède. Comme il est difficile de constater les pratiques de récupération simultanée dans les affaires de concurrence, l'auteur craint que l'interdiction des prix d'éviction par le droit de la concurrence ne suffise pas à régler le problème des subventions croisées dans la distribution d'essence.

Toutefois, les faiblesses et inconvénients des lois et règlements contre la revente « à perte » sont bien connus³⁵. Pour les petits magasins et les grandes surfaces, réduire les prix de certains articles est une stratégie moins onéreuse que la publicité traditionnelle dans les médias. La vente promotionnelle à perte peut être un moyen efficace d'attirer des clients, lesquels connaissent bien la qualité et les prix habituels des articles concernés³⁶, et l'essence peut être l'un des produits utilisés dans cette stratégie³⁷. Pour un distributeur traditionnel d'essence, les rabais sur l'essence, lorsqu'ils se substituent à la publicité ou à d'autres activités promotionnelles, s'apparentent aux subventions internes pratiquées par les petits magasins et grandes surfaces. Pour les grands distributeurs, il s'agit d'attirer les clients vers un « point de vente unique » et de les inciter ainsi à acheter d'autres produits. Interdire ces pratiques pourrait contraindre les distributeurs concernés à revenir à des formes de promotion plus onéreuses, ce qui pourrait se répercuter sur leurs prix et réduire la pression concurrentielle sur les autres distributeurs³⁸.

La possibilité d'appliquer des interdictions à la vente promotionnelle à perte soulève pour les décideurs des questions plus générales sur les variations des marges de vente au détail de différents articles. Par exemple, les consommateurs sont-ils lésés ou trompés lorsque de faibles marges sont appliquées à certains articles pour les attirer vers un magasin ? D'un point de vue qualitatif, convient-il de distinguer la situation où une grande surface vend de l'essence avec de faibles marges pour attirer des clients qui pourraient y faire d'autres achats, de celle où un revendeur d'essence vend son carburant avec de

³⁴ Kamerschen (2001).

³⁵ OCDE (2005).

³⁶ OCDE (2005) et Hilke et Nelson (1991). Du fait de la fréquence d'achat de ces produits, les clients s'habituent à des prix types. La présence de la/des même (s) marque(s) sur tous les points de vente leur permet de s'assurer de disposer d'une qualité équivalente, où qu'ils s'approvisionnent.

³⁷ ACCC (2007).

³⁸ OCDE (2005).

faibles marges et réalise des marges supérieures sur les sodas et cafés vendus aux clients séduits par les prix modérés pratiqués à la pompe³⁹ ?

4.2 Effets sur les conditions d'entrée

L'action des pouvoirs publics concernant l'intégration verticale dans la distribution d'essence peut avoir comme autre effet indirect de modifier les conditions d'entrée aux stades de la distribution ou du raffinage. Si toutes les stations essence étaient détenues et exploitées par les raffineurs, l'entrée sur le marché de la distribution supposerait l'accord préalable d'un raffineur pour fournir le nouveau distributeur. Une forme rentable de coordination entre les raffineurs pourrait consister conclure des accords pour accroître leur pouvoir de marché en réduisant la concurrence existante⁴⁰ ou pour empêcher l'entrée de nouveaux distributeurs de manière à se partager géographiquement les marchés. L'absence de points de vente non affiliés pourrait ralentir ou dissuader l'entrée de nouveaux raffineurs, car il leur faudrait dans le même temps prendre pied sur le marché de la distribution, c'est-à-dire s'engager simultanément dans deux stades de la production au lieu d'un seul.

Borenstein et Bushnell (2005)⁴¹ résument la teneur des nombreuses recherches économiques consacrées à l'intégration verticale :

Le contrôle vertical ne sert pas nécessairement toujours l'intérêt des consommateurs. Les recherches des vingt dernières années ont montré que l'intégration verticale ou des mesures de contrôle strictes peuvent être employées dans certaines circonstances pour ériger des barrières à l'entrée et réduire la concurrence. Dans les exemples les plus connus, également largement acceptés dans le cadre de l'analyse de la concurrence, le contrôle vertical a pu permettre d'empêcher aux concurrents d'accéder à des intrants essentiels. Si, par exemple, il est difficile de prendre pied sur le marché de la distribution d'essence, un raffineur pourrait s'intégrer verticalement en aval afin de réduire le nombre de points de vente que les raffineurs (ou importateurs) concurrents peuvent posséder pour vendre leurs produits. Certains opérateurs californiens du marché de l'essence craignent ainsi que le faible nombre de stations sans marques rende plus difficile l'entrée sur le marché de nouveaux fournisseurs (par le biais d'importations d'autres régions).

Il existe également de nombreuses théories sur l'interaction entre intégration verticale et collusion entre producteurs, la plupart posant que la première augmente la stabilité de la seconde. Si par exemple deux raffineurs souhaitent s'entendre sur les prix mais ne peuvent facilement surveiller réciproquement leurs prix de gros, dans certains cas, l'intégration verticale peut permettre à la surveillance des prix de détail de s'y substituer (à un coût bien inférieur). À l'évidence, ces incitations à l'intégration ou au contrôle vertical peuvent profiter aux entreprises mais nuire au consommateur⁴².

³⁹ Au Royaume-Uni, par exemple, les marges sur la vente d'essence étaient en 2007 deux fois moins importantes chez les distributeurs à haut volume disposant d'une boutique que chez les distributeurs traitant des volumes similaires mais se limitant à la vente d'essence. « La présence d'une boutique améliore la rentabilité d'une station essence, ce qui lui permet de supporter des marges moins élevées sur le carburants », UKIPA (2008), tableau 8.6.

⁴⁰ Nocke et White (2007).

⁴¹ Voir également Hastings (2004).

⁴² Ces recherches font notamment état d'inquiétudes quant aux effets de la limitation de la concurrence sur les marchés de gros en termes d'ajustements du marché de détail aux cours du pétrole internationaux. Voir par exemple Delpachitra (2002) sur la Nouvelle-Zélande. L'auteur conclut que si les prix au détail ne reflètent pas l'évolution des cours mondiaux, c'est parce que la concurrence entre raffineurs reste faible.

Une intégration verticale totale de la vente au détail pourrait également avoir une incidence négative sur la distribution d'essence⁴³. Elle pourrait retarder l'apparition de nouvelles formes de distribution d'essence et en ralentir le développement si la totalité ou la quasi-totalité des raffineurs n'approvisionnent que des points de vente affiliés. Les raffineurs ayant pris le risque d'investir dans la distribution pourraient ainsi trouver avantage à freiner l'innovation des revendeurs indépendants. On est en droit de penser que ce sont les petits magasins et les grands distributeurs généralistes qui innovent le plus dans la distribution d'essence. Ces sociétés y appliquent parfois des marges faibles voire négatives parce qu'elles commercialisent des volumes très importants (d'où de faibles frais généraux unitaires), se servent de ces prix pour attirer leurs clients ou parce qu'elles s'appuient sur des frais d'adhésion à leurs centrales d'achat pour réaliser des marges bénéficiaires sur l'essence et sur tous les autres produits qu'elles vendent⁴⁴. Les raffineurs qui n'appartiennent pas à un conglomérat généraliste ne peuvent généralement pas être concurrentiels sur ce plan dans la distribution. Un motif de préoccupation associé à la forte intégration verticale des raffineurs est qu'il pourrait leur permettre de limiter ou d'empêcher la vente d'essence à faible marge par les supermarchés et les grandes surfaces, afin de protéger les marges de détail des points de vente qu'ils détiennent ou d'apaiser les groupe de distributeurs ayant un pouvoir de monopsonie. Dans beaucoup de marchés, la distribution d'essence par les chaînes de magasins et les grandes surfaces pourrait être bien trop solidement établie pour que cette menace soit plausible.

Encadré 2. Les alliances entre supermarchés et raffineurs de pétrole en Australie

C'est au milieu des années 90 que sont apparus en Australie les premiers « shopper docketts », des coupons qui permettent aux clients des supermarchés d'acheter de l'essence moins chère chez certains distributeurs. Woolworths, une des deux principales chaînes de supermarchés du pays, a pris pied dans la distribution d'essence en créant sa propre marque, Petrol Plus. Tous les consommateurs peuvent s'approvisionner auprès d'une station Petrol Plus, mais ceux qui ont fait pour plus de 30 dollars d'achats chez Woolworths y bénéficient d'une réduction de quatre cents par litre.

En octobre 1996, ce système a été avalisé par l'Australian Competition and Consumer Commission (ACCC).

En mai 2003, le supermarché Coles (principal concurrent de Woolworth) et la grande société pétrolière Shell ont annoncé la conclusion d'une alliance couvrant 584 stations d'essence australiennes. Elle prévoyait notamment une offre groupée selon laquelle les clients ayant acheté pour 30 dollars ou plus de produits de consommation courante dans un supermarché Coles bénéficiaient d'une réduction de quatre cents par litre d'essence achetée chez Shell.

L'alliance Shell/Coles différait du système Woolworths/Petrol Plus en cela qu'elle associait une chaîne de supermarché de premier plan avec l'un des plus grands intervenants du marché pétrolier australien. Contrairement au système de Petrol Plus, cet accord ne facilitait nullement l'entrée de nouveaux opérateurs sur le marché de gros ou de détail. De plus, l'offre groupée Shell/Coles ne pouvait se justifier par une quelconque complémentarité entre produits. Si un lien peut exister entre la demande d'un client en produits de consommation courante et son achat d'essence, rien ne permet de penser que l'achat d'essence Shell ait une quelconque valeur intrinsèque pour le client d'un supermarché Coles. En outre, contrairement à ce qui est le cas au Royaume-Uni, il est rare que les supermarchés et pompes à essence soient situés dans une même zone. Si l'alliance implique que Coles gère le réseau de stations de Shell et y établisse des points de vente Coles Express, les bons de réduction sont fournis par des supermarchés traditionnels, quelle que soit leur distance par rapport à un point de vente Shell. En effet, les achats de produits de

Pour prendre pied sur le marché du raffinage, il serait nécessaire selon lui de bénéficier d'une aide des pouvoirs publics.

⁴³ L'économiste Robert Steiner a consacré de nombreux articles à la question générale des effets des contraintes verticales sur l'évolution de la vente au détail. Un numéro spécial de l'Antitrust Bulletin porte sur les travaux de Steiner, agrémentés d'articles connexes. Voir Harbour (2004).

⁴⁴ COSTCO, un distributeur à gros volumes et prix faibles, en est un exemple. Boyle (2006)

consommation courante réalisés dans des magasins Coles Express situés dans des stations Shell ont été explicitement exclus du système de réduction.

En août 2003, Woolworths a réagi à l'alliance Coles/Shell en annonçant la formation d'une coentreprise avec Caltex pour offrir des rabais similaires pour les achats couplés de produits de consommation courante et d'essence. L'accord Woolworths/Caltex couvrait plus de 450 stations d'essence australiennes.

Les accords conclus entre deux chaînes de supermarché australiennes de premier plan et deux des quatre principales sociétés pétrolières ont suscité une profonde consternation dans ces deux secteurs. Selon la Service Stations Association, ces offres couplées pourraient entraîner la fermeture de 3 000 stations d'essence indépendantes. En novembre 2003, IGA (une des plus petites chaînes de supermarchés d'Australie) a annoncé qu'elle « proposerait aux clients des remises sur leurs courses pour tout achat d'essence, quelle que soit la station concernée. » Bien que ces systèmes de coupons soient relativement nouveaux, des données empiriques indiquent que les petits supermarchés et les sociétés pétrolières autres que Shell et Caltex ont vu leurs ventes chuter. Dans le même temps, il semble que ces deux mécanismes se soient « mutuellement neutralisés » en termes de bénéfices, les supermarchés et sociétés pétrolières hors mécanismes se trouvant simplement en position de perdants.

Dans leur analyse de l'intégration verticale, certains économistes soutiennent que les alliances entre chaînes de magasins et raffineurs peuvent engendrer des pertes de bien-être social en faussant le comportement du consommateur et en réduisant la concurrence à long terme par l'instauration de barrières à l'entrée⁴⁵. Toutefois, l'ACCC a constaté que l'entrée des distributeurs de produits alimentaires sur le marché de la vente d'essence a provoqué une baisse des prix. Selon l'ACCC, les chaînes de supermarchés considèrent ces systèmes de coupons comme des outils de publicité et de marketing. Il est possible que le coût des systèmes de coupons proposés aux clients des pompes à essence se substitue à des dépenses publicitaires de la division « produits de consommation courante » de la chaîne de supermarchés.

Source : ACCC (2006).

Les critiques de cette forme de dégroupage estiment que les distributeurs indépendants profitent ainsi soit d'une marge de vente au détail plus importante, soit de la conservation d'une part plus importante de cette marge. Les distributeurs expliquent toutefois que le dégroupage vertical obligatoire réduit les frais de contentieux et les autres coûts des différends contractuels (de nature pécuniaire comme personnelle) en limitant la capacité et les incitations des raffineurs à adopter un comportement opportuniste. Des différends liés à l'intégration verticale opposent distributeurs et raffineurs depuis des décennies sans être tranchés clairement, par voie législative ou autre. Au contraire, les litiges observés aux États-Unis entre les sociétés d'embouteillage de boissons gazeuses et les fabricants de concentré, qui ont débouché sur une législation sectorielle contre la discrimination entre les sociétés d'embouteillage indépendantes et celles verticalement intégrées, se sont soldés par le rachat de la quasi-totalité des embouteilleurs par les fabricants de concentré⁴⁶. Dans le secteur du charbon, où les contrats entre sociétés minières et producteurs d'électricité font depuis longtemps l'objet de différends, l'analyse montre que les modalités contractuelles sont sensiblement différentes selon les régions, en fonction de la vulnérabilité des uns et des autres aux comportements opportunistes⁴⁷.

En somme, le dégroupage vertical obligatoire de la distribution d'essence peut apparaître, selon les théories, favorable ou défavorable à la concurrence. Souvent, seules des données empiriques provenant de différents pays ou de régions de pays permettent de trancher la question. Toutefois, il s'agit d'un domaine où l'on peut recouper les inférences statistiques découlant de l'analyse des marchés naturels avec des résultats provenant de marchés expérimentaux contrôlés (voir encadré 3).

⁴⁵ Résumé basé sur Gans et King (2004), sauf indications contraires en notes de bas de page.

⁴⁶ Saltzman, Levy et Hilke (1999), tableau III.5.

⁴⁷ Tirole (1988), pp. 24-29.

Encadré 3. Exemple de double marginalisation dans les marchés de l'essence en laboratoire d'économie

Les économistes Cary Deck et Bart Wilson ont créé une série de marchés de distribution d'essence présentant des degrés variés d'intégration verticale entre distributeurs et raffineurs, puis analysé les résultats de cette expérience. Le dispositif expérimental était centré sur des relations directes entre raffineurs et revendeurs d'essence de marque et il était organisé géographiquement, pour les marchés expérimentaux, autour de deux types de zones. Le premier était situé au centre du territoire, à proximité de distributeurs proposant des marques concurrentes. Le deuxième était excentré, à distance des autres revendeurs. Quatre marques étaient disponibles sur ces marchés et chacune disposait d'une station dans une zone excentrée et d'une station au centre du territoire.

Les conditions d'information sur ces marchés étaient les suivantes : tous les participants (distributeurs et raffineurs) avaient accès à toutes celles portant sur les prix de détail, mais chaque distributeur ne connaissait que le prix de gros proposé par son raffineur. Les consommateurs motorisés connaissaient toutes les informations sur les prix de détail, mais aucune sur le prix de gros. Dans le premier scénario, les distributeurs pouvaient définir des prix spécifiques à chaque station, mais encouraient des coûts pour servir chaque client et pour obtenir leurs stocks d'essence à vendre. Les raffineurs obtenaient les matières premières puis les transformaient en essence prête à la consommation qu'ils revendaient ensuite aux consommateurs. Ils pouvaient proposer des prix différents aux distributeurs s'ils le décidaient et encaissaient les recettes des ventes aux distributeurs, elles-mêmes diminuées de coûts de raffinage intégrant l'acquisition du pétrole brut. Chaque consommateur était prêt à payer un même prix maximum, sauf pour sa marque préférée pour laquelle il acceptait de payer légèrement plus (10 % environ). La probabilité qu'un consommateur donné préfère l'une des quatre marques et celle qu'il n'ait aucune préférence étaient toutes deux de 20 %. Le prix maximum intégrait le temps de conduite du consommateur. Celui-ci achetait son essence auprès du point de vente lui laissant le plus grand surplus.

Dans presque toutes les transactions intervenues sur les marchés expérimentaux, le dégroupage vertical complet a débouché sur une hausse des prix pour les consommateurs. Dans le scénario d'intégration verticale, les prix moyens de vente au détail étaient inférieurs de 13.2 % dans les zones centrales et de 16.5 % dans les zones excentrées, les consommateurs profitant de la suppression des doubles marges. Les auteurs ont également constaté que l'intégration verticale éliminait les asymétries dans lesquelles les prix de détail réagissent aux chocs des prix pétroliers à la hausse plutôt qu'à la baisse, mais qu'elle augmentait la durée des délais d'ajustement.

L'expérience a également examiné les effets de l'établissement de prix par zone ou uniformes par les raffineurs et des autres restrictions de prix territoriales parfois proposées comme substituts au dégroupage vertical obligatoire. Sur ces marchés expérimentaux, la tarification par zones conduisait à une baisse sensible des prix au détail dans la zone centrale, sans modifier de manière appréciable ceux pour les consommateurs des zones excentrées. En outre, l'application de tarifs de gros uniformes réduisait les incitations pour les consommateurs excentrés à se déplacer au centre pour bénéficier de prix plus bas. Les résultats de ces marchés expérimentaux ont donc montré que l'application de tarifs de gros uniformes profite aux distributeurs mais nuit au consommateur. La tarification par zones pénalise les distributeurs excentrés car les raffineurs accroissent les prix de gros pour capter une part plus importante de la rente de situation géographique des distributeurs isolés.

Source : Deck et Wilson (2008 et 2004).

5. Expériences de l'intégration verticale et du dégroupage

5.1 Argentine

L'Argentine est un exemple intéressant de politique intermédiaire en matière de dégroupage vertical obligatoire. Ce pays limite la part des points de vente qui peut être verticalement intégrée ainsi que la durée des contrats de fourniture. Cette dernière disposition vise à favoriser l'entrée de nouveaux raffineurs sur le marché.

En 1991, le marché de l'essence argentin a été déréglementé et les restrictions sur les prix et la capacité de raffinage ainsi que sur la localisation et le nombre des points de vente ont été supprimées.

Accaparé à plus de 85 % par quatre entreprises, le marché de l'essence est très concentré. Au cours des années 90, des observateurs se sont plaints que les prix à la pompe soient demeurés élevés en dépit de la plongée des cours du pétrole. Les études économiques réalisées durant cette période présentent des résultats contradictoires⁴⁸. En 2000, la nouvelle autorité de la concurrence (le Secrétariat à la consommation et à la protection de la concurrence) a recommandé :

- de limiter la durée des contrats entre les sociétés pétrolières et les revendeurs exploitant des stations d'essence et
- de plafonner l'intégration verticale en fixant un pourcentage du réseau de stations d'essence qu'une société pétrolière (un raffineur) peut détenir et exploiter.

Le Président a examiné ces recommandations, les mettant ensuite en application par voie de décret. Serebrisky (2003) a étudié les arguments avancés par l'autorité de la concurrence pour les étayer. Comme les exemples d'autres structures étaient rares et que le secteur du raffinage restait très concentré même après sa privatisation par le gouvernement (quatre sociétés accaparant 85 % du marché), ils étaient largement basés sur des comparaisons internationales. Les préoccupations en matière de concurrence concernaient essentiellement le raffinage et la distribution car il existe en Argentine plusieurs producteurs de pétrole ainsi que de nombreuses sources d'importation de carburant prêt à la commercialisation. Les recherches sur le caractère effectif de la concurrence dans ces secteurs se sont concentrées sur des indicateurs structurels (décrits ci-dessus, ajustés à l'évolution des cours internationaux du pétrole et aux conditions d'entrée). Dans les années 90, les prix à la pompe étaient statiques par rapport à ceux pratiqués aux États-Unis et les ajustements en fonction des cours du pétrole y étaient moins marqués au début des années 2000. Ainsi, les prix du diesel sont restés en Argentine quasiment stables dans les années 90 alors qu'ils fluctuaient de plus de 40 % aux États-Unis. En 2001, ils ont chuté de 35 % environ aux États-Unis contre une baisse de moins de 5 % en Argentine. Les comparaisons entre les prix à l'importation de l'essence prête à la commercialisation et les prix de vente au détail ont également fait apparaître des problèmes de concurrence. Les données de la période 1994-2001 font ressortir une prime très variable pour l'essence de production nationale, ce qui est difficile à expliquer par la différenciation des produits ou la préférence des consommateurs argentins pour les produits nationaux. Serebrisky en conclut que l'essence distribuée en Argentine reste isolée de l'évolution des prix de l'essence internationaux. Dans une étude de 2003, cet auteur a également constaté que, jusqu'aux fortes perturbations du cours de change en 2002, les prix au détail relatifs des différentes marques sont restés stables après 1995. De 1995 à 1999, les prix de détail moyens des quatre marques principales sont demeurés très proches.

L'enquête de l'autorité de concurrence a examiné les conditions de distribution, l'extraction de pétrole étant considérée concurrentielle et le raffinage aussi concurrentiel que ce pouvaient permettre les mesures de privatisation du gouvernement. L'accent étant mis sur la concurrence dans la distribution, l'enquête s'est étendue sur les conditions d'entrée, notamment sur les possibilités d'entrée au stade du raffinage. L'autorité a constaté qu'il serait sans doute difficile à une petite raffinerie de prendre pied sur marché ou de se développer car, bien qu'il existe de nombreux revendeurs indépendants, ceux qui n'étaient pas liés par des contrats de fourniture avec les principales raffineries en place étaient très rares. Serebrisky (2003) estime que la prépondérance de points de vente d'essence détenus et exploités par les revendeurs s'explique par les restrictions dont souffrent les raffineurs pour contrôler le travail de leurs salariés. Selon lui, les entreprises sont amenées à recourir à des contrats de fourniture plutôt qu'à l'intégration verticale pour répondre aux problèmes d'agence auxquels elles font face. La durée de ces relations constitue toutefois une décision distincte. Serebrisky (2003) pose que les contrats de fourniture à long terme visent à empêcher l'entrée de nouvelles raffineries. Un nouveau raffineur doit avoir accès à un réseau de distribution. Il peut le constituer en partant de zéro, mais il lui sera sans doute plus rapide, moins risqué et moins coûteux

⁴⁸ Serebrisky (2003).

(malgré les coûts élevés d'une telle opération) d'obtenir des distributeurs qu'ils changent de fournisseurs. Les contrats d'approvisionnement à long terme avec les revendeurs peuvent faire effectivement obstacle à cette approche.

Confirmant cette inquiétude, l'autorité de concurrence a observé à la fin des années 90 une évolution délibérée des raffineurs vers l'adoption de contrats à long terme. Au début des années 90, environ 22 % des contrats portaient sur une durée supérieure à 14 ans. À la fin des années 90, ce chiffre était de 38 %. Les marchés de l'essence ayant un même opérateur principal en Argentine et en Espagne, l'Argentine a formulé une recommandation similaire à la décision prise en 1999 par l'UE de fixer une durée maximale pour les contrats d'approvisionnement. L'autorité de concurrence argentine s'est également fondée sur une étude de 1998 de l'Office of Fair Trading, selon laquelle, au Royaume-Uni, les contrats sont de moins de trois ans et la concurrence est alimentée par l'entrée des supermarchés et des hypermarchés dans la distribution d'essence.

L'Argentine a estimé que, son coût du capital étant plus élevé, la durée des contrats devait y être plus longue et elle a choisi une durée de huit ans au lieu de cinq. Sa seconde recommandation, qui était de limiter la part de points de vente susceptibles d'être détenus et exploités par les raffineurs, a été adoptée pour empêcher les raffineurs de tous opter pour une intégration verticale totale et de faire ainsi obstacle à l'entrée de nouvelles raffineries. Le pourcentage retenu (40 %) se base sans doute sur des statistiques sur le niveau d'intégration verticale en Europe. Il représente peut-être aussi un compromis entre le dégroupage vertical obligatoire, favorisé par les distributeurs, et l'intégration verticale illimitée assortie de restrictions contractuelles, défendue par les raffineurs.

5.2 *Australie*

L'Australie a récemment supprimé les restrictions s'appliquant à l'intégration verticale de la distribution d'essence, mais les distributeurs continuent de s'inquiéter de la faiblesse des marges de vente au détail des magasins et grandes chaînes. Les marchés d'essence australiens sont exploités par quatre grands raffineurs (Mobil, Shell, BP et Caltex), un petit groupe de distributeurs indépendants et de nouveaux opérateurs récents, notamment les chaînes de supermarché. Par exemple, comme le montre l'encadré 3, le supermarché Woolworths a pris pied sur les marchés australiens de la distribution d'essence en 1996 et a bâti en 2003 un réseau national de près de 300 points de vente, sans avoir au départ conclu d'alliance avec un raffineur. Un certain nombre d'alliances ont par la suite été nouées entre les sociétés pétrolières et les supermarchés équipés de stations. Ainsi, Woolworths a ensuite signé un partenariat avec Caltex, en réponse à la stratégie d'alliance Coles/Shell. Cette dernière avait débuté en 2003 et visait à proposer une réduction sur le prix de l'essence aux clients de tous le pays, dans environ 450 stations-service⁴⁹. En 2006, ces alliances avec les supermarchés contrôlaient 40 % de la distribution d'essence⁵⁰. Des centaines de programmes de réduction par coupons étaient alors en place et rencontraient un franc succès auprès des consommateurs. Ces grands partenariats étaient si bien accueillis par les clients que les raffineurs ont un peu délaissé l'exploitation de leurs propres points de vente⁵¹. Environ 5 % des stations sont directement exploitées par les raffineurs contre 64 % par des exploitants indépendants. Avec l'arrivée sur le marché de Coles Express en 2003 et de la coentreprise Woolworths/Caltex en 2004, les consommateurs ont profité d'une baisse des tarifs à la pompe. L'ACCC a examiné les prix de détail dans cinq principales zones urbaines avant et après que Coles Express y prenne pied. Par rapport à un indicateur indépendant (l'indicateur de parité à l'importation de l'ACCC, qui reflète les mouvements du prix du

⁴⁹ Roarty et Barber (2004).

⁵⁰ ACCC (2006).

⁵¹ BP est une exception car la société n'a conclu aucun partenariat avec une quelconque chaîne de distribution.

pétrole raffiné à Singapour et le taux de change USD/AUD), il apparaît que les prix de l'essence avaient reculé après l'entrée sur le marché de la distribution de Coles Express et de la coentreprise Woolworths/Caltex. Ces baisses dépendaient des villes concernées et du moment d'observation, s'échelonnant de 0.5 cent à plus de 3 cents par litre⁵².

Les revendeurs indépendants ont fait part de leurs préoccupations quant à ces alliances. Ils craignent que les réductions qu'elles proposent, qui impliquent parfois des prix de détail inférieurs aux prix de gros, n'aient pour effet d'acculer les indépendants à la faillite, réduisant ainsi sensiblement la concurrence à long terme. L'autorité de la concurrence estime quant à elle que ces systèmes l'ont encouragée, permettant de réduire les prix sur les marchés australiens de carburants⁵³.

Les structures économiques actuellement observées sur les marchés de la distribution en Australie reflètent largement l'application de deux dispositions législatives récemment abrogées :

- le Petroleum Retail Marketing Sites Act de 1980 (dit « Sites Act »), qui imposait un quota de sites que les raffineurs-revendeurs peuvent exploiter directement ou sur la base de contrats de commission, et
- le Petroleum Retail Marketing Franchise Act de 1980 (dit « Franchise Act »), qui spécifiait des conditions générales minimales pour les contrats de franchise.

Ces lois ciblaient le déséquilibre du rapport de forces entre les grandes sociétés pétrolières et leurs commissionnaires, ces derniers s'étant plaints des pratiques abusives des premières. La solution proposée consistait à contraindre les grandes sociétés à mettre en franchise la plupart de leurs sites. Le Sites Act établissait un quota pour chaque raffineur. Les dispositions du Franchise Act visaient quant à elles à asseoir la situation des franchisés et donc à encourager les petites entreprises à prendre pied sur les marchés de la distribution d'essence.

Dans le cadre du Downstream Petroleum Reform Package, le Sites Act et le Franchise Act ont été supprimés et remplacés par un code contraignant (dit « Oilcode ») établi au titre du Trade Practices Act. Ce code fixe notamment des droits et obligations spécifiques aux grossistes et distributeurs de carburants liés par des accords de distribution⁵⁴.

5.3 *Canada*

Le Canada n'impose pas de restrictions juridiques à l'intégration verticale. Les marchés de la distribution d'essence y ont fait l'objet de plusieurs études économiques, portant notamment sur les effets des entreprises marginales sur les prix de détail et sur les évolutions structurelles du secteur. L'étude des prix de détail a mis en évidence certains comportements coordonnés entre distributeurs.

Selon Sen (2005), les marchés canadiens de l'essence s'articulent autour d'entreprises dominantes intégrées verticalement, face à une frange concurrentielle de distributeurs indépendants. En 1991, les entreprises dominantes desservaient 65 à 97 % des marchés des onze villes canadiennes analysées. Sen a utilisé des données mensuelles sur les prix moyens de l'essence au détail et les parts de marché observés dans ces villes de 1991 à 1997 pour examiner les effets exercés sur les prix par la frange concurrentielle et

⁵² ACCC (2006).

⁵³ Gans et King (2004) présentent un tableau moins favorable des prix bas proposés par les supermarchés distributeurs d'essence.

⁵⁴ Voir ACCC (2007) pour plus de détails et des données plus récentes.

l'efficience des distributeurs. Il a constaté que, si une augmentation de la part de marché totale des plus petites entreprises est corrélée positivement mais de manière non significative avec les tendances des prix de détail (les petits distributeurs risquant d'être moins efficaces que les gros distributeurs intégrés verticalement), ces effets sont neutralisés par la baisse des prix. Cette baisse découle de la dilution de la concentration de marché (interprétée comme une perte de pouvoir de marché) chez les entreprises verticalement intégrées, qui résulte elle-même de l'augmentation de la part de marché totale des petites entreprises. En particulier, une augmentation de 1 % de la part de marché totale des entreprises les plus petites est associée à une baisse de 1.0091 cent des prix de détail moyens. L'auteur conclut que les mesures visant à renforcer ou à protéger les petits distributeurs devraient générer une réduction nette des prix de détail.

Eckert et West (2005a) ont étudié la concentration du marché de la distribution d'essence au Canada. Les auteurs font observer que de nombreuses sociétés ont réduit le nombre de stations de leur réseau, accru leurs capacités et supprimé les services de réparation. Les points de vente restants proposent généralement d'autres services, comme des magasins et des stations de lavage. Mais, toujours selon Eckert et West, ce phénomène pourrait aussi s'expliquer par une collusion tacite. Dans une autre étude (2005b), ils montrent ainsi que la structure des prix de détail à Vancouver concorde avec une telle hypothèse.

Eckert et West (2004) ont étudié le comportement des prix de détail de l'essence dans deux villes canadiennes, Ottawa et Vancouver. Les données empiriques font état de niveaux élevés de dispersion et de volatilité à Ottawa et, à l'inverse, d'une stabilité et d'une uniformité plus grandes à Vancouver. En s'appuyant sur les prix pratiqués dans les différentes stations, ils expliquent que ces tendances cadrent avec la théorie économique, qui montre que les entreprises de Vancouver sont en collusion tacite alors que celles d'Ottawa s'affrontent pour gagner des parts de marché.

S'agissant du Canada, deux cas d'application du droit de la concurrence sont particulièrement intéressants. Le premier concerne la pratique de prix d'éviction sur le marché de l'essence de Chatham. Un distributeur indépendant s'était plaint qu'une société verticalement intégrée, Pioneer, pratiquait des prix de gros supérieurs aux prix de détail en vigueur. Sur la base des prix journaliers observés en février et mars, le Bureau de la concurrence⁵⁵ a établi que rien ne permettait d'étayer ces allégations car les prix de gros n'avaient été supérieurs aux prix de détail qu'une seule journée durant toute la période. Dans la deuxième affaire, le Bureau a annoncé en juin 2008 que certains exploitants de stations-service de plusieurs régions du Québec avaient été accusés de collusion, et précisé que la grande majorité des distributeurs d'essence de ces marchés avaient effectivement participé à l'entente sur le marché de la vente au détail⁵⁶.

5.4 *Japon*

Dans le secteur japonais de l'essence, les différentes étapes de la chaîne d'approvisionnement sont très cloisonnées et, historiquement, l'intégration verticale entre distributeurs et raffineurs a moins retenu l'attention des pouvoirs publics que dans les pays où elle est plus courante. En particulier, l'exploration et le pompage du pétrole brut ont été depuis longtemps séparés des stades du raffinage et de la distribution. Cette structure remonte aux lendemains de la Seconde Guerre mondiale, lorsque la loi sur le secteur pétrolier fut adoptée en vue « d'assurer un approvisionnement stable en pétrole par le contrôle des opérations de raffinage en amont, autorisant ainsi de manière effective la séparation des activités d'amont et d'aval⁵⁷. » En outre, il n'existe pas de cas d'intégration verticale complète des stades de raffinage et de

⁵⁵ Bureau de la concurrence (1999).

⁵⁶ Bureau de la concurrence (2008).

⁵⁷ Kikkawa (2002). Voir également Masaki (2006).

distribution, les stations détenues par les sociétés pétrolières étant souvent gérées par des agents spéciaux⁵⁸ ou des entreprises de vente au détail⁵⁹. La suppression de l'interdiction de la distribution en libre-service, en 1998, a provoqué une transition rapide vers ce mode de distribution et l'entrée de nouveaux opérateurs sur le marché. Toutefois, les raffineurs et les distributeurs de produits de consommation courante ont tissé des partenariats et la concentration des stades de l'exploration et du raffinage s'est accrue depuis 2000⁶⁰.

5.5 *Pays-Bas*

Les Pays-Bas ont enquêté sur certains problèmes liés à l'intégration verticale dans la distribution d'essence, décidant toutefois de ne pas intervenir. En 2001, l'autorité de la concurrence avait indiqué craindre que le système d'accords verticaux entre sociétés pétrolières et distributeurs ne décourage la concurrence. Pour traiter le problème, elle avait envisagé d'abroger l'exemption par catégorie européenne sur les accords verticaux. Après avoir procédé à des études complémentaires et demandé l'avis des intervenants du marché, elle a décidé de ne pas intervenir, les éléments étant insuffisants pour assurer que cette intervention réduirait les prix de détail. Elle a préféré soumettre le secteur à une surveillance étroite⁶¹.

5.6 *Nouvelle-Zélande*

La rationalisation du secteur de la distribution d'essence se poursuit depuis de nombreuses années en Nouvelle-Zélande. Selon le New Zealand Institute of Economic Research (2005), le nombre de stations d'essence est passé de plus de 4 000 avant 1976 à 1 600 en 2002. Ce sont principalement les distributeurs indépendants à faible volume qui ont fermé et les raffineurs ont racheté aux revendeurs indépendants la plus grande partie des stations les plus productives. La plupart des nouveaux points de vente appartiennent aux raffineurs. Par conséquent, les marchés de la distribution sont de plus en plus intégrés verticalement.

Le New Zealand Institute of Economic Research (2005) en conclut que l'accentuation de l'intégration verticale de la vente d'essence en gros et au détail ne devrait pas gaspiller de ressources ni nuire au consommateur, à moins qu'elle ne conduise à un renforcement des barrières à l'entrée. Les deux principaux nouveaux opérateurs apparus ces dernières années ont privilégié les sites de construction récente à gros volume plutôt que les stations indépendantes existantes. L'intégration verticale des grossistes dans la distribution a permis des gains d'efficacité dans la gestion des stocks et la distribution, et accru la concurrence par les prix et hors prix.

5.7 *Espagne*

Ces 15 dernières années en Espagne, la distribution d'essence a connu de nombreuses évolutions de la réglementation, suivies d'une restructuration. Des actions en justice ont récemment été engagées pour réviser les conditions des contrats verticaux. Jusqu'en 1992, la distribution d'essence était assurée par un monopole d'État approvisionné par plusieurs raffineurs publics et privés. Cette année-là, le monopole a été démantelé et le réseau de détail divisé entre les raffineurs, la distribution demeurant toutefois un monopole. En 1990, le gouvernement a remplacé la réglementation des prix par un système de plafonds en vigueur jusqu'en 1998.

⁵⁸ Les « agents spéciaux » sont des sociétés de distribution qui exploitent des stations et, souvent, revendent de l'essence aux distributeurs.

⁵⁹ Oyama (1998).

⁶⁰ Masaki (2006) et Hofman (2003).

⁶¹ Rapport de l'Autorité de la concurrence des Pays-Bas (2002) (<http://www.nmanet.nl>)

S'agissant de la distribution, la restructuration du secteur pétrolier a débouché en Espagne sur un oligopole fortement concentré. En se basant sur les données de la presse, Bello et Cavero résument ainsi la structure du secteur :

En 1993, les raffineurs espagnols contrôlaient environ 85 % des 5 983 stations-service (Repsol, 54.8 %, Cepsa-Elf, 23.8 %, et BP, 6.3 %). La faible densité du réseau de détail espagnol au regard des autres pays européens, et par conséquent la forte productivité de ses points de vente, ont incité à construire de nouvelles stations-service. Depuis 1993, le nombre de stations-service a crû de plus de 200 unités par an pour atteindre 8 155 stations en 2003, bien que ce rythme se soit ralenti récemment. Depuis le début des années 90, quelque 30 nouveaux intervenants ont pris pied sur le marché, notamment Petrogal, Agip, Esso, Shell, Avanti, des stations gérées par des grandes chaînes de supermarchés, des indépendants, etc. Par conséquent, la part de marché des nouveaux opérateurs est passée de 15 à 30 % entre 1993 et 2003. Les raffineurs espagnols contrôlent aujourd'hui environ 70 % des stations-service (Repsol-YPF, 43.8 %; Cepsa-Elf, 18.7 % et BP, 6.9 %). Presque toutes les stations-service qui ne sont pas détenues et gérées directement par une société pétrolière (c'est-à-dire 95 % d'entre elles) sont exploitées via des contrats de vente exclusifs avec les fournisseurs, qui décident des prix et des frais applicables aux exploitants des stations (Cinco Días, 24/2/1997). À cet égard, les marchés espagnols de l'essence sont très différents de ceux de nombreux pays où l'intégration est bien moindre et où les fournisseurs ne contrôlent pas totalement les prix de détail.

Bello et Cavero (2008) ont analysé la structure des marchés et la différenciation des marques en Espagne. Les auteurs notent que les prix des stations indépendantes sont moins élevés que ceux des stations des marques et que cette différence est plus nette lorsque les sites appartiennent à des marques secondaires. Ils constatent de plus que les distributeurs indépendants sans marque entrent plus directement en concurrence avec les points de vente de marque verticalement intégrés qu'avec ceux en location, au moins dans la région de Navarre. Cela confirme selon eux l'existence d'un problème de double marginalisation et d'une différenciation des produits entre marques. Ils concluent que la différenciation verticale signifie que, du point de vue des raffineurs, la meilleure option contractuelle entre eux et les stations de marque doit laisser intervenir une certaine double marginalisation, qui leur permet d'apaiser la concurrence par les prix sur le marché de la distribution. Bellow et Cavero (2002) notent que les stations de marque offrent aux consommateurs un plus grand nombre de services alors que les stations indépendantes privilégient l'entretien et à la réparation de véhicules⁶².

Diverses affaires de concurrence ont porté, dans le secteur, sur la question de savoir si les distributeurs sont des commissionnaires ou des revendeurs indépendants. Les décisions de justice en la matière ont généralement considéré qu'ils constituaient des entités indépendantes et soumis les contrats verticaux d'approvisionnement à des règlements supplémentaires sur les prix verticaux. En particulier, le Tribunal pour la protection de la concurrence a pris la décision 490/00-501/00 REPSOL-CEPSA. Dans cette affaire, deux plaintes avaient été déposées à l'encontre des deux principales entreprises pétrolières nationales, selon lesquels des accords restrictifs (article 1 de la loi nationale et article 81 du Traité instituant la Communauté européenne) avaient été conclus, consistant en une fixation verticale des prix de leurs distributeurs et une violation du règlement 1983/84 de la Commission, qui établit les conditions pour les exemptions de catégorie concernant certains accords d'achat exclusif.

Le Tribunal pour la protection de la concurrence a estimé qu'il y avait fixation verticale des prix car les stations essence sont des revendeurs plutôt que, comme le soutenaient les deux sociétés pétrolières, des commissionnaires. Il a jugé que les distributeurs assumaient plusieurs risques commerciaux et financiers et

⁶² Globalement, ces résultats correspondent aux conclusions de Shepard (1993) ainsi que de Blass et Carlton (2001).

constituaient à ce titre des entrepreneurs indépendants, rendant ainsi applicables les articles 1 et 81. Concernant l'extension des périodes contractuelles d'approvisionnement, il n'a pas estimé que les entreprises s'étaient effectivement livrées à des pratiques frauduleuses visant à allonger de manière excessive l'application des conditions des contrats⁶³. Toutefois, dans les deux cas, la moitié des membres du Tribunal a fait part de divergences totales ou partielles concernant cet aspect. Le Tribunal a imposé aux deux entreprises des amendes, cependant jugées trop faibles par certains⁶⁴.

