

COMPETITION & REGULATORY NEWSLETTER

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CMA issues final report on market study into the supply of road fuel in the UK

Introduction

On 3 July 2023, the Competition and Markets Authority (CMA) [published](#) its final report in connection with its market study into the supply of road fuel in the UK (the Final Report). The market study considered, amongst other things, developments in the road fuel market, covering the refining, wholesale and retail elements of the supply chain. The CMA has reached the conclusion that competition in the retail market is not working well, and greater transparency in pricing is needed to improve consumer confidence and bring down prices for drivers. On the other hand, the CMA did not identify any issues requiring action in the wholesale and refining sectors.

Background

On 11 June 2022, the Secretary of State for Business, Enterprise and Industrial Strategy wrote to the CMA requesting an urgent review into whether developments in the retail road fuel market had adversely affected customer interests. The CMA's decision to conduct a market study in this area reflects the outcome of its Urgent Review (published 8 July 2022) which identified cause for concern in parts of the retail road fuel market.

Interested parties and stakeholders were invited to comment on potential problems with how the road fuel market is working for consumers, as well as measures that could be taken to address them within the UK market.

In December 2022, the CMA published an update paper setting out its initial findings and its reasoning for not proposing to make a market investigation reference. A further update was provided in May 2023 as part of a wider update on the action the CMA is taking to contain cost of living pressures. The publication of the Final Report on 3 July 2023 now concludes the CMA's in-depth market study.

Key findings

The CMA has found that, while most of the fluctuation in petrol and diesel pump prices has been due to global factors and movements in the crude oil price, deficiencies in competition have led to unnecessary costs for drivers in relation to three aspects of the UK retail market: national, local, and motorway.

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National level

The CMA has found that competition between retailers has weakened in recent years. The Final Report considers that competition between retailers has generally been driven by low-cost supermarkets setting the pace at which other retailers (supermarkets and non-supermarkets) follow. The CMA found that these supermarkets have implemented less aggressive pricing policies in recent years, significantly increasing their internal target margins. Other retailers adopting a largely passive approach have imitated this upward trend and have therefore not exerted the competitive pressure expected as other retailers have raised their prices.

Sarah Cardell, Chief Executive of the CMA, [said](#) “Drivers buying fuel at supermarkets in 2022 have paid around 6 pence per litre more than they would have done otherwise, due to the four major supermarkets increasing their margins”. The CMA estimates this has resulted in a combined additional cost of around £900m for customers of these supermarkets in 2022 alone, equivalent to approximately £75m a month for this period.

Local level

The CMA has also identified significant price differences in the supply of road fuel between local areas. The Final Report considers that prices are likely to be higher in areas where there are no supermarkets, or where an existing supermarket faces no supermarket competitors. Where supermarkets face little competitive pressure from other supermarkets, they are likely to set their prices by reference to a non-supermarket retailer. Since non-supermarket retailers are generally more expensive, this therefore results in increased prices in these areas. The CMA found that local price variation has increased since mid-2022, consistent with the weakening of competition at the national level.

While the CMA considered there was some evidence local price dispersions may partially be caused by differences in costs, with businesses needing to charge higher prices to remain profitable, the Final Report concludes that a significant cause of price variation is retailers’ pricing policies, requiring them to align or price close to their cheapest rivals locally.

The CMA also found that although drivers were minded to travel a few miles extra to purchase cheaper fuel, their willingness to do so was inhibited by the absence of reliable, comprehensive and real time price information that they can use to compare pricing differences between local areas.

Motorway

The CMA has found that drivers without access to fuel cards incur a significant premium at motorway service stations compared to other fuel stations. The Final Report states that these drivers, accounting for 20-25% of fuel sales on motorways, pay approximately 20 and 15 pence per litre more on petrol and diesel respectively at motorway service areas than they would elsewhere. The CMA considered that this price gap with non-motorway sites has grown; with its predecessor, the Office of Fair Trading, identifying a premium in its 2012 study of less than half of 2022 prices.

The Final Report concluded that higher prices for non-fuel card carriers cannot be explained by higher retailer costs, but rather a combination of regulatory barriers to competition, a concentrated market, and the low ability of consumers to observe prices and shop around.

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Recommendations and next steps

To address the concerns identified in its Final Report, the CMA has recommended the Government should create as soon as possible:

- (a) an open data fuel finder scheme requiring retailers to share their prices on an open, real-time basis, meaning that drivers can easily compare prices in any area of the UK; and
- (b) a fuel monitor function within an appropriate public body, to monitor developments in the market, both nationally and locally, provide ongoing scrutiny of prices and consider whether further action may be needed to protect consumers.

