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The Portuguese Competition Authority decides to end 8 procedures regarding restrictive practices in the service-station market (Anti-competitive practices in the liquid road-fuels sector)

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Last April 21st 2009, the Portuguese Competition Authority (Autoridade da Concorrência - "AdC") announced the decision to discontinue eight procedures for breach of article 4 of the Competition Law (Law 18/2003), considering that some parallel behavior existent between oil companies and some restrictions present in the contracts between oil companies and service-station operators were caught by the Block Exemption on vertical restraints (Regulation 2790/1999 [1]) [2] .

It is worth noting that there was a major public outbreak, for a long time, against the oil companies and service-station operators, as there is a public feeling that, in spite of the radical changes of oil prices in the last few years, operators showed suspected parallel behavior probably amounting to a concerted practice.

For this, the Government imposed, in 2005 (Decree-Law 170/2005) and 2008 (DL 120/2008 - available at Law 120/2008) that service-station owners are bound to announce in highway concessions the price of the diesel fuel and 95-octane petrol for consumers to be informed and choose where to fill up their car deposit.

Furthermore, the Competition Authority was asked to realize an in-depth Analysis of the Liquid Fuel and Bottled Gas Sectors, being presented two interim reports in 2008 and the final report, last March 31st [3] .

Following the Final Report conclusions, the Portuguese Competition Authority decided to terminate the proceedings initiated against, in the end, BP, GALP, REPSOL and TOTAL, the only four companies currently operating in Portugal, according to the press release.

According to the AdC press release, there was some parallel behavior detected but there was no evidence supporting "the existence of competitive offences" between 2004 and 2009.

Other 7 procedures related to the existence of non-competition clauses in the standard supply contracts and the suspicion of vertical retail price fixing in breach of article 4 (1) of the Competition Law. In no point a reference is made to a possible breach of the similar article 81 of the EC Treaty, although the press release is not clear in this regard, for the existent restrictive practices found by the AdC were considered to be directly justified under the Block Exemption Regulation on Vertical Restraints (see Regulation 2790/1999).

It is certain that the Competition Law, in article 5 (3) says that « [p]ractices prohibited by Article 4 are considered justified when, though not affecting trade between Member States, they satisfy the remaining application requirements of a Community regulation adopted under Article 81 (3) of the Treaty establishing the European Community » (translation provided at the AdC website, at Portuguese Competition Law 18/2003), but this provision is not referred in any point of the Press Release ; on the contrary, the AdC seems to have analyzed the clauses in the verticals agreements under the "national or Community rules applicable" and applied the Regulation itself.

For the Competition Authority, the non-competition clauses in agreements between oil companies and service-station operators were under the 30% share that allows for the block exemption to be applied and that the agreements between service-station operators and CEPSA, TOTAL and ESSO were caught by the de minimis rule. Also, that means that GALP , BP and REPSOL may hold, in conjugation, more than 85% of the market. Even then, the AdC did not appreciate - or it is divulged any considerations on the subject - the existence of cumulative effect of parallel networks (under the ECJ Delimitis doctrine [4]) - envolving GALP, BP and REPSOL networks.

Furthermore, it considered that recommended prices and the fixing of maximum prices do exist in the market but it clearly stated that, since no supplier holds a market share above 30%, these clauses don't "normally" raise "competition questions".

For us, it seems clear that, even though one may argue that there is no sign of concerted practices and that, in the vertical agreements analyzed, there could be found some reasons to terminate the proceedings, the Competition Authority is not free of criticism, since there are clear structural problems in the markets concerned, regarding the refining "pipeline", gross distribution and the retail market. This last markets were addressed in the intended GALP/Carrefour service-stations merger, that was withdrawn by the applicant in the beginning of 2009, after an in-depth investigation by the AdC [5] .

[1] Commission Regulation (EC) n° 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, (OJ L 336, p. 21).

[2] The available information can be found in the Press Release n° 7/2009, at http://www.concorrencia.pt/download....

[3] The Press Release regarding the final report can be found at http://www.concorrencia.pt/download... ; the Final Report, in Portuguese, can be found at Final Report_Liquid_Fuel_and Bottled Gas_PT.

[4] ECJ, February 28th, 1991, Delimitis, Case C-234/89, [1991] ECR I-935

[5] See Press Release 2/2009 on the withdrawn GALP-Carrefour merger ; also, in 2005, a merger between GALP and ESSO, regarding some service-stations in ports was prohibited - See PCA prohibition GALP-ESSO_2005.

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