La Commission européenne⁶⁵ a également traité une affaire portant sur les marchés espagnols de la distribution d'essence, aboutissant en un règlement selon lequel les contrats de fourniture en essence des distributeurs ne sauraient dépasser cinq ans. Elle est présentée à l'encadré 4.

Encadré 4. Intervention de l'UE en Espagne en vue de restreindre la durée des contrats de fourniture des distributeurs d'essence

« La Commission européenne a adopté une décision formelle en vertu des règles de concurrence du Traité de Rome qui rend juridiquement contraignants les engagements pris par REPSOL concernant l'ouverture de ses contrats à long terme avec les stations-service. REPSOL libérera des centaines de stations-service de leurs contrats de fourniture exclusive à long terme. Les consommateurs pourront ainsi bénéficier d'un choix plus étendu et de prix potentiellement plus avantageux. La Commission avait lancé une enquête afin de déterminer si les contrats de fourniture conclus par REPSOL étaient contraires aux règles du Traité de Rome relatives aux pratiques commerciales restrictives (article 81), mais a décidé d'y mettre fin à la suite des engagements proposés par REPSOL. » Commission européenne (2006a).

« En vertu des contrats signés avec Repsol CPP, les propriétaires fonciers accordaient à Repsol CCP un 'droit réel' sur leurs terrains ou sur leurs terrains et bâtiments pour une longue période (de 25 à 40 ans). Repsol CPP finançait ensuite la construction/la rénovation de la station, relouait la station au propriétaire et était le fournisseur exclusif de la station en carburants pour véhicules motorisés, pour la durée du 'droit réel'. » Commission européenne (2006b).

Ces contrats posaient problème du fait de la forte intégration verticale du marché :

« L'enquête de la Commission a montré qu'il est relativement difficile d'accéder à ce marché en raison de sa structure et, en particulier, de l'intégration verticale de tous les opérateurs. Les contrats d'exclusivité signés entre les opérateurs et les dernières stations-service indépendantes lient celles-ci pour de longues durées, ce qui pèse sur la concurrence. Les contrats signés par Repsol CPP, en particulier ceux à long terme en vertu desquels elle se voit attribuer des 'droits réels', contribuent tout particulièrement à fermer le marché. Cela réduit en définitive la pression pour réduire les prix et améliorer la qualité, au détriment des consommateurs. » Commission européenne (2006b).

Source : Commission européenne, affaire COMP/B-1/38348 – Repsol CCP SA.

5.8 Royaume-Uni

Au Royaume-Uni, le secteur de l'essence est l'un de ceux où les enquêtes sont les plus fréquentes. Au cours des 20 dernières années ont ainsi été menées trois investigations de la Monopolies and Mergers Commission (MC, 1965 ; MMC, 1979 et 1990), deux du Trade and Industry Select Committee de la Chambre des communes (1988 a, b) et une de la Price Commission (1979 a, b, c). Dans chacune des enquêtes menées depuis 1979, les divers comités n'ont rien constaté dans ce secteur qui soit contraire à

⁶³ Espagne (2001).

⁶⁴ Lloreda et Sanz (2001).

⁶⁵ Case COMP/B-1/38348 – Repsol CCP SA.

l'intérêt public. Driffard (1999) présente toutefois une vue moins favorable de la dynamique des prix à court terme et des conditions d'entrée sur le secteur britannique de l'essence.

L'intégration verticale n'est pas très marquée au Royaume-Uni et les problèmes de verrouillage potentiel du marché sont donc rares.⁶⁶ Cook (1997) y a étudié l'intégration verticale dans les secteurs de l'essence et de la brasserie. Ses conclusions, qui se fondent sur l'examen et l'analyse de données du domaine public et sur des entretiens, font écho à celles de la Monopolies and Mergers Commission. Cette dernière a estimé que l'intégration verticale dans le secteur de l'essence était largement motivée par la perspective de gains d'efficacité profitant aux consommateurs⁶⁷. Aucune mesure n'a été recommandée⁶⁸.

Comme dans beaucoup de pays, l'arrivée des supermarchés a révolutionné les marchés de la distribution d'essence du Royaume-Uni. Entre 1994 et 2007, la part vendue par ces intervenants est passée de moins de 20 % à plus de 40 %⁶⁹. Les systèmes de coupons, tels que ceux décrits à l'encadré 1 sur l'Australie, sont courants au Royaume-Uni.

5.9 États-Unis

Les économistes spécialisés dans l'organisation industrielle ont mené plusieurs études économétriques sur l'intégration verticale et le dégroupage vertical dans la distribution d'essence aux États-Unis. Cet axe de recherches est apparu intéressant car, bien que les États aient adopté des politiques assez différentes concernant l'intégration verticale, de nombreuses variables perturbatrices nécessaires aux comparaisons internationales peuvent être contrôlées ou ont les mêmes valeurs dans les différents États. Nombre d'entre eux ne disposent ni de lois ni de règlements sur l'intégration verticale outre les lois générales sur la concurrence, fédérales et d'État. Toutefois, des règlements requérant le dégroupage vertical des points de vente d'essence sont en vigueur dans plusieurs États depuis plusieurs années⁷⁰. Les recherches se sont essentiellement attachées à déterminer si les prix de détail de l'essence sont différents dans les États où le dégroupage vertical est obligatoire, en contrôlant les autres facteurs susceptibles d'influer sur les prix. Sur la base de ces travaux, la Federal Trade Commission s'est prononcée dans plusieurs commentaires contre le dégroupage vertical obligatoire des points de vente d'essence de plusieurs États⁷¹. Les économistes de la FTC ont bien sûr contribué aux travaux sur ce thème⁷².

Les études sur le dégroupage vertical obligatoire des stations essence aux États-Unis concluent presque toutes qu'il est associé à une hausse plutôt qu'à une baisse des prix à la pompe. Dans son examen de la concurrence dans le raffinage et la commercialisation de produits pétroliers, Moss (2007) passe en revue quatre travaux assez récents sur les effets du regroupement obligatoire⁷³ et deux sur les incidences de l'obligation d'ouverture des circuits d'approvisionnement (« open supply »)⁷⁴. À une exception près, il

⁶⁶ Voir par exemple « Competition in the supply of petrol in the UK », rapport de l'Office of Fair Trading (mai 1998).

⁶⁷ Voir également Cook (1998).

⁶⁸ Au contraire, l'intégration verticale dans la brasserie semblait s'expliquer par la volonté d'acquiescer un pouvoir de marché, et nécessiterait des mesures structurelles « radicales ».

⁶⁹ UKPIA (2008).

⁷⁰ Le Maryland a été le premier État à imposer un dégroupage vertical.

⁷¹ Voir par exemple le commentaire récent de la FTC (2007). Il s'agit là d'un des nombreux avis formulés par l'autorité sur cette question.

⁷² Voir par exemple Vita (2000) ainsi que Taylor, Kreisle et Zimmerman (2007).

⁷³ Spears (1991) ; Slade (1998) ; Blass et Carlton (1999) et Vita (2000).

⁷⁴ Marvel (2003) ainsi que Barron, Taylor et Umbeck (2004).

s'agissait de travaux économétriques. Selon l'auteur, « ces recherches tendent à démontrer que le dégroupage forcé des raffineurs et distributeurs implique une hausse des coûts et/ou des prix à la consommation. » Le tableau synthétique de Moss est reproduit ci-après. Les coefficients des variables correspondant au dégroupage vertical obligatoire montrent que les augmentations de prix dues à cette politique sont comprises entre deux et cinq cents le gallon, soit une hausse de 2 à 5 % par rapport aux prix moyens observés au cours des études. De précédents travaux étaient parvenus à des conclusions similaires⁷⁵.

Tableau 1. Résultats des études sur la dissociation et l'ouverture des canaux d'approvisionnement

Auteur(s) et année de l'étude	Résultats
Résultats sur la dissociation (« divorce »)	
Spears (1991)*	Les lois instituant la dissociation conduisent à subventionner les intermédiaires de produits pétroliers, aux dépens du consommateur.
Slade (1998)	La dissociation est associée à des prix de détail élevés pour l'essence.
Blass et Carlton (1999)	L'intégration verticale est motivée par l'efficacité et non par l'éviction de la concurrence. Les coûts de la dissociation sont élevés.
Vita (2000)	Les politiques de dissociation provoquent une hausse des prix de détail de l'essence.
Résultats sur l'ouverture des circuits d'approvisionnement	
Marvel (2003)	Imposer l'ouverture des circuits d'approvisionnement peut accroître les stocks, protéger de la volatilité des prix et réduire les coûts de transport de l'essence.
Barron, Taylor et Umbeck (2004)	Les stations disposant des sources d'approvisionnement les plus nombreuses sont celles aux prix de détail les plus élevés.

*Analyse non économétrique.

La plupart des commentateurs ont estimé que ces résultats contredisent directement les thèses des partisans du dégroupage obligatoire. Selon plusieurs travaux économétriques, au lieu de réduire le risque, les coûts et les prix, il provoquerait une hausse des prix. Les commentateurs en concluent généralement que les lois visant à l'imposer nuisent aux consommateurs.

Plusieurs réserves pourraient être apportées au raisonnement selon lequel, puisque le dégroupage vertical obligatoire est associé à une hausse des prix, il nuit au consommateur. Cette hausse pourrait par exemple indiquer que les raffineurs cessent d'user de stratégies d'éviction puisque les lois obligeant à un dégroupage vertical empêchent de récupérer les pertes liées à ces pratiques. Blass et Carlton (2001) abordent cette problématique en se demandant si le mélange d'intégration et de séparation verticales observé dans les États n'ayant pas de règles contre l'intégration verticale ne pourrait pas s'expliquer par des raisons liées à l'efficacité des points de vente. En particulier, les auteurs expliquent qu'il est particulièrement difficile de contrôler l'activité de l'opérateur dans les points de vente qui fournissent des services de réparation automobile et vendent de faibles volumes d'essence. Les raffineurs estimeront vraisemblablement plus efficace de ne pas les intégrer verticalement. Il devrait à l'inverse leur être plus facile de contrôler les points de vente qui n'offrent pas de services de réparation et vendent de grandes quantités d'essence. Selon Blass et Carlton, la structure effective des stations (en location ou détenues par

⁷⁵ Barron et Umbeck (1984) ont fait état de hausses comprises entre 1.7 et 5.3 cents par gallon pour les stations multiservices ou en libre-service, respectivement. Shephard (1993) a observé des baisses allant de 1.5 à 10 cents sur les points de vente détenus par les raffineurs.

le raffineur) correspond à ces anticipations. De plus, les raffineurs tendent à user de contrats de location lorsqu'ils créent de nouveaux sites qui proposent des services de réparation et dont le volume des ventes est assez faible. Les auteurs soutiennent que si les raffineurs voulaient mener les locataires à la faillite par des pratiques d'éviction, ils ne chercheraient pas à mettre en place de telles relations sur de nouveaux sites et les variables d'efficience verticale n'expliqueraient pas aussi sensiblement la structure effective des relations verticales.

Il faut apprécier les travaux disponibles avec prudence lorsqu'ils emploient les prix de l'essence comme seule mesure pertinente du bien-être du consommateur. Cette perspective présente certains inconvénients majeurs, le principal étant que, souvent, la qualité de service peut contribuer largement au bien-être du consommateur, dimension que le prix de détail n'intègre pas. Les consommateurs pourraient par exemple préférer une offre composée d'un meilleur service et de prix plus élevés à une autre couplant un service de plus mauvaise qualité à des prix plus bas. Dans la distribution d'essence, la notion de qualité de service va, semble-t-il, plus loin que la propreté des toilettes ou le sourire des employés. La réduction du nombre de stations pourrait en effet accroître le prix effectif de l'essence en augmentant la durée de déplacement nécessaire pour s'approvisionner et la quantité de carburant utilisée à cet effet. Ces hausses des coûts de recherche et d'accès pour le consommateur pourraient neutraliser l'avantage des baisses de prix à la pompe attribuables à la concentration des points de vente⁷⁶. Le fait que les stations soient moins nombreuses et plus dispersées pourrait également avoir un effet indirect sur les prix en réduisant les recherches du client et par conséquent, l'élasticité-prix de la demande, comme dans le modèle de comportement de recherche du consommateur dit du « piège à touristes »⁷⁷. D'autre part, Barron et Umbeck (1984) et Slade (1998) ont constaté que le dégroupage vertical obligatoire conduit les distributeurs à réduire leurs horaires d'ouverture, autre mesure de la qualité de service.

6. Influence des distributeurs indépendants sur les prix

Les travaux économiques sur les effets directs du dégroupage obligatoire des points de vente d'essence indiquent que ces règles ont provoqué une augmentation des prix de détail. Mais d'autres études économétriques sur leurs effets indirects potentiels constatent que les prix de détail de l'essence dans une zone donnée sont beaucoup moins élevés si la part de marché des points de vente indépendants sans marque y est plus élevée. L'étude de Hastings (2004), par exemple⁷⁸, a examiné l'effet des différents types d'accords verticaux liant les distributeurs et constaté que l'intégration verticale aux dépens des indépendants provoque une hausse de cinq cents le gallon⁷⁹. Cette étude s'inscrivait dans le contexte de l'achat d'une chaîne de points de vente indépendants par ARCO, un grand raffineur. Cette opération a profondément modifié les parts de marché des stations indépendantes et de marque et permis de contrôler

⁷⁶ Le caractère significatif de ce facteur dépendra des comportements de conduite des différents consommateurs et pourrait être plus sensible dans les zones rurales où la densité des points de vente est déjà plus faible. Il convient de noter que les arguments selon lesquels l'intégration verticale est motivée par des raisons d'efficience interne et réduira les prix à la pompe, que l'on retrouve dans le rapport du New Zealand Institute of Economic Research (2002) ne signifient pas nécessairement que l'intégration et la concentration qui lui est associée profitent au consommateur.

⁷⁷ Carlton et Perloff (2005), chapitre 13.

⁷⁸ Moss (2007) indique qu'Adymir et Buehler (2002) ainsi que Hastings et Gilbert (2005) font état de résultats similaires. En 2004, la Federal Trade Commission et le Government Accountability Office se sont opposés sur l'interprétation d'analyses *ex post* des fusions opérées dans la distribution d'essence (Moss, 2007).

⁷⁹ Gilbert et Hastings (2002) indiquent également que les prix au détail et de gros augmentent d'environ trois cents le gallon lorsque le degré d'intégration verticale des points de vente dépasse la médiane dans une zone donnée.

les variables liées aux différentes stations et villes, que les études économétriques omettent souvent car ces variables sont difficiles à identifier ou à quantifier. Hastings (2004) conclut :

Les résultats de cette étude montrent qu'une baisse de la part de marché des stations indépendantes a une incidence significative sur le prix de détail local. Toutefois, une modification de la part de marché des stations de marque détenues et exploitées par les raffineurs n'a pas de répercussion sensible sur le prix du marché local. Ces résultats ont d'importantes implications car les responsables politiques considèrent la réglementation des contrats verticaux comme un moyen d'accroître la concurrence sur les marchés d'essence. Le protocole de recherche et ses données détaillées permettent également d'établir par inférence la nature sous-jacente de la concurrence en matière de distribution d'essence.

Les résultats présentés par Hastings (2004) ne tranchent sans doute pas le débat sur ces effets verticaux, que ce soit en général ni même en particulier. Par exemple, Taylor, Kreisel et Zimmerman (2007) ont observé des effets beaucoup moins marqués (moins d'un dixième de ceux indiqués plus haut) alors qu'ils utilisaient une série de données similaires mais non identique en vue de reproduire l'expérience de Hastings (2004).

Borenstain et Bushnell (2005) concluent ainsi leurs recommandations aux autorités de tutelle californiennes :

Pour résumer, les précédents travaux ont démontré l'importance que revêtent les stations indépendantes qui ne s'appuient pas sur l'une des grandes marques. Leur présence réduit les marges de détail et, vraisemblablement, les marges de gros. L'incidence des indépendants usant de marques est plus difficile à déterminer, de même que celle de la méthode de distribution. C'est pourtant ce dernier élément que l'ouverture des circuits d'approvisionnement à l'ensemble des marques devrait le plus influencer. (...) À ce jour, les données empiriques sont bien plus nombreuses concernant les gains d'efficacité permis par les contrôles verticaux au niveau de la distribution. Il faut toutefois noter que, du fait des données disponibles et d'autres facteurs, il est beaucoup plus difficile d'estimer l'incidence de ces politiques sur la concurrence des marchés de gros que sur les prix au détail pratiqués par certaines stations. (...) [L]es propositions visant à réglementer les politiques verticales pourraient produire des effets secondaires inattendus. L'interdiction de certaines pratiques tarifaires ou arrangements contractuels, par exemple, pourrait inciter à accroître l'intégration verticale directe ou déboucher sur de nouveaux arrangements contractuels s'avérant plus dommageables que les pratiques qu'ils remplacent.

Leur conclusion selon laquelle il n'y a pas de relation entre les effets salutaires associés à une forte présence de distributeurs indépendants sans marques et les propositions de règlements tendant à ouvrir les circuits d'approvisionnement à l'ensemble des marques, pourrait également s'appliquer au dégroupage vertical obligatoire. S'ils se trouvaient contraints de se plier à une telle mesure, il semble peu probable que les raffineurs laisseraient ces stations devenir des distributeurs indépendants sans marques si le développement de tels intervenants leur portait préjudice en accentuant la concurrence globale.

Au vu du débat évoqué plus haut sur la relation négative potentielle entre intégration verticale et distributeurs indépendants sans marques, on pourrait assister à un conflit entre effets directs et indirects du dégroupage obligatoire. Malheureusement, les recherches économiques disponibles ne traitent pas cette confusion d'effets avec l'autorité que les responsables de l'élaboration des politiques pourraient espérer. Les approximations les plus viables se trouvent peut-être chez Chouinard et Perloff (2007), Aydemir et Buehler (2003) et Sen (2005).

Selon Chouinard et Perloff (2007), les fusions aux stades de la distribution et du raffinage provoquent une hausse des prix de détail, mais les prix sont négativement corrélés avec le pourcentage de points de vente exploités par les sociétés et positivement corrélés avec celui de stations exploitées par des locataires. Cette étude ne résout donc pas la contradiction.

A contrario, Aydemir et Buehler (2003) s'emploient à distinguer les effets d'efficience et de verrouillage associés à l'intégration verticale. Dans leur modèle empirique, les paramètres liés au comportement et aux coûts inconnus sont déduits de la réactivité des prix à l'évolution de l'élasticité de la demande et à divers paramètres de coûts connus (variables instrumentales). Leurs résultats sont plus nuancés que les autres recherches menées en ce domaine. Ces auteurs constatent des effets d'efficience et de verrouillage, mais leur importance relative varie fortement en fonction de la situation régionale des entreprises. L'incitation à l'efficience prédomine pour les raffineurs disposant de parts de marché relativement faibles dans des régions où le niveau de concentration est assez peu élevé. À l'inverse, l'incitation au verrouillage prédomine pour les raffineurs disposant de parts de marché relativement importantes dans des régions où le niveau de concentration est assez élevé. Si ce résultat peut aider à mieux comprendre la relation entre intégration verticale et prix de gros chez les raffineurs pris isolément, elle ne résout nullement la question de l'incidence globale de l'intégration verticale sur l'ensemble des raffineurs, ni celle de ses effets moyens sur la distribution.

Sen (2005) fait état d'effets compensateurs associés à l'augmentation de la part de marché des distributeurs indépendants. D'un côté, les indépendants alimentent la concurrence au niveau des raffineurs, de l'autre, ils exercent une pression à la hausse sur les marges au détail. Le premier effet prédomine dans les données de Sen, mais cela pourrait ne pas être le cas en d'autres lieux ou durant d'autres périodes.

7. Conclusion

Plusieurs propositions contradictoires ont été formulées quant aux effets du dégroupage vertical obligatoire et, de manière plus générale, ceux de l'intégration verticale sur les marchés de l'essence. Concernant plus particulièrement le dégroupage vertical obligatoire, les données empiriques tendent généralement à indiquer que ces lois et règlements ne profitent pas, ou peu, aux consommateurs. Cependant, la question politique générale de l'intégration verticale de la distribution d'essence apparaît plus complexe. Il semble en particulier que la présence de distributeurs indépendants vendant de l'essence sans marque soit le grand moteur nouveau de la concurrence sur ces marchés. En contrepoint des effets négatifs de l'intégration verticale obligatoire, il convient de noter que si la plupart des raffineurs s'intègrent verticalement et n'approvisionnent que les distributeurs opérant sous leur marque, cela peut empêcher l'entrée de nouveaux distributeurs indépendants (souvent des grandes surfaces) et pousser à la faillite les distributeurs indépendants sans marques en place.

Les lois et les règlements sur l'intégration verticale dans ce secteur n'entretiennent qu'un rapport indirect avec les problèmes de concurrence concernés. Ils se concentrent plutôt sur les vifs différends contractuels qui opposent régulièrement raffineurs et franchisés concernant la discrimination par les prix et l'opportunisme. Les partisans de l'intégration verticale doivent traiter les problèmes d'exécution des contrats résultant de comportements opportunistes. Les partisans du dégroupage obligatoire doivent vérifier si les lois générales sur l'abus de position dominante et la concurrence déloyale peuvent résoudre les problèmes d'opportunisme et de subventions croisées.

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AUSTRALIA

1. Introduction

1.1 *The ACCC petrol inquiry*

In June 2007, the Australian Competition and Consumer Commission (ACCC) Chairman sought approval from the Commonwealth of Australia's Treasurer to conduct an inquiry into the price of unleaded petrol under the Commonwealth's competition law, the *Trade Practices Act 1974* (the TPA).

The ACCC proposed an inquiry into the price of unleaded petrol, with matters to be taken into consideration by the inquiry including:

- the current structure of the industry;
- the extent of competition at the refinery, wholesale and retail levels, including the role of imports;
- the determination of prices at each of these levels, including the methodology for determining wholesale prices; and
- current impediments to efficient petrol pricing and possible methods to address them.

The Treasurer approved the ACCC's request. On 29 June 2007 the ACCC released a paper that outlined the issues which the ACCC was examining and the process for the inquiry, as well as describing how interested parties could make submissions to the inquiry. The ACCC received over 50 submissions from interested parties, who ranged from major oil companies to members of the general public. As part of the inquiry the ACCC conducted 25 public hearings across all Australian capital cities and in several regional towns. Forty-eight organisations were represented at the public hearings and the inquiry heard from 94 witnesses.

In addition to submissions, the ACCC also exercised its information gathering powers under the TPA. The powers enabled the ACCC to obtain information and documents from interested parties, as well as summoning a person to appear at an inquiry hearing to give evidence and produce documents. As well as taking into account the information provided by submissions and witnesses, the ACCC commissioned surveys and requested data from other sources.

The ACCC's report of its inquiry was handed to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs on 14 December 2007¹. The information below outlines a number of key issues identified in the inquiry report, which may be relevant to the OECD's Roundtable on *Competition Policy for vertical relations related to gasoline retailing*. Australia's submission will cover:

- the wholesale and retail petroleum market in Australia;

¹ <http://www.accc.gov.au/content/index.phtml/itemId/790921>

- current industry structure of the petroleum market;
- issues affecting petroleum retailing, including bundling of petrol and supermarkets;
- retail pricing in Australia; and
- the role of industry regulation, such as the mandatory Oilcode on vertical relationships in the supply chain.

2. The Wholesale and Retail Petroleum Market in Australia

2.1 Refiners

There are four integrated refiner/marketers operating refineries in Australia: BP Australia Pty Ltd (BP), Caltex Australia Limited (Caltex), Mobil Oil Australia Pty Ltd (Mobil) and the Shell Company of Australia Limited (Shell).

- BP is a wholly owned subsidiary of BP plc (UK), which is a major international energy explorer, producer and marketer. While BP in Australia is primarily involved in refining and marketing, it also produces solar cells on a commercial scale and is involved in the export of liquefied natural gas.
- Caltex is an Australian publicly listed company. While Chevron Corporation (US) is a 50 per cent shareholder, Caltex is not a subsidiary and all decisions are made by Caltex's board and management in Australia. Caltex is a refiner/marketer, but has no oil or gas exploration interests.
- Mobil is an operating company of ExxonMobil Corporation (US). ExxonMobil is involved in oil and gas production and refining and marketing in Australia through a number of operating companies including Mobil Oil Australia Pty Ltd and Esso Australia Pty Ltd.
- Shell is part of Royal Dutch Shell plc. In addition to importing, refining, wholesaling and retailing unleaded petrol in Australia, Shell is involved in the development and sale of liquefied natural gas, the supply of aviation and marine fuels and lubricants, bitumen and chemicals.

All of the refiner/marketers import petrol into Australia. There are also independent importers who import petrol for wholesale within Australia from time to time. These independent importers only import small volumes and source most of their product from the refiner/marketers in Australia.

2.2 Wholesale Market

The refiners/marketers operate at the wholesale level and some have equity in distributor operations. Some independent companies also operate at the wholesale level.

The supply of fuel from terminal to retailer is conducted by distributors. The refiners/marketers and independent wholesalers supply wholesale customers through a mix of their own operations and independent distributors (and distributors in which they have an equity interest). Distributors supply businesses such as primary producers, commercial and industrial, aviation, mining, and the service station network.

Depending on the proximity of wholesale customers to the wholesaler's terminals, distributors either supply wholesale customers directly, or from inland depots. In general, metropolitan areas are supplied

directly from the terminal by the operations of refiner/marketers while regional areas are supplied by distributors.

At the retail level, the refiner/marketers supply to retail operations they own and operate, commission agent sites, franchisees and independent operators (both branded and unbranded). Independent wholesalers supply their own and other independent retail sites.

2.3 *Retail Structure*

Petrol retail sites in Australia can be separated into four broad categories on the basis of ownership and wholesale supply arrangements. These are:

- refiner/marketer owned sites
- refiner/marketer branded independent and distributor owned sites
- supermarket operated sites
- independent operator sites selling their own brands.

Retail sites within these categories are operated in one of the following ways:

- Owner operated—the owner of the site is free to choose its wholesale supplier and determine its retail price. An independent owner-operator may choose to align its site with the brand of fuel sold by a particular wholesaler, by receiving branding (signage identifying that site as sourcing its fuel from a particular wholesale supplier).
- Commission agent— an individual manages a site (owned by a refiner/marketer or independent chain), and compensation is generally in the form of a commission based on the quantity of product sold.
- Franchise operated—an individual rents a site or a number of sites, (generally owned by a refiner/marketer) and operates under a franchise agreement. At these sites, fuel is sourced from the owner of the site and branded accordingly.

The business structures observed in the retail market largely reflect the operation of two pieces of recently repealed legislation:

- the *Petroleum Retail Marketing Sites Act 1980* (the Sites Act), which placed a quota on the number of retail sites that the refiner/marketers could operate directly or on a commission agent basis
- the *Petroleum Retail Marketing Franchise Act 1980* (the Franchise Act), which specified minimum terms and conditions for franchise arrangements.

The Sites Act was designed to counteract the dominance of the petrol retail market by the refiner/marketers by restricting oil companies from operating or controlling more than 5 per cent of total retail sites. The Franchise Act set out minimum terms and conditions governing a franchise agreement in the retail petrol market and covered all retail outlets selling above a certain minimum quantity of petrol a year. In response, the refiner/marketers adopted other marketing strategies (including multi-site franchising).

Under the Downstream Petroleum Reform Package², the Sites Act and the Franchise Act were repealed and a mandatory code (the Oilcode) under the TPA was introduced. The Oilcode, among other things, provides wholesalers and fuel resellers with specific rights and obligations in relation to fuel reselling arrangements.

2.4 Refiner/marketer owned sites

The refiner/marketers own and operate their own sites, have commission agent sites, and market their fuel through single or multi-franchise operations. The refiner/marketers determine prices at company owned and commission agent sites. While prices are determined by franchisees at franchise sites, the refiner/marketers may influence prices at these sites through the provision of price support.

2.5 Refiner/marketer branded independent operators and distributor-owned sites

Independent operators tend to own their site but retail the fuel of one of the refiner/marketers. There are also distributor-owned sites that do this. The price of fuel at these sites is determined by the operator.

Distributor-owned sites are run by a local fuel distributor, some of which are owned or part-owned by the refiner/marketers and others which, like branded independent operators, use their own site and equipment and have a brand and supply agreement with a refiner/marketer. These sites tend to be located in rural and regional areas.

2.6 Supermarket operated sites

The two major supermarket chains in Australia—Coles and Woolworths—operate sites which have shopper docket discount schemes linked to grocery sales at their supermarkets. These are the Coles Express and Caltex/Woolworths joint venture sites. Prices at these sites are determined by Coles Express and Woolworths.

2.7 Independent operator sites selling their own brands

Independent operators selling their own brands range from the large independent chains to small one-to two-site operations. There are also independent operators that purchase fuel from independent wholesalers and align themselves with that independent wholesalers' brand.

Independent chains generally purchase fuel in bulk from local refiner/marketers and sell it through their company-owned sites. Sites are generally operated on a commission agency basis. The smaller independent operators tend to use their own site, equipment and brand name and purchase fuel on an ad hoc or contractual basis from local refiner/marketers or independent wholesalers.

3. Current Industry Structure of the Petroleum Market

3.1 Site rationalisation

There are currently around 6500 retail sites in Australia. There has been continual rationalisation of retail sites in Australia over the past 30 years. In 1970 there were 20 000 sites, in 1980 there were 12 500 sites and in 2000 there were 8000 sites. Service station rationalisation has been a feature of most developed countries over recent decades.

² See The Parliament of the Commonwealth of Australia House of Representatives Petroleum Retail Legislation Repeal Bill 2006

While rationalisation of service stations has occurred for many reasons, changes in underlying supply and demand factors in the petroleum market have been important contributors.

- On the **supply** side, lower operating costs have been achieved with the development of high volume service stations, the use of self-service technology, and the availability of complementary goods and services (such as the sale of convenience goods) with petrol. The entrance of large independent chains, convenience stores and, more lately, supermarkets into the market has provided greater competition.
- At the same time, **demand** has changed for service stations. Motorists have different driving patterns because of the development of highways and major arterial roads to accommodate higher traffic volumes. Consumers desire longer shopping hours and more convenient arrangements for purchasing goods and services. The small service station with one or two pumps is being replaced by more modern sites—generally located on major thoroughfares—with multiple pumps, a shop and other facilities.

3.2 *Increasing importance of non-fuel competition*

A number of industry participants indicated that, while the board price was an important component of the competitiveness of a retail site, there was an increasing focus on deriving revenue from non-fuel products and services.

Some parties to the inquiry submitted that competitive pressure on fuel margins has led retailers to focus on developing sites that are capable of delivering very high fuel throughput, as well as additional margin from non-fuel offerings such as convenience stores, car washes and repair facilities. Non-fuel price competition - through factors like brand and product differentiation, site facilities, customer service, and site condition and appearance - is becoming increasingly relevant in the market.

4. **Issues affecting petroleum retailing**

4.1 *Bundling with groceries—shopper dockets*

Another market characteristic at the retail level that the ACCC examined closely concerns the emergence and impact of supermarket shopper docket arrangements. The emergence and expansion of shopper docket arrangements over the past 10 years has changed the competitive landscape for the retail supply of petrol.

The shopper docket schemes, first introduced in Australia by Woolworths in 1996, provide consumers with an incentive to link their purchases of groceries to a particular petrol retailer. Coles Express matched Woolworth's shopper docket scheme when it entered the market in July 2003.

In August 2003 Woolworths and Caltex announced that they were proposing to enter into a joint venture for the retailing of motor fuel. As at November 2007 Woolworths operated from 505 petrol outlets across Australia—371 outlets were owned and operated directly by Woolworths and the remaining 134 were owned by Caltex. All 505 outlets were branded with dual logos of Caltex and Woolworths. The petrol sold at these outlets is owned by Woolworths. Transactions for around 60 per cent of fuel sold at Woolworths service stations involve a shopper docket.

In July 2003 Coles and Shell entered into an alliance under which Coles took over the management of Shell's core franchise network across Australia. The roll-out of the 'Coles Express' network was

completed in March 2004. As at November 2007 there were around 600 'Coles Express' service station sites in operation.

Both Coles Express and Woolworths offer a 4 cents per litre (cpl) discount on the price of petrol to customers who have purchased a minimum value of goods or services from their respective supermarkets or other companies in the group. From time to time, Coles Express and Woolworths offer special promotions above the standard 4 cpl discount.

The key competition concern with regard to Coles' and Woolworths' shopper docket arrangements is the argument that supermarkets may have the ability to leverage their strong positions in the grocery sector into the petrol retailing sector, leading to anti-competitive effects in the market.

The emergence and expansion of shopper docket arrangements over the past 10 years has changed the competitive landscape for the retail supply of petrol. Consumers have enjoyed the benefits of discounted fuel in increasing numbers. There is little doubt that the shopper docket arrangements have aided the establishment and expansion of supermarkets in petrol retailing, and have created significant challenges for those retailers not aligned with the supermarkets.

The introduction of shopper docket arrangements had a significant impact on other retailers' sales volumes and market shares, and they are likely to have contributed to decisions by some to exit the industry. In recent times, a number of participants have substantially recovered their lost volume and market shares. Some independent chains have increased their size in terms of site numbers. Other participants appear to have halted their decline, but remain at a lower market share. There is no evidence to suggest that the arrangements over the past five years have increased the industry trend of rationalisation in the number of sites.

Other retailers have responded to the introduction of supermarket shopper docket arrangements with a variety of strategies, including competitive promotions and a renewed focus on delivering consumer choice and convenience. In many respects, the arrangements have been a spur for competition of this nature to the benefit of consumers. However, while other shopper docket schemes have assisted competitors to recover some lost volume, the ACCC acknowledges no competing scheme can have the pulling power of those offered by the two main supermarkets.

To date, the general emergence of supermarket shopper docket arrangements has not had an anti-competitive effect but has delivered discounts to the benefit of consumers and promoted competition from other retailers. The use of shopper dockets by motorists has increased significantly. A survey commissioned for the Inquiry by the ACCC found that 77 per cent of motorists had used shopper dockets.³ This compared with only 52 per cent of motorists in 2003. The survey also found that 49 per cent of those motorists that use shopper dockets claim to use dockets 'at least most of the time' they buy petrol.

5. Retail Pricing in Australia

5.1 Retail Price setting

The ACCC also looked into the general process of price setting at the retail level. The most important factor determining the retail price generally is the wholesale price at which the retailer purchased the fuel. Retail petrol prices in Australia will tend to reflect wholesale prices plus associated costs (such as branding and transport) plus a profit margin.

³ The 2007 ANOP survey commissioned by the ACCC for the Petrol Inquiry is attached to the Inquiry report at Appendix H.

Particular pricing strategies of different types of organisations (commission agent, franchise agent, owner-operated, supermarket alliance) also have an impact.

- At owner-operated sites, the owner of the site determines the retail price. However, such owners may have agreements with their wholesale supplier that include price support. Price support agreements generally include provision for a maximum retail price for the period in which price support is supplied and in this way the wholesaler influences the setting of prices.
- At commission agent sites, a site is managed on behalf of another organisation, typically a refiner-marketer. At such sites, the retail price will be set by the principal refiner/marketer.
- At franchise-operated sites, the operator rents a site or number of sites and operates under a franchise agreement, under which fuel will generally be sourced from the owner (refiner/marketer) of the site. While the franchisee may be responsible for setting the retail price, the wholesale price is generally determined by the owner of the site and, in addition, the owner may influence retail prices through the provision of price support.
- In relation to the supermarket alliances, the relevant refiner/marketer supplies fuel to the supermarket under a wholesale supply agreement, however, it is the supermarket that set the retail price. Again, price support may be a feature of such an arrangement.

In addition to these supply and structural considerations retailers take into account a range of demand conditions in their markets. In response, they formulate a particular price setting strategy and this includes their reactions to the price cycles in their areas.

5.2 Price Support

Price support also has an impact on the final retail price. Price support is still used in varying degrees by Shell, Caltex, Mobil and BP to control or influence the setting of retail prices at certain retail sites. Evidence provided to the ACCC is obviously commercially sensitive but some common elements can be disclosed:

- Each company sets an internal reference price at which the relevant retailers purchase fuel (plus freight and other costs).
- Each company also determines a margin that each of its retailers is entitled to obtain. The company monitors competitors' prices and provides price support to a level that allows the retailer to match the competitors' prices during periods of discounting, but still retain the margin above the internal reference price.
- In some circumstances a recommended retail price is communicated to the retailer and the price support may be conditional on the retailer not pricing above this price. The retailer will generally follow the recommended price.
- Price support tends to be given on the basis of a rebate at the end of a given period.
- The major oil company decides at a given point in time to withdraw price support and informs the retailer.

Price support arrangements are an important feature of the retail market. They are a significant tool used by the refiner-marketers to influence the market and enable retailers to match competitors' prices

during periods of discounting. The withdrawal of price support is also significant in controlling the rapid upward movement at the commencement of each cycle.

5.3 *Price Cycles*

A unique feature of petrol prices, compared with the prices of other goods and services, is the regular price cycles in the larger metropolitan cities. The way that petrol prices go up and down by relatively large amounts over short time periods is often a cause of consumer concern. Petrol prices in the larger capital cities in Australia tend to move in regular weekly cycles. The rise in each cycle is relatively fast after which the price tends to fall more gradually.

There are a number of characteristics of petrol which appear to make it susceptible to price volatility. These include:

- Regular unleaded petrol is generally a very similar product with limited brand loyalty. Competition is therefore based primarily on price. For the individual retailer, there is an incentive to discount prices to attract sales from competitors when demand is low.
- The price of petrol is highly visible, as it is prominently displayed on price boards at service stations. Petrol prices are more visible than the price of most other products. Therefore there is greater incentive to discount when demand declines.
- The refiner/marketers and other retailers receive comprehensive up-to-date information on their competitors' petrol prices at regular intervals during the day, which means they can quickly respond to price movements (both up and down).
- Service stations with shops attached may have lower petrol prices to attract customers who may then buy other products with a greater profit margin.

In Australia, regular price cycles in retail petrol are generally confined to the largest metropolitan cities and areas close by. The price cycles that occur in Sydney, Melbourne, Adelaide, Brisbane and Perth are fairly regular and have been a recurring feature in these markets. Canberra, Darwin, Hobart and rural areas still have petrol price volatility associated with price movements in the upstream products of crude oil and refined petrol. However they are less likely to have regular or persistent short term price cycles.

Responding to price cycles is a major component of pricing strategy at the retail level of the market. In participating/responding to price cycles there are patterns of behaviour among different types of retailers.

While there may be individual differences in pricing strategy among the major refiner/marketers, it appears that in individual markets, it is generally a refiner/marketer that initiates price increases from the trough of a price cycle. The refiner/marketers operate very sophisticated strategies which allow them to adjust prices on a localised basis. They follow pricing strategies location by location that can extract the greatest benefit from the price cycles.

Refiner/marketers with a significant retail presence in a particular location, often together with having a refinery in the area, generally lead prices up. A major oil company which uses price support measures decides at a given point in time to withdraw price support and informs the retailer. This inevitably results in a rise in retail prices generally.

In an examination of price cycles, the price monitoring service provided by Informed Sources⁴ seems to be influential in retail price setting. The data collected and collated by Informed Sources is made available to subscribers (primarily the refiners/marketers and supermarkets) through an internet service and covers about 3500 sites. Subscribers can generate reports based on data received. High transparency of competitors' prices effectively reduces the risk encountered by retailers who seek to lead prices up in a market. A price leader can tell whether its competitors follow the price rise or not. If not, then the price leader can drop its price back in line with the market within a short time.

With regard to retail price setting in regional areas the ACCC concluded that:

- Prices and retail margins in regional areas are generally higher and more stable than those in the largest capital cities of Australia. Focusing on the largest five cities, the average annual city–country differential over the last five years is 5 cpl.
- The reasons for this difference include smaller populations in country areas, which results in less competition and higher required margins and greater transport costs.
- There is also a lag effect to be considered. Prices in country areas tend to take longer to reflect the movements in international petrol prices often with a lag of around one to two weeks. In part this is because petrol stocks are replenished less often in country areas. This lag leads to city prices being closer to country prices during a rise in international prices and further apart during a fall in international prices.

5.4 Retail Price Competition

Drawing this evidence together the ACCC found that the state of competition at the retail level can be summarised in the following way:

- There is a significant degree of price competition at the retail level. The retail sector is substantially less concentrated than both the refining and wholesale level of the market. However, the strong presence of the refiner/marketers at the retail level of the market is evidence of a significant level of vertical integration at this level, most obviously through company-owned and supplied sites. The refiner/marketers also influence retail prices through price support.
- Retail margins have remained broadly constant over the last four years. Margins fell with increased competition from the supermarkets (between 2003–04 and 2004–5), before increasing to 2006–07. Retail margins are relatively small. Interested parties to the inquiry supported this view. The average gross indicative retail margin in the five largest metropolitan cities over the last four financial years is 4.2 cpl. Margins in regional areas are generally higher than margins in metropolitan areas.
- However, it is important to note that while an understanding of margins is relevant to petrol pricing, an analysis of margins on a cent per litre basis may not, by itself, enable an accurate assessment of profitability to be made at individual sites for individual retailers. This is because overall profitability of individual sites will depend to a large extent on the volumes traded and the ability to achieve a successful balance between volume sold and margin. It is quite possible for a high margin, low volume site to be less profitable than a low margin, high volume site.

⁴ Informed Sources Pty Ltd is

- Price cycles are a distinguishing characteristic of Australian metropolitan retail unleaded petrol markets.

5.5 *Price cycles conclusions*

Given the impact of price cycles, the ACCC decided that further work should be undertaken at both the theoretical and applied level to understand the nature of price cycles as they operate in the various Australian markets for the sale of unleaded petrol.

The following findings were made:

- There are a range of explanations for price cycles. Many of these are consistent with competitive market behaviour and the existence of price cycles does not provide any evidence of a lack of retail competition. It is clear, however, that compared to international experience, Australia's price cycles appear distinctive.
- There is little evidence to support the media claim that cyclical petrol price increases before public holidays are always higher than the cyclical price increases that occur at non-public holiday times.
- There is no evidence to suggest that price cycles are 'caused' by the activity of Shell, Mobil, Caltex and BP alone. The major oil companies usually lead the price hikes that commence each cycle while the supermarkets, independents and majors engage in competitive discounting over the following week. What is more difficult to pinpoint is the precise reason why the cycles are so regular and steep. The timing of the provision and termination of price support, as well as the amount of price support, may all reinforce regular price cycles. However, there is no evidence to suggest that the price support scheme itself is a cause of price cycles.
- Undoubtedly the existence of price cycles is contributed to by key players influencing/controlling retail prices through complex and sophisticated pricing strategies. Price support arrangements and Informed Sources price monitoring may have facilitated this.
- As for consumers, significant numbers of price sensitive consumers take advantage of the cycles, but others do not or cannot. On the whole it is not possible to say conclusively whether the cycles operate to the benefit of consumers or retailers. The rapid movement of the cycles and the speed of responsive movements by price followers makes it harder for some motorists to time their purchases to take advantage of any price movements.
- However, despite the extensive analysis undertaken, the conclusion has to be made that the causes of the well-defined price cycles in Australia's retail unleaded petrol markets are an enigma.

5.6 *Retail price transparency*

As the ACCC's work on price cycles has indicated, there is evidence that consumers can take advantage of price cycles but at the cost of time and some individual effort. This raises the issue of price transparency—a vexed issue for the consumer and one that has broader implications for market competition.

There is currently an imbalance in pricing transparency between buyers and sellers of petrol in Australia. The imbalance allows sellers to react more quickly than buyers to price movements with likely

negative effects on competition and consumer search costs. Price volatility in the form of intraday price movements and price cycles is one contributor to this imbalance.

A second contributor to this imbalance in Australia is the Informed Sources price sharing service. This service provides a centralised exchange of retail petrol pricing information for its subscribers, primarily the major refiner-marketers and larger independent retailers. The depth of real time information available to Informed Sources subscribers is not available to consumers. This raises particular concerns for the relative levels of price transparency between retailers and consumers in the retail petrol market in Australia.

6. Industry Regulation in Australia

The petrol industry has been subject to significant degrees of regulation at various levels over the years.

Before 1 August 1998 the Australian Government (via the ACCC and prior to its establishment the Prices Surveillance Authority) regulated the wholesale prices of BP, Caltex, Mobil and Shell under the price notification provisions of the then *Prices Surveillance Act 1983*.

Currently, at the Commonwealth level, regulation is applied to specify standards for domestic fuel supply and to regulate the conduct of market participants at various levels of the supply chain. Some State Governments also stipulate fuel standards and have introduced measures that are intended to improve price transparency at the retail and wholesale level and reduce price volatility.

6.1 Mandatory Oilcode of Conduct

The Oilcode came into effect on 1 March 2007 as a prescribed mandatory industry code of conduct under s. 51AD of the TPA. The Oilcode regulates the conduct of suppliers, distributors and retailers in the downstream petroleum retail industry. The ACCC is responsible for promoting compliance with the Oilcode and conducting enforcement action for breaches of the Oilcode where it is necessary.

The purpose of the Oilcode is to:

- improve transparency in wholesale pricing and provide better access to declared petroleum products at a published terminal gate price (TGP)
- assist industry participants to make informed decisions when entering, renewing or transferring a fuel reselling agreement through the disclosure of specific information
- improve the operating environment for all industry participants by providing access to a cost-effective and timely dispute resolution scheme as an alternative to litigation.

6.2 Terminal gate pricing

The Oilcode provides a nationally consistent approach to terminal gate pricing arrangements between wholesale suppliers and their customers.

A wholesale supplier under the Oilcode is a person who sells declared petroleum products such as unleaded petrol and diesel from a wholesale facility such as an oil refinery, a shipping facility, a facility connected by a product transfer pipeline to an oil refinery or shipping facility, or a facility connected by a pipeline to a shipping facility. A customer is simply a person engaged in the business of buying declared petroleum products from a wholesale supplier.

There are a number of requirements for terminal gate pricing under the Oilcode. Broadly, these include a requirement on wholesale suppliers to:

- make their TGP publicly available each day on a website
- provide transaction documentation at the time of delivery and within 30 days of delivery if necessary
- make their declared petroleum products available at the TGP except in a limited number of circumstances where it would be not unreasonable to refuse supply
- ensure that their customers are complying with applicable health and safety responsibilities.

6.3 Fuel re-selling businesses

The Oilcode establishes minimum standards for parties involved in a fuel reselling business. This aims to help parties to make informed decisions when entering, renewing, extending, transferring and operating under a fuel reselling agreement.

Under the Oilcode, a fuel reselling agreement is between suppliers and retailers where the:

- supplier grants the retailer the right to conduct a fuel reselling business
- supplier is able to exert substantial control over that business
- fuel reselling business will be associated with a trademark, commercial symbol or advertising that is owned, used, licensed or specified by the supplier
- retailer is required to pay, or agree to pay, a fee before starting the fuel reselling business
- supplier reasonably believes that the amount of fuel that will be sold under the agreement will not be less than 30 000 litres per month.

If a commission agency meets these criteria, except the requirement to pay or agree to pay a fee, it would still be specifically identified as a fuel reselling agreement.

In relation to fuel reselling agreements, the Oilcode requires a supplier to:

- ensure the agreement has a minimum duration of five years except in certain circumstances (for example, where the upfront initial investment is less than \$20 000)
- create and provide a disclosure document to a prospective retailer at least 14 days before the agreement is entered into
- make allowances for a specified cooling-off period at least seven days after entering into the agreement of paying any money under the agreement
- provide leasing documentation to the retailer
- not prohibit a retailer from associating with other retailers for a lawful purpose

- disclose materially relevant facts such as the finalisation of certain court proceedings and bankruptcy as the supplier becomes aware of them
- follow certain procedures where a renegotiation, variation or transfer of the fuel reselling agreement is sought
- follow certain procedures where it is sought to terminate the agreement because of a breach by the retailer or other special circumstances outlined in the Oilcode
- follow certain procedures before the expiry of the agreement or the parties agree to terminate it early.

6.4 *Dispute resolution*

The Oilcode provides for a dispute resolution scheme, the objective of which is to provide the industry with an effective and inexpensive way of resolving disputes. The scheme includes the appointment of the Dispute Resolution Adviser (DRA).

The scheme covers disputes:

- where a wholesale supplier fails to supply a declared petroleum product to a customer
- arising between parties to a fuel reselling agreement
- arising from any provision of the Oilcode covering TGP or fuel reselling agreements.

The Oilcode provides separate procedures for dealing with disputes about supply of products at a TGP and disputes unrelated to a failure to supply. This is because the Oilcode takes into consideration the potential for commercial damage that may flow as a consequence of a failure to supply declared petroleum products. Consequently the Oilcode provides for disputes about supply to be promptly dealt with by the DRA.

CANADA

1. Introduction

The Competition Bureau of Canada (the “Bureau”) submits this paper in response to the OECD’s request for submission on issues of vertical integration and separation within the gasoline markets.

The Bureau in particular and the federal government in Canada in general do not regulate the gasoline industry. However, given the nature of this industry, the Bureau has investigated the petroleum industry over the years by conducting and commissioning several studies on the gasoline industry.¹

Neither the federal government nor provincial or territorial governments have legislation or regulations that require vertical separation between refiners and retail gasoline stations, although this issue has been examined over the past 20 years by the aforementioned investigations and studies conducted by the Bureau. It is important to note that the *Competition Act* (the “Act”) applies to the gasoline industry as it does to other sectors of the economy. For example, this past June 2008, an enforcement case led to charges and guilty pleas under the conspiracy provision of the Act against gasoline retailers in four Quebec municipalities.

While the federal government does not regulate the gasoline industry, five Canadian provinces have decided to regulate retail gasoline prices. Newfoundland, New Brunswick and Prince Edward Island have implemented maximum retail prices in order to protect consumers. While Quebec uses a minimum price law in order to protect retail margins. Nova Scotia imposes both a minimum and maximum retail price to the benefit of consumers and independent gasoline stations.

2. Overview of Retail Gasoline Markets

According to the *National Retail Petroleum Site Census 2006*, 27 June 2007, from MJ Ervin & Associates Inc.² (the “MJ Ervin Census”), as of the 31st of December 2006, there were 13,772 retail gasoline stations operating in Canada – approximately 4.2 outlets for every 10,000 people. The number of gasoline stations has declined by 36% since 1990, dropping from an estimated 22,000 retail gasoline stations.

The rationalization of the networks started in the 1980s, responding to the over-capacity in the retail segment of the industry. According to the *Study of the Economics of the Nova Scotia Gasoline Market for Service Nova Scotia & Municipal Relations* by Gardner Pinfold Consulting Economists Ltd. and MJ Ervin

¹ The Final Fifteen Feet of Hose: The Canadian Gasoline Industry in the Year 2000, Conference Board of Canada, (2001): What Determines the Profitability of a Retail Gasoline Station, LECG Canada, (2006): Technical Backgrounder on Hurricanes Katrina and Rita, Competition Bureau (2005).

² National Retail Petroleum Site Census 2006, 27 June 2007, from MJ Ervin & Associates Inc.

& Associates Inc. in September 2005, this rationalization has produced a substantial benefit in terms of improved average sales volumes, resulting also in reduced margin requirements at the surviving outlets.³

Gasoline retailing has shifted from a service offered in conjunction with automobile repair services to a gasoline station selling food. The provision of goods and food instead of automobile repair services are of vital importance to the competitiveness and viability of retail gasoline outlets. One of the main reasons explaining this shift is that the gross margin on the sale of a litre of gasoline is generally not sufficient to provide for the operating costs and reasonable return on the operation of these facilities. A study shows other reasons why automobile repairs integrated into a gasoline station are becoming rare: cars are travelling longer distances between fuel stops, requiring less maintenance, carry longer warranties, are much more fuel efficient and they are strongly tied to car dealerships. Also, the emergence of specialist automotive shops (mufflers and shocks), and the emergence of hypermarkets that use cross-merchandising as a means of consolidating demand has contributed to this trend.⁴

3. Structure of the Canadian Petroleum Markets

Canada's gasoline supply is largely produced from the 16 refineries, operated by a total of ten refining organizations.⁵ The MJ Ervin Census describes the following players in the marketplace:

- **Integrated Refiner-Marketers:** marketers whose corporate structure also encompasses one or more domestic refineries. There are ten refiner-marketers operating a total of 16 refineries in Canada.
- **Non-refiner Marketers:** marketers who obtain supply from a refiner "at arms' length".

Non-refiner marketers generally include:

- **Regional Distributors:** An independent marketer who operates a number of retail outlets, which carry a well-known brand (usually a refiner's brand), under a supply and licensing arrangement.
- **Big Box Marketers:** A marketer whose primary offering is non-petroleum in nature, usually dealing in "high volume" retail sites.
- **Traditional non-refiner marketers:** A marketer whose primary offering is petroleum in nature, operating a chain of traditional gas stations under their own brand.
- **Wholesale Brokers:** A marketer who buys from a refiner and sells to independent dealers who are typically not affiliated with any sort of recognized brand.

The control of prices at the retail level are determined by various contractual and ownership arrangements. The refiners control prices in two types of retail outlets: refiner-owned station and refiner-owned with a lease to an individual operator. Twenty-nine percent of all gas stations come under the price control of one of the ten integrated refiner-marketers in Canada.⁶ The remaining 71 percent of gasoline stations control their own prices and fall into the category of non-refiner marketers, which include both

³ Economics of the Nova Scotia Gasoline Market, for Service Nova Scotia & Municipal Relations made by Gardner Pinfold Consulting Economists Ltd. and MJ Ervin & Associates Inc., September 2005.

⁴ *Idem*, supranote 3

⁵ *Idem*, supranote 1.

⁶ Petro-Canada, Imperial Oil or Shell Canada Ltd.

traditional (firms with a primary focus on petroleum products) and non-traditional (firms with a primary focus on products other than petroleum products) marketers.

Independent gasoline stations that are having the most significant impact on the market are "Big-Box" marketers. There are approximately 1,433 gasoline outlets in Canada associated with a "Big-Box" (less than 10% of the market by number).⁷ A "Big-Box" is a non-traditional marketer whose primary source of gross sales revenue is typically merchandise, such as groceries, rather than gasoline. The MJ Ervin Census stated that these "Big-Box" marketers are generally able to charge lower pump prices due to the high volume of gasoline sold and thus low operating costs per litre, as well as the ability to cross-merchandise with their non-petroleum products.

4. Vertical Integration and Separation

The Bureau in the context of studies it has published or commissioned has discussed vertical integration and separation issues at times. These issues include the potential for a small number of refiners to control the retail price of gasoline and the ability of refiners to exclude independent operators from competing by squeezing retail margins.

5. The Restrictive Trade Practices Commission Report

The issue of vertical integration was discussed in the 1986 Restrictive Trade Practices Commission Report titled *Competition in the Canadian Petroleum Industry* (the "RTPC report"). The Restrictive Trade Practices Commission (the "Commission") existed prior to the coming into force of the Act in 1986. It acted as an independent review body or tribunal. Included in its mandate was to conduct inquiries under section 47 of the *Combines Act* (the predecessor to the *Competition Act*), which is essentially an examination of the workings of the markets or markets involved. In 1981, the Commission was asked by the Director of Investigation and Research (the predecessor to the Commissioner of Competition) to examine the state of the petroleum industry in Canada. This followed an eight-year investigation by the Director dating back to 1973 into allegations of price-fixing by oil companies as well as to determine whether or not vertical integration had contributed to higher prices for gasoline and fuel oil.

The result was an extensive report that looked into the petroleum industry from 1958 – 1985.⁸ The report looked at various trends affecting the Canadian gasoline market, including the effect on competition of "swap agreements" and vertical integration.

With respect to the issue of Inter-Refiner Supply Agreements, or "swap agreements", the Commission found that the agreement between refiners were not anti-competitive but efficiency enhancing given the geography of Canada. There were a number of agreements that the Commission studied, including exchange, processing and terminalling agreements⁹. All of the individual refiners had agreements with other refiners forming a network, which ensured supply in the event of a supply shock. As well, it allowed for more efficient refinery utilization rates and reduced transportation costs. The Commission agreed that the swap agreements helped refiners to be more efficient, and cited the difficulties and costs of integrated firms to establish new refineries in distant locations, when existing capacity was not being used. This allows refiners without a local refinery to compete with local firms at the retail level.

⁷ *Idem*, supranote 1.

⁸ "Competition in the Canadian Petroleum Industry", Restrictive Trade Practices Commission (1986).

⁹ According to the RTPC Report, under a terminalling agreement a firm having bulk storage and handling facilities agrees to receive product, store it and redeliver it to the same firm according to an agreed schedule in return for a "throughput" fee.

At the time, the predecessor to the Competition Bureau raised issues with the ability of a small number of refiners to have direct control of retail prices. The Commission rejected this argument, as the data did not prove that competition had been reduced.¹⁰

The Commission also explored the issue of sharing risk when an independent retailer enters into an agency agreement with a refiner. This type of agreement allows for the retailer to sell gasoline as an agent for the refiner, earning a commission on each litre of gasoline sold. The refiner may be in a better position to assume the pricing risk inherent in the market. The final major issue that was contemplated by the commission relates to price support given to branded independents.

In times of shrinking retail margins, refiners have extended price support to their independent dealers in order to ensure a viable margin. In these cases, the retail outlet will cede control of pricing to the refiner, who will ensure that the retailer makes a certain margin.

The Commission's report recognized that there are potential problems with vertical integration; however, restricting vertical arrangements in gasoline had resulted in higher, not lower, consumer prices in the jurisdiction examined.¹¹

6. The LECG Report

The issue of vertical integration was examined again in 2005 following complaints from independent gasoline retailers about margin squeezing and predatory pricing by national-owned and large independent retailers. The Bureau's examination addressed allegations that the national refinery-owned and large independent retailers dropped gasoline prices below their cost in these areas during certain periods in order to eliminate independent retailers (predatory pricing). It also examined complaints that the national refinery-owned gasoline retailers charged higher wholesale prices to independent retailers who compete with their outlets at retail (margin squeezing). As a result of the alleged behaviour, the independent retailers claimed their profit margins had eroded over time, hurting their ability to compete.

The Bureau concluded that there was insufficient evidence to support allegations that the refinery-owned gasoline and large independent retailers engaged in abusive behaviour to eliminate or discipline independent retailers. In the course of the investigation, the Bureau hired LECG, a consulting group, to perform an independent study on the profitability in Canada's retail gasoline market.¹²

One of the objectives of the LECG Report was to compare the profitability of independent gasoline retailers with vertically integrated retailers. In doing so, the authors compared two independent retailers with three vertically integrated retailers. While the data set was relatively small, and the study was only able to include big box independent retailers, the conclusions remain valid in that wholesale prices charged to independents are nearly identical as to the transfer prices enjoyed by vertically integrated retailers.

The key conclusion of the study is that throughput remains a very important driver of profitability. Throughput increases the number of customers that may purchase ancillary services, however, more importantly, the study indicated that the higher throughputs allows the operators to realize lower average costs and has a substantial impact of profitability.

¹⁰ Ibid. p.280.

¹¹ Ibid p. 282, the Commission reviewed an academic paper that explored the effects of legislation in Maryland that required vertical separation.

¹² LECG Report, *What Determines the Profitability of a Retail Gasoline Outlet?* published in March 2006. ([http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/RetailGasolineOutlet-e.pdf/\\$FILE/RetailGasolineOutlet-e.pdf](http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/RetailGasolineOutlet-e.pdf/$FILE/RetailGasolineOutlet-e.pdf)).

7. Advocacy

From time to time the Bureau will provide comments to or will appear before certain bodies when new laws or regulations are being considered. The Bureau advocates for open competition in Canadian markets to promote efficient allocation of resources within the economy and provide consumers with the best price, choice, quality and innovation.

For example, the Bureau commented to a Nova Scotia legislative committee when the committee studied the issue of vertical separation in 2004. In those hearings, the Bureau indicated that the evidence from four U.S. states that did impose “divorcement” laws resulted in higher prices and shorter operating hours.¹³ The committee decided to propose vertical separation. Ultimately the Government of Nova Scotia decided against the proposal and instead elected to regulate prices. Nova Scotia imposed both a minimum and a maximum price in order to protect retailers and consumers. The Nova Scotia law explicitly regulates retail margins.

8. Conclusion

While there have not been recent indepth studies on vertical integration issues in the gasoline sector in Canada, it is important to note that the Bureau believes that generally market forces should prevail over regulation, or in this case, mandating vertical separation. Vertical integration is more often than not pro-competitive and efficiency enhancing. Only in situations where there is evidence of anti-competitive behaviour would the Bureau intervene. Even in such a case, it is unlikely that the Bureau would seek an order requiring vertical separation.

¹³ Speaking Notes, Richard J. Taylor, Deputy Commissioner of the Civil Matters Branch of the Canadian Competition Bureau, July 27, 2004.

GERMANY

1. Introduction

Unbundling, as a structural measure to solve competition problems, is not implemented in the German Act against Restraints of Competition (ARC). Therefore the Bundeskartellamt does not have any case history in unbundling and its effects in retail fuel markets.¹

The following contribution focuses on presenting an overview of the structure of the fuel markets in Germany.

2. General information²

In 2007 about 35.6 million tons of fuel were sold by more than 14,000 retail fuel outlets. That is 1.8 percent less than in 2006. The fuel-trading companies expect that, although there will be more registered cars, total fuel sales will decrease by 25 percent and the sales of gasoline, in particular, will fall by 40 percent by 2025. The main reasons for the decreasing sales are reported to be higher prices for fuel and more efficient car engines.

Before fuel is sold at retail fuel outlets, it has to be produced (i.e. refined from crude oil), transported and stored. Germany's domestic crude oil production is comparatively small (3.5 million tons in 2006), so most of its demand is imported. In 2006 the total import volume amounted to 109.4 million tons. The most important countries of origin were:

Table 1.

<i>Country</i>	Share of German imports in 2006
Russia	33.7 percent
Norway	16.9 percent
Great Britain	12.1 percent
Libya	11.3 percent
Kazakhstan	7.0 percent
26 other countries	19 percent

Crude oil is transported into Germany by barge or pipeline from the nearby European seaports in Belgium, the Netherlands, France and Italy. In Germany, there are 14 German refineries with annual refining capacities of 119 million tons, i.e. some three percent of the world-wide capacity. Germany is a

¹ Four out of ten cars in Germany run on diesel. Due to the far-reaching similarities of the fuels, their chains of distribution, etc. the details given below cover both, gasoline and diesel (referred to as: markets for fuel).

² The source of this information is the Bundeskartellamt's recent merger decision in case B8 - 134/07 - Shell/HPV, which is available in German at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B8-134-07.pdf>.

net-exporter of refined mineral oil products. For the domestic distribution of fuels, seven major pipelines and 279 tank farms with a total capacity of 68 million cbm are used.

3. Specific Regulations

As elsewhere, retail prices for fuel in Germany have to be displayed in a manner which enables approaching car drivers to easily compare prices. Yet, the public display of prices also makes it very easy for competitors to know the current fuel prices of their competitors in the markets. The integrated oil companies are known to systematically collect data on the prices of their competitors several times a day. With this information they have the opportunity to aggregate and analyse the prices on a nationwide basis. Any change of price by a competitor is therefore known immediately in the market. This ensures high price transparency, at least for the big integrated oil companies.

National law, implementing Directive 2003/30/EC on the promotion of use of biofuels or other renewable fuels for transport, stipulates that biofuels have to be blended into mineral oil derivatives by certain percentages. This blending process affects the transportability and storage suitability of fuel. For quality reasons, the industry is hesitant to transport ready mixed motor fuels by river barges. Thus, the mineral oil derivatives have to be blended afterwards or transported by pipeline. Therefore importers of fuel depend on suppliers of fuel additives and biofuels. The suitability of blended products for storage is also reduced from three to four years (mineral oil products) to only a few months for blended products. Therefore tank farms rely on a relatively fast turnover of their stored fuel.

4. Retail fuel outlets

The retail markets for fuel are divided into outlets of the vertically integrated oil companies (“majors”) and independent outlets. The latter are rather fragmented and are thus not in a position to act as an effective counterbalance to the majors.

4.1 *Vertically integrated oil companies*

In 2007, the five majors, Shell, BP/Aral, Esso (Exxon), Total and ConocoPhillips/Jet, accounted for about 7,400 retail fuel outlets (service stations) in Germany. These service stations are run by sales agents of the integrated companies or by branded resellers. They cover some 50 percent of all outlets, but account for 72.5% of the total amount of fuel sold, revealing the majors’ relative strength in turnover. Their nationwide market shares in 2007 were:

Table 2.

Company	
Aral	23 percent
Shell	22.5 percent
ConocoPhillips	10 percent
Esso (Exxon)	8.5 percent
TOTAL	8.5 percent
<i>Sum</i>	<i>72.5 percent</i>

These high market shares have been fairly stable for years and indicate that there is only limited scope for competition. Consequently, and due to the evidence of a number of facilitating factors, the

Bundeskartellamt in its latest merger decision in the fuel retail markets³ established that the five majors together hold a collective dominant position on the German market for fuel distribution via petrol stations.

Another 10 percent of fuel retail sales are accounted for by three affiliates of vertically integrated oil companies which, however, have most of their production facilities abroad. These are:

Table 3.

Company	<i>Nationwide market share in 2007</i>
Agip	4.5 percent
OMV	3 percent
Orlen	2.5 percent
<i>Sum</i>	<i>10 percent</i>

Agip is a subsidiary of the Italian energy company ENI and has been active in Germany since the 1960s. OMV and Orlen belong to the leading Austrian respectively Polish oil fuel company. They both entered the German markets as a result of divestiture requirements in the Bundeskartellamt's earlier merger decisions in the cases BP/Aral and Shell/DEA in 2001.⁴

Vertical integration, spanning the chain from production/refinery to retail at the pump, gives fuel companies, especially the majors, a high degree of flexibility in allocating costs at different points in the processing chain as well as in setting prices and adjusting them quickly over large sales areas. Thus, while prices at the pump, across the spectrum of the firms in the markets, are transparent for any observer (but especially for the integrated fuel companies, cf. above), the relevant factors, occurring somewhere along the processing chain, which determine the price-setting of an individual vertically integrated fuel firm are hard to discern from the outside.

4.2 Other Competitors

Several small and medium-sized companies are only active on one level of the trade chain. Some of them run service stations which are independent of the majors (so-called "white pumps" or "freie Tankstellen" in German). Some of the medium-sized companies are organized in the AVIA brand and purchasing community. A significant number of the independent retailers use the common brand of their association called Bundesverband Freier Tankstellen e.V. (bft). Bft, however, does not constitute a single economic entity; it is a business association of several hundred small independent operators.

5. Upstream market levels

5.1 Vertically integrated oil companies

On the upstream markets the links between most of the vertically integrated oil companies are very close. In particular, joint ventures are operated for refineries, tank farms and pipelines (not retail fuel outlets, however).

³ See case B8 - 134/07 - Shell/Hanseatic. The decision is available in German on the Bundeskartellamt's website at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B8-134-07.pdf>

⁴ See cases B8 - 120/01 - Shell/DEA and B8 - 130/01 BP/E.ON (ARAL). The decisions are available in German on the Bundeskartellamt's website at <http://www.bundeskartellamt.de/wDeutsch/archiv/EntschFusArchiv/2001/EntschFus01.php>.

5.1.1 *Refineries*

Each of the big five integrated oil companies offers its products nationwide, but not every one of those companies has got refineries in every part of the country. However, all German refineries are in solitary or common possession of the vertically integrated oil companies.

5.1.2 *Pipelines*

The German refineries receive most of their crude oil from abroad. The commodity is transported by barge and pipeline. There are also pipelines in Germany that transport fuel to or between the tank farms. The most important pipelines for crude oil and all the pipelines for gasoline are jointly owned by the vertically integrated oil companies.

5.1.3 *Tank farms*

The gasoline produced by the refineries is stored to a large extent in tank farms. These are either run by the vertically integrated companies or by specialised independent companies. As diesel fuel and gasoline (each separately) are homogeneous products, there is no need to store the fuel of different companies in separate tanks. Diesel and gasoline are given their respective brand specifics by blending with additives. The additives are only added when the fuel leaves the tank farm.

5.1.4 *Swaps*

The big vertically integrated oil companies operate a system of fuel exchange between their tank farms. They also share some of the independent storage facilities by means of common contracts. The economic effect is a reduction of costs for nationwide access to fuel. However, this system also has the effect of increasing transparency among the major companies. They are aware of any change in the amount of fuel sold by a single supplier.

5.2 *Other Competitors*

There are no refineries or major pipelines that are operated independently of the vertically integrated oil companies.

There are some companies running independent tank farms, but only as service providers vis-à-vis mineral oil product wholesalers.

The only opportunity for importers to buy fuel at competitive transport prices without using the facilities of the vertically integrated oil companies is transport by barge along the river Rhine from the seaports of Amsterdam, Rotterdam and Antwerp. The problems with the transport of ready mixed fuel on barges have already been mentioned.

6. **Sector Inquiry of the Bundeskartellamt**

The Bundeskartellamt started a sector inquiry this summer to gain a better understanding of the fuel markets in Germany. It aims to assess whether the fuel markets in Germany are functioning properly.⁵

⁵ See the press release in German on the Bundeskartellamt's website at http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2008_05_28_II.php

As a first step, the sector inquiry has started to examine the general market conditions and to identify the possible distortions of competition. So far there have been no results that can be reported.

7. Unbundling of the Retail Fuel Outlets

With the present knowledge about the fuel markets in Germany it cannot be reliably said that unbundling the retail fuel outlets from the major vertically integrated oil companies would have a specific effect (i.e. on the prices for fuel) on the markets.

Generally, unbundling can be an appropriate instrument of active competition policy to solve competition problems on static markets with high concentration. In particular, vertical unbundling may be an effective measure to reduce the potential for discrimination or obstruction along the value chain in downstream markets.

However, unbundling by the State is not adopted as a measure to remedy competition problems in the German ARC and there are no plans to do so.

Any attempt to introduce measures allowing for unbundling provisions would likely be challenged as serious infringements of the basic rights of property and free enterprise and would have to fulfil the condition of commensurability.

HUNGARY

1. Status of vertical relations related to retail gasoline outlets

Although increasing gasoline prices have frequently been the topic of policy discussion, no national laws or regulations requiring either explicit vertical separation of refineries from gasoline distributors or retailers, or some level of vertical unbundling exist nor have ever existed in Hungary. Therefore, retailers are not restricted in building or buying their own refinery capacity, although there have been no such market transactions in the past, so the market environment is quite stable from the point of view of vertical integration.

The upstream market of refining and wholesale of gasoline in Hungary is very concentrated and all market players are integrated further downwards in the retail sector. The leading player is the Hungarian oil company MOL, serving more than 80% of the Hungarian market from its Százhalombatta (Hungary) and Bratislava (Slovakia, bought in 2002) refineries. The main competitive constraint on MOL's behaviour comes from the Austrian oil company OMV, which owns big refinery capacity near the Hungarian border (Schwechat) but sells mainly to its own stations. Russian oil company Lukoil started to expand its downstream activity by buying gasoline stations from 2004, but having its closest refinery in Romania, it relies partly on MOL's wholesale supply as well. Other market players (PKN/Unipetrol and Agip) have negligible market shares (1-2%).

Table 1. Estimated market shares at the upstream level

MOL	80+%
OMV	10+%
Lukoil	Max 5%

The downstream market of gasoline retail is less concentrated than the upstream level, although more than two-third of the 1300 stations are controlled by four leading oil companies: MOL, OMV, Shell and Agip. Besides these main brands, two types of more serious competitors emerged in the recent years: the above-mentioned Lukoil with station acquisitions and hypermarkets opening new stations (with Tesco accounting for more than 80% of these). There also exist two types of competitive fringe: about 30 smaller networks selling branded gasoline from 2-10 stations each, and more than 100 "white" stations selling non-branded gasoline. To sum up, fully vertically integrated firms supply around half of the downstream market.

Table 2. Estimated market shares at the downstream level

MOL	30-35%
OMV	10-15%
Shell	10-15%
Agip	10-15%
Lukoil	5-7%
Hypermarkets	Around 5%
Small brands	10-15%
White pumps	10-15%

The majority of company-owned stations is operated by an external dealer in the so-called Co-Do model, where the company keeps the right to set station level retail prices.

The competition authority of Hungary (GVH) run antitrust investigations against MOL in 2000 and 2004 (case numbers Vj-2000/152 and Vj-2004/33) on whether MOL abuses its dominant position on the upstream market by setting excessively high wholesale prices for its downstream competitors. Although it was found in both cases that MOL was indeed in a dominant position, its pricing was not found to be excessive. There have been no antitrust (and to our knowledge, any other types of legal) actions taken against retail wholesalers on price or service discrimination (which could be regarded as an abuse of dominance under Section 21 of the Hungarian Competition Act) or on resale price maintenance (which is covered by Section 11 of the Hungarian Competition Act). There have also been no acquisitions of wholesale capacities; therefore the issues of vertical relations and separation were not specifically investigated.

For recent years, we do not have explicit information on the existing vertical relations between gasoline refiners and retailers. As there have been no major changes or events on the market that would have made these kinds of investigations possible, the evolution of vertical contracts in the Hungarian gasoline sector was examined neither by academic researchers nor by the GVH.

The classical segments of the energy sector remained highly regulated even after the market opening. As the ongoing discussion on vertical separation in the electricity and gas sector has not come to an end yet, the current Hungarian legislation in these sectors does not reach beyond what is necessary according to EU laws. Therefore, Hungary's present laws and regulations do not require vertical separation between network and commercial activities in the economic sense of ownership unbundling; only legal separation and the unbundling of accounting. Currently every company active in the retail of electricity / gas is affiliated to firms that hold interests in generation / exploration as well, and so we cannot yet identify or compare the costs and benefits of vertical separation.

2. Costs and benefits of different vertical relations related to retail gasoline outlets

Vertical separation in the retail gasoline sector as such has not been the direct topic of policy discussion, therefore the potential benefits and costs were not compared. Some of these issues arose indirectly after the hostile takeover attempt of MOL launched by OMV in late 2007, which would have combined the two main gasoline suppliers of the Central European region.¹ Therefore, market power at the wholesale level and vertical issues were examined in a Phase II investigation by the European Commission in detail (case number M.4799). However, OMV abandoned the merger after receiving the Statement of Objections in August 2008, so there are no public results that emerged as a result of the merger investigation.

Although there were no shocks that may have affected vertical integration in Hungary, we are able to use a large panel database covering a significant share of gasoline stations in order to compare the prices and services offered by companies with different levels of vertical integration. Our database contains price data for a selected day (Friday) in 88 consecutive weeks between October 2006 and August 2008 for almost 90% of Hungarian petrol stations.² In this document, we merely present some of the simplest

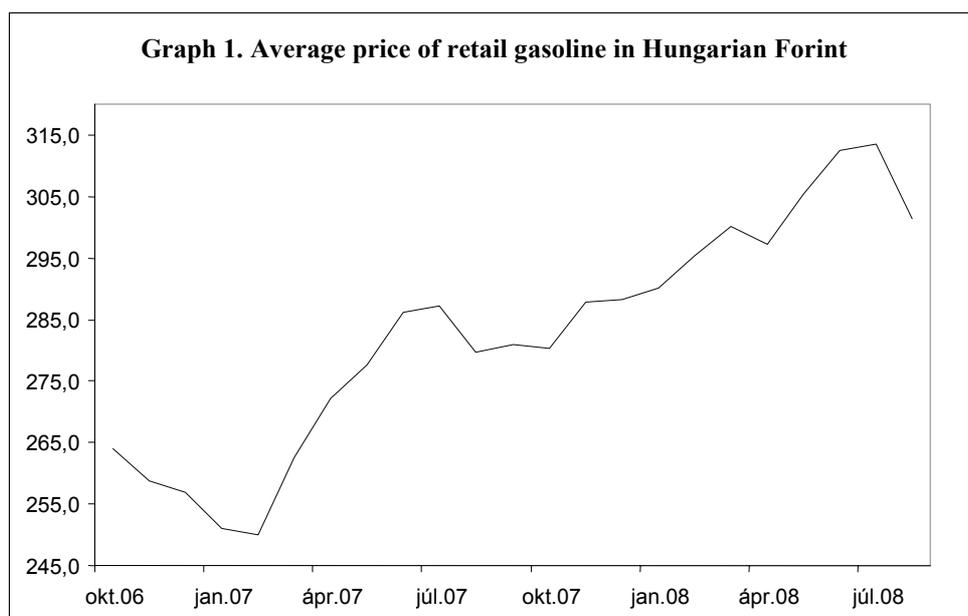
¹ As these two companies are the only integrated players who would be able to engage in quantity swapping, their hostility against each other makes these agreements unlikely.

² The source of our data is a public homepage used for daily gasoline price comparisons: www.holtankoljak.hu (Where To Tank?), run by a private company. We selected Friday as this was the day with the most observations, and price changes are usually made on Wednesdays.

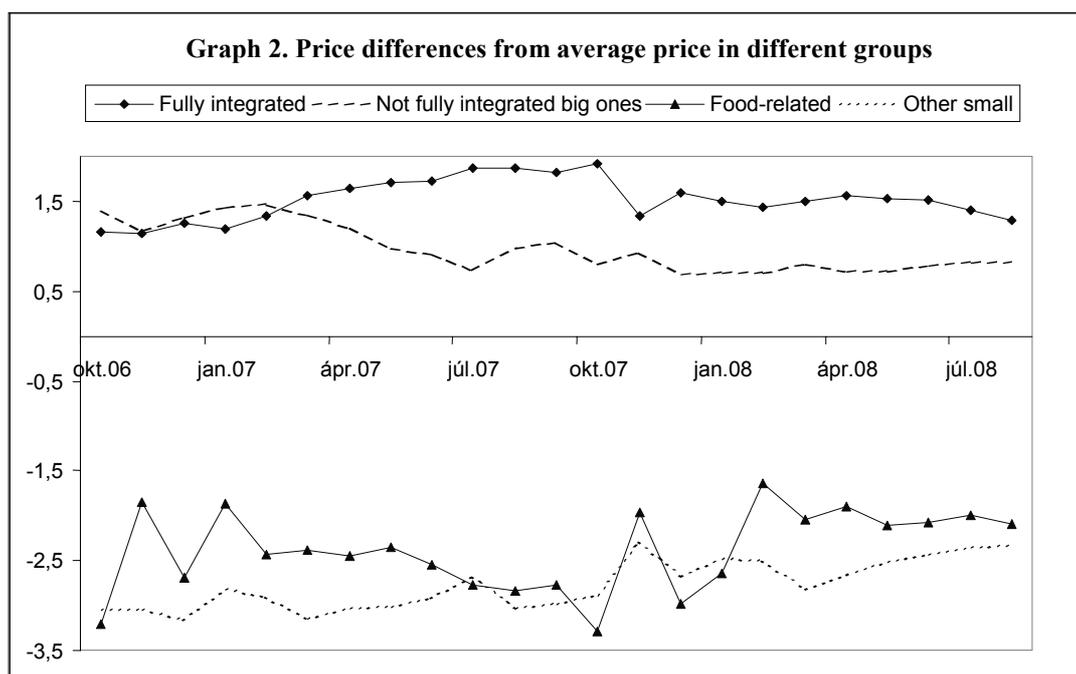
stylized facts that might shed some light on the effect of vertical integration on gasoline retail prices and services offered.

2.1 Pricing

Similarly to other OECD countries, average retail prices have risen significantly in Hungary following the crude oil price increases in 2007, as the diagram below also demonstrates. The increase was 16% over 2007, and a further 8% in the first half of 2008.



However, if we take a look at company-level average prices, there are some noticeable differences in pricing between the firms with different profiles, which are quite stable over the observed period of two years. Vertically integrated firms (MOL, OMV) are on average the most expensive ones followed by stations owned by large but not fully integrated firms (Shell, Agip), but all four are able to charge a significantly higher price than average. Stations connected to hypermarkets charge a significantly smaller price than average, while the prices of small brands and at white pumps are even lower. The graph below shows how the average price of these groups differs from the overall average price in the observed period.



Although we cannot observe the exact contractual vertical relationship between these different groups and their wholesalers (which should mostly be MOL), we can use these groups as proxies for different level of vertical integration.³ Note that the observed price differences are statistically significant, but they are not necessarily significant from an economic point of view: a 5 HUF price difference, which is not very common, represents just 2.5% of the average price.

One might argue that vertical integration is not necessarily the main factor behind higher prices: downstream market power (approximated by market share) can also be a price-driver, since vertically integrated companies are usually larger. In our case, however, we can partially separate these two explanations, as the second largest integrated player OMV is roughly of the same size as the large non-integrated suppliers, and OMV's pricing seems to follow the other vertically integrated firm's pricing more closely than Shell's or Agip's do.

The effect of full vertical integration can be also estimated by simple panel regression analysis, in which we can control for local demand characteristics for each station and for common shocks in time (changes in the wholesale price) as well.⁴ Our results indicate that fully integrated retail stations charge a price that is about 2.5 HUF higher on average than that of non-integrated companies – this difference is statistically significant, although it constitutes only about 1% of the average price.

There has been one antitrust case (Vj-168/2004) in which the GVH investigated whether some stations connected to hypermarkets were offering prices below costs, but found no evidence on this matter. The parties claimed that low wages and the significant economies of scale arising from their other selling activities (so common costs of infrastructure and operation are distributed over a lot of transactions) allow them to set these prices, making the gasoline branch profitable.

³ This method might also be justified by the fact that price differences between these groups are smaller than differences within the group.

⁴ For each station we observe the so-called statistical municipality it resides in (this is a statistically defined area where the inhabitants do most of their shopping activities, so it can be used as a proxy for the local market), and therefore local demand characteristics (population, average income) can be controlled.

2.2 Services

In line with some other countries' experience, the focus of services offered by retail stations in Hungary has shifted from automobile repair services to a model with snack and other food sales, complemented by the sale of newspapers, gifts, etc. There remain only a few petrol stations where automobile repair services are still provided.

In our database, some of these services are recorded, such as: restaurant, ATM, sale of highway vignette, sale of medicinal products, Internet services. The following table gives information about the penetration of these services at various petrol stations.

Table 3. Estimated market shares at the downstream level

	Restaurant	ATM	Vignette	Medicine	Internet
<i>Average for all stations</i>	26,1%	6,3%	38,2%	1,0%	4,6%
Average for fully integrated stations	27,5%	7,2%	45,6%	2,3%	7,5%
Average for non-integrated stations ⁵	29,8%	6,2%	39,7%	0,3%	3,0%
Average of Agip & Shell	35,7%	9,1%	48,6%	0,4%	5,1%

We can see that the penetration of all these services (except for that of restaurants) is higher at the petrol stations operated by integrated companies than at stations operated by non-integrated ones – however, the differences are not striking.⁶ Again, a part of these differences may be explained by size effects, so it might be more fruitful to compare the integrated companies to networks of similar size, Agip and Shell, whose stations offer these services with considerably larger likelihood (except for medicines). Based on these stylized facts, we cannot state that the fully integrated companies have any advantage in the provision of these additional services.

⁵ Without white pumps.

⁶ These differences in penetration are again statistically significant.

IRELAND

1. Introduction

The Irish Competition Authority is pleased to make this submission to Working Party 2 concerning vertical relationships in gasoline retailing in Ireland. The Competition Authority recently completed a consultation on this subject and, pursuant to this consultation, issued a Category Declaration in July 2008. This Declaration states that, where certain conditions are met, specified types of motor fuel retailing vertical arrangements meet the exemption criteria detailed under s.4(5) of the Competition Act 2002.¹ This submission draws heavily on the Authority's recent work on the Category Declaration.

2. Status of vertical relationships in gasoline retailing

2.1 *Solus Agreements*

Vertical agreements binding owner-operated retail gasoline outlets are an important feature of the motor fuel retailing landscape in Ireland. Agreements of this nature which feature exclusive purchasing requirements are referred to in Ireland as "Solus agreements". Solus agreements featuring exclusive purchasing obligations allow retailers to take advantage of the branding and cross-selling opportunities, as well as the marketing expertise and buying power of the upstream firm.

Due to the competition concerns arising from the exclusive nature of Solus agreements, and recognising the benefits which can also arise from Solus agreements, the Competition Authority issued a Category Licence in June 1993 to specific types of motor fuel exclusive purchasing arrangements. This Category Licence provided a "safe harbour" for such agreements once certain specified conditions were met.²

The Category Licence, which was of 15 years' duration, expired on June 30th 2008. Accordingly, the Competition Authority issued a consultation in 2008 concerning the renewal for a period of two years of an exemption for Solus agreements. Following receipt of a number of submissions, the Authority has renewed its exemption for such agreements for two years in the expectation that, given altered market structures, the exemption will lapse in 2010.

2.2 *Refineries*

There are no laws requiring vertical separation of refiners from gasoline retailers. There is only one refinery in Ireland, based in Whitegate, Co. Cork. This refinery was sold by the state-owned Irish National Petroleum Corporation (INPC) to Tosco in 2001. Tosco was subsequently acquired by ConocoPhillips in

¹ The Category Declaration is available online at <http://www.tca.ie/EnforcingCompetitionLaw/DecisionsandCooperationAgreements/Declarations/Declarations.aspx>

² The Category Licence is available online at <http://www.tca.ie/EnforcingCompetitionLaw/DecisionsandCooperationAgreements/Declarations/Declarations.aspx>

2001, which now operates the refinery, which has a net gasoline production capacity of 18 million barrels per day. It supplies over one third of the Irish transport fuel market, involving major oil distributors and smaller re-sellers. ConocoPhillips previously operated at the retail level in the Irish market, operating the JET brand. However, JET was acquired in 1996 by Statoil,³ which was itself acquired by Topaz in 2006, and ConocoPhillips no longer has a retail presence in Ireland.

Motor fuel is also sourced from depots located principally in Dublin and Cork. Most motor fuel companies have their own depots from which they supply to both company-owned and owner-operated retail outlets, although Tesco sources its motor fuel from Topaz.

2.3 *Types of vertical relationships in gasoline retailing*

The Competition Authority has in the past identified four stages of the motor fuel industry in Ireland:⁴

- Stage 1 - Product Supply from Refineries;
- Stage 2 – Wholesalers;
- Stage 3 - Inland Distributors; and
- Stage 4 – Retailers.

2.3.1 *Stage 1 – Product Supply from Refineries*

As detailed above, there is only one refinery in Ireland, which sells product on the Irish market.

2.3.2 *Stage 2 – Wholesalers*

The function of wholesalers is to import petroleum products into Ireland using depots, usually located in ports and storage facilities throughout the country, although they may also make use of the refinery facilities at Whitegate. Wholesalers are generally vertically-integrated oil companies and are both Irish-owned and multinational. However, a number of storage facilities are operated on a shared storage basis, such as the Dublin Joint Fuels Terminal, operated jointly by Esso and Texaco, and independent terminal operators (e.g. Simon Storage at Shannon on the western seaboard) also participate in the market, while bulk liquid storage facilities are owned by the major ports and made available to oil firms. Campus, Maxol, Topaz and TOP all operate their own terminals at ports, while Esso and Texaco jointly operate a terminal facility, while also servicing third party oil firms. Of these firms, only Esso and Texaco are integrated back to the refining stage.

2.3.3 *Stage 3 – Inland distributors*

Distributors are supplied by a number of wholesalers including multinational Irish brands. The distributors draw from the wholesalers' coastal terminals (or from dry terminals inland) for resale to a range of domestic, industrial, commercial and agricultural customers.

There are many more companies involved in this stage. Some of these companies may be vertically integrated up to Stage 2 or Stage 1 through subsidiaries, (e.g. Texoil, Esso, TOP, Campus) although the

³ Due to competition concerns, some JET stations were acquired by Maxol rather than Statoil.

⁴ Competition Authority Decision of 30 January 1998: Notification No. CA/15/97 - Statoil Ireland Ltd./Clare Oil Company Ltd. - Share Purchase Agreement and Service/Employment Agreement.

majority of companies at Stage 3 are independently-owned – Maxol, Emo and Topaz rely either completely, or to a very significant degree, on authorised distributors. The predominant means of distribution is through authorised distributors. However, for many independent authorised distributors, the nature of their contracts with their suppliers means that they are vertically integrated through exclusive purchasing contracts or territorial arrangements.

2.3.4 *Stage 4 – Retailers*

At Stage 4, the most common types of vertical relationships in gasoline retailing are company-owned stations and exclusive purchase lessee-dealer or owner-operator contracts, (Solus agreements). The number of service stations in Ireland has been declining consistently over the past 15 to 20 years, and Solus agreements account for a smaller proportion of supply arrangements to service stations than in the past. There is no standard industry distribution model, as various motor fuel distribution firms operate differing vertical relationships, with some firms owning most of their service stations outright, while others prefer to operate predominantly by means of Solus agreements.

By comparison, the number of independent motor fuel retailers is small. “Independent” retailers, taken to mean retailers which operate open-dealer contracts, form the smallest cohort of gasoline retailers in Ireland, and the vast majority of service stations are either company-owned or operated under Solus agreements which are generally of five years’ duration.

Legislation is not prescriptive with respect to vertical arrangements in the industry. While varying degrees of separation have been applied to state-owned incumbent natural gas and electricity firms (Bord Gáis Éireann and the ESB respectively), no such legislative requirements have been placed on the gasoline retailing industry.

It is expected that, until 2010, vertical relationships in gasoline retailing will be treated differently from other vertical relationships only insofar as they accord with the Authority’s Category Declaration. The Competition Authority has clearly signaled that it expects the Category Declaration to lapse in July 2010, after which time, Solus agreements will likely be treated in the same manner as any other form of exclusive purchasing agreement by the Authority. The two-year lead-in time has been provided by the Authority in order to avoid confusion in the market due to a lack of notice. For example, further to the Motor Fuels Category Declaration of July 2008, resale price maintenance is not permitted. However, a supplier may impose a maximum resale price.

3. Costs and benefits of different vertical relationships related to retail gasoline outlets

3.1 *The Retail Landscape in Ireland*

The motor fuel retail market has changed appreciably in recent years – in particular, forecourt retailers have increased their product and service offerings to approximate a convenience store-type experience. Comparatively low margins on fuel sales mean that petrol and diesel are used by retailers to increase footfall into the forecourt shop where higher-margin products are sold. Forecourts have moved from offering basic motor fuel provision, along with perhaps minor mechanical services and basic grocery provision, to a much more diverse set of offerings, encompassing a range of consumer services, such as ATMs, substantially larger grocery stores, deli items, sale of hot food and beverages, off-license sales of alcohol, provision of wi-fi connectivity and other ancillary services. The most recent data available (2006) indicates that approximately 60% of forecourt retailers operate both a motor fuel-specific brand and a grocery-specific brand at the forecourt.⁵ In April 2008, Texoil, a Joint Venture involving Texaco, signed an

⁵ Competition Authority, 2008. A Description of the Structure and Operation of Grocery Retailing and Wholesaling in Ireland: 2001 to 2006, p.158.

agreement with grocery retailer Londis to locate 20 convenience store outlets at Texaco forecourts,⁶ while Maxol commenced an alliance with Mace in 1997.⁷

This change in forecourt offerings has been driven, inter alia, by the need to maximise return on investment, as retailers diversify into higher-margin, lower-bulk consumer offerings. It has also been driven by customer and service innovation by distribution firms aiming to capitalise on strong branding presences by offering high-quality, homogeneous services across the entirety of their service station network.

Indeed, Topaz which operates Ireland's largest (c.350) forecourt retail network, having acquired the Shell and Statoil forecourt brands in October 2006, has recently announced plans to move into non-fuel dedicated convenience store retailing. This is likely to remain a strong growth area in forecourt retailing. Concomitantly, the availability of automobile repair services has declined significantly and has now largely retrenched to garages and dedicated automobile repair workshops, save for a small number of service stations which are attached to car dealerships. Tesco also obtains its fuels from Topaz.

3.2 Decline in Service Station Numbers

There has been a major decline in the number of forecourt retailers - from about 2,500 ten years ago, to the current level of around 1,200. Irish Petroleum Industry Association (IPIA) figures indicate that IPIA-member service station numbers have declined from 2,308 in 1997 to 1,092 in 2007. There are a number of reasons for this decline:

- More stringent safety standards, such as the European Communities (Control of Major Accident Hazards involving Dangerous Substances) Regulations, 2000, have led to an almost complete decline in the provision of "kerbside" (as opposed to forecourt) motor fuel provision.
- Until the recent decline in the Irish commercial property market, forecourt closures were also driven by high property prices in Dublin, rendering the closure and sale of service stations for development attractive to owners, as well as extremely tight margins on fuel sales, and pressure from Tesco service stations.

The number of forecourt convenience store retailers has increased dramatically in recent years, according to the Department of Enterprise, Trade and Employment.⁸

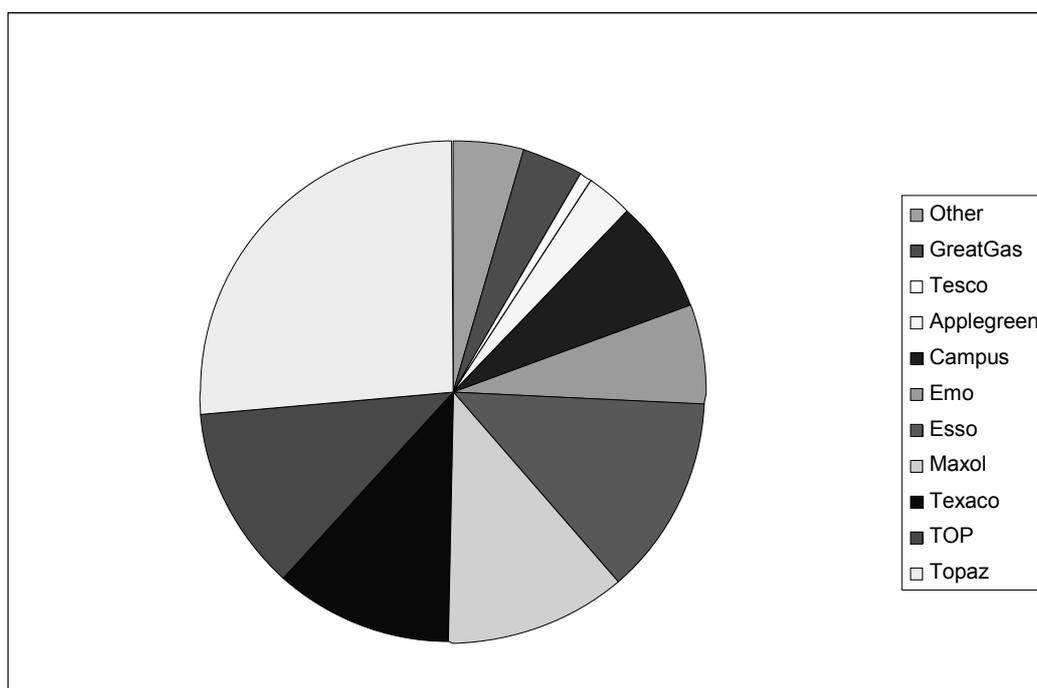
Moreover in recent years, Tesco has entered the market and often, though not always, offers low fuel prices compared to neighbouring service stations; although it only has a retail footprint of 12 petrol stations nationwide, compared to from 150 to 350 outlets for the four biggest motor fuel retailing groups, it has an estimated 6.5% market share.

Approximately ten retail brands operate nationally in Ireland, the largest of which, Topaz, operates a network of 350 service stations, some of which it owns and some of which it operates under Solus agreements. Esso, Maxol, Texaco and TOP all operate similar numbers of service stations, while a variety of brands account for the remaining 22% of service stations:

⁶ <http://www.irishtimes.com/newspaper/breaking/2008/0408/breaking36.htm>

⁷ http://www.estuaryfuel.ie/maxol_group/company_history.html

⁸ "Restrictive Practices (Groceries) Order 1987 - A Review and Report of Public Consultation Process", p.51. Available online at <http://www.entemp.ie/publications/commerce/2005/groceriesorder/chapter5.pdf>

Figure 1. Service Station Brands in Ireland, 2008, n = 1332

3.3 *Enforcement: the Statoil Price Support Agreement*

The Competition Authority has had cause to examine the motor fuel retail industry on a number of occasions. The Authority very frequently receives complaints from members of the public concerning alleged collusion in the setting of prices at fuel pumps. However, almost invariably, parallel pricing is taking place, rather than collusion.

In 2002 the Competition Authority initiated its own investigation into possible resale price maintenance in Letterkenny, a town of in the north-east of Ireland, by Statoil Ireland and its three motor fuels retailers in the town. This followed an earlier investigation by the Competition Authority into allegations of retail price fixing in Letterkenny among motor fuels retailers. That investigation was closed.

During the course of that investigation it came to the Competition Authority's attention that Statoil was operating a scheme, the Price Support Agreement, with independent retailers of motor fuels. These agreements provided financial support to Statoil retailers in order to match the price of selected motor fuels retailers that are most likely to compete with the Statoil stations. However, as part of the agreement the Statoil branded station owner was not allowed to charge more than the Statoil recommended retail price and would not receive price support from Statoil for any price cut below the marker stations.

The Price Support Agreement combined a ceiling on price – the recommended retail price – and a floor – that charged by strategically located rival motor fuels retailers. Rival stations knew that if they lowered their price then the Statoil branded stations would match their price reductions. Therefore it would appear that the Price Support Agreement may have acted as a restraint on competition and thus harmed consumers.

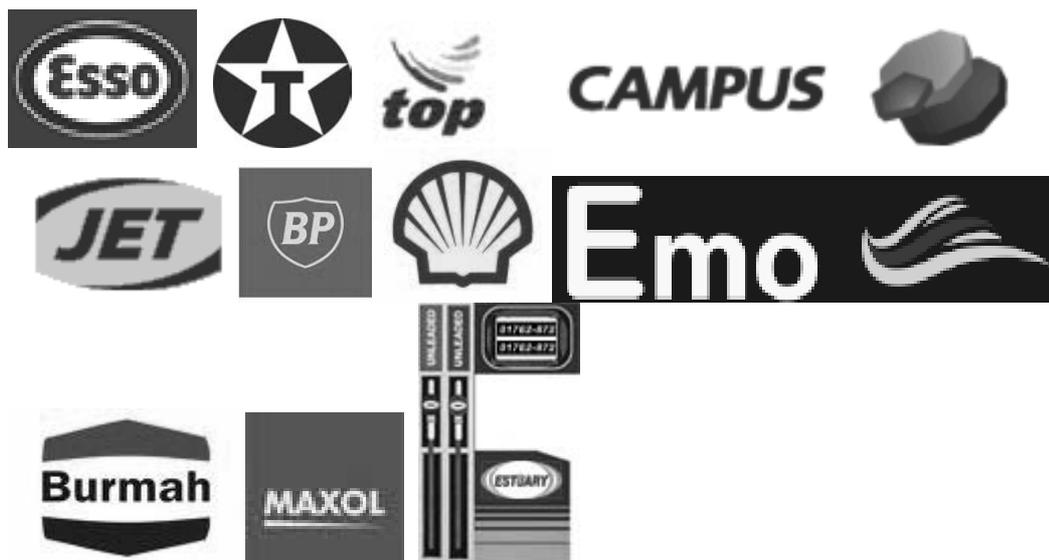
A careful examination of the facts of the situation in Letterkenny, in terms of market shares of Statoil and other stations, the views of the motor fuels retailers and several price surveys, combined with the

development of a very simple model, led the Competition Authority to the view that the Price Support Agreement operated in such a way that it breached the Competition Act 2002.

After the Competition Authority informed Statoil that it intended to initiate legal proceedings unless certain undertakings were given to the Competition Authority to amend its behaviour, Statoil abolished the PSA scheme from July 31st 2003 and agreed not to implement or introduce any new support scheme containing the features that the Authority considered breached the Competition Act 2002. The Competition Authority refrained from initiating legal proceedings in light of the fact that Statoil undertook not to implement or introduce any system that would have the effect of reducing the incentives for petrol retailers to compete with each other on price and services for the business of motorists.

APPENDIX 1: THE MOTOR FUEL RETAIL LANDSCAPE IN IRELAND

1. 1990



Along with the independents, there are 11 participants in the retail motor fuel market in Ireland. Of these, Esso, Texaco, Shell, BP, JET (owned by Conoco Phillips) and Burmah (owned by Burmah-Castrol) were all multinational firms vertically integrated from the refining through to the retail stages. TOP, Campus, Emo, Maxol and Estuary Fuels were all Irish firms integrated to either the wholesaler or distributor level.

2. 1992

BP's operations in Ireland are acquired by Statoil.

3. 1996

Conoco Phillips withdraws from the retail market. Its JET network is sold to Statoil and Maxol.

4. 1999

Burmah Castrol withdraws from the retail market. Its Burmah network is acquired largely by Emo Oil, with Maxol also acquiring some stations.

5. 2002

Estuary Fuels, a small regional retail operator in the south-west of Ireland, is acquired by Maxol.

6. 2005

GreatGas enters the market.

7. 2006

Topaz, an Irish-owned firm, acquires the retail networks of Shell and Statoil, who both exit the retail market.

Applegreen enters the market.

8. 2008

Along with the independents and some very small (<10) retail networks, there are 10 participants in the retail market: Esso and Texaco are vertically integrated to the refinery level. Tesco sources its fuel requirements from Topaz, and the remaining seven players are all Irish-owned. Topaz, the biggest player, is integrated to the wholesale level, as are TOP, Campus, Maxol and Emo. The two new entrants, GreatGas and Applegreen, are not integrated.



ITALY

1. The regulation of gasoline retailing in Italy

Until the early Nineties retail prices of gasoline were established by a Governmental Committee (CIP). In 1991 a first liberalization allowed oil companies to freely establish prices, but imposed that they be transmitted to the Ministry of Industry for “control”. In 1993, as a result of a further liberalization, oil companies had to transmit the information about prices to the Ministry but only for information purposes. In April 1994 it was established that dealers were allowed to freely fix the retail price, although oil companies could suggest a recommended price. Finally, the possibility for oil companies to indicate maximum prices to dealers was established in article 19 of Law n. 57/2001 implementing EC Regulation 2790/99¹.

As for entry, since the number of gasoline retailers was relatively high and their average efficiency was relatively low, a 1970 law (law n 1034/70) had blocked all new franchises (concessions) for opening gasoline stations (in order to open a new franchise three old ones had to be shut down) and contained other restrictions applying to relations between producers and retailers (for example on opening times of gasoline stations). In 1998 Decree n. 32 of 11 February started a process of progressive liberalization of the gasoline retailing network. This decree, replaced the existing regime based on concessions with a regime based on authorizations. It removed the obligation of closing three stations in order to open a new one and it broadened the range of products (all non-food products) allowed to be sold at service stations. The new regulation provided for a transitory regime aimed at rationalizing the network before full liberalization². A new intervention, with Legislative Decree n. 346 of 8 September 1999 introduced a more stringent schedule for the transition and easier procedures for new entrants. Finally Law 28 December 1999 led to full liberalization (subject to minimum distance requirements) as of January 1st 2000.

In 2001 article 19 of Law n. 57 (Norms on markets opening and regulation) outlined a national plan for the modernization of the distribution network and introduced the principle that vertical agreements between oil companies and retailers, which before were signed collectively, must be signed separately by each company, in accordance with Regulation no. 2790/99³. Even after liberalization, however, there were

¹ Commission Regulation (EC) n. 2790 of 22 December 1999 on the application of article 81 (3) of the Treaty to categories of vertical agreements and concerted practices.

² The Italian Competition Authority made several advocacy interventions suggesting the elimination of the restrictions in gasoline distribution. In December 1997 the Authority submitted an opinion to Parliament and the Government on a draft legislative decree for the rationalisation of the fuel distribution system (AS 113 *Opinion on the legislative decree for the rationalisation of the fuel distribution system in Bull. N.51/98*). Pointing out that in the transitional period, while entry was still restricted, incumbent companies would have proceeded to a concerted restructuring of the network. Because of the possible anticompetitive consequences of these provisions, the Authority expressed its preference for the network to be restructured at the same time as the full liberalization of market access. In another report, in November 2004, the Authority stressed that the persistent restrictions on the entry for companies that were not vertically integrated had led to an unsatisfactory degree of modernization of the distribution network, high prices and more generally an insufficient degree of competition in the market (*AS283 Norms on gasoline distribution*).

³ Commission Regulation (EC) n. 2790 of 22 December 1999 on the application of article 81 (3) of the Treaty to categories of vertical agreements and concerted practices.

still restrictions that affected entry⁴. These have recently been eliminated with law 6 August 2008 no. 133. In particular, entry of new stations cannot be subject to quantitative restrictions and the limitations on the number of hours a day a manned station could remain open was significantly extended (no limitation on self service stations).

2. The structure of the gasoline industry

There is a limited extracting activity in Italy and most of the consumed oil is imported (imports amounted to 85% of total consumption in 2006)⁵. The national oil market is therefore articulated in three activities: refining, logistics and distribution.

2.1 Refinery capacity and refining

The oil imported to Italy comes by sea or pipelines to the 17 refineries located on the national territory. The refineries, although located on the entire national territory, are mainly concentrated in Sicily (41%) and Sardinia (15%). Eni is the major company in refining and it accounts for more than 30% of the refining capacity. The integrated companies have a large share of the market (82.6%).

There are also refineries belonging to non integrated companies, such as Saras, Iplom, Alma Petroli and Ies, but they only account for a limited share of the market.

⁴ *AS 379 Legislation on gasoline distribution* In January 2007 in a new report on the state of gasoline distribution liberalization the Authority highlighted the persistence of numerous legislative and administrative barriers such as: *i*) limits on access to the market (for example, imposing a maximum number of new plants, minimum distances and/or minimum surface areas) by companies that are not vertically integrated, and in particular by operators active in major distribution channels; *ii*) limits on activities, such as maximum hours of service and obligatory closing periods; *iii*) the potentially anticompetitive daily publication, by the Ministry of Economic Development, of recommended prices by individual oil companies.

⁵ Source: Unione Petrolifera, Annual Report 2008.

Table 1. Italian oil market (2005)

Company	Share
<i>ENI</i>	30,8
<i>ESSO</i>	12,7
<i>Kuwait</i>	7,8
<i>Tamoil</i>	7,4
<i>Erg</i>	6,9
<i>Total</i>	5,7
<i>API</i>	4,3
<i>Shell</i>	4,0
<i>IP</i>	3,0
<i>IES</i>	2,4
<i>Others</i> [°]	10,7
<i>Importers/Direct Consumers</i> *	4,3
Total	100

[°] Companies with market shares below 2,4. They are Alma Petroli, Arcola Petrolifera, Beta Import, BP Italia, FL Selenia, Iplom, Liquigas, Maxcoma, Sras, S. Marco Petroli, ecc.).

* Mainly for thermo electrical use.

Source: *Unione Petrolifera Databook 2008*

As in other OECD countries an important rationalisation of the refining capacity took place, between 1975 and 1995, through the elimination of some refineries and an increase in capacity utilization. In the last few years the number of refineries has remained constant, while improvements of capacity utilization have been obtained through optimization of existing structures. The number of active refineries, throughout the years, is shown in the following table:

Table 2. Refineries and refining capacity

	1975	1980	1985	1990	1995	2000	2005	2006
Number of refineries	33	32	25	20	18	18	18	18
Capacity (Mton/year)	178	162	133	123	114	116	116	117
Effective capacity (Mton/year)	148	134	117	107	99	100.2	100.2	106.3

Source: *Unione Petrolifera*

2.2 Logistics

Logistics connects the refining stage to retail distribution moving gasoline from refineries to gasoline stations. It is, therefore, a key factor in the gasoline industry. In Italy there are about 700 depots with a capacity above 3000 cubic metres and 15,000 with lower capacity and pipelines used both for transportation of crude oil and for transportation of gasoline. The ownership of depots grants a competitive

advantage, allowing a reduction in the cost of transportation. Since environmental legislation makes it very difficult to build new depots or pipelines, the access to these infrastructure can constitute a bottleneck, resulting in a barrier to entry for non integrated companies⁶.

Only integrated companies operate in the logistic sector in Italy. Eni has a prominent position in logistics, with comprehensive national coverage of storage depots and a strategic series of pipelines. Due to the geographical configuration of the country and the localisation of refineries and logistic infrastructure, there is a relevant degree of cooperation among oil companies both through joint ventures and swapping agreements. Eni and Esso have joint ventures managing deposits in some regions in the North of Italy and other companies have joint ventures in other regions. Some of these joint ventures has been evaluated by the Italian Competition Authority⁷.

Oil companies selling gasoline in areas where they have no refineries trade gasoline with companies that own refineries in the region through swapping agreements⁸. These swapping agreements are bilateral operations where equal quantities of petroleum products are made available in different areas. The purpose of these exchanges is the availability of product in areas where the company has no logistic infrastructures. Because of these swapping arrangements all companies can have a retail network nation wide.

2.3 *Distribution*

In Italy two different networks operate in the distribution of oil products: a wholesale network and a retail network. The wholesale network, originally, supplied oil products different from gasoline (such as heating oil, oil used for agriculture, etc.) or gasoline sold to large customers (such as fleets, etc.) but now also supplies some independent gasoline stations. In the wholesale network, besides the eight integrated oil

⁶ The strategic role of logistics has been first underlined by the Italian Competition Authority in a sector enquiry concluded in 1996, focusing on the evolution of the market after price liberalization. The enquiry showed that the dependence of all oil-companies on Agip's logistical systems had prevented the adoption of an independent and non-co-operative behaviour on the distribution market. The Authority suggested to that some of the assets controlled by Agip be disinvested before privatisation, or that the storage facilities of all existing oil companies by assigned to a joint venture open to new competitors, in order to facilitate market entry and make storage services available to any operator on a non discriminatory basis. See *IC18Market Study on gasoline prices*, in Bull. N. 44/1996.

⁷ A number of joint ventures have been authorized without conditions: I304 Esso Italiana Agip Petroli in Bull. N.23/1998; a joint venture for the management of logistic capacity in Liguria by Eni, Erg, Kuwait and Shell and I345 Colisa Continentale/SIGEMI, in Bull. N. 29/39/1998. In some cases the joint venture was authorized subject to commitments in order to ensure the access of third parties to logistic capacity: in case I307 Agip Petroli/ESSO/Petroven, in Bull. N. 7-8/2000 (a joint venture between. AgipPetroli, Esso and Api) the parties agreed to grant access to unutilised capacity to third-parties.

⁸ Some swapping agreements have been analysed in case I181 *Agreement between Agip Petroli and Kuwait Petroleum Italia*, in Bull. N.41/199. Agip Petroli (now Eni) and Kuwait Petroleum Italia had notified the Authority their intention to conclude a number of agreements, in relation to refining and logistics. With regard to refining, the agreement provided for both companies to hold a 50-50 share in the Raffineria di Milazzo company which was previously wholly owned by Agip in order to increase the refinery's production capacity and competitiveness. Under the logistics agreement the infrastructure facilities owned by both parties in the Naples area would be rationalised, and Kuwait would be able to use Agip's logistical facilities in the Port of Livorno. They also planned to conclude contracts for exchanging final products, setting the quantities each year. The Authority found that the content of the agreement would make it extremely difficult for the parties to act independently on the market. The parties therefore submitted a new version of the agreement and removed the mutual obligation to exchange products. This new agreement was deemed by the Authority to be unlikely to restrict competition to any substantial degree.

companies, there are also some independent oil companies (Repsol, Saras), and some intermediaries. However the supply of the retail gasoline market is carried out only by the integrated companies.

The structural characteristics of the gasoline stations network have been affected by the restrictions contained in the regulation, which made it very difficult for new retailers to enter the market.

Between 1991 and 2001 the network has been modernised and rationalised, with a reduction in the number of stations from 28,341 in 1991 to 23,383 in 2001. However, especially in the early years, the rationalisation was slow and encountered difficulties also in the implementation procedures.

In June 2001 the Authority concluded a sector enquiry focusing on the progress made in rationalizing and modernizing the gasoline distribution network pursuant to Legislative Decree no. 32/1998. Considerable lags were found in the adoption of the necessary implementing provisions by Regions and especially by Municipalities. In particular, some regional plans laid down quantity objectives and regulations based on a rigid “planning” approach that conflicted with the aim of opening the market to competition. Furthermore, it was found that four years after the elimination of the concessions, some Regions still used them, with the consequent limitations on the possibilities of new entrants.

Today the majority of gasoline stations are still low volume, full service stations. The retail network is still extremely fragmented with about 22.000 stations, an average sale per gasoline station of 1.620 cubic meters, which, although higher than in the past, is still below the average volume of other European countries. Self service stations represent 28% of the total and only 13% of the stations sell non oil products.

Table 3. Number and characteristics of gasoline stations in Italy

Year	Number of gasoline stations	Average Sale per station	Self Serviced Stations	% of self serviced stations	% of stations w. non oil products
1995	28.200	1.205	2.809	10	n.a
2000	23.900	1.479	3.998	17	n.a
2002	22.800	1.602	4.066	18	n.a
2006	22.400	1.620	6.170	28	13

Source: Unione Petrolifera Databook 2008

3. Vertical relations in the Italian retail gasoline market

Two thirds of the gasoline stations belong to oil companies which generally do not manage them directly but lease them to independent dealers. . These dealers receive all the equipment from the oil company and commit themselves to exclusive distribution. The dealers set the retail price, however oil companies recommend retail prices nation wide.

About one third of the stations are owned by independent companies or individuals. However, even when independent firms own the gasoline stations, they usually rent them to oil companies and sign exclusive supply agreements with them. As a result oil companies sell their brand of gasoline in 95% of the Italian gasoline stations. There are few gasoline stations that are completely independent: these are the so called ‘white stations’ selling unbranded gasoline and represent less than 5% of the market. They are usually owned on an individual basis and buy gasoline from the wholesale network.

Even though, with entry liberalization some supermarket chains have started selling gasoline their impact on the market is still negligible, and in most cases even the supermarket chains sell branded gasoline through exclusive agreements with the integrated oil companies.

A typical characteristic in vertical relations in the Italian gasoline market was, for a long time, the existence of the so called “inter-professional” agreements, by which oil companies and associations of retailers determined, at the national level, the margin granted to retailers in form of a unit discount on the retail price of gasoline⁹. The national agreement also contained provisions on other aspects of the relationship between oil companies and retailers such as opening hours. The oil companies implemented the national inter-professional agreement with other agreements (so called “colour agreements”) signed at the firm level.

After price liberalization, in 1994, oil companies and retailer’s associations continued with inter-professional agreements until 2001, when, as mentioned before, implementing European regulation on vertical agreements, law n. 57/2001 established that the relationships between oil companies and retailers could only be regulated through bilateral agreements¹⁰. After 2001 oil company have been negotiating individually the terms of their agreements with retailers’ associations.

In a paper investigating the vertical relations in the Italian gasoline industry and the effects it produces on retail prices it has been argued that the retailer, in presence of a quantity decreasing unit discounts (which are maintained in order to allow the small stations to survive) on the gasoline purchased, very often will charge a price higher than the recommended level¹¹.

4. Conclusions

In Italy the majority of gasoline stations are vertically integrated, basically through two forms of integration: they either belong to oil companies and then they are leased to independent dealers or, even when independently owned, they are exclusively supplied by integrated oil companies. The unbranded gasoline stations are less than 5% of the total and even entry by supermarket chains, up to now, has not had an impact, since also gasoline stations at supermarkets have been supplied by integrated oil companies and sell branded gasoline. Although this situation is certainly the result of very restrictive entry regulation on retail gasoline distribution it may well be the case that market power at the upstream stages of the industry (refinery and logistics), possibly through collusive behaviour facilitated by joint ventures and agreements, have undermined the effect of both price and entry recent liberalization.

The Authority in its most recent report on the sector has recognized that entry liberalization could not be sufficient to enhance competition in gasoline distribution, because of the difficulties that non integrated gasoline retailers encounter in accessing supply and logistics. The Authority has therefore suggested the

⁹ These agreements dated back to the sixties, in a situation of regulated gasoline price. Due to the conflicts between oil companies and retailers, often resulting in strikes, since 1982 the Government participated in the bargaining process.

¹⁰ In case I165 Agreements for gasoline supply the Italian Competition Authority concluded that oil companies had adopted, through “colour agreements” an identical mechanism to set the margin for service stations, had performed a collusive agreement in order to impose a RPM. The decision has been overturned by the Council of State.

¹¹ See G. Colangelo G. Martini, *Relazioni verticali e determinazione del prezzo nel mercato dei carburanti in Italia*, *Rivista di Politica Economica*, Settembre Ottobre 2003, pp. 113-153.

introduction of regulatory measures to ease access by non integrated gasoline station, such as reserving a part of the stocking capacity and logistic facilities to non integrated operators¹².

¹² AS436 Access regulation to gasoline distribution and stocking capacity to not vertically integrated third parties, in Bull. N.46/2007.

JAPAN

In Japan's gasoline retail sector, most service stations (hereinafter referred to as "SSs") are run by business entities other than oil wholesalers. There has been no national legislation or regulation calling for a separation of the management among oil wholesalers, distributors and retailers. The same applies to the local and municipal administration.

Although there are still a limited number of cases where SSs are directly managed by wholesalers, the relative proportion of SSs run by wholesalers' subsidiaries and SSs that act as commission agents (see 1(1) below) has been rising in recent years in contrast to the decline of the total number of SSs. This situation has prompted a business organization mainly comprising the affiliated agencies of wholesalers to voice requests for regulations to restrict the involvement, etc., of oil wholesalers and their subsidiaries in the management of SSs, but the development of such regulation has yet to be realized.

Moreover, a resale price maintenance system for gasoline is not permitted in Japan.

The following section gives an outline of the oil retailing industry in Japan and the Japan Fair Trade Commission's (JFTC) efforts concerning it.

1. Types of gasoline distributors

SSs are largely classified by sign pole into three types: (1) "Wholesaler affiliated SSs" which show the brand names of specific gasoline wholesalers, (2) "Private Brand SSs" (hereinafter "PBSSs") which use private brands developed by energy trading firms and other major business entities, and (3) "Non-brand SSs" (independent gasoline stations) which do business without using any brand names.

1.1 Wholesaler affiliated agencies and affiliated stores

Wholesaler affiliated SSs are managed by business entities to which the wholesaler grants a license to use its trademark and where the design of SSs is standardized by each wholesaler.

There are two types of business entities that a wholesaler grants a license to use its trademark: (1) wholesaler affiliated agencies that sign contracts to directly purchase gasoline from the wholesaler (hereinafter "affiliated agencies"), and (2) wholesaler affiliated stores that purchase gasoline via the affiliated agencies (hereinafter "affiliated stores").

The number of business entities and SSs that are either affiliated agencies or affiliated stores has been on the decline in recent years. Still, wholesaler affiliated SSs account for approximately 80% of all SSs.¹ In terms of the business scale of the affiliated agencies, business entities with capital of less than 10 million yen or those that have less than two SSs account for nearly half of all affiliated agencies. Thus, many affiliated agencies are relatively small-scale business entities. At the same time, it is supposed that there

¹ Of all gasoline distributors, the number of SSs and business entities declined to 45,792 locations (22,952 business entities) by the end of FY 2006 after reaching a peak in 1994 (60,421 locations and 31,599 business entities) (Annual Energy Report 2008).

are many affiliated stores that are smaller in size than affiliated agencies which trade directly with oil wholesalers.

1.1.1 Equity holding relationships, etc., between affiliated agencies and wholesalers

Among affiliated agencies that are not subsidiaries of wholesalers, only a few have received equity investments or executive officers from wholesalers. However, SSs that adopt the following management practices have emerged in recent years: (1) wholesalers’ subsidiaries run SSs as their affiliated agencies; and (2) affiliated agencies undertake the outsourcing of the management of SSs from the wholesalers under the so-called “commission agent system.” Under the commission agent system, a wholesaler outsources the management of SSs by paying commission fees to its affiliated agencies for managing such SSs, while the wholesaler has the right to make decisions on business policies and selling prices charged by SSs, etc. Except for these business models, there are few business arrangements in which wholesalers directly manage SSs.

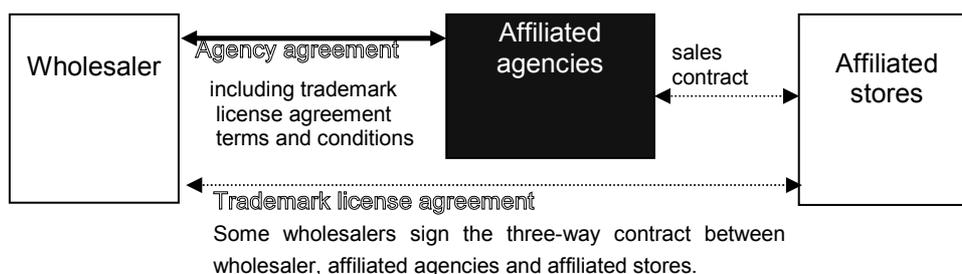
In recent years, wholesalers have been proactively utilizing their sales subsidiaries. The sales share of gasoline sold by wholesalers directly and through their subsidiaries in the domestic market has nearly tripled in the past 10 years².

1.1.2 Contractual relationships between affiliated agencies/affiliated stores and wholesalers

Affiliated agencies generally conclude an “agency agreement” with a wholesaler, which requires the wholesaler to ensure a continuous and stable supply of gasoline and contains “trademark license agreement terms and conditions³” to the effect that affiliated agencies can sell gasoline using the wholesaler’s trademark.

Affiliated stores conclude both a “trademark license agreement” with a wholesaler and an agreement concerning sales and purchases of gasoline with affiliated agencies (Figure 1).

Figure 1. Contractual relationship concerning gasoline sold at Wholesaler Affiliated SSs



1.2 Private Brand business entities and PB stores

PB business entities are business entities that operate SSs (PBSSs) with their own trademarks different from those of wholesaler affiliated SSs. They are, namely, energy trading firms, ZEN-NOH

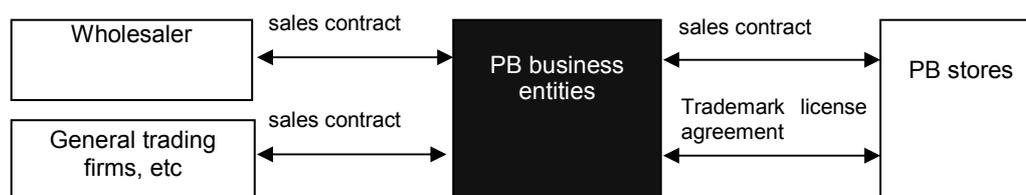
² Their share of the market was 5.5% in FY 1997 and 15.6% in FY 2006 (from a survey of the Agency for Natural Resources and Energy).

³ Some wholesalers conclude a separate agreement dealing with trademark license in addition to an agency agreement.

(National Federation of Agricultural Cooperative Associations), home-center stores, etc⁴. PBSSs include both those directly operated by PB business entities and those operated by PB stores.

PB business entities purchase gasoline for PBSSs from wholesalers or general trading companies and subsequently either sell the gasoline at their directly operated PBSSs or supply it to PB stores. As the contract between the PB business entities and wholesalers in purchasing gasoline for PBSSs is a general sales and purchasing contract, PB business entities do not have the same contractual assurance of a continuous and stable supply of gasoline as affiliated agencies do (Figure 2).

Figure 2. Contractual relationship concerning gasoline sold at energy trading firms' PBSSs



1.3 Non-brand stores

Non-brand stores are the business operators that purchase gasoline from energy trading companies, etc. and sell it to consumers without using either a wholesaler's brand or a private brand of energy trading companies, etc. Some non-brand stores are profitable as they can reduce the purchase price of gasoline or costs by using such measures as securing cheaper gasoline by futures contracts, large volume purchases from energy trading companies by tanker, and distribution to the SSs by their own tanker trucks, while they also make efforts to improve services to their customers.

The number of non-brand SSs is not exactly known, but it is thought to be growing. There are also cases in which entities formerly operating as affiliated agencies or affiliated stores transform their businesses into non-brand stores, partly because of the effect of the abolishment of the Provisional Measures Law⁵ and the certificate system of supply sources⁶.

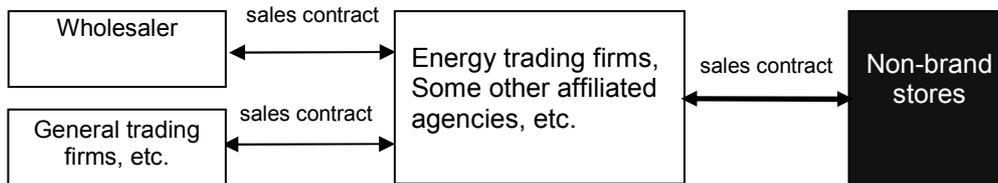
Because wholesalers do not sell gasoline directly to non-brand stores in principle, non-brand stores purchase their gasoline from energy trading companies and large affiliated agencies. Vice versa, energy trading companies and large affiliated agencies selling gasoline to non-brand stores purchase gasoline for non-brand stores from wholesalers and general trading companies, etc. (Figure 3).

⁴ There have been entries from different industries; for example, major distributors (large supermarkets, etc.) establish joint investment companies with energy trading companies to develop private brand businesses.

⁵ The Law Concerning Provisional Measures for the Importation of Specified Refined Petroleum Products was repealed in March 1996 and the importation of petroleum products such as gasoline, which had been permitted exclusively to petroleum refining companies/wholesalers, has now been liberalized subject to stockpiling and quality assurance obligations.

⁶ Registration procedures for gasoline distributors under the Law to Secure the Quality of Volatile Oils, etc., previously required gasoline distributors to submit a document (a certificate of supply source) that identified the transaction flow that can track back to petroleum refining companies or importers. However, the requirement to submit a certificate of supply source was abolished at the end of December 1997 due to a concern that it might hinder the smooth entry of new businesses or might have certain side effects, such as causing the rigidification of business relationships, etc.

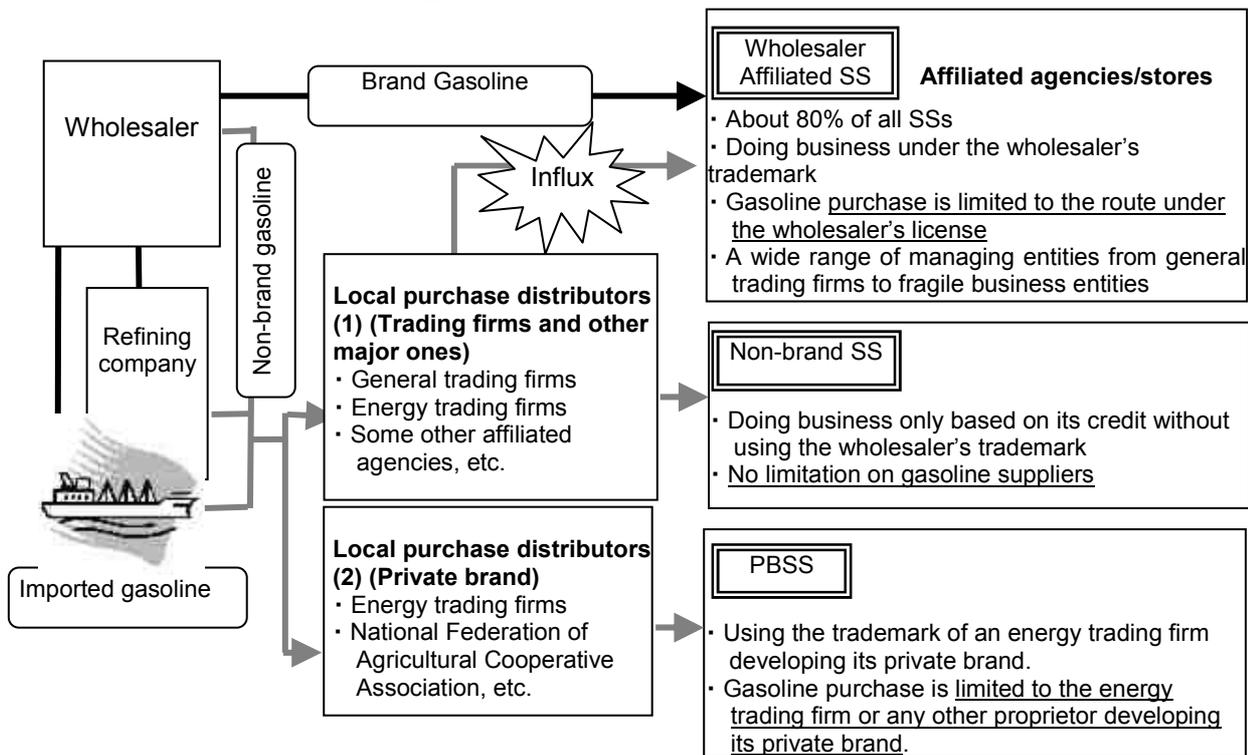
Figure 3. Contractual relationship concerning gasoline sold at non-brand stores



2. The distribution channel

The distribution channel of gasoline sold to consumers at SSs is divided into two routes depending on the customer of the wholesalers: a route mainly via affiliated agencies and another route. The gasoline that is sold through each route is respectively called “brand gasoline” (“*Keiretsu-gyoku*” in Japanese) and “non-brand gasoline” (“*Gyoten-gyoku*” in Japanese). Part of the gasoline provided by wholesalers as non-brand gasoline is conceivably sold to wholesaler affiliated SSs operated by affiliated agencies, etc. (Figure 4).

Figure 4. Distribution Channels of Gasoline



(Note) Some trading firms and major affiliated agencies turn over non-brand gasoline while trading brand gasoline as affiliated agencies. Moreover, some wholesalers and general trading firms, etc. turn over non-brand gasoline in other departments from those dealing with brand gasoline.

2.1 Brand gasoline (“*Keiretsu-gyoku*” in Japanese)

“Brand gasoline” is sold via gasoline distribution channels in which gasoline is supplied from wholesalers to their affiliated agencies and affiliated stores based on agency agreements.

As a way of streamlining the distribution of petroleum products, wholesalers jointly distribute, facilitate the trading of petroleum products (through barter transactions or swap transactions), share oil tank facilities, etc., with other wholesalers.

2.2 *Non-brand gasoline (“Gyoten-gyoku” in Japanese)*

Non-brand gasoline is sold via distribution channels in which wholesalers sell to general trading companies, etc., and which are separate from the distribution channels for brand gasoline. Gasoline sold at PBSSs and non-brand SSs belongs to this category.

The characteristic of petroleum products is such that different kinds of petroleum products are produced at the same time by the refining of crude oil, so specific products cannot be produced as much as required. Therefore, there are situations in which wholesalers cannot sell all of the gasoline produced to their own affiliated agencies, etc., so that they sell such unsold gasoline, etc., to general trading companies, etc., as non-brand gasoline.

However, for trademark protection reasons, in an attempt to prevent their non-brand gasoline from being distributed to their affiliated agencies or affiliated stores, wholesalers request that general trading companies, etc., refrain from selling non-brand gasoline sold by wholesalers to their affiliated agencies or affiliated stores. The practice that general trading companies, etc., do not sell non-brand gasoline to agencies and stores affiliated to the supplier of the gasoline has in fact become customary among wholesalers and general trading companies, etc. (Some wholesalers have instituted a policy whereby they will cease trading with any trading company that sells non-brand gasoline to the wholesaler’s affiliated agencies or affiliated stores.)

Some wholesalers request that general trading companies, etc., refrain from identifying the supplier of non-brand gasoline as the business relationships with their affiliated agencies, etc., may be harmed if it is revealed that they are selling non-brand gasoline to general trading companies, etc.

Non-brand gasoline is basically traded by way of spot trading and the trading price of non-brand gasoline is more susceptible to factors such as supply and demand conditions than brand gasoline that is traded both continuously and in a stable manner. Therefore, while the trading price of non-brand gasoline may at times exceed that of brand gasoline, the trading price of non-brand gasoline is generally lower than that of brand gasoline. This is thought to be attributable to the following factors: (1) the system for the sharing of distribution costs is different - for example, while brand gasoline is, in general, transported to SSs by wholesalers⁷, non-brand gasoline is basically picked up from storage tanks by general trading companies, etc.⁸, and (2) the cost of the various services⁹ provided by wholesalers to their affiliated agencies, etc., is added to the price of brand gasoline.

2.3 *The inflow of non-brand gasoline into brand gasoline channels*

Under trademark license agreements, wholesalers require their affiliated agencies and affiliated stores to refrain from selling non-brand gasoline at wholesaler affiliated SSs.

⁷ Wholesalers deliver gasoline to SSs in tank trucks on which the wholesaler’s trademark is displayed.

⁸ General trading companies and affiliated agencies, etc., arrange for tank trucks to pick up gasoline at wholesalers’ refineries.

⁹ The services and support offered by wholesalers to their affiliated agencies, etc., include granting the right to use trademarks widely recognized by consumers, providing sales promotion programs, providing emergency response support when accidents occur, and bearing the cost of painting affiliated SSs.

However, according to the survey on gasoline distributors undertaken by the JFTC in 2004, many affiliated agencies (about 47%) do in fact purchase non-brand gasoline either “continuously” or “sometimes”, which indicates that approximately half of them buy non-brand gasoline and sell it at SSs under the wholesaler’s brand name. Affiliated agencies most frequently (85.3%) cited the fact that “wholesalers’ brand gasoline is expensive” as the reason for purchasing non-brand gasoline. The ratio of non-brand gasoline to the total volume of gasoline purchased was less than 50% for many of the affiliated agencies that purchase non-brand gasoline.

3. Recent JFTC activities

The JFTC surveyed the actual conditions of gasoline distribution and published a report in 2004. In 2005, the JFTC conducted a follow-up survey and published the results of the survey. The 2004 report highlighted the actual conditions of gasoline distribution, and showed the viewpoints on the Antimonopoly Act (“AMA”) concerning issues such as the difference in the wholesale price of wholesalers to distributors, restraints on the trade of non-brand gasoline and the imposition of non-transparent business terms, etc.

For example, in terms of the restraints on the trade of non-brand gasoline, the following cases can be regarded as raising problems under the AMA (Trading on Exclusive Terms, Discriminatory Treatment, Trading on Restrictive Terms, Abuse of Superior Bargaining Position, etc.) in that the act of the wholesaler may not be regarded as the exercise of trademark rights by deviating from or infringing the spirit and purpose of the trademark protection system.

- Where the wholesaler exercises its trademark rights in an arbitrary and discriminative way and exerts a direct and serious effect on the competitiveness of affiliated agencies treated in a disadvantageous way: e.g., asking only some of its affiliated agencies to stop trade in non-brand gasoline (and terminating the agency agreement for the reason of such trade if they do not comply) while not asking others among the affiliated agencies of the same wholesaler.
- Where the wholesaler inhibits the free business activities of its affiliated agencies and consequently brings unfair disadvantages to them by preventing them from purchasing the wholesaler’s brand gasoline for a lower price from such entities as a major agency affiliated to the same wholesaler; and
- Where the wholesaler inhibits the free business activities of its affiliated agencies and brings unfair disadvantages to them by forbidding them from selling non-brand gasoline by way of exercising its trademark rights in such a case where the wholesaler fails to promote a consistent distribution of its properly trademarked brand gasoline by allowing and overlooking its brand gasoline to be mixed with different brands of gasoline from other unspecified companies and neglecting quality control by not separating brand gasoline from non-brand gasoline in the process of distribution.

Furthermore, the following views regarding transactions between wholesalers and affiliated agencies involved in gasoline distribution were expressed on 1 June 2007:

- Wholesalers who make unilateral decisions on the wholesale price for affiliated agencies may be infringing the AMA (Abuse of Superior Bargaining Position);
- Wholesalers who prohibit their affiliated agencies from purchasing the wholesaler’s products from other affiliated agencies may be infringing the AMA (Trading on Restrictive Terms, Abuse of Superior Bargaining Position) because they suppress price competition for the relevant branded product in the sense that affiliated agencies are unable to purchase cheaper gasoline and

at the same time they impose a trade condition that is detrimental to the interests of affiliated agencies.

The JFTC subsequently instructed the relevant wholesalers to improve conditions regarding agency agreements, etc. that stipulate contents contrary to the above viewpoints.

With respect to Discriminatory Consideration, the following view, which has been expressed in the past, was stated again:

- Where the fair competitive order may be adversely affected by a wholesaler who sells to other business entities with a markedly lower wholesale price than the market price provided to general affiliated agencies, in that the differences between them are beyond those in trading conditions and arrangements, and thereby has a direct and significant influence on the competitiveness of affiliated agencies, the wholesaler may raise a problem under the AMA (Discriminatory Consideration).

The JFTC indicated to the parties concerned that if the JFTC faces any facts as mentioned above, it would carry out the necessary investigations and take rigorous measures on the cases that may involve problems under the AMA.

KOREA

1. Gasoline sales market structure

In Korea, no laws or regulations mandate the vertical separation of gasoline retail outlets from refiners. In other energy sectors also, there are no laws or regulations mandating the vertical separation of retailers from upstream producers or market participants.

But under *the Petroleum and Petroleum Substitute Fuel Business Act*, types of gasoline businesses are largely categorized into refining, importing & exporting and marketing and the marketing business is again broken down into wholesaling and retailing (gas stations). And accordingly, areas of operations are vertically divided by each type of business¹.

However, under the Act, there are no entry barriers between different types of businesses, rendering the distinction in areas of operations described above virtually meaningless. For example, refiners or wholesalers are allowed to operate gas stations. As a result, as of late December 2007, the number of stations under management of refiners or wholesalers was estimated at 2,235 or 18.4% out of total 12,139 stations.

Refiners or wholesalers operate gas stations in the following three forms. First, they have stations in which the manager of the station is their employee. Second, they make the commissioned-agent contract to run their stations. And lastly, they make a lessee-dealer contract. In practice, the first case is very rare for lack of efficiency and the second and the third cases are prevalent.

In the commission-agent management, the agent just gets fees for his service and all sales proceeds belong to the refiner (as client).

In the lessee-dealer contract, the lessee purchases the whole quantity of gasoline products from the refiner and all sales proceeds belong to the lessee. However, the lessee pays rents to the refiner for renting the station. The right to setting retail prices solely lies in the lessee.

¹ Korea's refining market has four dominant players that are SK, GS, Hyundai Oil and S-oil. There are roughly 470 wholesalers as of 2007 and most of them are locally operating, centering on certain cities or provinces.

Figure 1. Management by commissioned-agent contract

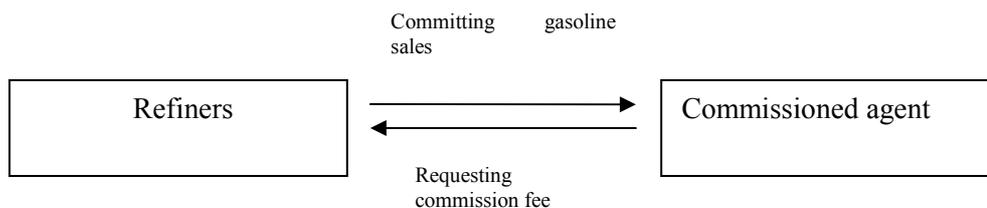
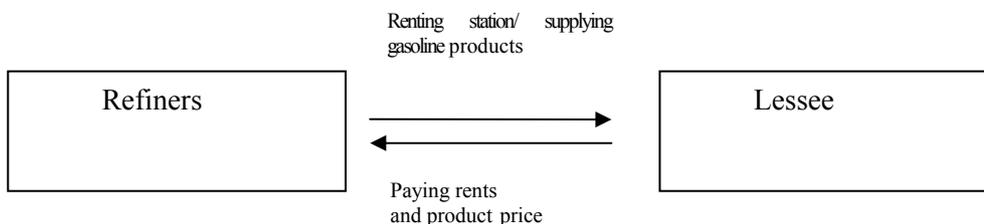
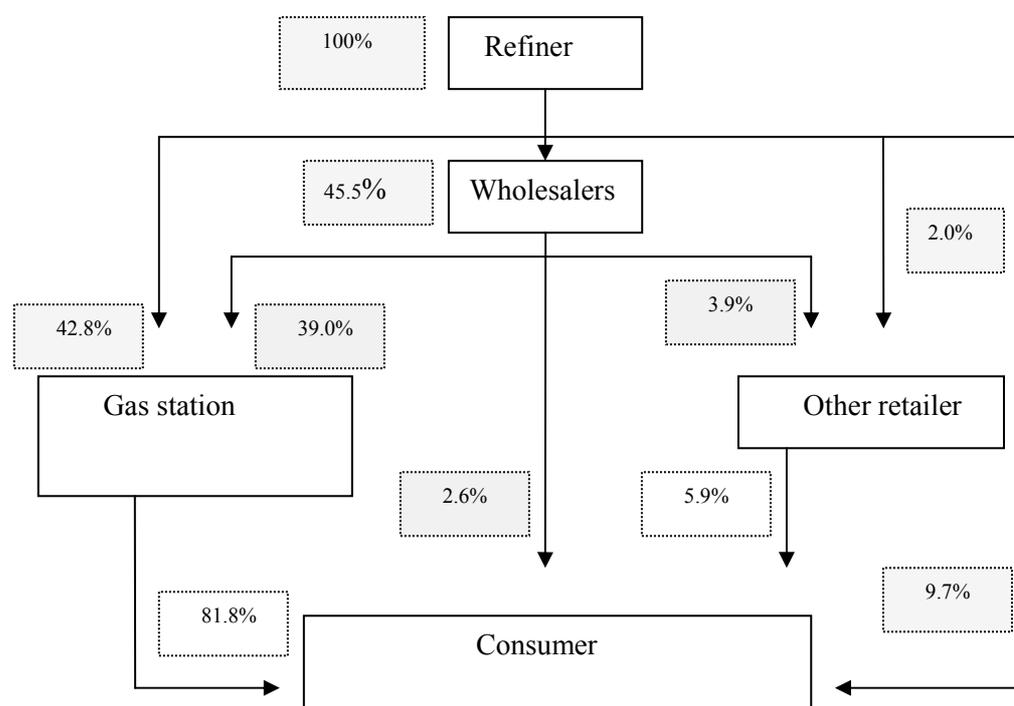


Figure 2. Management by lessee-dealer contract



Independent stations other than refiner- or wholesaler-run stations account for 9,493 out of the total 12,139 stations as of late December 2007. In particular, 9,082 stations are run under a specific refiner brand, and most of them have made the “Total Quantity Purchase Contract” with the refiner or a wholesaler in return for using the brand and receiving financial support. Only 411 stations or 3.4% of the total is operating under their own independent brand or no refiner brand.

Figure 3. Distribution structure of gasoline products (as of 2007)

Meanwhile, Korea is also witnessing quantity swapping between refiners increasingly growing as they try to save logistics cost. The following tablet shows the quantity swapping between refiners as of 2007.

Table 1. Gasoline quantity swapping between refiners

	(Unit, 1,000 barrels)					
	SK Energy	GS Caltex	SK Incheon	Hyundai	S-OIL	Total
Total domestic sales	22,561	20,141	1,856	9,570	7,954	62,082
Quantity swapping	13,214	10,113	655	4,937	248	29,167
Percentage	58.6%	50.2%	35.3%	51.6%	3.1%	47.0%

2. Competition issues in gasoline sales market

2.1 Total Quantity Purchase Contract

In Korea, introduction of mandatory vertical separation or the effect of vertical separation on prices has not been vigorously discussed.

Yet, discussion on whether the TQPC (Total Quantity Purchase Contract) generates anti-competitive effect throughout the gasoline distribution process is actively taking place in Korea.

Some argue that through the TQPC with refiners, most retailers have their right to choose a product from other refiner restrained and their product supply and distribution channel blocked, and this could

significantly prevent new entrants from entering the market, ultimately restraining competition. Especially, as more and more refiners recently file civil lawsuits including damage suits against stations that made the TQPC with them for selling products of other refiners, whether or not the TQPC is a sort of exclusive dealing that restrains competition has become a hotly debated topic.

However, refiners are trying to make their case that the TQPC can be useful for enhancing efficiency through promoting inter-brand competition, preventing free-riding and saving transaction costs.

2.2 *Large discount stores' entry to gasoline sales market*

Recently in Korea, large discount stores like Emart are reported to be contacting refiners concerning the potential sales of gasoline products at their premises, but no store has yet to advance into the gasoline retailing business. These stores think they can leverage their massive purchasing power to provide cheaper gasoline to customers, thereby attracting more customers to them and inducing them to buy other products as well. Meanwhile, existing stations are opposing discount stores' entry to their market, saying that they are ill positioned for price competition with the new competitors.

NORWAY

1. Introduction

The purpose of this roundtable is to examine the costs and benefits of vertical separation in gasoline retailing and provide evidence related to actual experience with vertical separation and integration. A hypothesis often considered is that there is a link between the vertical structure of gasoline retailers and pricing. Some policymakers hold the hypothesis that vertical integration promotes higher prices, while an alternative hypothesis is that vertical integration may promote the achievement of efficiencies and internalization of externalities which in turn generate lower prices. The experiences and views of the Norwegian Competition Authority in this respect are presented below.

2. Status of vertical relations related to retail gasoline outlets

There are no national laws or regulations that require vertical separation of petroleum refiners from petrol retailers in Norway. In fact, the three largest companies in the retail market for gasoline products in Norway, StatoilHydro, Shell and Esso, are vertically integrated in the upstream market for the production and refining of oil products.

These three integrated companies have an aggregate market share of approximately 80 per cent in the downstream market for petrol retailing. Also present in the Norwegian market is JET which is an integrated player. JET, unlike the three companies mentioned above, does not have any ownership stake in a refinery in Norway. YX Energi and Best are also present in the market. YX Energi is a fuel-chain with independent, branded stations as well as company-owned stations. YX Energi does not possess refineries, but does have ownership to several fuel-depots in Norway. Best is a loosely knit buyer-organisation of petrol stations.

StatoilHydro, Shell, YX and Esso have some independent stations which are operated by the station dealer. These stations have a supply agreement with the oil company and use its brand name. About one-third of the stations are owned by the dealer, while the remaining two-thirds are owned by the company. The ownership pattern corresponds to approximately 650 dealer owned stations, and 1150 company owned stations.

Retail price maintenance would constitute a violation of section 10 (1) of the Norwegian Competition Act, which is harmonised with Article 81 (1) of the EC Treaty¹. Hence, a petrol station that is both operated and owned by the dealer has to be allowed to set its price independent of the chain. An obligation to follow the chain's price would be regarded as a violation of section 10 (1) of the Norwegian Competition Act.

The main oil companies' head offices practise recommendations with respect to the price to be applied by the stations owned and operated by independent dealers. The stations take into consideration the recommendations from the head office. Nevertheless, the head office of the chain cannot legally demand

¹ The Norwegian Competition Act is harmonised with EU competition rules as regards the prohibition against cooperation that restrict competition and abuse of dominance laid down in Articles 81 and 82 respectively. The corresponding sections in the Norwegian Competition Act comprise section 10 and 11.

that the station follows its recommendations. Even in the case of a price war², the dealer can set the price on an independent basis. However, while an a priori approval of the price cut from the head office would result in the oil company and the dealer sharing the costs of the price cut, the station operator bears the full costs of a price cut which has not received prior approval of the head office.

With regards to stations owned by the oil company, which constitute part of the same economic unit, the head office decides the prices to be set at the stations. The stations that are operated by the station dealer and owned by the chain are obliged to follow instructions from the head office.

Various price analyses of the Norwegian market have not revealed systematic differences between the outlet price of vertically integrated stations vis-a-vis independent stations. In practice, the prices of dealer owned vis-a-vis company owned stations, adjusted for transportation costs, are in general about the same. A possible explanation for this is that the dealer does not have incentives to lower the price below the recommended price.

However, there clearly seems to be differences between geographical regions regarding competition intensity. It is the view of the Norwegian Competition Authority that observed price level differences stem from differences in market concentration rather than degree of vertical integration.

Finally, it can be noted that there have been some instances of disputes between petrol stations and the chain/oil company in Norway. These disputes have been reported mainly through the media, and have centered on issues regarding termination of contracts, more exactly where the chain terminates its contract with dealers of well-managed company owned stations after the dealer has put effort into achieving a well functioning station.³

2.1 Experience with vertical separation and integration in other sectors

The electricity market is a segment of the energy sector where Norway has regulations that require separation of network operations from producers and or production⁴. In the electricity sector in Norway, a clear separation between network and production is practiced.

From a competitive point of view, the unbundling between network activities, which constitute a natural monopoly, and activities which are exposed to competition is important. In the view of the Norwegian Competition Authority, the most efficient way to prevent any discriminatory behaviour in the electricity sector is ownership unbundling, as it relies on incentives rather than external monitoring and ex post penalties⁵.

However, the separation between production/supply and network in the electricity sector should in our opinion not be viewed as vertical unbundling. It is our view that production and supply are in the same value-chain, whereas network is part of a separate value-chain. It is difficult to decide which of the two activities, production or network services, is the upstream activity and which is the downstream activity. An important reason for unbundling network and production/supply is to achieve supply of network access

² A price war is a situation where competitors frequently set a price below the competitors in order to maintain or gain market share.

³ Handelsbladet FK 12. May 2008, <http://www.handelsbladetfk.no/artikel.asp?artikelId=122080&strukturId=6&visa=1>.

⁴ Regulation no. 959, of July 12th 1990, "Regulations of the energy law".

⁵ For further elaboration on this, see Report No. 1/2007 from the Nordic Competition authorities, "*Capacity for Competition*".

on non-discriminatory conditions. Optimal use of scarce transportation capacity conditions prioritization of the most competitive producers, regardless of whether they hold ownership shares in the network or not.

It is noteworthy that, there is no obligation to unbundle production and supply in the electricity market in Norway, although these services obviously are vertically connected.

A great number of retailers in Norway have ownership stakes in local grid companies. This may distort the network company's incentives, for instance to provide customer-related information to independent retailers in a non-discriminatory manner. As a result, independent retailers may have difficulties entering the market and this may lead to ineffective competition. Vertical integration may in this manner represent a significant problem in the retail market. However, it is very difficult for the competition authorities or the energy regulators to prove breaches of the legislation.

3. Costs and benefits of different vertical relations relating to retail fuel outlets

In most cases, vertical integration is viewed as positive both for the owner and from an economic point of view. Vertical integration invariably implies that the companies can directly control prices downstream. Positive economic effects of vertical integration include internalisation of external effects and prevention of double marginalisation.

So far as there is competition, both upstream and downstream, there are in general few concerns for damaging effects of vertical integration. This is because vertical integration does not essentially lead to market-power⁶. Vertical integration might strengthen market power if there are severe restrictions on competition, upstream or downstream, but does not in itself lead to market-power.

As mentioned above, there are five branded petrol retailers in Norway. Four of these are vertically integrated chains. One of the retailers, YX Energi, is not vertically integrated as it has no refineries, but it does possess fuel depots. Results from recent analyses of petrol and diesel-prices in Norway, shows that there does not seem to be any significant differences in prices quoted by the chains.

The only exception regards a chain with only unmanned stations. In general, unmanned stations are presumably more dependent on being able to hold lower prices to attract customers. Another plausible advantage of unmanned stations is less waiting time, as no pumps are physically blocked by customers spending time inside the station.

One variable that clearly has a large impact on pump-prices is the degree of local competition. A station without local competition tends to have higher prices than other stations, independent of its brand name and vertical organisation. This is indicated by two separate studies on petrol/diesel-prices in Norway. A study was conducted on behalf of the Ministry of Government Administration and Reform to identify price differences between various parts of the country. Another study was carried out as part of a merger case investigation involving AS Norske Shell's acquisition of several stations from YX Energi AS. The merger case study did not primarily focus on the identification of price differences, but the data pointed in the same direction as the abovementioned study.

As mentioned above both the integrated and non-integrated chains have a mix of chain-employed site managers and independent site-managers with long-term contracts with the chains.

The Norwegian Competition Authority is of the opinion that there are different incentives for integrated and non-integrated retailers. Chain-employed site-managers (CODO = Company Owned, Dealer

⁶ The ability to price goods (significantly) above marginal cost.

Operated) normally receive a salary comprising a fixed amount and a variable amount dependent on the volume of fuel sold. Chain-employed site-managers therefore have a strong incentive to sell as much volume as possible, regardless of the price.

The site-manager does not have a direct influence on the pump-price, as it is set by the chain/oil-company. It is however normal practice that the site-manager is responsible for reporting prices of nearby stations. If nearby stations drop their prices, the chain/oil-company normally lowers the price to meet competition. This leads to an incentive for the chain-employed manager to report the prices of competitors to be lower than they really are.

The chains have different routines to avoid such disloyal, faulty reporting. Given that these routines are sufficient to avoid faulty reporting, the site-manager still has stronger incentives to promptly report competitor's price-cuts than price increases. Thus the chain-employed site-manager model can be the source of strong local competition.

With regards to the independent site-manager (DODO = Dealer Owned, Dealer Operated) with a long term contract with the chain, the incentives are different. It is our observation that the chains end up with the largest part of the gross margin on the sales of petrol/diesel. Price analysis performed in Norway does indicate that in cases of local competition, the chain is willing to cut its margin to maintain volume. This leads to the chain giving the DODO a rebate on petrol/diesel sold at lowered prices. Sometimes the chain bears the whole impact of a price-cut. At other times the impact of the price cut is shared between the chain and the dealer. Since the dealer contracts give the chains a significantly larger portion of the gross margin, it can be shown that the chain has a stronger incentive than the dealer to lower prices to maintain, or even gain, volume.

The discussion above shows that chain-employed site-managers and independent site-managers have different incentives as regards pricing and price-reporting. It is not clear from these different incentives if the vertically integrated or the non-integrated fuel station is the optimal organisation to promote competition.

4. Competition Advocacy and Litigation

Petrol prices are often discussed in the media in Norway. The discussion basically relates to high price levels, and also suspicion of horizontal cooperation. As far as the Norwegian Competition Authority knows, vertical separation has never been an issue in such discussions.

In the past few years, a weekly pattern in petrol prices in Norway has been observed. On (almost) every Monday the prices increase all over the country and this is followed by a gradual price decrease during the week. This pattern, however, is not observed in areas where there is only one player in the market.

A model that has been used to explain price volatility in petrol prices is the Edgeworth cycle model.⁷ Prices moving in accordance with an Edgeworth Cycle will gradually be cut, until the price-war of attrition leads to a price that leads to losses for one (or more) of the players in the market. The player will then raise prices risking loss of volume. In conjunction with the Edgeworth Cycle, the other players will realise that

⁷ Francis Ysidro Edgeworth, Papers Relating to Political Economy (3 volumes), originally published in London by Macmillan for the Royal Economic Society (1925) & Eric Maskin & Jean Tirole, A Theory of Dynamic Oligopoly II: Price Competition, Kinked Demand Curves and Edgeworth Cycles, 56 *Econometrica* 571 (1988).

their first-best option is to also increase prices. The gradual undercutting will, however, soon start again, repeating the cycle.

In Norway, the prices are (almost) always raised on a Monday. Thus, the weekly patterns for Norwegian petrol/diesel-prices are not wholly in accordance with what one would expect from an Edgeworth Cycle. The gradual price-cuts, however, are in accordance with an Edgeworth Cycle.

The Norwegian Competition Authority has during the spring of 2008 conducted studies into whether the weekly pricing pattern is a result of explicit coordination between the players in the market for petrol/diesel. No evidence of explicit coordination has been found.

It ought to be noted that it is highly unlikely that there would be any price-cuts during the week if there were successful, explicit coordination. It is our opinion that the described pattern results from competition in specific areas rather than national price setting from the oil companies.

There seems to be several causes of the price-pattern. All the petrol-chains and petrol-stations obviously have a desire for high prices. They would like to have high prices throughout the week, but the temptation to lower prices to gain volume seems to be too big to be able to sustain high-price equilibrium. A plausible reason for Monday being the high price point in the cycle is that, there is higher probability for low volume instigated losses if one operates with high prices in the weekend. During the weekend, customers have more time to shop around.

If this is the case, then the possibility to reach a price depicting a “true” Edgeworth Cycle is higher during the weekend than during the week. If it is true that the price elasticity is higher during the weekend, it is also true that the price elasticity is lower during weekdays. The penalty for increasing price on Monday can be perceived to be less severe than during the weekend, and the penalty is more or less the same the rest of the week-days. This might explain why a supplier would be inclined to increase prices on Mondays rather than other days of the week, and also why the other players would be more inclined to follow the price-increase.

As regards possible effects of this price pattern, it can be argued that if the price cycle is “reset” before an Edgeworth Cycle would be reset, the lowest price in the weekly cycle would be higher than the lowest price in an Edgeworth Cycle. At the outset this lowers the welfare of consumers, because the extreme low prices are never reached.

A weekly cycle as described above makes the price pattern very predictable for the consumers. The more predictable the cycle, the easier it is to make purchases when the price is low (unless the customer does not have storage-capacity for a week).

The predictable price cycle could be viewed as a kind of price-discrimination, where the extremely price-sensitive consumers do all their shopping during the low-price part of the cycle, whilst the less price sensitive obtain their supplies at various times in the week. This sort of price-discrimination might give the suppliers a possibility to set prices lower than they would without the cycle. It is noteworthy that the described price cycle could have a net positive economic effect, partly because the volume-weighted price would be lower than if no cycle was present.

A more speculative effect might be that when the suppliers get used to the weekly pattern, they can expect – with a high degree of certainty – that the prices will rise on Monday. This certainty might lead to prices being cut to the same level as the level in a “true” Edgeworth Cycle, in order to gain the largest possible volume. If this happens, then there would be no negative effects of the weekly cycle just as would be the case in a true Edgeworth Cycle. The prices will reach the same level, and the predictability of the cycle will give an opportunity for positive economic effects.

The Norwegian Competition Authority has so far this year performed a thorough review of the fuel market in Norway, but has not found grounds to intervene. The authority will, however, still monitor developments in the market.

PORTUGAL

1. Status of vertical relations related to retail gasoline outlets

1.1 *Question 1: Are there national laws or regulations that require vertical separation of petroleum refiners from gasoline retailers in your country? Are there national laws or regulations that require vertical separation of gasoline distributors from gasoline retailers or petroleum refiners in your country? Even if there are no national restrictions of vertical integration in the gasoline industry, are there vertical unbundling requirements for gasoline retailing that apply in provinces or states? What changes if any have there been in such requirements in recent years? Is this an active area of policy discussion in your country? Do vertical separation rules, if any, also apply to gasoline distributors (jobbers)? Do any prohibitions of vertical integration prevent retailers individually or collectively from buying or building refinery capacity?*

In Portugal, nation-wide and across regions, there are no specific laws or regulations which require or prevent any of the referred types of vertical integration. Petroleum refiners – a single one in Portugal, namely Galp Energia, SGPS (GALP), which owns the two existing refining plants in Portugal – together with gasoline distributors are free to operate in any of the oil activity stages, from petroleum refining to distribution and retail sales to final consumers.

1.2 *Question 2: If there are no requirements for vertical separation of gasoline retail outlets in any or all parts of your nation, what types of vertical relationships exist between gasoline retailers and refiners or other upstream entities in these areas? How common are each of the types of vertical relationships in these areas of your country? In these same areas, are there any trends in the popularity of particular types of vertical relationships?*

Because Portugal has no oil production, it imports all the oil (*Brent* type) it consumes. Hence, the national sector is characterized by the downstream oil activities of refining, wholesale (distribution) and retail sales to final consumers.

Six oil companies operate in Portugal, namely GALP (the single refiner), *British Petroleum* (BP), *Repsol YPF* (REPSOL)¹, the *Total-Fina-Elf* Group (CEPSA)², *AGIP* (part of the *ENI Group*, which holds 1/3 of GALP's capital)³ and *ESSO* (from the *Exxon-Mobil Group*). Together they control more than 90%

¹ In September 2004, with no opposition from the European Commission (EC), REPSOL took over the distribution and retail operations of SHELL in Portugal (EC Merger Decision No. COMP/M.3516 - REPSOL/SHELL, 13rd September 2004). According to statements issued by REPSOL, this company overtook BP, by the end of 2005, as the second largest retail seller in Portugal.

² In September 2004, with no opposition from the EC, TOTAL acquired exclusive control over CEPSA (EC Merger Decision No. COMP/M.4329, 13rd October 2006). Prior to that date, TOTAL had, in fact, 45% of CEPSA's capital. Since at the beginning of this year, TOTAL decided to leave only the CEPSA brand in the Iberian Peninsula, we shall here and henceforth refer to TOTAL and CEPSA branded retail outlets as CEPSA.

³ At the end of 2004, about 20% of GALP shares were made available for trading on the Stock Market. The remainder is held by the Amorim Group (1/3), by ENI (33%) and by the State.

of total wholesale activity (distribution) and their brands represent around 85% of total retail sales in Portugal, with the so-called “white hypermarket pumps” representing less than 5% of that total and other independent operators representing roughly 10% of that total.⁴

Moreover, oil companies’ own outlets – COCO (“Company Owned and Company Operated”) together with CODO (“Company Owned and Dealer Operated”) types – account for roughly 63% of total retail sales. Oil companies’ branded open dealers, *i.e.* the DODO (“Dealer Owned and Dealer Operated”) type, account for roughly 22% of total retail sales (in 2005).⁵

Though there are independent wholesalers and independent retailers – minor brands together with the white hypermarket outlet networks – these operators can be said to be dependent upon oil companies as they depend upon their refining activity, with the further possibility of importing, notably, from the Spanish refiners (REPSOL, CEPSA, and BP).

Most of the public debate on oil companies’ vertical integration into retail sales is related with the relations those companies have with their branded open dealers (DODO). A recurrent complaint from the national fuel resellers association (ANAREC)⁶ concerns, notably, an alleged resale price maintenance (RPM) practice oil companies impose on their DODO through their recommend pricing policy.

In spite of the fact that most of the public debate is focused on the vertical relations between oil companies and their branded DODO, the four refiners in the Iberian Peninsula – GALP, REPSOL, CEPSA, and BP – account for more than 80% of total wholesales in Portugal and are expected, in the near future, to control more than 90% of this activity as AGIP and ESSO are currently selling their Iberian activity, which, probably, will be taken-over by GALP.⁷

It must be noted that up to the entry of Portugal into the European Union (EU), in 1986, GALP had a legal monopoly of fuel sales in Portugal, with the impossibility of other operators (BP, ESSO, and CEPSA at that time) to import and operate retail outlets in Portugal. No other types of “vertical separation” have characterized the national sector apart from this one.

1.3 Question 3: *If there are requirements for vertical separation, what rationales and evidence were used? Do refiners potentially have market power? Prior to vertical separation, were refiners, distributors and retail gasoline outlets all integrated? If so, how concentrated was the industry and to what extent has entry been feasible? Where do independent distributors obtain their gasoline?*

See reply to Question 2 above.

⁴ See also *Report by the [Portuguese] Competition Authority on the Fuel Market in Portugal*, of 2 June 2008, available in http://www.concorrencia.pt/download/AdC_Report_Fuel_Market_02-06-2008.pdf.

⁵ The dealer operated outlets (CODO and DODO) include the special case in which the dealer operates in a franchising type of regime, *i.e.* the “Company Owned and Franchised Operated” (COFO) and the “Dealer Owned and Franchised Operated” (DOFO) outlets respectively.

⁶ ANAREC stands for “*Associação Nacional de Revendedores de Combustíveis*”.

⁷ These merger operations are, actually, under ongoing analysis by the EC.

1.4 Question 4: How common are independent gasoline retailers in your country as a whole and broken down according to whether mandatory vertical separation requirements are in place in the gasoline retailing business?

As aforementioned, independent operators – wholesalers and retailers – have a relatively small market share in Portugal, less than 10% of total wholesales and around 15-20% of total retail sales, though it can be argued that they are dependent upon oil companies' wholesaling and refining activities.

1.5 Question 5: How would you characterize the frequency and intensity of legal disputes between gasoline retailers and refiners or other upstream entities (like distributors) in the gasoline industry in your country? Are there actively enforced laws or regulations against price and service discrimination in your country? Do these apply to price and service discrimination between retail gasoline outlets by refiners or other upstream entities in the gasoline industry? Are there antidiscrimination laws or regulations specific to the gasoline retailing trade? What has been the relationship (substitutes, complements) between price discrimination prohibitions and vertical separation requirements in your country, if any?

There are legal disputes between gasoline retailers and wholesalers, mostly oil companies, but mostly related with private enforcement cases. No official complaint has been addressed to the Portuguese Competition Authority (PCA).

Apart from the general provisions in Article 4(1) and Article 6 of the Portuguese Competition Law (Law No. 18/2003, of 11 June, henceforth referred to as PCL), whose text is similar to those of Article 81(1) and Article 82 of the EC Treaty respectively, the PCL prohibits, in addition to the EC Treaty, the "abuse of economic dependency" (ex vi Article 7 of the PCL). In particular, Article 7(1) of the PCL prevails that.⁸

"Insofar as it may affect the functioning of the market or the structure of the competition, one or more undertakings shall not engage in the abusive exploitation of the economic dependence on it or them of any supplier or client on account of the absence of an equivalent alternative"

This provision may apply to the vertical relations between oil companies and their branded outlets. There is, however, no case on an infringement to Article 7 of the PCL.

Moreover, there is a specific Portuguese legislation on price and service discrimination, as prevailed in Decree-Law No. 370/93, of 29 October, as amended by Decree-Law No. 140/98, of 16 May, but to the entire retailing activity in general, not specific to gasoline retailing trade only. That legislation's provisions are on the "Application of Discriminatory Prices or Selling Conditions" (Article 1), "Lists of Prices and respective Selling Conditions" (Article 2), "Sale below Costs" (Article 3), "Refusal to Sell Goods or Render Services" (Article 4), and on "Abusive Business Practices" (Article 4-A). Moreover, as prevailed in Article 6 of that legislation, the Portuguese Authority on Food and Economic Security (*Autoridade de Segurança Alimentar e Económica*) has the duty of inspecting this act's fulfilment and the PCA has the duty of handling the respective cases' proceedings and adopting decision, imposing fines if justified.⁹

According to recent evidence collected by the PCA, that legislation should, however, only apply to open dealers, *i.e.* to independent retailers and the oil companies' branded DODO type of outlets, as the oil companies' branded COCO and CODO type of outlets are directly owned by the company. In other words,

⁸ See PCL (Law No. 18/2003, of 11 June) in <http://www.concorrenca.pt/en/Legislation/National.asp>.

⁹ Only the Portuguese version of these two Decree-Laws are available and authentic. Translations are our own (see <http://www.autoridadedaconcorrenca.pt/Legislacao/Nacional.asp>).

as aforementioned in the reply to Question 2 above, vertical restrictions, in case they exist, on gasoline retailing activity¹⁰ should only apply to open dealers, not to the oil companies' own outlets (COCO and CODO).

There is, however, no acknowledgeable case on the application of such legislation in the gasoline sector.

1.6 Question 6: What, if any, other segments of the energy sector in your country have laws or regulations that require vertical separation of retailers from upstream manufacturers or other entities? What are the perceived costs and benefits of mandatory vertical separation in these segments, if any? Is there a historic relationship between these vertical separation requirements and adoption or discussion of vertical separation requirements in gasoline retailing?

Vertical separation in the national energy sector occurred in electricity, in 2001, and in the natural gas activity, in 2006, but related with the separation of the transport facilities infra-structure from the upstream production side.

1.7 Question 7: If vertical separation is mandatory in the retail gasoline business in all or part of your country, have academic researchers (or your agency) assessed whether supply contracts have evolved in ways that are nearly equivalent to vertical integration?

Not applicable in the case of Portugal (see Questions 1 to 5 above).

1.8 Question 8: Retail price maintenance (RPM) permits a supplier to determine a retail price of goods that it supplies without owning the retailers. Is resale price maintenance permitted or not permitted for gasoline?

Similarly to Article 81(1) of the Treaty which established the European Community (EC Treaty); RPM is forbidden by Article 4(1) of the PCL. In particular, Article 4(1), section a), of the PCL prevails that:¹¹

“Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, whatever form they take, of which the object or effect is appreciably to prevent, distort or restrict competition in the whole or a part of the national market, are prohibited, in particular those which:

a) Directly or indirectly fix purchase or selling prices or interfere with their establishment by free market forces, thus causing them artificially either to rise or fall”

Yet, as aforementioned in the reply to Question 2 above, there is no decision against RPM (or any other type of potential vertical restrictions) in the national gasoline industry.

¹⁰ Considering the same expression as in the present OECD Questionnaire, we shall here and henceforth refer to “gasoline” as all the usual motor liquid fuels sold in filling stations, diesel and gasoline.

¹¹ See PCL (Law No. 18/2003, of 11 June) in <http://www.concorrenca.pt/en/Legislation/National.asp>.

2. Costs and benefits of different vertical relations related to retail gasoline outlets

2.1 *Question 9: If there are parts of your country with mandatory vertical separation of gasoline retailers and parts with no such requirements (or if there have been recent changes in vertical separation requirements), what differences (or changes) are there in prices charged, repair services offered, goods sold at the same location, etc. between retailers in the areas (or time periods) with mandatory vertical separation compared to those areas without such requirements. Are there published studies that analyze such differences or changes in your countries gasoline retailing segment? If there are such studies, did they control for competition from independent retailers of non-branded gasoline?*

Vertical separation in gasoline retailing is, as aforementioned, not applicable in the case of Portugal and there are no acknowledgeable studies on this issue regarding the national sector.

2.2 *Question 10: If vertical relations related to retail gasoline outlets is an active issue in your country, what are the principal benefits that advocates of vertical separation cite? What evidence or studies are cited to substantiate the claimed benefits? Is there any evidence that either wholesale or retail prices are lower in markets with vertical separation? What are the principle costs identified by opponents of mandatory vertical separation in the retail gasoline business?*

No formal analysis has been performed yet on the pros or cons of vertical separation in the Portuguese gasoline retailing activity. The empirics of this issue have been tackled by some other competition agencies.¹² In particular, in spite of the fact that open dealers account for about 61% of total retail sales in the US, against 20% of CODO type and 19% of COCO (see Meyers and Fisher, 2004), most of the empirical studies argue that vertical separation is bad both for consumer welfare and for market efficiency (see Froeb *et al.*, 2005 and Taylor, Kreisle, and Zimmerman, 2007, for surveys of this literature).

Following from such empirical findings and the fact that oil companies' open dealers (DODO type) represent only about 20% of total Portuguese retail sales, the effects from vertical separation should not be relevant in our market.

Moreover, unofficial complaints from open dealers, that they are obliged to sell at the respective oil company's recommended prices as these do not leave them sufficient margin to sell below such prices, suggests that possible vertical separation might, actually, lead to higher prices to final consumers, thus worsening consumer welfare. On economic grounds, there is, actually, no incentive for a dealer to sell at a lower price than the respective brand's recommended price should she have full freedom to sell above or below that price (see the so-called double mark-up problem¹³).

2.3 *Question 11: In some countries, the lowest gasoline prices tend to be offered by large general retailers of food and consumer goods. In countries where such large general retailers are important suppliers or retail gasoline, is separation in place? Where do the large general retailers obtain their gasoline? How have they been able to set low prices?*

In Portugal, large general retailers of food and consumer goods – the so-called “white hypermarkets pump networks” – operate only in the gasoline retailing activity and have, at present, a small market share,

¹² See *v.g.*, the US Federal Trade Commission (FTC) studies Deck and Wilson (2003), Froeb *et al.* (2005), Meyer and Fisher (2004), Vita (2000), and Taylor, Kreisle, and Zimmerman (2007).

¹³ In *v.g.*, Shepard (1993), Taylor (2000), and Deck and Wilson (2003).

less than 5% in 2005.¹⁴ They buy in the general wholesale spot market and, mostly, from oil companies. As in other EU Member States – such as France and the UK for instance – their price is lower than that of the remaining brands, around 2 to 8 cents / litter below the other brands.

There is some evidence, but no formal analysis as of yet, that such price reductions are possible since white hypermarket pumps abdicate from part of their fuel distribution margins in order to attract consumers to their major consumer goods' retail stores.¹⁵ Moreover, as their main activity is not the fuel sector but the general food and consumer goods', white hypermarket pumps are much less subjected to the fuel activity specific volatility and costs than the major fuel operators.

2.4 *Question 12: In some countries, gasoline retailing has shifted from a service offered in conjunction with automobile repair services to a model in which snack and other food sales are typically available at the same location, but automobile repair services are no longer offered or are much less prominent than in the past. Has your country experienced this or other notable changes in the gasoline retailing? Is there any difference in the pace of this transformation between the areas where vertical separation is mandatory versus those where it is not mandatory?*

The major changes which have occurred in the Portuguese gasoline retailing activity are related with the almost disappearance of gasoline outlets in urban areas, outside the major roads – motorways and superhighways with or without toll payment – where gasoline outlets offer a variety of services wider than the gasoline activity, from convenience stores to general catering services and vehicles' cleaning stations.

General automobile repair services offered in conjunction with gasoline retailing are less prominent than in the past, but still exist.

2.5 *Question 13: Some observers note that the minimum efficient scale for refining is large, while the minimum efficient scale for distribution is much smaller. In some countries, this leads to quantity swapping between refineries in order to ensure that each refining company can have a broader geography of distribution. Does quantity swapping for gasoline exist in your country? Is such swapping viewed as a way to achieve some of the benefits of vertical separation without requiring actual ownership separation? Does quantity swapping make entry more difficult?*

There is some evidence of quantity swapping in Portugal, among refiners in the Iberian Peninsula and among oil companies in the national wholesaling activity. As of yet no analysis has, however, been performed to tackle the pros and cons of such a practice.

¹⁴ Though there is some evidence that this market share may have grown to around 7% in 2007, following mid 2005 legislation aimed at promoting the entry into the market of such pumps and, notably, from the recent strong increases in the price of motor fuels (gasoline and diesel).

¹⁵ The recent *Report by the [PCA] on the Fuel Market in Portugal, op. cit.*, shows that overall gasoline distribution margins – *i.e.* the difference between net-of-taxes final pump prices and ex-refinery prices – are about 10 to 13 € cents per litter (see Sections 4 and 5 of the PCA Report).

3. Competition Advocacy and Litigation

3.1 *Question 14: Has your agency undertaken any competition advocacy regarding mandatory vertical separation or vertical relations in the retail gasoline trade? If so, what has been your position about this policy? What costs and benefits did you identify? Did you find any particular arguments to be particularly compelling? What was the outcome of your advocacy effort and what explains the outcome?*

The PCA has not taken any advocacy measures regarding vertical separation or vertical relations in the general gasoline activity.

There is scope for promoting the development of alternative retailing brands to oil companies', mostly, the white hypermarket's type. The PCA advocacy measures in the sector have been the object of a PCA Recommendation to the Government (Recommendation No. 3/2004).¹⁶

3.2 *Question 15: Has you agency undertaken any litigation regarding vertical integration or price/service discrimination involving gasoline retailing? What evidence was most important in deciding to bring the case(s)? What were the principal arguments in the case? What was the decision in the most prominent case? Did the case or its outcome influence subsequent law enforcement initiatives, regulations, or legislation?*

Evidence suggests that vertical restrictions affect only DODO type of outlets since CODO and COCO fall directly under the exemptions of Article 81(3) of the EC Treaty, whose application is foreseen in Article 5 of the PCL, as such outlets are owned by the oil company, the CODO type being, actually, seen as a type of agency contract.

¹⁶ Available in http://www.concorrenca.pt/Download/recommendation2004_03.pdf. See also the *Report by the [PCA] on the Fuel Market in Portugal, op. cit.*, Section 7 for a more detailed description of the proposed advocacy measures in the sector.

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GLOSSARY

ANAREC	Portuguese national association of (liquid) fuel resellers
COCO	Company owned and company operated retail outlets
CODO	Company owned and dealer operated, franchised or not, retail outlets
DG	Directorate General
DODO	Dealer owned and dealer operated, franchised or not, retail outlets
EC	European Commission
EC Treaty	Treaty which established the European Community
EU	European Union
FTC	US Federal Trade Commission
PCA	Portuguese Competition Authority
PCL	Portuguese Competition Law (Law No. 18/2003, of 11 June)
RPM	Resale Price Maintenance

SPAIN

1. Regulation of petroleum by-products in Spain

During the last two decades petrol markets in Spain have hugely changed, mainly because of the movement from a legal monopoly system towards free competition. This demonopolization process started in 1984 as a condition to adhere the European Communities¹.

Nowadays, the hydrocarbon sector is regulated in the Hydrocarbons Act No. 34/1998², published in October 1998, which has been amended at several stages. The aim of this Act is to foster free competition in the energy sector and to put in place different mechanisms to obtain information from market agents in order to check that market liberalization objectives have been achieved. Likewise, this Act seeks to provide an industry-wide regulation. The Hydrocarbon Act also creates the *Comisión Nacional de la Energía* (Spanish Energy Regulator) whose functions are those of regulating and monitoring the energy markets in order to guarantee their transparency.

With this goal, Article 1 of this Act states that the activities aimed at providing hydrocarbon products shall be exercised under the principles of objectivity, transparency and free competition. In particular, Title III relates to the regulation and management of the petroleum by-products market. Article 37 establishes that the activities of refining of crude oil and storage, distribution and selling of petroleum by-products shall be provided freely, subject to the fulfilment of certain conditions of the Act, i.e. technical and administrative ones³. Besides, Article 38 declares that the prices of petroleum by-products shall be freely set.

From the hydrocarbon production to the use of petrol in our vehicle, a lot of economic transactions are made. All these transactions need to be globally considered. Vertical integration is not imposed nor prohibited under the Act⁴.

We find in Spain situations of *vertical integration*, where refiner, petrol retailing outlets and petrol distributors are integrated into one company; and *vertical disintegration*, where transactions and processes are run by different companies. There are around 8,000 petrol stations in Spain, 2,000 belonging to the refiner and most of the rest belonging to others but using the refiner's brand name.

Royal Decree-Law 5/2005 was adopted to further deepen the orderly liberalization of the energy sector and to adopt structural measures in order to enhance productivity and efficiency among economic agents, to promote free competition within the energy market and to prevent distortion of prices. One of

¹ For further information: www.cne.es/cne/doc/publicaciones/IAP_CRONO_DP06.pdf.

² For further information: http://www.cne.es/cne/doc/legislacion/NE005_05.pdf.

³ For example, an administrative authorisation is needed to open and/or to build a new petrol station.

⁴ In case C 86/04, DISA v. SHELL, the *Tribunal de Defensa de la Competencia* stated that there were several relevant markets: gasoline distribution, retailer through petrol stations market, wholesale petroleum products sales market, petroleum products storage market, refined products supply or sale market, lubricants retail distribution market. Note that from September 2007 the two former Spanish Competition Authorities, the *Tribunal* and the *Servicio*, merged into the *Comisión Nacional de la Competencia*.

these measures related to the hydrocarbon market is the creation of a retailers' register that should improve the existing petrol prices data base.

2. Vertical relations related to petrol retailing in Spain

When it comes to vertical relations in the sector of petrol retailing, the main controversies between oil companies and petrol stations are of two kinds. On the one hand, petrol stations consider themselves as retailers, not agents, and thus they complain that the oil company should not, directly or indirectly, fix their retail prices. On the other hand, petrol stations believe that the duration of their contracts with oil companies is longer than legally allowed according to Article 5 (a) of Regulation 2790/1999, on the application of Article 81.3 of the EC Treaty to categories of vertical agreements.

The doctrine of the Spanish Competition Authority in this respect states the following⁵:

2.1 *The nature of the relationship between the supplier (the oil company) and the retailer (the petrol station)*

“Genuine” agency agreements do not fall within the scope of Article 1 of the Spanish Competition Act⁶, but “non-genuine” agency agreements may fall within the scope of this Article. According to a Commercial Court ruling dated 22.03.2005, “non-genuine” agency agreements are not prohibited by Spanish law, as it allows contractual freedom and innominate contracts, but they are subject to Competition rules.

Nevertheless, it is difficult to determine an agency contract is genuine or not.

According to Spanish legislation and jurisprudence, in the context of a genuine agency contract or agreement an independent agent is responsible for negotiating –or negotiating and concluding- the sale or purchase of goods on behalf of the employer or principal:

- It is a long term contract in the sense that it creates a legal relationship between the parties requiring permanence or stability;
- The agent has to carry out his activity on behalf of the employer not bearing the risks of operations he has promoted or concluded for the employer;
- The agent is considered an independent "intermediary", meaning that his intermediation work is organized according to his own criteria;
- An agency contract is bilateral and onerous: The agent's activity has to be paid by the employer, but the obligation to pay the agent only arises when the business is done. In our case, the obligation by the oil company to pay the petrol station arises when the fuel is actually sold to end users.

Thus, the conclusive factor to determine whether an agency agreement is genuine or not is who bears the risks. But there are different kinds of risks:

⁵ See Decisions on cases 490/00, 493/00 and r691/06, available at <http://www.cncompetencia.es/index.asp?m=42&p=>

⁶ Act 15/2007, of 3 July. Available at <http://www.cncompetencia.es/PDFs/legislacion/47ing.pdf>.

- *Damage to the goods risk*: According to Article 1766 of the Spanish Civil Code if the petrol station bears the damage to the goods risk as a result of negligence or faultily handling the product, the contract is an agency contract. If the petrol station bears the fortuitous damages suffered, the contract is not an agency contract.
- *Product liability risk*: When the agent does not undertake responsibility towards third parties for damage caused by the product, set aside negligence, the contract is an agency contract.
- *Price risk*: The fuel sale price is given by the aggregation of two elements: the sale price of the oil company and the petrol station commission. The fact the price risk is on the principal is one of the key elements of the agency relationship. Another element linked to the price risk is the increase or decrease in the stocks value as a result of retail price changes. When the contract does not specify that the oil company shall compensate the petrol station for fluctuations in the petrol stocks value, this means that the risk is on the petrol station, which is inconsistent with the nature of an agency contract.
- *Economic risk*: It is the agent who typically assumes the risk as a result of a bad business.
- *Volumetric risk*: This risk should be on the principal for the contract to be an agency contract. In our sector, it is estimated to amount to just 3 per 1,000 of the volume.
- *Financial cost*: Usually the retailer pays cash or within 9 days from delivery -if the retailer provides a guarantee for the supplied product, or the equivalent to 15-day product supply. When payment is required in advance or when the average period that the fuel stays at the petrol station before it is sold is more than nine days, the financial cost falls entirely on the retailer. In 2001 the assumption of this risk by the retailer was considered not compatible with a genuine agency contract. Nevertheless, the *Tribunal Supremo* (Spanish Supreme Court) ruled otherwise in 2004, concluding that the retailer was not bearing any financial. First, because the value of the supplied product was collected from the consumer before the time of reimbursement, due to supply rotations. Second, because Article 251 of the Spanish Commercial Code provides for the possibility to advance the funds by the agent when carrying out the commissioned task.

To correctly determine whether the purported agent bears some risks that a genuine agent should not, in some cases the *ownership of the petrol* is relevant, as a secondary proxy. If the petrol station, on behalf of the oil company, sells some products for which the damage to the goods and price risks and the financial costs (in other words, the risks inherent to property) are distributed between the petrol station and the oil company, it can hardly be said the oil company keeps that ownership. Thus, the petrol station is not a genuine agent but a true retailer.

2.2 Once it has been established that a contract is not an agency contract.

Exclusive petrol distribution agreements could fall, in principle, within the prohibition of Article 1 of the Competition Act, as they restrict the parties' commercial freedom. Nevertheless, they may generate efficiencies and encourage interbrand competition. Thus, these agreements could be exempted, subject to the fulfilment of the conditions required by EC Regulation No. 2790/1999⁷.

The fixing of retail prices by the oil company when the petrol station cannot be qualified as a genuine agent makes the contract unable to obtain the exemption provided for in article 2 of Regulation 2790/1999 (see article 4.a. of the Regulation) and so maybe considered as a prohibited practice under Article 1 of the

⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:336:0021:0025:EN:PDF>.

Competition Act. Indeed, when a reseller firmly buys the product he becomes a competitor of the oil company (which owns petrol stations itself) in the downstream market, within the petrol station network, and so the oil company cannot impose nor suggest any retail prices, as petrol stations are not his agents but true independent undertakings.

The clauses restraining the agents' freedom to reduce resale prices through the reduction of their commission have received the same treatment. Even more, the Spanish Competition Authority has seen the contract clauses explicitly enabling the agent to reduce his commission, as a means to indirectly fix resale prices due to the fact that even though the petrol stations were allowed to offer discounts on the resale price indicated by the supplier, they had limited incentives to do so because of fiscal considerations (the VAT return system)⁸. This rationale was shared by a Commercial Court in a ruling dated 29.07.2005 but not by another Commercial Court ruling dated 22.03.2005, where it was considered that petrol stations could effectively offer such discounts. No unifying jurisprudence has been adopted by the *Tribunal Supremo* yet.

As for the duration of the non-compete obligations imposed on the retailer, the Spanish Competition Authority has interpreted article 5. a. of Regulation 2790/1999, which provides that the duration of exclusive purchase obligations should not exceed five years unless the retailer (the petrol station) operates from premises and land owned by the supplier (the oil company) or leased by him from third parties not connected with the retailer, in a restrictive manner.

First, five-year duration contracts not requiring the explicit acknowledgement by both parties for renewal have been considered as highly likely to lead to a long duration contract and, therefore, as not covered by the exemption⁹.

Second, complex contract sequences on the land and premises are looked into very carefully. According to our experience, sequences such as *the retailer owns the land, the retailer grants the right to use the land to the oil company, the oil company invests a significant amount of money in building the petrol station on the land the retailer rents the plant and equipment and signs an exclusive purchase contract with the oil company* are very common. The Spanish Competition Authority assesses on a case-by-case basis whether such sequences are fraudulent and used as a means to extend the duration of exclusive purchase contracts beyond five years and still fall within the scope of the exemption Regulation. In short, if the land is initially owned by the retailer, regardless of the investment or legal relations between

⁸ See Decision on case 490/00 of 11.07.2001.

⁹ See Decision on case r 691/06 DISA of 27.11.2007. The SDC had decided not to proceed with the investigation on 38 agreements between fuel retailers and SHELL ESPAÑA S.A. (to whose position DISA PENÍNSULA S.L.U. had by then subrogated) on grounds that 13 were between principal and agent, or because exemption under EC Regulation 2.790/1999 was of application, or because even when the agreements exceeded the duration of five years or when they included tacit renewal clauses so that the relationship could be extended beyond five years, the agreements were not capable of having a material effect on the motor vehicle fuel distribution market because DISA Peninsula was below the 5% market share established in the EC *de minimis* Notice. The Council agreed that the essential question here was whether the duration of the exclusive purchase obligation in the DISA agreements analysed had or could have the effect of restricting competition. Thus, it was necessary to examine the two cumulative requirements stated in the ruling of the Court of Justice of the European Communities in the Delimitis case as to determine the effects of an exclusive purchase agreement: whether the market was hard to access for competitors, and the extent to which the agreement entered into by the operator concerned contributed to the cumulative effect produced by the combination of similar agreements in the market. The information on the case file showed that the agreements did not contribute significantly to the closure of the Spanish mainland fuel distribution market. The Council therefore decided to dismiss all the appeals filed in relation to these proceedings.

them, the retailer should have the freedom, after a maximum of five years, to change suppliers and so, "to re-enter the market"¹⁰.

Other clauses have been considered not to fulfil the conditions of Regulation 2790/1999¹¹:

- The exclusive obligation for purchasing motor oils, lubricants and other related products and the prohibition to sell competing products.
- The prohibition to advertise products not supplied by the oil company.
- The clauses establishing the oil company's power to inspect the petrol station's books and documents, even when the aim is that of elaborating cost-benefit studies on the petrol station.
- The obligation imposed on the retailer not to accept credit cards other than those issued by the oil company.
- The prohibition on the retailer to run industry activities not expressly authorized by the oil company.

2.3 *Bilateral behaviour*

In order to apply Article 1 of the Competition Act, an understanding between at least two undertakings is required and the prohibited conduct must be attributable to all parties involved. However, in vertical relations related to petrol retailing, fines are usually imposed only on the supplier, that is to say, on the party holding the strongest bargaining position, as the retailer is normally only allowed to adhere to a framework contract. Since Article 63 of the Competition Act states that fines are imposed on those that, intentionally or by negligence, infringe the provisions of the Act, and retailers do not usually behave intentionally, this lack of culpability or responsibility makes them not to be considered as infringers.

3. **Ongoing work**

On the one hand, the CNC is carrying out an analysis of the general trend in petrol prices over the past two years and the market structure with special attention to entry barriers.

On the other hand, the CNC is currently investigating the horizontal relations between oil companies. In August 2008 a Spanish consumer association filed a complaint before the *Comisión Nacional de la Competencia* (CNC) that price fluctuations at point of sale (i.e. petrol stations) could have been agreed upon.

¹⁰ See Decisions on cases R 566/03 Estaciones de servicio Galicia of 27.01.2004 and r 676/05 Jofra oil/Shell of 17.07.2006.

¹¹ See Decisions on cases 468/99 TEXACO 2 of 27.07.2000 and 520/01 DISARED of 31.05.2002.

TURKEY

The Turkish Competition Authority (TCA) prepared a **Report on Fuel Market** dated 2.6.2008 with a view to assessing the market from the perspective of competition law. Following the findings of the Fuel Market Report, and the news in the media and complaints alleging that the Act no 4054 on the Protection of Competition (Competition Act) might have been violated, a preliminary inquiry has been initiated against Turkish Petroleum Refineries Corporation and the five largest distributors namely Petrol Ofisi A.Ş., Shell&Turcas Petrol A.Ş., BP Petrolleri A.Ş., Opet Petrolcülük A.Ş., Total Oil Türkiye A.Ş.

Following the preliminary inquiry, the Competition Board decided that the Competition Act was not violated and there was no need for an investigation when only the information and documents regarding pricing were taken into account.¹ However, when the findings of the Fuel Market Report were also considered, it was concluded that there were serious structural barriers against competition in the fuel market and the sector did not display a competitive outlook. The findings of the Fuel Market Report as well as the preliminary inquiry have been adopted as a formal Opinion of the Competition Board and sent to the Energy Market Regulatory Authority (EMRA) on 11.8.2008.

This contribution is based on findings of the Fuel Market Report.

1. Fuel Market in Turkey

Petroleum industry in Turkey has had a vertically integrated structure historically and the assessments regarding the structure drew attention to operational advantages caused by the structure such as ensuring security of supply. The petroleum producers faced no obstacle in building refineries or entering wholesale and retail sale chains in the past. The *de facto* situation existed in the past was confirmed legally by the Petroleum Market Law no 5015² (Petroleum Market Law) allowing the refiners to enter into distribution activities.³

However, the Petroleum Market Law restricted sales by fuel stations operated by distributors with a maximum 15% of the distributor's total domestic market share.⁴ Therefore, it can be said that while there exists no legal obstacle against vertical integration up to retail level, the Petroleum Market Law aims to prevent emergence of a vertically integrated structure between distribution and retail sale.

Although the Petroleum Market Law brings 15% threshold cited above, it should be said that, similar to current situation, the distribution firms have not had a tendency to vertically integrate at retail level even before the enactment of Petroleum Market Law due to high costs. However, instead of vertical integration via building fuel retailers or acquiring current fuel retailers, a sort of alternative vertical integration model

¹ Decision is dated 24.7.2008 and numbered 08-47/653-250.

² Petroleum market activities are carried out by Petroleum Market Law, while production and searching activities are dealt with by Petroleum Law no 6326.

³ Law No 5015, published in the official gazette on December 20, 2003.

⁴ See Article 7(5). Same article also provides that domestic market share of the distributor shall not exceed 45% of the total domestic market.

has been instituted through rights such as ‘lease’ and ‘usufruct’. Therefore, in practice more than 95% of fuel stations signed usufruct contracts with the distributors.

In fact, the Petroleum Market Law requires fuel retailers to sign exclusive purchasing contracts with distributors.⁵ Therefore, the distributors generally have signed both exclusive purchasing contracts and usufruct contracts with the fuel stations. Moreover, according to the Petroleum Market Law, the distributors are prohibited from selling to fuel retailers that are supplied by other distributors.⁶ Therefore, the Petroleum Market Law did not allow operation of independent fuel stations (so-called white flagged stations) which existed before the Petroleum Market Law and brought price competition. Before the enactment of the Petroleum Market Law, such stations obtained their supplies at cheaper prices via border trade. The main reason for termination of their operation was the allegations that they involved in illegal fuel trafficking. However, it should be said that illegal fuel trafficking has nearly ended after entry into force of legislation regarding national marker (additive to be added to the fuel at the refinery exit point or at customs entry point) and its enforcement.

2. Provisions Prohibiting Discrimination

According to Petroleum Market Law, refineries can perform fuel distribution activities via its distributors.⁷ However, it should offer, on a category basis, the same conditions to those demanding fuel from itself as it does to its own distributor.⁸ According to another clause in the Petroleum Market Law, distributors can not grant subsidies to stations that they operate or treat them differently from other stations that they supply.⁹ Moreover, the provisions in the Act no 4054 on the Protection of Competition (Competition Act) prohibiting discriminatory agreements, concerted practices, decisions and abuse of dominant position are also applicable in energy markets.

3. Pricing and Vertical Relations in Fuel Market

Although there exists no overt clause in the Petroleum Market Law regarding pricing by retailers, the secondary legislation concerning licences in petroleum market empowers the distributor to set maximum prices to be applied in the fuel retailers and notify it to EMRA.¹⁰ In practice, EMRA publishes the prices notified and therefore announces it to all undertakings in the market. Moreover, according to Petroleum Market Law, distributors should inform the fuel retailers of promotional campaigns to be carried out with their participation in a transparent and clear manner together with the documents regarding the costs of such campaigns.¹¹ However, the participation of the fuel retailers in the campaigns shall be optional.

The Petroleum Market Law aims to create a pricing structure that is in harmony with price changes in international market on one hand and to ensure that competitive advantages are reflected in the market through freedom to set price on the other. Within this framework, it is expected that retail prices rise as international prices rise whereas they fall as international prices fall. However, the Fuel Market Report mentions that although prices charged by refineries and retail prices rise when international prices rise, falls in international prices are not reflected in retail prices at identical rates. This indicates price rigidity at

⁵ See Article 8(1).

⁶ See Article 7(2).

⁷ See Article 5(1)(b).

⁸ See Article 5(1).

⁹ See Article 7(5).

¹⁰ See Article 34(1)(e) of the Implementing Regulation on Licences in the Petroleum Market.

¹¹ See Article 9(12).

wholesale and retail level when international prices fall meaning that either changes in international prices are not taken into account in an adequate manner or competitive pricing does not occur despite liberalisation at wholesale and retail level.

According to the Fuel Market Report, it is hard to create competition at retail level. As retail fuel products are homogenous to a great extent, severe price competition would put the fuel retailer who cuts the price at an advantageous position. However, the impact of the price competition will be harmful for all if other fuel retailers follow the price cut. Therefore, at retail level price competition is avoided and only trivial differences in price that can not be distinguished by consumers emerge. As a result, the retail fuel trade has been shaped as a market where price is taken as granted and fuel retailers refrain from price competition.

As prices are taken as granted, the consumers buy fuel at the closest fuel retailer that works with a well-known distributor without searching the prices at different fuel stations. Consumers prefer fuel retailers working with well-known distributors because of existence of illegal fuel trafficking in the past.

Since price competition is weak, the undertakings focus on amount of sale to increase their revenues. In order to reach a particular amount of sale, fuel retailers aim to sign a contract with one of the big distributors whereas the distributors try to sign long term contracts with fuel stations at busy spots. Therefore, the image of the distributor is combined with advantage of attractive sale outlets owned by fuel retailers and this leads to signing of usufruct contracts. As a result of such contracts, a particular amount of sale is guaranteed for both the distributor and the fuel retailer. This, in return, weakens the tendency of both the distributor and the fuel retailer to compete on price.

The usufruct contracts exclude distributors who have newly entered the market or whose image is not strong. As illegal fuel trafficking is no longer an important issue in the market, brand image of big distributors begins to lose its significance. This inevitably affects consumer preferences and fuel retailers located at busy spots lose incentive to sign contracts with big retailers. Small distributors who newly entered the market or willing to increase market share have begun to submit more attractive offers to fuel retailers. However, such distributors face usufruct contracts as impediments before concluding agreements with fuel retailers. Therefore, such contracts have become a factor that prevents competition between big and small retailers. From the point of big as well as small distributors, the most important factor that affects competition in the market is the location of the fuel stations and the duration of the contracts for retail fuel distribution.

It is hard to find a place to build fuel stations at busy spots in central residential areas and competition is not strong and usufruct costs are high. Therefore, fuel stations with high amount of sale in central residential areas are important to compete in the market. Moreover, the Petroleum Market Law and secondary legislation on licences in petroleum market require minimum amount of sale for distributors.¹² Therefore, it is very important for small distributors to operate fuel stations in central residential areas. Moreover, there are legal restrictions on land to build fuel stations such as distance limit.¹³ However, since it is very hard to find land to build new stations, developing horizontal competition among fuel stations beyond a certain point is difficult even in the absence of such legal restrictions. Even if the distance limit is abolished, it can not ensure competition among fuel retailers alone. As a result, the Fuel Market Report mentions that the realistic approach to make fuel stations compete is to create competition at distribution

¹² See Article 9(2) of the Petroleum Market Law and Article 17(2) of the Implementing Regulation on Licences in the Petroleum Market.

¹³ Article 8(4) of the Petroleum Market Law provides an explicit restriction on trade regarding fuel and LPG stations and requires that distances between fuel and LPG stations on the same direction shall be no less than 10 kilometres on highways and 1 kilometre within the city.

level. Furthermore, considering the difficulties to create competition at retail level, the Fuel Market Report states that distribution level is the most effective factor to create competition in the fuel market and a competitive structure should necessarily be instituted at this level. Therefore, restrictions derived from usufruct contracts should be removed to enable small distributors to conclude contracts with fuel stations in central residential areas at the end of the duration of their contracts.

The Fuel Market Report cites those issues regarding retail market and the contracts as reasons preventing price competition in the fuel market despite price liberalization since January 2005. Therefore, among other measures regarding prices, the Fuel Market Report urges that legal regulation is needed to prevent de facto abolition of five-year non-competition restrictions in contracts with fuel retailers via use of usufruct contracts and contracts for lease.

4. Competition Advocacy

Apart from those cited above, the Fuel Market Report provides some other suggestions to bring competition in the fuel market some of which are in the following.

The findings of the Fuel Market Report provide that the 15% threshold creates a model that restricts vertical integration although the distributors do not have a tendency to set up fuel stations operated by them. However, this model is not necessarily the preferable model in terms of price competition as vertical integration, when its financial advantages are taken into account, results in separation of profits obtained by the distributor and the fuel retailer. Therefore, the Fuel Market Report recommends that the 15% threshold be removed from the Petroleum Market Law. Parallel to removal of the threshold, the Fuel Market Report suggests that the prohibition of discrimination by distributors in favour of fuel stations operated by them should only be applicable to the dominant distributor in order to enable other distributors to enter the market in a more competitive way by charging competitive prices to the fuel retailers operated by themselves by means of financial integration.¹⁴

Moreover, the Fuel Market Report suggests that in order to have competitive effects from separation between distributors and retail outlets nearly all of the latter of which are outside the vertically integrated structure, non-competition clauses should be removed at retail level and the separation is transformed into commercial independence in its real sense for the fuel retailers. The main reason is that such clauses exclude vertical competition as fuel retailers bound by non-competition obligation are not different than fuel retailers operated by distributors. Thus, the Fuel Market Report suggests taking usufructs and leases as agreements having non-competition clauses, changing the Block Exemption Communiqué on Vertical Agreements¹⁵ issued by the TCA to remove exceptions to rights such as usufructs¹⁶ and prohibiting non-

¹⁴ The TCA is aware that there has been no tendency to vertically integrate in the fuel market in the past, and therefore these measures can only produce effects in mid or long term.

¹⁵ Communiqué No 2002/2, published in the Official Gazette dated 14.7.2002 and numbered 24815.

¹⁶ Article 5 of the Block Exemption Communiqué on Vertical Agreements is as follows:

“The exemption granted by this Communiqué shall not be applicable to obligations in the agreement which are mentioned below.

a) Non-compete obligation imposed on the purchaser, which is for an indefinite period or whose duration exceeds five years.

In case of agreeing that the non-compete obligation may be implicitly renewed in a way to exceed the duration mentioned above, the non-compete obligation shall be deemed for an indefinite period.

Should the ownership of the facility to be used by the purchaser while continuing its activities based on the agreement belongs to the provider together with the land or under a right to build over, which has been secured from third persons not connected with the purchaser, or should the purchaser shall continue this

competition clauses if the duration exceeds five years or prohibiting agreements producing the same result. However, the Fuel Market Report favours distributors with a market share below 5% and suggests permitting them to conclude agreements with non-competition clauses longer than five years.

Moreover, the Fuel Market Report considers independent fuel retailers (so-called white flagged) as the most competitive model and recommends removal of restrictions on such retailers as illegal fuel trafficking observed in the past has been prevented to a great extent via national marker and inspections. By enabling existence of independent fuel retailers and fuel retailers who are imposed non-competition obligation with only limited duration, competition will be created among distributors, and fuel retailers would be permitted to purchase fuel from small distributors thereby increasing competition in upstream market of distribution.

The Fuel Market Report also recommends that the prohibition of discrimination by refineries vis-à-vis distributors should only be applicable to the dominant distributor in order to enable new refineries to build their distribution channels and price competitively.

As maximum prices at retail level set by distributors are taken and applied as resale price by fuel retailers and distributors are decisive in setting margins valid for fuel retailers, margins valid for distributors and fuel retailers rise relatively when prices fall indicating that there is not sufficient price competition at wholesale and retail level, effective measures should be taken regarding pricing together with reassessment of publication of prices by EMRA, a practice which could facilitate concerted practices.

activity of it in a facility which is the subject of a real or personal right of use obtained by the provider from third persons not connected with the purchaser, the non-compete obligation imposed on the purchaser may be tied to the duration of use of the said facility by the purchaser; it is to such an extent that the non-compete obligation merely encompasses the activity of the purchaser to be conducted by it in the said facility, in terms of the part of this duration exceeding five years.”

UNITED STATES

1. Introduction

The degree to which refiners are vertically integrated into gasoline retailing in the United States has changed considerably over the past 30 years. Industry changes in the late 1970s led to a sharp reduction in the number of retail gasoline stations operated by franchise dealers and precipitated many regulations relating to vertical integration in gasoline retailing that exist in the United States today. The ranks of franchise dealers began to decline even further in the 1990s as major refiners began to sell many of their retail outlets. Empirical studies on the divorcement experience of the United States suggest that divorcement legislation raises the retail price of gasoline and the Federal Trade Commission (“FTC”) has advocated against divorcement and other vertical restrictions on the retailing of gasoline in the United States.

2. Types of Vertical Integration in Gasoline Retailing

Gasoline is sold at retail in the United States through company-owned and operated stations (“company-operated”), lessee dealer stations, and open dealer stations. At company-operated stations, the manager of the station is typically a salaried employee of the refiner that owns the station. The refiner sets the retail price at the station as well as the station hours. At lessee dealer stations, or franchise stations, the physical capital of the station is typically owned by the refiner and is leased to the manager of the station. The manager sets the retail price and station hours and is the residual claimant to the station’s profit. The lessee dealer station sells only the branded gasoline of its station owner. At open dealer stations, the physical capital of the station is owned either by the station manager or by a “jobber” (an independent wholesaler). The open dealer may contract with any refiner to sell that refiner’s gasoline. If the station is branded, however, the dealer may only sell the gasoline of its branded refiner. If the station is unbranded, it may sell the gasoline of any refiner.

The degree to which these various forms of vertical integration are present in gasoline retailing in the United States has varied over time. In 1972, the major refiners sold gasoline through 203,101 branded retail outlets. Among those, 5.7 percent were company-owned, 52.4 percent were operated by lessee dealers, and 41.9 percent were operated by open dealers.¹ In 2006, the major refiners sold gasoline through 38,797 branded retail outlets. Among those, 20.4 percent were company-owned, 15.8 percent were operated by lessee dealers, and 63.8 percent were operated by open dealers.²

3. Economics of Vertical Integration in Gasoline Retailing

Economic theory suggests that the optimal degree of vertical integration is dependent on the characteristics of the retail gasoline station at which the refiner sells its product. A refiner generally has three decisions to make with regard to the retailing of its gasoline. The first decision relates to the location and the characteristics of the station at which its gasoline will be sold. Given the characteristics of the

¹ U.S. Department of Energy, Final Report: The State of Competition in Gasoline Marketing (1981), p. 174.

² Energy Information Administration, Performance Profiles of Major Energy Producers, Table B30, available at <http://www.eia.doe.gov/emeu/perfpro/btab30.html>.

station, the refiner chooses the degree of vertical integration that is most profitable for the refiner. The final decision relates to the contractual terms between the refiner and either the manager of its company-operated station or its dealer. The economics literature on vertical integration in gasoline retailing generally takes the decisions about station location and characteristics as given. That is, the literature focuses on the optimal degree of vertical integration and contract terms once the station location and characteristics have already been determined.³

Principal-agent theory provides some insight as to the degree of vertical integration likely to be chosen by a refiner. The theory predicts that stations at which manager effort is easily observable, such as stations that have self-service only or that have convenience stores, are more likely to be company-operated. Stations at which unobservable or costly manager effort is important to the profitability are more likely to have lessee dealers or open dealers. Such stations include those that offer full service or have auto repair service. The more important unobservable effort is to the overall profitability of the station, the more likely the station is to be an open dealer rather than a lessee dealer.

The share of profits derived from ancillary services (i.e., automotive repair, convenience store, car wash, etc.) also has an important effect on the choice of whether to operate a station with a lessee dealer as opposed to an open dealer. The total profit of a station might be sufficiently high to earn a normal rate of return on the land and invested capital, but the refiner's share of the station profit, as reflected in its profit on gasoline sales and the leasing of the station capital may not be. Therefore, the higher the share of profits derived from ancillary services, the more likely it is that the station will be operated as an open dealer as opposed to a lessee dealer.

Retail prices that maximize the refiner's profit are most easily assured in the case of company-operated stations, since retail prices at those stations can be set directly by the refiner. In the case of dealer-operated stations, the refiner cannot directly control the retail price. If the refiner sets a lease payment equal to its fixed cost of operating the station and sets a price for gasoline equal to the marginal cost of producing gasoline, the joint profits of the refiner and the dealer from the sale of gasoline are maximized, but all of the gains from the retailing of gasoline accrue to the dealer. In order to appropriate a share of those gains, with a lease payment equal to its fixed cost, the refiner charges the dealer a price above marginal cost for gasoline. "Double marginalization" occurs because the dealer's retail price will most certainly include the marginal cost of operating the station.

Double marginalization can be avoided, however, by charging a price for gasoline equal to marginal cost and a lease payment in excess of fixed cost. In this way, joint profits from the sale of gasoline are still maximized, but now a share of the gains accrues to the refiner. If the dealer is risk averse, however, the contract terms will likely result in the refiner charging a higher price for gasoline and a lower lease payment in order to reduce the fluctuations in the dealer's income. In the case of an open dealer, prices charged to the dealer for gasoline can be expected to be in excess of marginal cost because, in effect, the lease payment charged by the refiner to open dealers is zero. It is possible to induce dealers to charge lower retail prices for gasoline through minimum quantity requirements. From the perspective of the refiner, however, this is second best to setting the price directly. Since the minimum quantity requirement tends to be in place over a long period of time, it needs to be sufficiently low so as to allow the dealer to meet the requirement under a variety of market conditions. Therefore, even with minimum quantity

³ J. Barron and J. Umbeck, The Effects of Different Contractual Arrangements: The Case of Retail Gasoline Markets, *Journal of Law and Economics* 27 (October 1984): 313-28, and A. Shepard, Contractual Form, Retail Price, and Asset Characteristics in Gasoline Retailing, *RAND Journal of Economics* 24 (Spring 1993): 58-77 both have a good discussion of the economic theory of vertical integration in gasoline retailing and much of this section is drawn from their work.

requirements, prices at dealer-operated stations can be expected to exceed those at company-operated stations.

4. Changes in Gasoline Retailing in the United States which Led to Divorcement

Since the late 1970s, there have been numerous proposals in the United States at both the federal and state level, some of which have become law, to affect the vertical relationship between gasoline suppliers and their franchised dealers. Many of these proposals, especially those relating to divorcement, have been in response to changes in supply and demand taking place in the gasoline retailing industry. About 30 years ago, gasoline retailing in the United States began its transformation from low volume, full service stations with auto repair service to high volume, self-service stations with convenience stores. This transformation was driven by changes in consumer preferences and by increased construction and operating costs of retail gasoline stations. One consequence of these industry changes was a reduction in the overall number of retail stations, and a reduction in the number of stations operated by lessee dealers in particular. The total number of branded stations of the major refiners fell from 203,101 in 1972 to 125,713 in 1978. Over this same period, the number of lessee dealers fell from 106,430 to 57,171, while the number of company-operated stations increased from 11,521 to 13,790.⁴

The dramatic decline in their numbers and the concomitant increase in the number of company-operated stations led lessee dealers to conclude that refiners must be acting predatorily to drive them from gasoline retailing. The lessee dealers took their claims of predatory behavior to state legislatures, and the result in some states has been the divorcement of gasoline retailing from refining. The evidence bearing on industry behavior at the time that most divorcement laws were enacted suggests that predation did not occur. Absent collusion, the individual refiners did not have sufficient market power to engage in successful predation against their dealers. At the time that the claims of predation were being made, refiners sold far more gasoline through lessee dealers than they did through company-operated stations. In 1978, the major refiners only sold 11.8 percent of their gasoline through company-operated stations, while 25.5 percent of their gasoline sales were made through lessee dealers.⁵ It would not make economic sense for refiners to act predatorily toward a group that was responsible for such a large proportion of their retail sales.

5. Federal and State Laws in the United States Affecting Vertical Relationships in Gasoline Retailing

5.1. *Petroleum Marketing Practices Act (PMPA)*

The PMPA is the main federal law in the United States regulating vertical relationships in gasoline retailing. It stipulates the circumstances under which a supplier can either terminate or choose not to renew a franchise contract with its franchisee. The main circumstances under which a supplier may terminate a franchise contract include noncompliance with important provisions of the contract, lack of good faith effort to carry out the contract terms, mutual agreement between the supplier and the franchisee, and instances in which the supplier no longer serves the market area of the franchisee. The circumstances under which a supplier may choose not to renew a franchise contract include all of the circumstances under which a franchise contract may be terminated. In addition to those circumstances, a supplier may choose not to renew a franchise contract if the franchisee does not agree to changes or additions to the franchise; if there are numerous consumer complaints regarding the franchise; if the franchise is operated in an unsafe or unhealthy manner; if the supplier has decided to change the use of the property, to materially add to or

⁴ U.S. Department of Energy, Final Report: The State of Competition in Gasoline Marketing (1981), pp. xi and 174.

⁵ Id., p. ES-6.

alter the property, or to sell the property; or if continuation of the franchise is uneconomical. The PMPA also grants certain rights to the franchisee at the termination or non-renewal of the franchise contract regarding the disposition of the franchise property. Under certain circumstances, the franchisee has the right of first refusal on the sale of the property and may be entitled to part of any compensation the supplier receives when the property is taken through eminent domain, or when the supplier loses the right to grant use of the trademark.⁶

5.2. *Case Law: State Oil Co. v. Khan*

In *State Oil Co. v. Khan*, the United States Supreme Court considered the use of a maximum resale price agreement between a lessee dealer (Khan) and a supplier (State Oil). State Oil sold gasoline to Khan at a price equal to a suggested retail price less a specified profit margin. If Khan made sales above the suggested retail price, it was required to rebate the difference to State Oil. If sales were made below the retail price, then Khan's profit margin was reduced. State Oil began eviction proceedings against its lessee dealer when Khan fell behind on lease payments. Khan brought suit under the Sherman Act claiming that the pricing provisions of the lease violated what was then a *per se* rule against maximum resale price maintenance. The Court overturned its previous decision in *Albrecht v. Herald Co.* and held that maximum resale price maintenance should be evaluated under a rule of reason. This means that maximum resale price agreements in gasoline retailing, and generally, are only illegal if the anti-competitive effects of the agreement outweigh the pro-competitive benefits.⁷

5.3. *State Regulations*

Currently, the laws of six states and the District of Columbia require some form of divorcement for retail gasoline stations. Most of the laws were passed in the late 1970s and early 1980s. The state of Maryland has the longest experience with divorcement. Maryland's law requiring divorcement was passed in 1974 but did not become effective until 1979 due to legal challenges. The state laws vary in the degree of divorcement required. The laws in Connecticut, the District of Columbia, and Maryland required divorcement for both new and existing retail stations.⁸ The law in Delaware, however, only applied to new stations. The laws in Hawaii and Virginia do not require complete divorcement but instead regulate the distance between company-operated and dealer stations. In Hawaii, there can be no new company-operated stations within one-eighth of a mile of dealer stations in urban areas and within one quarter of a mile elsewhere. In Virginia, new company-operated stations must be at least 1.5 miles from dealer stations. The law in Nevada limits the number of stations that a refiner may operate. A refiner with fewer than 30 company-operated stations may add no more than five company-operated stations per calendar year. A refiner with at least 30 company-operated stations must add one lessee dealer station for every two company-operated stations added.

Numerous other proposed and actual state laws affect the vertical relationships between dealers and refiners. Most of these laws are aimed at preventing price discrimination on the part of refiners. Two types of price discrimination are addressed by the legislation. Some of the laws seek to prevent price discrimination based on the ownership of the station. That is, the laws seek to prevent refiners from setting transfer prices at their company-operated stations lower than the price charged to lessee dealers. Other

⁶ A summary of the main provisions of the PMPA can be found at <http://www.cga.ct.gov/2006/rpt/2006-R-0626.htm>.

⁷ Although not directly related to gasoline retailing, the U.S. Supreme Court also overturned a *per se* rule against minimum resale price maintenance in its *Leegin Creative Leather Products v. PSKS, Inc.* decision.

⁸ See the discussion on the FTC's advocacy work in section VII below for more detail about the District of Columbia's divorcement law.

laws are aimed at preventing the use of price discrimination based on the geographic location of the station. That is, the laws seek to prevent the establishment of price zones. With zone pricing, refiners typically charge higher prices to stations with less competitive conditions. Arkansas, California, and Florida have laws aimed at preventing price discrimination based on the ownership status of a station, and the Connecticut legislature recently considered a bill banning the use of price zones.

6. Empirical Studies Relating to the Divorcement Experience of the United States

The economics of vertical integration in gasoline retailing suggest that regulations aimed at affecting the degree of vertical integration, such as divorcement, are likely to raise the retail price for gasoline. If a refiner would choose to operate an outlet, but is prevented from doing so by divorcement, economics tend to predict that the retail prices for gasoline will be higher. Inefficiencies are introduced into gasoline retailing by limiting vertical integration to a sub-optimal level and through double marginalization. Several empirical studies find that regulations aimed at affecting vertical relationships in gasoline retailing likely result in higher retail gasoline prices in the United States.

Barron and Umbeck used regression analysis to estimate the impact of divorcement on retail gasoline prices in Maryland. Their study was conducted using data from Maryland retail stations from June 1, 1978 to January 15, 1981. Their data set included prices both before and after divorcement as well as prices on affected and non-affected stations. They estimated that prices at stations affected by divorcement were, on average, 9.5 cents lower than non-affected stations prior to divorcement. In addition, they found that at stations affected by divorcement, the full-service price increased by 6.6 cents and the self-service price increased by 1.4 cents. At stations in competition with affected stations, the full-service price increased by 1.0 cent, and the self-service price increased by less than a cent. Their estimates suggest that prices at all stations rose as a consequence of divorcement, but the increase was larger for stations that were previously company-operated.

Shepard used regression analysis to explore the implications of the economics of vertical integration in gasoline retailing on the degree of vertical integration and on price. Her study used data on price and the organizational form of 924 stations in eastern Massachusetts in 1987. Since company-operated stations can set retail prices directly, we might expect retail prices at those stations to be lower relative to lessee dealers and open dealers. Shepard estimated that the price of premium full-service unleaded gasoline was five cents lower at company-operated stations than at dealer-operated stations.⁹ She also estimated that, on average, the existence of auto repair service reduced the probability that a station would be company-operated from 0.08 to 0.02. In addition, she estimated that the existence of a convenience store increased the probability that a store would be company-operated from 0.03 to 0.08. Although not a direct part of her analysis, these results suggest that requiring divorcement would result in higher retail prices for gasoline.

Vita, similarly to Barron and Umbeck, used regression analysis to estimate the impact of divorcement on retail gasoline prices.¹⁰ Vita's study differs from that of Barron and Umbeck in that he used a cross-sectional data set containing retail gasoline prices in both divorcement and non-divorcement states, whereas the Barron and Umbeck study looked only at one state before and after divorcement was introduced. In his study, Vita used data on average monthly retail prices for each state for the period between January 1995 and December 1997. He estimated that the retail price of gasoline was 2.6 cents

⁹ Lower prices are also found at company-operated stations for other grades and levels of service. However, those estimates were not statistically significant.

¹⁰ M. Vita, Regulatory Restrictions on Vertical Integration and Control: The Competitive Impact of Gasoline Divorcement Policies, *Journal of Regulatory Economics* 18 (2000): 217-33.

higher in states with divorce laws than without these laws. In addition, he estimated the loss to U.S. consumers from divorce to be over \$100 million annually.

Blass and Carlton examined data on the newly constructed stations of 10 integrated refiners for the period 1984-87.¹¹ Their data included the contractual form used by the refiner in addition to the gasoline volume and number of service bays at each station. They found that only 18 percent of stations without service bays were run by dealers, while more than half of newly constructed stations with service bays were run by dealers. They also estimated the cost of converting all company-operated stations in the United States into lessee dealer stations to be at least \$1 billion annually. They argued that the actual cost could be even higher because they only examined data for major refiners, and independent refiners tend to have a larger proportion of company-operated stations. Blass and Carlton also found that investment in new retail stations is lower in divorce states than in non-divorce states. They found that new investment increased by 153 percent in non-divorce states and decreased by eight percent in divorce states. In addition, investment in newly constructed stations depends on the level of company-operated station sales, and not on the level of dealer sales.

A study by Barron, Taylor, and Umbeck, although not dealing with divorce specifically, examined another aspect of vertical relationships in gasoline retailing.¹² The study focused on the issue of open supply. Open supply proposals typically involve eliminating the restriction on lessee dealers to carry only the gasoline of their contracted refiner and allowing lessee dealers to purchase gasoline from any source. The proponents of open supply argue that such a policy would allow the lessee dealers to pay the lower rack price for gasoline which stations supplied by jobbers pay, and that the savings from doing so would be passed on to consumers. An examination of retail prices in the Los Angeles Basin for the period 1992-95 revealed that the claims of open supply proponents may not be true. Barron, Taylor, and Umbeck estimated that stations supplied by jobbers had retail prices 1.7 to 2.7 cents per gallon higher than stations that were directly supplied by the refiner. In addition, stations that switched from being supplied by jobbers to direct supply by the refiner reduced their prices by 0.6 to 1.0 cents per gallon. These results suggest that lessee dealers would not necessarily pass on cost savings if they were given the right to open supply.

7. Advocacy by the Federal Trade Commission Regarding Vertical Relationships in Gasoline Retailing

The FTC has responded to numerous requests since the mid-1980s to comment or provide testimony on proposed or actual state and federal laws aimed at regulating the vertical relationship between suppliers and dealers.¹³ At the state level, about half of the requests relate to divorce and open supply proposals, while the balance relates to prohibitions of price discrimination. The FTC has not supported one method of gasoline retailing over another in its testimony and comments, but has instead opposed restrictions that limit a refiner's choice in how it retails its gasoline. Three main points have been made by the FTC. The first is that the competitive harm that the law is aiming to correct likely does not exist. Second, even if a competitive harm does occur, federal and state antitrust laws are adequate to address the harm. Third, the likely effect of the proposed or actual law is to raise retail gasoline prices for consumers.

¹¹ A. Blass and D. Carlton, The Choice of Organizational Form in Gasoline Retailing and the Cost of Laws that Limit that Choice, *Journal of Law and Economics* 44 (October 2001): 511-24.

¹² J. Barron, B. Taylor, and J. Umbeck, Will Open Supply Lower Retail Gasoline Prices?, *Contemporary Economic Policy* 22 (January 2004): 63-77.

¹³ In addition to the advocacies mentioned here, the FTC has also contributed comments to state legislatures in Hawaii (1985 and 2003), Georgia (1987), Virginia (1990), Arkansas (1991), California (1992), Utah (1992), and Kansas (1992). In prior years, the Department of Justice engaged in similar advocacy.

The FTC, in the 1980s, testified before the United States Congress in opposition to three proposed bills affecting the vertical relationship between refiners and gasoline retailers.¹⁴ The bills proposed complete divorcement for major refiners, caps on retail station ownership for smaller independent refiners, open supply, uniform pricing, and prohibited sales below cost. The open supply proposal was supported, in principle, by the FTC in that open supply could encourage dealers to provide new products and induce independent refiners and jobbers to enter into new marketing areas. The bill, however, was likely to encourage integration into company-operated stores merely to avoid allowing open supply. The FTC opposed divorcement proposals on the grounds that the evidence did not suggest that predatory subsidization on the part of refiners, at which the proposals were aimed, actually existed. Testimony was also given in opposition to the pricing proposals because they were likely to prevent pro-competitive price decreases.

The most recent state level advocacy request relating to divorcement was a request to comment in 2007 on proposed changes to the existing divorcement law in the District of Columbia. The District's *Retail Service Station Act of 1976* originally prohibited the operation of retail service stations in the District by jobbers, producers, refiners, or manufacturers of motor fuels. The proposal on which comments were requested was to amend the law to allow jobbers to operate retail service stations. The FTC opposed the divorcement provision of the *Retail Service Station Act* but supported the proposal to allow for jobber-operated retail stations. The FTC believed that residents of the District were likely paying higher prices and receiving a lower quality of service as a consequence of the divorcement provision. In addition, the FTC suggested that the proposal would enhance retail service station competition (although, the benefits would be greater if the divorcement provision was removed altogether).

The FTC was last asked to comment on a state level open supply proposal in 1990 by the legislature of the Commonwealth of Massachusetts. The open supply proposal was part of a pair of bills pending before the legislature that also included divorcement and uniform pricing provisions. The open supply provision would have prohibited refiners from preventing dealers from storing or distributing the motor fuel purchased from other suppliers at the refiner's branded station, provided the dealer posted appropriate notice of such activity to the station's customers. The FTC opposed the open supply provision for two reasons. The first was that, in the presence of open supply, refiners would likely abandon franchised retail stations in favor of making more commodity sales at the terminal or refinery gate. The second reason was that refiners would be less likely to make sizeable capital investments at their leased stations if they are not able to guarantee sales of their products at those stations. Both of these implications of the open supply provision suggested that it would lead to a less efficient distribution system for gasoline.

The FTC, in 2007, was asked to comment on a proposal before the Connecticut legislature to prohibit geographic price discrimination at the wholesale level on the part of refiners. The proposal, which ultimately did not pass, was aimed at eliminating the practice of zone pricing on the part of refiners. As mentioned previously, refiners using zone pricing charge higher prices in geographic areas with less competitive conditions. The FTC opposed the proposal to prohibit zone pricing because the practice has the potential to benefit consumers. Zone pricing may encourage entry into less competitive areas by refiners since the practice allows refiners to capture more of the return from ownership of more profitable retail stations.

8. Recent Trends in Gasoline Retailing in the United States

Consolidation among major refiners beginning in the 1990s and the low profitability of their marketing assets led to the conversion of a large number of lessee dealers to open dealers. In 1991, 40.9

¹⁴ The proposed bills on which the FTC offered testimony were House Resolution 1362 (1981), House Resolution 5023 (1984), and Senate Bill 1140 (1985).

percent of retail stations of the major refiners were lessee dealers, while 22.1 percent were company-operated and 37 percent were open dealers. By 2001, only 21 percent of stations were lessee dealers, while company-operated stations fell to 21.2 percent and open dealer stations increased to 57.7 percent. This trend has continued into 2006 with 15.8 percent of stations operated as lessee dealers, 20.4 percent company-operated and 63.8 percent operated as open dealers.¹⁵ The percentage of stations operated as open dealers might be expected to increase even further in 2008 with recent announcements by ExxonMobil, ConocoPhillips, and BP that they are selling large numbers of their company-owned stations. ExxonMobil announced plans to sell over 2,200 stations, of which 1,400 are currently operated by dealers.¹⁶

Most of the stations that are part of the recent sell-off by major refiners will continue to be operated as retail gasoline outlets. This suggests that overall the stations are profitable but that the refiner's share of the profit (i.e. its profit from gasoline sales) is not sufficiently high to maintain an ownership interest in those assets. Statistics on the profitability of convenience stores which also sell gasoline seem to support this conclusion. The average gross margin on their in-store sales for 2006 was 29.9 percent, while their average gross margin for motor fuel sales was only 5.5 percent giving an overall average gross margin of 12.3 percent.¹⁷ As refiners continue to reduce the degree to which they are vertically integrated into gasoline retailing, we might expect restrictions on vertical integration, such as divorcement, to become less binding over time.

9. Conclusion

All of the empirical studies on the divorcement experience of the United States suggest that divorcement raises the retail price of gasoline. The FTC, in its testimony before Congress and in its comments to state legislatures, has consistently advocated against restrictions, such as divorcement, on the vertical integration of refiners into the retailing of gasoline. Industry changes in the late 1970s motivated many of the restrictions on vertical integration in gasoline retailing in place today. If more recent trends are maintained, and refiners continue to reduce the extent to which they are vertically integrated into gasoline retailing, regulations restricting that integration may become less binding over time.

¹⁵ Energy Information Administration, *U.S. Downstream Independents Acquire National Prominence in the 1990s*, available at <http://www.eia.doe.gov/emeu/finance/sptopics/restructure/highlite4.html> and Energy Information Administration, *Performance Profiles of Major Energy Producers*, Table B30, available at <http://www.eia.doe.gov/emeu/perfpro/btab30.html>.

¹⁶ J. Franco, ExxonMobil to Quit Retail Gasoline Business, *Octane Week* 23 (June, 23, 2008): 11; P. Merolli, Conoco to Exit Low-Margin U.S. Retail Market, *Oil Daily* (August 28, 2008).

¹⁷ National Petroleum News, *Marketfacts* (2007), p. 95.

INDONESIA

Downstream oil and gas industry is one of a real developed industry and becomes one of main sector which necessary for public interest. Growth of downstream oil and gas sector in Indonesia was hardly influenced by alteration of changes in oil and gas policy from monopolistic structure toward competition. The alteration was hardly clearly seen at the Law No. 22/2001 concerning Oil and Gas (which replacing the Law No. 8/1971), which open of the role of and private sector in this industry. Form of alteration also happened in the form of more assertive classification between function of the Government (policy maker); regulator; and business actor, resolving of business chain to some business activities (unbundling) and liberalization of downstream oil and gas sector.

Related to resolving of business activity, in article 10 of the Law No. 22/2001 expressed that business institution doing an upstream activity is prohibited to does downstream business and vice versa, but there is no rule to do segregate in different downstream business. The Law No. 22/2001 explains about coverage of downstream business activity in article 5 of the Law No. 22/2001 which include efforts for processing (fabrication), transportation, storage, and commercial. Processing is purifies activities, obtains parts, heightens quality, and heightens added value of Petroleum and/or Natural Gas, but not be including field processing. Transportation is inducement activity of Petroleum, Natural Gas, and/or its processing result from work area or from place of relocation and mixing, including transportation of natural gas through transmission pipe and shelf distribution. Storage is receiving, gathering, relocation, and disbursement activity of petroleum and/or oil and gas. Commercial is purchasing activity, sale, export, import and/or result of its processing, including commercialization of natural gas through pipes.

In practice, there are four permits released by government based on Article 23 of the Law No. 22/2001. The permits are for processing, forwarding agent, storage, and commercial. Every business body can be given multiple permit as long not be against applied law and regulation. This identifies that there are no demarcation for vertical integration in downstream business. To make a picture is the processing factory owned by Pertamina, Corp. as state-owned enterprises and national business actor. Number of its factories in Indonesia are 6 (six) factories with total capacity of 1030 MBOPD (thousand barrels per day). While number of permit for storage is 23 permits, 44 permits for forwarding agent, 14 permits for public commercial, and 36 permits for limited commercial. Amongst business actors, only Pertamina, Corp. is conducted vertical integration from processing, storage, transportation and commercial. This occurs due to Pertamina's representation of the Government while at the same time as single business actor before the implementation of the Law No. 22/2001. Pertamina also at the same time stands as owner of national oil and gas infrastructure.

Ever since the implementation of the Law No. 22/2001, downstream business activity is dominated by Pertamina Corp., so that transportation operator and shelf distribution is part of the company. But since the implementation of the Law No. 22/2001, the downstream business actors is free to choose distributor line that is bring advantage to them by using rent mechanism. For example Aneka Kimia Raya Corp. who obtains supply for its petroleum through import. Then for transportation and storage has been owned by itself. Aneka Kimia Raya Corp. has not owned commercial facility (gas station) because their petroleum only sold for industrial purpose. Another example is Shell and Petronas. Both of them supplies petroleum from Pertamina and their factories. For transportation and storage, both are still doing rent mechanism, while their petroleum is sold to the consumer through their own gas station.

In doing business transaction between processing, storage, transportation and commercial is done based on condition of business to business. There is no demarcation order implemented in accessing facility from incumbent operator as long as it's remain to pays attention to economic and technical aspect of the business actors. Independent distributor can access incumbent's facility given that agreed by both parties. Until now there has not any case (dispute) between business actor in processing, storage, transportation and commercial. Problems rose on price discrimination and service are finalized between both cooperative business entities. From regulation side, there is no specific order about commerce between distributions lines of commodity exchange incorporated. But, in the existence of anti competitive behavior in the distribution line, hence business actor can report this to KPPU.

At retail gas station side, there are three type of systems implemented, namely Company Own Dealer Operated (CODO), Company Own Company Operated (COCO) and Dealer Own Dealer Operated (DODO). Common cooperation form is done where 98% owned by other business actor (dealer), although still tied contract with Pertamina. Along with the opening downstream market, there is other business actor entering in oil and gas retailing, such as Shell and Petronas, by developing Company Own Dealer Operated (CODO) system. To anticipate this, now there is new operating system from Pertamina, namely COCO (Company Own Company Operate) system.

With the existence of new system directly handled by Pertamina, hence oil supply prioritized on COCO gas station compared to DODO gas station which contracting with Pertamina. Specifically for gas station partnership, contract between gas station entrepreneurs with Pertamina is form of long-range contract (25 years). The contract meant as certainty of supply from Pertamina to the gas station. Besides, COCO gas station as one of Pertamina's business unit is being given amenity with antecedent of supply, postponement of payment time to Pertamina, and equipped with complete gas station facility (such as car-wash, ATM, tune-up, mini market, and other). In this case, competition between COCO and DODO gas station is merely competition on service, quality, and order. Then in the guideline of Downstream Oil and Gas Regulator, it was determined that private business actor that build a gas station with COCO, CODO and also DODO schemes, the maximum number of COCO gas station is 20% amongst cooperated SPBU.

Price fixing in gas station is price which has been specified by the Government especially for subsidized petroleum retailing. For non subsidized petroleum retailing, the price was specified by business actor for by keeping abreast of international market price.

Competition is more determined from service activities side and quality for end customer. But with international price always rising, the competition tends to occur far beyond prediction. Now only there are three business actors for retail petroleum, namely Pertamina, Shell and Petronas. In one sides, this will enrich competition at service level, quality, and offered price at customer level. However, competition has not fully is enjoyed by Indonesian consumer, because 70% petroleum consumption is for type subsidized petroleum. Meanwhile, business actor distributing subsidized petroleum is only Pertamina.

Now there is no specific research in analyzing impact of form of un-bundling in downstream oil and gas. Economically, vertical bundling gives efficiency to business actor in doing business for downstream side, because can reduce transaction cost, and arranges coordination and better delivery. This is because the sold product priced by the Government (especially for subsidized petroleum), thus this reason used by Pertamina as incumbent and dominant player. For new entrance like Shell and Petronas, form of chosen un-bundling is selected by considering limited trading amounts (non subsidized petroleum), so that will consume numerous cost if they must have their own facility for processing, storage, and transportation in Indonesia. But, with large number of business actor and in existence of resistances in accessing facility, hence either form of bundling and also un-bundling does not give significant influence good to consumer, considering consumer price that tend to inelastic.

ISRAEL

The Israeli gasoline market went through comprehensive reforms in the 1980's and 1990's. Since 1988 the market has been subject to considerable structural changes that included, *inter alia*, the privatization and divestiture of the national refineries and the opening of the wholesale market to new entrants.

This report summarizes the main features of the Israeli gasoline market while addressing the effects of vertical integration on competition in the market. It outlines the legal framework and highlights recent developments that followed the reform process in a market where the Israel Antitrust Authority (IAA) played a significant role.

The focus is on two major vertical relations in the Israeli gasoline market, namely, vertical relations between refineries and wholesale gasoline companies and vertical relations between wholesale gasoline companies and gasoline stations.

1. General overview of vertical relations in the gasoline sector

In general, vertical relations may offer many advantages and can contribute considerably to efficiency. This general rule may also apply in the gasoline market. In the wholesale-retail relations major wholesale firms may offer their experience and expertise in planning, construction and operation of stations, better financing opportunities, nationwide service for large scale consumers, reputation, and other efficiencies in aspects such as laboratory services, insurance, licensing and regulation, environment etc. A major wholesaler vertically integrated with gasoline stations can pre-commit to buying yearly quantities from the refinery in discount prices. Some of the discount may be passed to the stations and through them to the end consumers. In refinery-wholesale firm relations, vertical relations may offer certainty of committed quantities which has considerable impact on both parties. In the special case of vertical integration, a wide range of efficiencies is reached, including reduction of management, transaction and marketing costs. On the other hand, in markets with little competition, vertical relations may further hinder competition. In the retail market, vertical affiliations with major wholesalers might form an entry barrier at both local and state level. In particular, difficulties in selecting suitable locations for gasoline stations, especially in urban areas, and lengthy procedures and restrictions concerning environment, planning and licensing regulations make the accessibility of existing stations critical to new entrants. Vertical separation promotes gasoline stations' ability to constantly "shop around" for the best prices offered by wholesalers and to share some of the discount with consumers (assuming there is competition in the geographical level). The advantages and disadvantages of vertical relations in both sectors will be further discussed in the subsequent paragraphs.

2. The gasoline market in Israel

As mentioned above, the gasoline market in Israel went through a major reform over the last two decades. Hereunder is an outline of the main features of the Israeli gasoline market prior to the reform and following its completion:

3. Basic structural features of the gasoline market prior to the reform

Until 1988, the Israeli gasoline market was heavily regulated and lacked competition. There was only one, state owned, oil refinery which operated separate plants. The larger plant, which accounts for about 2/3 of the total refining capacity in Israel, operates in the northern part of Israel at Haifa industrial zone ("Haifa Oil Refinery" - "**HOR**"). A smaller plant, holding 1/3 of the total refining capacity in Israel, is located in Ashdod, in the southern part of Israel ("Ashdod Oil Refinery" - "**AOR**").

Gasoline has been sold in stations through three major wholesale companies- *Paz* (formerly a state owned company), *Delek* and *Sonol*, subject to quotas set by the government. Nearly all prices (including wholesale price, station retail price, transport and storage prices etc.) were set by the government on a cost plus basis. The three major gasoline companies purchased distillates from the refineries and sold them to gasoline stations, most of which were owned, operated or otherwise controlled by the same gasoline wholesalers. Entrance to wholesale market was practically prevented.

In the refinery-wholesale aspect – a certain share of oil distillates supply was imported¹, while the main share was bought from local refineries. Import was based on "spot" deals and not on long term contracts, mainly because the major companies could purchase almost any needed quantity directly from the local refineries at (fixed) price of CIF Lavera, at the price of the distillates in Lavera harbour, which is the main trading harbour for oil distillates in the Mediterranean, including shipment costs. Import was therefore an effective alternative only where prices were lower.

4. Enhancement of competition in the wholesale gasoline market

In 1988, the government decided to open the gasoline market to new entrants. Consequently, new companies entered the market, introducing competition in the wholesale market. Today the three major wholesalers still control about 70% of the gasoline stations on a national scale, while the remaining 30% of the stations are affiliated with one of the new companies that were established after 1988². It is noteworthy that in certain geographic areas, some of which are densely populated, the share of stations controlled by the three incumbent wholesalers is still much higher than 70%. Effective competition at each geographic area is the main driving force which ensures that efficiencies which stem from vertical integration are passed on to consumers. In order to ensure continuity of geographical market competition, the Gasoline Sector - Enhancement of Competition Law (1998) sets a minimum distance between gasoline stations which are affiliated with the same company (1 km in urban roads and 10 km along inter-city roads). Any deviation from the standard set by the law is subject to IAA authorization. In such cases, the IAA examines the geographical competition in that area and approves the establishment of a new station only when it doesn't raise any competitive concerns.

The most prominent new entrant is *Dor-Alon* which is the product of a 1999 merger between two new entrants (Dor and Alon). *Dor-Alon* controls about 17% of the gasoline stations. The growth of *Dor-Alon* is important especially in light of the fact that one of the highest entry barriers to the petrol retail market is the establishment of new stations. On average, a period of seven years may be needed to establish a new gasoline station in Israel. At present, instead of three major wholesalers there are four major wholesalers (namely, Paz, Sonol, Delek and Dor-Alon), which control nearly 90% of the market. Under these circumstances, in November 2005, the IAA blocked a merger between Sonol and Dor-Alon. The economic assessment carried out by the IAA demonstrated that the merger would eliminate a substantial competitor and would increase the risk of coordinated effects in an oligopolistic market. The merger raised concerns in

¹ According to official statistics in the years 2000-2006 average import share was around 20% of the distillates sold in Israel.

² According to data of the Israel Ministry of National Infrastructures (May 2008).

the geographic dimension and the parties did not present any efficiency gains that could justify the transaction. In light of the above, the merger was blocked. The merging parties have filed an appeal, which was approved by the Antitrust Tribunal on 9 April 2006, however, the ruling was reversed by the Supreme Court on 15 June 2006. The Supreme Court's ruling issued by Chief Justice Barak, Justice Procaccia and Justice Arbel upholds the IAA decision to block the merger, due to the importance of preserving competition among four players in the national fuel market. The detailed decision is based on reasoning that the merger in question should not be approved because of its adverse effect on competition, particularly in a small economy such as Israel.

5. Separation and privatization of the national oil refinery

The next stage of the reform included separation and privatization of refineries in Israel. In December 2004, following the 1988 reform, the Israeli government decided to split the national oil refinery company into two separate companies and privatize them in order to introduce competition in the refining market. In the planning of the separation and privatization process, the issue of vertical integration between oil refineries and gasoline wholesalers became imperative. In contrast to the traditional view concerning the gasoline market structure, the government has adopted a new policy that encourages refineries to enter the gasoline stations market, in order to enhance competition. According to government's decision, the separation process would mark the end of price supervision on the main distillates produced by the refineries.

As mentioned above, vertical integration between a refinery and a wholesale company may induce efficiencies. On the other hand, since there are only two refineries in Israel, wholesale competition may be injured in the event that only two wholesale firms are allowed to vertically integrate while others are not.

The government turned the issue to the IAA which serves as consultant to the government on competition matters. In an effort to find an optimal solution that minimizes the disadvantages of vertical integration while maximizes its advantages, the IAA recommended that the four major gasoline companies should not be allowed to bid for the larger refinery (HOR). As for the smaller refinery plant in Ashdod (AOR), the IAA found there was no need to prevent the four major companies from taking part in the bid.

6. IAA's conditions on AOR-Paz merger

In 2006, the smaller refinery (AOR) was auctioned and sold to *Paz*, the largest wholesaler, which operates about 26.5% of public gasoline stations in Israel. The IAA approved the merger subject to conditions which aimed at minimizing anti-competitive effects. One of the concerns was that *Paz* would consume most of the distillates produced in AOR, while practically excluding other wholesalers from buying distillates from AOR and raising their costs³. Considering the high entrance barriers which were noted earlier, the merger also raised a concern that *Paz* would largely expand in the retail market of gasoline stations which could lead to gradual exclusion of its rivals and harming competition in various geographic markets. The result might yield higher prices in the short run and creation of a duopoly of vertically integrated refineries-wholesalers-retailers in the long run. The IAA decided to approve the merger subject to conditions based on the fact that HOR which had excessive production capacity was not

³ Another concern was associated with the liquefied petroleum gas (LPG) marketing segment, in which *Paz* operates through its subsidiary, *Pazgas* Ltd. In this case, the competitive concern was that *Pazgas* would take advantage of the vertical integration between *Paz* and Ashdod Refineries to eliminate competition in this segment. The fact that LPG is scarce in many months of the year was taken into consideration. Subsequently, the IAA imposed a corporate separation condition on *Pazgas* and Ashdod Refineries and instructed the latter not to discriminate other companies that market LPG. In addition, the IAA does not allow Ashdod Refineries to increase the quantity of LPG allocated to *Pazgas*, in order to assure that the competition in the LPG market is not distorted.

allowed to merge with one of the major gasoline companies. The fact that there is an effective and viable import alternative ensures that import infrastructures are available to all distillates consumers.

The conditions which were imposed on the merger concerned various activities in which *Paz* group was involved, including IAA's supervision over *Paz's* expansion in the gasoline station market, especially in Jerusalem and Tel-Aviv, where it operates (either through ownership or contractual ties with the stations) a particularly large share of public gasoline stations. The conditions also prohibited *Paz* from establishing new stations in these cities without prior approval of the IAA. In order to maintain competition in geographic areas, the merged company was not allowed to affiliate with stations located in vicinity to other *Paz*-connected stations (one kilometer within urban areas and 10 kilometers along inter-city roads).

In addition, *Paz* was restricted to a 33% market share with respect to operation of public gasoline station. Crossing the above threshold by affiliating with a public gasoline station would be subject to IAA's approval. *Paz-AOR* were not allowed to hold infrastructures that are essential to import of distillates and were prohibited from engaging in long term contracts with HOR, unless approved by the IAA.

7. IAA's role in HOR tender

The larger refinery (HOR) was later sold through the stock market to the Israel Company Ltd., which was not engaged in either retail or wholesale supply of gasoline. In privatizing state owned companies, that play an important role in the Israeli economy, it is necessary to secure future national interests under any new ownership. Israeli law authorizes the Prime Minister and Minister of Finance to issue an Essential Interests Decree to secure these interests, amongst them, promotion of competition. Essential Interests Decrees were issued as part of the privatization process of both refineries. The AOR decree is of special interest to the current discussion.

Following the IAA initiative, the 2007 Essential Interest Decree concerning HOR included severe limitations on the identity of the ownership of HOR, practically preventing vertical integration between HOR and (amongst others) the major wholesale companies having nation-wide presence. The HOR decree also limited the firm's ability to affiliate with more than 20% of the public gasoline stations in Israel, unless specifically authorized by the Ministers, considering the state of competition in the market.

The Essential Interests Decree's order minimized the threat that HOR would drive the wholesale companies, which used to be its customers and became its potential rivals, out of the market. Since mergers with a major wholesaler were prohibited, the only effective ways by which HOR can expand are by purchasing small companies or establishing new gasoline stations. Since the largest among the non-major companies holds only about 3.5% of the gasoline stations, and since establishing a new station is a lengthy and complicated process, it is unlikely that HOR would be able to expand to a degree that would allow it to profitably exclude wholesalers and create a duopoly of vertically integrated companies in a foreseeable future.

In order to maintain competition in geographic areas, HOR was not allowed to affiliate with stations located in certain vicinity to stations that are affiliated with *Paz* (1 kilometer in urban areas and 10 kilometers along inter-city roads).

Current market conditions are such that HOR is dependent on its customers and bound by downstream competition between its customers and *Paz-AOR*, as well as by import. As such it has very limited ability to raise prices.

One of the conditions in the approval of both mergers in the refining market was the complete structural separation between the two refineries operating in Israel. The rationale behind this condition was that the two refineries have just been split from a single entity. In order to promote effective competition

between them, full separation is needed at least in the beginning of the process. Considering the extremely high entry barriers in establishing a new refinery, it was very important to prevent any risk of collusion between the two plants.

In this aspect it was important to prohibit the refineries from reaching a "swap" arrangement according to which AOR will supply gasoline in the center-south parts of the country and HOR will supply in the north, since such an arrangement would result in geographic market division between the two competing refineries.

8. Vertical relations between wholesale firms and gasoline retailers

One of the main characteristics of the gasoline retail market is vertical affiliations (whether proprietary or contractual) between retailers and major gasoline wholesalers which have been holding a substantial share of the activity in the market for decades.

A common variation of vertical relations in the market is exclusivity contracts between gasoline stations and major wholesaler. Another substantial form of vertical relation has always been direct ownership or possession of the land by the wholesaler itself. It seems that in the last decade, this form of complete vertical integration between wholesalers and stations is becoming common. A third form of vertical relations is operation contracts by which the owner of a station grants the operation of the station, including the sale of gasoline to the wholesaler, in return to fixed sum and share of revenues.

9. Long term exclusivity contracts and their effect on competition

One of the main obstacles to the development of competition in the gasoline retail market in the post-reform period was the abundance of long term exclusivity contracts between major wholesale firms and station operators, many of which were directly owned by major wholesale firms. According to those agreements the operator was obliged to buy and distribute gasoline and oils exclusively from the wholesaler with which the agreement was made. The average period of exclusivity was extremely long and usually reached 50 – 100 years. In many cases the contracts included the right of the wholesaler to set not only the wholesale price but also the station retail price. It should be noted that the major wholesalers acknowledged that retail price setting is void and did not attempt to enforce those provisions.

In many cases the major wholesalers engaged with private land owners in contracts under which the wholesaler planned, financed and constructed the station and in return received an exclusivity right for a very long period, with or without land rights. In other cases, exclusivity contracts were made between a major wholesaler and an already operational station.

10. Exclusivity contracts in gasoline stations operated by disabled army veterans

Throughout the years, state involvement in the market was intensive enough to allow the creation of a settlement between state officials and major wholesalers concerning professional rehabilitation of disabled army veterans. According to the settlement, veterans that were found eligible by a committee of the Ministry of Defence were signed for a rehabilitation program which provided them with a license to operate gasoline stations on state owned land. The location of the station was selected by the wholesaler and was allocated without a public auction. Planning, licensing financing and construction of the station were left to the wholesaler. Both the wholesalers and the veterans received certain inter-dependent property rights in the land. Operation contracts, signed between the veteran and the gasoline wholesaler, always included purchase exclusivity provisions of for the full duration of the property rights held by both parties (usually 49 years with an option to another 49 years term).

11. IAA decision with respect to exclusivity contracts in the retail gasoline market

In 1993 the IAA General Director was first to take action in order to provide new gasoline wholesalers with access to existing stations and thus reduce entry barriers to the market. According with its powers, the General Director stated that exclusivity contracts in the retail gasoline market were restrictive practices that were harmful to competition. The General Director stated that station owners were not free to choose a wholesaler in a free market since it was found that the exclusivity contracts bound the majority of stations in Israel. Moreover, it was found that the great majority of the non-exclusive stations (i.e. stations which are not bound in exclusivity contracts with any major gasoline wholesaler) were owned by incumbent wholesalers making them also inaccessible to potential wholesale competitors. It was decided that the General Director's decision would come into force only after the judicial review process would be concluded.

In 1995 a settlement was reached between the General Director and two of the three major gasoline firms: *Paz* and *Sonol*. According to the settlement, the General Director revised the abovementioned decision by excluding contracts referring to stations where the gasoline wholesaler held land rights, amongst them, "army veteran rehabilitation program" stations. The revised decision emphasized the importance of releasing a considerable amount of stations from the exclusivity they were subject to. Exclusivity contracts that were excluded from the decision were still considered by the General Director as restrictive practice. The General Director described the considerable legal and commercial difficulties concerning this type of contractual relationship, where the firm has invested considerable resources in construction of the station and held land rights that were intertwined with the operator's right. The revised decision did not prohibit any private party from bringing private legal suits to challenge the validity of specific exclusivity contracts. The two major gasoline wholesalers, on their behalf, agreed to release dozens of stations that were bound by such exclusivity contracts. The release of these stations, as well as the later release of stations by the third major firm, *Delek*, is believed to mark the beginning a state-scale competition in the market.

As part of the settlement with *Paz* and *Sonol*, a flexible standard for permitted exclusivity periods was set by the General Director. According to the settlement a standard of 14 years of exclusivity was set for stations that were constructed and completely financed by the major firm. A standard of 7 years of exclusivity was set for stations that were renovated and financed by the gasoline firm up to a certain level. The default exclusivity period for stations that were not financed by the firm was set on 3 years. In addition, the duration of exclusivity contracts between released stations and their ex-suppliers was set on 1 year only. The abovementioned standards were later changed by the Antitrust Tribunal in the case of *Delek*.

Delek, the third major wholesaler in the gasoline market did not enter the settlement with the General Director until after Supreme Court decision in the *Caspi* case which did not allow the firm to enter the settlement prior to releasing stations.

In 1998, a settlement was reached between the General Director and *Delek*, which was similar to the previous settlement, reached with the other major firms. Due to changes in the Antitrust Law, this settlement was brought before the Antitrust Tribunal, which conducted a thorough examination of the exclusivity contracts⁴. The Tribunal's decision was formally restricted to exclusivity contracts that did not include land rights. The Tribunal reviewed the standard exclusivity periods set by the General Director in 1995. In its ruling, only some of the standards set by the General Director were approved. The Tribunal adopted the general standard of three years exclusivity in stations where no financial investment was made by the wholesaler but rejected the notion that the standard exclusivity period should reflect the scope of

⁴ Antitrust Case no. 469/98 *In re Delek*.

wholesaler's investment in the station. The Tribunal found that exclusivity enhances efficiencies in the gasoline retail market: it promotes stability and long term planning, offer better use of the majors' scale advantages and expertise in spotting commercially beneficial locations for the station, planning, regulation and construction of the station. Vertical relations formed by exclusivity can save transaction and financing costs and can further serve efficient risk allocation and encourage investment in construction of new stations. On the other hand, vertical relations reached through long term exclusivity create competitive concerns, such as blocking distribution channels, increasing entrance barriers to the market and preserving the low degree of competition in the market. The Tribunal stressed that easier financing through gasoline wholesaler and investment return should not justify long term exclusivity. Considering the advantages and disadvantages of vertical relations based on exclusivity, the Tribunal set the following standard exclusivity periods: already existing/operating station - three years; released station – one year; new station (finance and construction) – six years.

12. Exclusivity & land rights

Despite the fact that the revised General Director's decision and Tribunal's decision in the *Delek* case did not relate to stations where the firm had property rights in the stations, cases challenging the legality of such contracts were brought before civil courts since the early 1990's. Over a decade of legal debates, the courts did not reach a uniform opinion concerning such contracts. Appeals on contradicting decisions of the first instances are pending in the Supreme Court. In September 2008 the Attorney General, provided the State's position on the issue. Based on IAA opinion, the Attorney General stated that the land rights held by the wholesalers were artificial and could not justify long term exclusivity contracts as they are restrictive practices. The Attorney General based its opinion on the Tribunal's and General Director's finding that such contracts significantly harmed competition in the market.

13. Divestiture of Pi Gilloth Petroleum storage facilities and its acquisition by *Delek*

Pi Gilloth Petroleum Terminals & Pipelines Ltd. was the major storage facility for petroleum distillates in Israel, and had been owned by the major gasoline companies (Paz, Sonol and Delek) in conjunction with the State of Israel, through what the IAA perceived as an unauthorized restrictive arrangement that inhibited competition in the gasoline station segment. In 2004, the General Director initiated government negotiations with Pi Gilloth, involving the Ministries of Energy, Finance and Justice, in order to reach an agreement regarding a plan for the company's privatization and breaking-up. The IAA and Pi Gilloth ultimately reached an agreement that was later submitted for the Antitrust Tribunal's Approval as a consent decree under § 50B of the Law. The agreement, which was subsequently approved by the Tribunal, incorporated a privatization agreement and a creditors' settlement⁵. In August 2007, the Pi Gilloth facilities were successfully divested, to Delek, the Israel Fuel Corporation. This transaction was evaluated as a merger, and approved by the General Director under strict conditions that are expected to enhance competition and prevent market foreclosure⁶. The conditions prohibit Delek from discriminating or refusing to supply storage services to its competitors and impose on Delek a duty to apply for IAA approval in case it wishes to purchase or operate additional infrastructures to import, store or distribute distillates.

⁵ *Re: Delek the Israel Fuel Corp. Ltd. – Paz Oil Co. Ltd. – Sonol Israel Ltd. – Sonepco Straight Corp. Bank - Pi Gilloth Petroleum Terminals & Pipelines Ltd.* (Consent Decree), 2005 Antitrust 5000094.

⁶ *Re: Delek the Israel Fuel Corp. - Pi Gilloth Petroleum Terminals & Pipelines Ltd.* (Approval of Merger with Conditions), 2007 Antitrust 5000620.

RUSSIAN FEDERATION

1. Sale of oil products by vertically-integrated oil companies (VIOC)

The most important from the point of social and economic effect is the situation when VIOC use non-transparent schemes of sale of wholesale consignment of oil goods. According to the existing practice, oil products produced by the VIOC on their own refineries is sold in the following sequence (by priority):

- export,
- sale companies, which are a part of VIOC,
- independent market participants.

In general, the sale companies, which are part of VIOC, do not make transactions on purchase/sale of oil products when selling them to VIOC filling stations, as these filling stations are not a legal person separate from this sale company. As a result of such non-transparent scheme, the costs of sale and volumes of oil products are distributed disproportionately between VIOC filling stations and independent filling stations, that created unequal conditions for participants of the oil product retail market participants and makes it impossible to compare working terms of VIOC filling stations and independent filling stations in order to allow the FAS Russia to assess the cases of price pressure by VIOC on independent filling stations.

The most significant affect of non-transparent VIOC sales policy on the market can be seen during the periods of seasonal pick-up of demand on oil products when independent participants have a great deficit of products, whereas VIOC companies don't feel this deficit.

Sale of oil products from VIOC refineries to independent participants is done under half-closed tenders (or under lack of such) in which VIOC trusted companies can take part. In general, the scheme of such sales encourages corruption among VIOC management which creates "paper" intermediate companies. Thus, indeed independent companies do not have an opportunity to purchase a product directly from VIOC refineries and have to purchase it from such intermediate companies on higher prices. Moreover, when selling wholesale consignments of oil products from VIOC refineries everywhere there is stated a prohibition to sell them on retail markets in the regions where exist filling stations of this VIOC.

Such a sale policy conducted almost by all VIOC encourage non-effectiveness and unjustified costs for logistics, "paper" intermediate companies, excess inventories, etc. All this promotes formation of non-objective, overcharge on oil products.

Such market structure caused and maintained by all biggest VIOC damage the effectiveness of the VIOC themselves. The oil product market being non-transparent is divided on VIOC affected zones, in wholesale and retail sectors. Export-orientation, non-transparency of the existing oil products sale system promotes discredit between VIOC – each of which controls situation only within its own affected zones. General description of the incumbent structure is the following: oil produced by VIOC is refined on its own refinery and is sold on its own filling stations regardless territorial remoteness of these objects of

production chain from each other. Despite evident attractiveness of oil and oil trade between VIOC, this doesn't happen.

Thus, on the FAS Russia opinion, the negative impact of the vertical integration on the effectiveness of the companies' activity and free pricing on oil and oil products in Russia can be eliminated through considerable increase of transparency when making transactions with oil and oil products and involvement into the commercial intercourse of oil and oil products belonging to VIOC.

The price growth on oil products causes significant concern by the FAS Russia. The FAS Russia believes that increase of stability of the current price situation on the domestic oil product market is a system task to solve which the federal bodies of executive power would need to jointly undertake a number of measures not envisaging direct interference into pricing on oil and oil products.

From the beginning of 2008 the FAS Russia initiated more than 150 cases with regard to violation of the competition law in the fuel and energy sector. Out of the total number of cases initiated on the violation of the competition law in the fuel and energy sector

- concerted actions of economic entities make – 26;
- abuse of dominance by economic entities make - 20;

Out of them:

- on gasoline market – 33;
- on avia combustive-lubricating materials market and airport fuel filling stations services market – 13.

2. Certain measures proposed by the FAS Russia to stabilize price on oil product

2.1 Increase of pricing and economic relations transparency under monopolized structure of oil and oil products market.

- Separation of major types of VIOC activity between different legal persons within the frameworks of one holding and organizing of monitoring over economic relations (for instance, main transactions parameters within VIOC group of persons between the market sectors: production – refinery – wholesale – small wholesale – retail).
- Introduction of standards for disclosure of information on VIOC activity: pricing on every stage from oil production till its retail sale, stores and commodity balance within the frameworks of VIOC. Improvement of the mechanism for collecting and publishing of information on fuel resources in the Russian Federation in regional section.

Implementation of the above mentioned measures will increase the transparency of stages for price formation through all the chain production-refinery-wholesale-retail will promote determination of prices under market principles both within VIOC and in economic relations between VIOC and independent market participants that creates conditions for development of competitive relations.

Under unstable price situation on the domestic market this would allow to determine the market segment where is an imbalance of demand and proposal, to undertake timely measures to prevent it, to

reveal the reasons of imbalance which can be determined by market factors and market participants' actions (for instance, violation of competition law by an economic entity).

As a result the investment attraction would grow due to increase of predictability of the situation on market and long-term stability of business-environment, reduction of risks on conducting business in oil sector.

Implementation of these measures would increase short-term and medium-term stability of market participants' expectations, and would allow to hold planning and timely to take into consideration the possible reduction of oil product proposal on the domestic market to prevent agiotage demand and significant price growth under deficit.

2.2 *Suppression of further monopolization of oil products retail market.*

The FAS Russia elaborated amendments to the Land Code of the Russian Federation prohibiting economic entities that occupy dominant position on the oil product retail market to purchase lands for building of filling stations. Currently this proposal is discussed with the relevant bodies of executive power of the Russian Federation.

One of most illustrative cases initiated against VIOC is case initiated on July 21, 2008 against OJSC "Lukoil", OJSC "Gasprom neft", OJSC "TNK-BP Holding", OJSC "Oil Company "Rosneft", OJSC "Surgutneftegaz" on violation of part 1 article 10 of the Federal Law "On Protection of Competition" (establishing monopolistically high prices on oil and oil products, including aviation kerosene, mazut and diesel fuel) and parts 6 and 8 of the part 1 of the article 10 of the Federal Law "On Protection of Competition" (economically, technologically or in any other way unjustified establishment of different prices (tariffs) for one and the same commodity market and creation of discriminatory conditions for consumers on oil products wholesale markets in the Russian Federation. Consideration of cases started on August 5, 2008. It is for the first time in the practice of the competition authority when the case are considered on such a scale within the borders of the market of the Russian Federation and on the whole range of goods (from oil to oil products, including gasoline, avia combustive-lubricating materials, diesel fuel and mazut).

SOUTH AFRICA

1. An overview of the petroleum industry

1.1 *Regulation*

At the outset, it is important to note that the South African petroleum industry is subject to a variety of legislative and policy regulation including the White Paper on Energy, the Petroleum Industry Charter, the Petroleum Products Act, the Petroleum Products Amendment Act, the Petroleum Pipelines Act and the Clean Fuels Strategy. Other regulations include import control and a government-mandated formula for calculating retail prices for petrol.

The wholesale price of petrol and diesel, as well as the retail price of kerosene and the refinery gate price of LPG, is capped at a level calculated by reference to the Basic Fuels Price (“BFP”), plus an appropriate margin. The retail price of petrol is regulated.¹ Accordingly, the scope for price competition in the retail of petrol is, at best, limited. It has been reported that the Fuel Retailers Association is seeking higher retail margins, for the sale of petrol, from the National Department of Minerals and Energy (“DME”) as margins have come under significant pressure. However, the competition authority has not taken part in this debate.

The DME is in the process of liberalising the industry. This follows concerns raised in several quarters about the potential benefits of liberalisation and the harm brought about by regulation. In the process, some regulation will be reviewed, including the Marketing of Petroleum Activities Return (“MPAR”), the BFP and import controls.

As the retail price for petrol is regulated, we do not expect to see any differences between the prices of petrol in producer owned and dealer owned petrol stations in South Africa. This paper focuses on the vertical relationships within the industry and the concerns of downstream foreclosure which these relationships presented in the past. As discussed below, the possibility of deregulation has, however, been taken into account in the competition authority’s merger assessment in this industry.

1.2 *History*

South Africa has no significant crude oil reserves and had no refining facilities until the 1950’s. It relied on imports until refineries were built. Inland refineries at Natref and Secunda were established in 1955 and 1971 respectively. Coastal refineries were built between 1954 and 1966 and belong to:

- Engen;
- Caltex Oil South Africa (Pty) Ltd (“Caltex”);
- BP Southern Africa (Pty) Ltd (“BP”);

¹ Set at BFP plus a margin to cover the wholesale and retail costs plus taxes. The regulated price level can vary by region to reflect the difference in total transport costs incurred in getting the product to the region in which the retail site is located.

- Shell South Africa Energy (Pty) Ltd (“Shell”); and
- PetroSA.

Previously, the inland refineries were state owned. Ownership was transferred to Sasol Ltd when the state decreased its shareholding in Secunda and the National Iranian Oil Company disposed of its stake in Natref. The Main Supply Agreement (“MSA”) regulated the supply of refined products between Sasol and the other oil companies. The other oil companies were obliged to buy from Sasol through the MSA and Sasol was also obliged to supply the oil companies with finished products.

Prior to 2003 Sasol’s involvement in the marketing of its products was limited to the Blue Pump Agreement (“BPA”). In terms this agreement Sasol could only access the retail market through pumps on the forecourts of other oil companies and unbranded sites. The termination of both the MSA and the BPA in December 2003 meant that the restrictions were removed. Sasol entered the retail market as a fully vertically integrated participant through the acquisition of Exel.

1.3 *The structure of the industry*

There are seven major oil companies in South Africa, namely Sasol, Engen, Caltex, BP, Shell, PetroSA and Total. All of the abovementioned companies, except PetroSA, are vertically integrated, having operations at each stage of the supply chain, namely (i) refining and production, (ii) storage, (iii) wholesale marketing and (iv) retail.

1.3.1 *Production*

Production occurs at six production facilities. Four facilities are independently owned by:

- Engen (Enref in Durban);
- Caltex (Calref in Cape Town);
- PetroSA (in Mosselbay); and
- Sasol (in Secunda).

The other production facilities are jointly owned by:

- BP and Shell (Sapref in Durban); and
- Sasol and Total (Natref in Sasolburg).

Enref, Sapref, Calref and Natref use crude oil as an input and Sasol-Secunda and PetroSA use coal and natural gas, respectively.

1.3.2 *Distribution*

The distribution of products across oil companies varies from region to region. This is due to the geographic distribution of the production facilities and their ownership structure. The distinction between the distribution of production and the distribution of sales means that oil companies will be strong in the area where they own production interests and weak in areas where they have a marketing presence, but no production interests. These imbalances are corrected through the so-called inter-company transactions.

The supply of fuels to end-users is through wholesale sales to commercial and industrial customers and retail sales at service stations.

1.3.3 *Retail*

South Africa has a network of about 4500 service stations built on land owned either by oil companies or dealers themselves. Approximately 56% of South Africa's service stations are branded retail outlets owned by the oil companies and approximately 34% are either dealer owned or the dealers hold the head lease. The remaining service stations are unbranded "private" sales fuel companies such as farmers and industries who use petroleum in their production. They normally have their own tanks on site for storage.

As mentioned above, the retail price for petrol is regulated. We, therefore, do not expect to see any differences between the prices of petrol in producer owned and dealer owned petrol stations in South Africa.

1.4 *Products*

The products produced in the petroleum industry may be grouped into two broad categories: (i) high value products and (ii) low value products.

The high value products are together referred to as "white fuels" and are:

- Petrol
- Diesel
- Illuminating paraffin ("IP")
- Jet fuel
- Liquefied petroleum gas ("LPG")²

The low value products are together referred to as "black fuels" and constitute:

- Bitumen;³
- Fuel oil products;⁴ and

² LPG is butane and propane gas compressed into a liquid form. LPG is formed naturally or as a by-product from oil refining. It differentiates itself from other energy sources on the basis of portability, convenience, low sulphur, controllability and its clean burning nature. LPG is produced and sold to resellers in bulk and cylinders and distributed to end-users.

³ A substance used in the road-building industry.

⁴ Energy sources for heating and shipping purposes. They are a mixture of refinery residue and distillate and differ in their sulphur content and flowing properties at a given temperature. Fuel oils can be divided into light fuel oil, marine or bunker fuel oil and heavy fuel oil.

- Lubricants.⁵

1.5 *Transportation and storage*

There are three main different modes of transport used by the industry, namely pipelines, rail and road. Storage occurs at various depots across the country.

There are three pipelines, namely:

- The Crude Oil Pipeline (“COP”), used to transport crude stock from Durban to Natref at Sasolburg;
- The state-owned Durban Johannesburg Pretoria pipeline (“DJP”), used to transport white products between regions. It has eight terminals where the refined products are removed and transported by road or rail to the relevant depots or service stations. Allocation of space is done by Petronet,⁶ based on usage, and allocated every six months. The price is uniform for all users according to a Petronet published tariff; and
- The Durban-Witwatersrand Pipeline (“DWP”), also referred to as the Lilly, used as the gas pipeline. Sasol uses the DWP, which was originally meant to augment the DJP, for the transportation of gas from the inland to the coast.

After pipeline, long-haul rail is the most cost-effective means of transporting refined product to the inland region. Spoornet administers rail logistics in South Africa. Long-haul road transportation of refined product is the least cost-effective way of transporting product to the inland area and is provided by a number of third parties to which the oil companies have outsourced the service and by oil company owned fleets.

The distribution of white fuels, except jet fuel, involves storage at depots owned by oil companies. These are located in the inland and at the coast, and are linked by the product pipeline. Depots are “shared” among all oil producers through so-called “hospitality agreements”. Ad-hoc uplifts are relevant where no hospitality agreements prevail. Jet fuel is stored at mobile dispensers at the airports.

2. *Concerns arising from vertical integration*

As mentioned above, all of the oil companies, except PetroSA, are vertically integrated in South Africa, having operations at each stage of the supply chain, namely (i) refining and production, (ii) storage, (iii) wholesale marketing and (iv) retail. Where one company gains market power in the upstream level of the market, this gives rise to significant concerns of foreclosure.

The concerns arising from the vertical integration of the firms in the oil industry can best be illustrated by reference to a 2005 merger application in which Sasol Limited, Petronas, Engen Limited, Afric Energy Resources (Pty) Ltd (“AER”) and Tshwarisano LFB (Pty) Ltd (“Tshwarisano”) had signed a share-for-share exchange agreement, which regulated the steps involved in the forming of a joint venture to be named Uhambo Oil Ltd (“Uhambo”). Engen Limited would acquire 100% of the entire issued share capital of Sasol Oil then Sasol Limited and Engen Limited would form Uhambo. In consideration for the

⁵ A distinct product group with varying degrees of similarity. Lubricants are produced, blended and distributed to industrial and commercial users. There are auto, industrial, marine and aviation lubricants.

⁶ Done on the basis of the oil companies’ refining capacity.

first part of the transaction, Petronas and Sasol Limited, would each hold a 37,5% interest in Uhambo while AER and Tshwarisano, as BEE⁷ consortia, would each hold 12,75%.

The figures below set out the pre and post merger scenarios.

Figure 1. The relevant pre-merger ownership structure of Sasol LFB and Engen

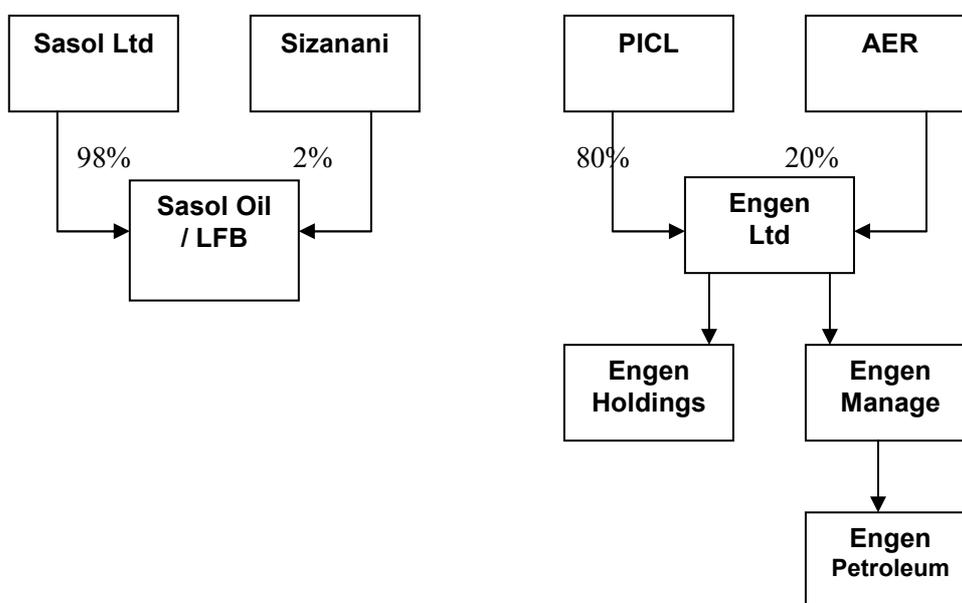
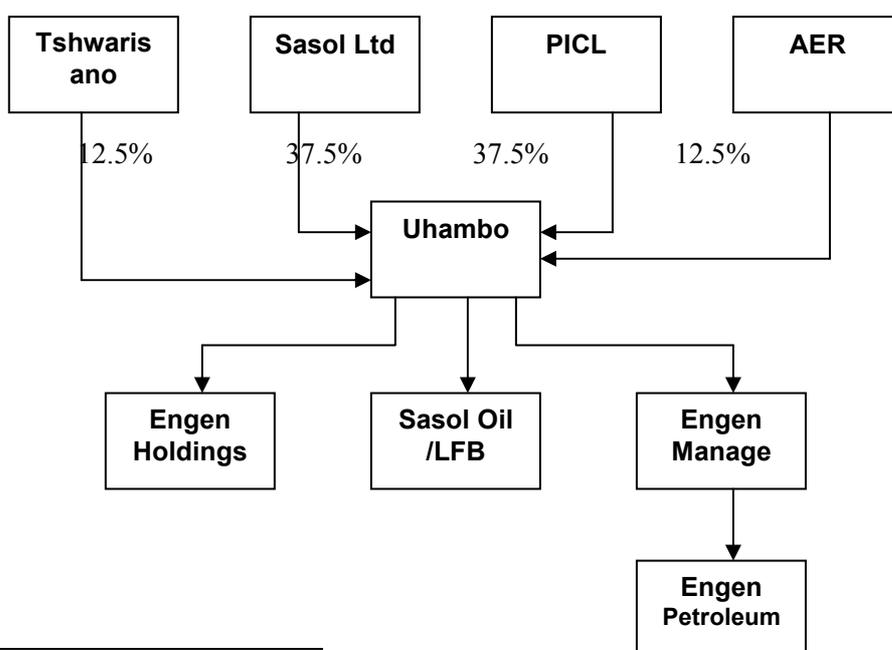


Figure 2. The post-merger ownership structure



⁷ Black Economic Empowerment (“BEE”) refers to a post-apartheid government policy aimed at redressing the racial and economic imbalance caused by apartheid in South Africa.

The proposed transaction had both horizontal and vertical dimensions. Horizontally Sasol Oil and Engen Limited were involved in the refining and production of petroleum products and the transaction raised competition concerns over production and marketing capabilities in the inland region. The parties were also vertically integrated in the marketing of the final products.

The Competition Commission of South Africa (“CCSA”) analysed the high value petroleum products. Two dimensions to the high value products existed: a horizontal and vertical dimension. While the CCSA analysed both the horizontal and vertical aspects of the merger transaction, only the vertical concerns uncovered therein are relevant for purposes of this report. In any event, it was the vertical concerns identified in the merger which led the CCSA to conclude that the transaction was likely to substantially prevent or lessen competition in the petroleum industry. This was based on the fact that:

- Uhambo would, post-merger, have a market share of 78% in the inland area⁸ and 28% in the coastal area; and
- there were logistical constraints underlying the other oil companies’ ability to ship adequate product to the inland region.

2.1 The CCSA’s recommendation

The CCSA came to the view that there were significant transport logistical constraints in moving white fuels from the coastal refineries to the inland region of the country, where there was the greatest demand for fuel. The three major modes of transport, the pipeline, road and rail did not provide sufficient transport capacity. The pipeline operating company, Petronet, advised that it was intending to replace the existing pipeline with a bigger pipeline, to be commissioned in 2010, with the capacity to provide sufficient transport for white fuels into the inland.

In view of the significant transport logistical constraints, the CCSA defined the market upstream as coastal and inland. Though Sasol was found to be dominant in the inland market, there was no geographic overlap in the activities of the parties upstream. A concern was raised that, taken together with the vertical concerns, the increased concentration levels could lead to the lessening or prevention of competition.

From a vertical perspective, it was found that the merger was likely to substantially lessen or prevent competition because of the likelihood that Uhambo would foreclose the other oil companies (“the OOC’s”) by refusing to supply them or raising their costs. The reason for this view was that the merger would significantly reduce the interdependency between the oil companies in many ways. For example, in the inland market Sasol was long on production but short on retail, while Engen was short on production and long on retail. If the merger proceeded, Uhambo would have access to the large production capacity of Sasol and the large retail network of Engen, making Uhambo less dependent on the OOC’s to put its products to bed.

In the CCSA’s view, the merger did not raise any significant public interest concerns.

The CCSA, therefore, in its report to the Competition Tribunal of South Africa (“CTSA”) recommended an approval of the merger subject to conditions intended to secure the supply by Uhambo of petroleum products to the OOC’s until a pipeline existed that would be capable of transporting their shortfall volumes to the inland market on reasonable terms.

⁸ Albeit that it shared its production facilities at Natref with Total.

2.2 *The Hearing*

In the hearing five OOC's participated as interveners, all opposing the merger. 17 witnesses, who included international experts in anti-trust economics and mergers, were called. Significant information that was not previously available to the CCSA, as well as the testimony of witnesses, in particular expert witnesses, persuaded the CCSA to reconsider its position regarding the merger. Furthermore, useful analysis of horizontal issues was made and elaborated on during the hearing. This included that, in looking at the market shares inland, one had to also consider what the other competitors were able to bring into the market. Following this approach there would be a significant accretion in the market shares in the inland as a result of the merger. Furthermore, once the new pipeline was commissioned and addressed the transport constraints, the market would be national, and Uhambo would own about 50% of the national production capacity.

The CCSA submitted that the likely scenario was that, absent the merger, when the new pipeline was in operation, Sasol would be compelled to decrease its prices of white fuels to the OOC's in order to maintain production levels, as it would not have a sufficiently large retail footprint to put its products to bed. Without the logistical constraints the OOC's would not be as dependent on Sasol, and Sasol would have to make an attractive offer to the OOC's to entice them to purchase its products. The CCSA expected that some of the price decreases would be passed on to consumers, particularly when the market was deregulated. In contrast, if the merger was approved, Sasol would not have any incentive to show flexibility on the prices it demanded for its products, with a potentially detrimental effect on consumers.

In a situation where Uhambo were to increase its prices at production or retail levels (in a deregulated environment), the OOC's would be unlikely to react by following a strategy to capture additional market share through maintaining lower prices due to their own capacity constraints and the fact that Sasol's production costs were lower than theirs. It was likely that the OOC's would rather follow the price increases of Uhambo.

In light of the information arising from the hearing, the CCSA came to the view that the competition concerns arising from the merger could not be adequately addressed by a behavioural condition. The CCSA was also not in a position, in light of the issues covered during the hearing, to confidently propose any structural remedy that would address the competition concerns. The CCSA further submitted that there were no public interest issues or efficiency defences that would rescue the merger. In the circumstances, and by the conclusion of the hearing, the CCSA did not see an alternative to an outright prohibition.

2.3 *Finding of the CTSA*

Following the hearing in the matter, the CTSA held that the merger would most likely lead to a substantial lessening of competition in both the upstream (refining) and downstream (retail) markets for petroleum and diesel, without any countervailing efficiency or public interest gains which would outweigh the anti-competitive effects of the proposed transaction.

According to the CTSA, the principle competitive harm resulting from the post-merger structure was that it would have created a "*credible threat of foreclosure*" in relation to the other oil companies, which were dependant on Sasol for their inland fuel requirements. This would likely lead to a "*retail cartel*" under the leadership of the merged entity.

The CTSA stated that Sasol was, at the time, a "maverick" who stimulated price competition at both wholesale and retail levels. Therefore, the pre-merger structure of the market was far more conducive to competition than the post merger market where Sasol's incentives to operate as a maverick would cease.

Ultimately the CTSA found that the anti-competitive effects of the merger could not be remedied by any appropriate structural or behavioural conditions. Accordingly the CTSA prohibited the merger in February 2006. The parties decided not to appeal the matter.

CHINESE TAIPEI

1. Introduction

In preparing the present submission, the Fair Trade Commission (the FTC) consulted with the competent agency, the Bureau of Energy under the Ministry of Economic Affairs, which is responsible for the Energy Management Act, Electricity Act, Petroleum Administration Act, Regulations Governing Administration of Gas Utilities and other energy-related regulations. In this report, the FTC decided to focus on three issues. The first issue describes restrictions on vertical integration within the petroleum products value chain prior to market liberalization. The second issue depicts the current status of the vertical integration and the competitive environment of the gasoline retailing market. The third issue then discusses the policy concerns regarding the vertical separation of the domestic petroleum market.

2. The structure of the petroleum market

The liberalization of the petroleum market in Chinese Taipei has been implemented step by step, beginning from the downstream sale of petroleum, progressing to the upstream refinery business and finally reaching the opening of petroleum products imports following the promulgation of the Petroleum Administration Act on October 11, 2001. The domestic petroleum market has been fully liberalized since December 26, 2001. The domestic structure of petroleum supply chain essentially entails:

- Petroleum refiners: A duopoly market including CPC Corporation, Taiwan (CPC) and Formosa Petrochemical Corporation (FPCC) with market shares of 75% and 25%, respectively. Both refiners do not currently import refined oil.
- Petroleum distributors: There are 196 distributors on record, but only 1 with enough scale to negotiate supply contracts with petroleum suppliers and owning trucks to carry the petroleum products. There exists limited competition at this level.
- Gasoline station operators: Currently, this level of market is slightly concentrated. Of the current 2,656 operators domestically, 653 operators are part of the filling-station network operated by CPC and 150 are gasoline stations operated by Formosa Oil, a 100% subsidiary of FPCC. The 10 larger scale gas station chains account for 57% of the entire operators market while the independent stations account for 43%. This segment does exhibit a trend towards consolidation and conglomeration.

The efforts by the government to supervise the petroleum industry are reflected in the following 6 areas: 1) Security stockpile control, 2) An efficient pricing notification system on petroleum products, 3) Petroleum fund subsidies and rewards, 4) Petroleum statistics, 5) Petroleum quality control and 6) Petroleum pipelines.

3. Restrictions on petroleum vertical integration by the FTC prior to liberalization

The petroleum industry consists of oil production, refining and distribution. Domestic producers and refiners of petroleum products had been integrated prior to the liberalization of the petroleum market. Distribution has occurred either by building new or buying existing gasoline stations. “The distribution

channel is the king” is a true depiction of the petroleum market, and is true for suppliers and importers alike, where the distribution channel is treated as the key to competitive advantage and the way to gain market share. To accommodate market liberalization, the FTC implements the following administrative measures related to vertical integration:

- New consolidation between petroleum suppliers and gasoline retailers was prohibited to prevent petroleum suppliers from attempting to expand their scale of distribution via vertical integration. This was not uncommon prior to the full liberalization of the petroleum products market in 2000 and had the effect of preventing new entrants.
- Distributors were relieved from the original long-term supply contracts with their suppliers to allow them the option to renegotiate with upstream suppliers post-liberalization.

3.1 Control on mergers between CPC and gasoline station operators

CPC had previously applied for merger approvals of its operating jointly with another enterprise or establishing new enterprises in their attempt to establish new gasoline stations. (This case involved 19 gasoline stations where the CPC provided all hardware equipment and software for operations and land-owners provided land.) Since November 1997, the FTC ceased granting any further approvals for merger applications with downstream retailers to the state-owned and sole petroleum supplier, the CPC. The decision was made based on the following considerations:

- CPC, who has enjoyed a monopolistic position, operated at both the producing and retailing markets;
- The gasoline station market was highly concentrated with an HHI index of 2,516 and CPC holding a market share of 50.2%.

3.2 Long-term petroleum supply contracts

The duration of the long-term supply contracts between petroleum suppliers and gasoline station operators cannot surpass the effective date of the liberalization of the domestic petroleum products market or the deadline of the liberalization of imported petroleum products. Suppliers are asked to make necessary amendments to existing contract provisions as soon as possible. In 2000, the FTC drafted a “Policy Statement on the application of the Fair Trade Act to the petroleum supply practices prior to the full liberalization of the petroleum products market”. Under the Statement, gasoline station operators were given the right of advance notice of termination to avoid preventing new players from entering the market and restricted in the restriction of competition.

3.3 Ensure full execution of contract termination rights by the gasoline station operators

In December 2001, in accordance with the liberalization schedule, the FTC held a public hearing and consulted with representatives of government agencies, petroleum suppliers, importers, retailers and regional trade associations to determine the timeline for retailers to engage in contract renegotiations. The meeting participants and government agencies had reached a consensus on an implementation timeline after taking into consideration a practical working schedule. In case that there was no new entrant to commence supplying petroleum products by 1 March 2002 due to the delays in government agencies’ administrative processing, the incumbent petroleum suppliers should properly adjust the deadline for the exercise of renegotiation right and extend the original termination dates to meet the practical needs of gasoline station operators to choose among sufficient number of petroleum suppliers.

4. The types of vertical relationships exiting between petroleum suppliers and gasoline retailers after the full liberalization of the petroleum products market

4.1 *Self-operated gasoline stations by suppliers*

The CPC had been able to secure a comprehensive gasoline station network by leveraging its state-owned enterprise status. The CPC has a monopolistic position in both the upstream production and downstream distribution segments. The CPC currently owns as many as 653 gasoline stations in Chinese Taipei, accounting for 24.6% of the domestic distribution market. However, the costs of production and distribution are commingled and cannot be clearly separated. The other major producer, FPCC, operates gasoline stations through a 100%-owned subsidiary. FPCC is responsible for petroleum production and gasoline station distribution is operated by its subsidiary. In this way selling prices and costs are completely separated. Currently, the CPC and FPCC extend their gasoline station network mostly by acquisition, or by lease, and to a lesser extent by building the stations themselves. This allows the CPC and FPCC to respond to market changes with greater flexibility.

4.2 *Gas station chains*

Gas station chain operators develop proprietary Corporate Identity Systems (CIS) and design their own station outlook as well as propriety Point of Sales (POS) Systems. Petroleum supply contracts are negotiated by the chain operators' head offices with producers who are only responsible for petroleum supply. This business model creates better brand awareness with consumers and it is easier to expand brand equity. To obtain better discounts through large-scale operations and better bargaining power by the gas station chain, all operations-related negotiations are conducted by the head office.

4.3 *Independent gasoline retailers*

Independent gasoline retailers by themselves negotiate supply contracts with producers. The independent gasoline stations account for 40% of the domestic distribution market. Independent gasoline retailers lack bargaining power against the upstream suppliers and are squeezed horizontally by other conglomerate-operated gasoline stations. They are doomed for closure or to be consolidated into conglomerates.

4.4 *Leased gasoline stations*

The nature of vertical integration is also changing. Among the gasoline stations directly operated by the 2 domestic petroleum suppliers, the cost efficiencies associated with building gasoline stations are often compared with the costs of leasing. In recent years, leasing has been the preferable mode to the upstream petroleum producers. The CPC, for example, even includes a "First right of lease" clause in their supply contracts with downstream gasoline stations operators. It stipulates that the gasoline stations currently bound by the CPC's supply contracts are required to seek prior approval from the CPC on the intent to lease, assign or to entrust a station to a third party. A failure to do so would result in a breach of contract. It is clear that petroleum suppliers have a dominant position over gasoline stations and can decide whether to exercise their first rights of lease according to the regional competitiveness and conditions pertaining to each gasoline station to which they supply. Petroleum suppliers also often participate in the operations of gasoline station chains via share-holdings or else establish 100%-owned subsidiaries to consolidate the entire gasoline station chain being supplied into that of a conglomerate.

5. The pricing issue in distribution channel

Wholesale and retail pricing: Although suppliers allow downstream retailers to freely determine their retail prices, the conventional practice is usually for the downstream gasoline retailers to uniformly adjust

their retail prices to profit from temporary price gaps as soon as one upstream supplier makes a wholesale price move. Upon any wholesale price move, the retail price list is usually updated simultaneously with nearly no time lag. Essentially, gasoline stations immediately pass through the costs from price movements to consumers. The pricing correlation between wholesale and retail price tags is prevalent across gasoline stations operated directly by suppliers, chain operators or independent gasoline retailers. Such an action therefore creates an impression on end consumers of the petroleum price to be “Up like a rocket, down like a feather”.

Gas station chain operators often engage in regional price competition due to the better discount terms they enjoy with suppliers. A membership program is another frequently used tactic to lock in a “loyal customer base”. Gas station chain operators also often engage in cross-participation activities, offering services in conjunction with automobile repair services, franchised coffee shops, or baby products sales. Marketing is done in a variety of ways in order to capitalize on the domestic core businesses of many of these chain stores, including President Chain Store’s 7-11, other food industries or forming a G-STORE to become the hybrid brand extension of the original core products/services offered by gasoline station operations. Given the fierce competition in the gasoline station market, some independent gasoline retailers face the inevitable fate of being eliminated by the force of market competition.

In recent years, suppliers have not been as aggressive in securing gasoline station distribution or building distribution channels as they were before. This may be due to depressed domestic price and sales, as well as the incentives to export. In addition, suppliers have lowered the discount scheme offered to new contracts and new retail gasoline entrants starting from 2007. With reduced motivation to acquire distribution channels, petroleum suppliers tend to prefer gas station chains to independent gasoline stations as targets for consolidation.

6. Reasons behind the absence of vertical separation to date in liberalization of petroleum products market

Vertical integration already observed between domestic petroleum suppliers and downstream retailers in Chinese Taipei are mainly driven by efficiency consideration and social desire, especially the popularization of petroleum supply service. With the liberalization of the petroleum products market, the burden of building gasoline stations in mountain and offshore areas still falls on the self-operated gasoline stations of the state-owned CPC. The new suppliers or gasoline station operators currently still choose to refrain from such markets due to profitability concerns. The CPC, a state-owned enterprise, with its comprehensive distribution system still has a monopolistic position in both the upstream production and downstream retailing markets. No obligation of vertical separation has been imposed on CPC but it still carry a certain sense of responsibilities to safeguard the nation’s basic oil consumption requirement and cannot refuse to supply the petroleum.

The Petroleum Administration Act stipulates the use of a petroleum fund which includes:

- subsidies on the setting up of petroleum facilities in mountain and offshore areas as well as transportation outlays;
- rewards in relation to the exploration for and development of petroleum and natural gas reserves; and
- implementing research and development on energy policy, oil development technology and alternative energy.

Unfortunately the subsidies are not sufficient enough to provide retailers with the required incentives to establish operations in these remote areas. In addition, to separate the state-owned gasoline stations enterprise now, may have an adverse impact on the universal service of petroleum supply and other related policy responsibilities.

7. Policy concerns regarding the vertical separation of petroleum suppliers from gasoline retailers

To date, the upstream production market still faces a bottleneck due to the high concentration in the petroleum market. To consider vertically separate the petroleum suppliers from gasoline retailers in the future, the FTC takes the position that vertical separation is believed to generate higher benefits than vertical integration.

In the case of the petroleum products market, barriers to entry include security stockpiles, historical background, capacity expansion, costs, risks and profitability as well as the reputations of incumbent players, practical controlled/approved cost structures and economies of scale/scope. Given that the petroleum production market is now dominated by 2 oligopolistic petroleum refiners, it is unlikely that a new refiner or an importer will enter the market now or in the near future. The upstream market is a naturally monopolistic market, particularly following the implementation of the floating price mechanism. Even if companies are economically capable of making the entry, domestic gasoline prices have been depressed and yield limited profits to motivate foreign petroleum companies to enter the Chinese Taipei market where the price continues to be highly regulated. In addition, the number of gasoline stations has increased from 1,513 in 1997 before the liberalization of the petroleum products market to 2,656 currently. The market is already saturated. While the incumbent players can secure control of distribution channels by vertical integration, the same practice is difficult to replicate with new entrants. Consequently, such a situation will raise rivals' costs and result in anti-competition effects.

Of the 600 gasoline stations owned by petroleum suppliers, the direct supplies of petroleum by upstream suppliers often raise competition concerns, such as lower input costs, higher discounts or less amortized overheads (computer system expenditures, CIS, marketing subsidies, and waived penalty for breach of contract). Instead of enjoying an inherited competitive advantage by being integrated with the upstream supplier, vertical separation allows the regulators to identify cost structure in all segments of the supply/ distribution/ retailing chain. It also prevents enterprises from engaging in cross-subsidy practices so as to make use of their revenues from their monopolizing businesses to subsidize the businesses with which they compete.

The current proposals of vertical separation include:

- separating self-operated gasoline stations from petroleum suppliers;
- spinning off gasoline stations into separate subsidiaries;
- setting up independent revenues and costs accounting items for petroleum products production and gasoline stations; or
- auctioning operating rights via open bids to be awarded to the highest bidder.

Before the separation of gasoline station operations can be separated from the CPC to eliminate the anti-competitive concerns arising out of the extension of upstream monopoly power (specifically prior to the CPC's privatization), further studies are required for regulators to deal with natural monopolies and the structure measure issues.

8. Conclusion

Prior to the petroleum products market being fully liberalized, the FTC has adopted administrative measures to restrict the vertical integration between petroleum suppliers and gasoline retailers. It is also possible to expect that the extension of an upstream natural monopoly will create downstream anti-competitive conditions resulting in further bottlenecks after the liberalization of the petroleum products market. Therefore, consideration of the necessity of vertical separation should be weighted in terms of its benefits and costs.