In addition, the CMA considered whether acting to directly control prices or margins would be an effective and proportionate way of addressing its concerns. However, having considered various options, the CMA has stated that it *“does not believe it would be feasible to do this in a way that would be likely to improve overall outcomes for consumers, and doing so could in fact risk worsening them”*.

The CMA also noted that it has not found any evidence to suggest that there has been cartel behaviour taking place across any parts of the road fuel market covered by the study, and that it has no plans to open an enforcement case.

The Government has [responded](#) approvingly to the CMA’s Final Report. It has announced that it will consult on the design of the open data scheme and associated monitoring function this autumn. In the interim, the CMA will create a voluntary scheme encouraging fuel retailers to share accurate, up-to-date road fuel prices for publication by August, and will continue to monitor fuel prices using its existing powers.

OTHER DEVELOPMENTS

ANTITRUST

European Court of Justice rules that NCAs can take data protection rules into consideration when applying competition law

On 4 July 2023, the European Court of Justice (CJ) issued its [judgment](#) on a reference from the Duesseldorf Higher Regional Court for a preliminary ruling on whether the national competition authorities (NCAs) may review whether a data processing operation complies with the requirements set out in the General Data Protection Regulation (GDPR).

In 2019 the German Federal Cartel Office issued a decision against Meta finding that Meta’s data processing, which was allegedly not consistent with the GDPR, constituted an abuse of Meta’s dominant position on the German market for online social networks. Meta appealed the decision to the Duesseldorf Higher Regional Court.

The CJ ruled that NCAs must assess whether the conduct of an undertaking hinders competition in a market and to do so, the compliance or non-compliance of that conduct with rules other than those relating to competition law, such as the provisions of the GDPR, may be *“a vital clue”*. The CJ further clarified that, due to its duty of sincere cooperation, NCAs are under an obligation to consult with data protection authorities when assessing and applying the GDPR. Furthermore, NCAs cannot depart from a decision by the relevant data protection authority and are therefore required to verify whether a certain conduct has already been the subject of a decision by the

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data protection authority (or the CJ). In all other cases, the NCAs must consult and seek the cooperation of the data protection authorities before starting their own assessment. Importantly, the CJ remarks that such scrutiny by the NCAs does not replace the role or function of any data protection authority, namely in monitoring and enforcing the application of the GDPR.

In this judgment the CJ recognises that the access and the use of personal data are of great importance in the context of the digital economy, hence, it argues it may be considered to be a “*significant parameter of competition*”.

STATE AID

European Commission amends the State aid General Block Exemption Regulation to further facilitate and speed up green and digital transition

On 30 June 2023, [Commission Regulation 2023/1315](#) amending the General Block Exemption Regulation 651/2014 (GBER) was published. The revised GBER aims to further facilitate, simplify and speed up support for the EU's green and digital transitions. Together with the [Temporary Crisis and Transition Framework](#) the amendment aims to make it easier for Member States to grant necessary support for key sectors in line with the [Green Deal Industrial Plan](#).

The amendments will provide Member States with more flexibility to design and implement support measures that are key for the transition to climate neutrality and to a net-zero industry. In particular, the revised rules include key amendments that extend and/or facilitate possibilities for aid in relation to environmental protection and energy. They also increase thresholds for Important Projects of Common European Interest (IPCEI) related projects, training aid, environmental aid and research, development and innovation projects. Further, measures are introduced to block exempt aid involved in Member States' measures to regulate prices for energy produced from natural gas or electricity. Additionally, the GBER is prolonged until the end of 2026 providing for legal certainty and regulatory stability.

The amendments more broadly align the provisions of the GBER with the new [Regional Aid Guidelines](#), the [Climate, Energy and Environmental State aid Guidelines](#), the [Risk Finance Guidelines](#), the [Research, Development and Innovation Framework](#) and the [Broadband Guidelines](#).

The amended Regulation entered into force on 1 July 2023.

GENERAL COMPETITION

Hong Kong Competition Commission to take a more proactive approach in investigations

On 26 June 2023, the Hong Kong Competition Commission (HKCC) submitted a [report](#) on its work since June 2022 and an outlook for 2023-2024 to a panel of the Hong Kong Legislative Council. The HKCC also stated that it would adopt a more proactive investigation strategy while mentioning that the ultimate goal of every investigation is litigation.

In a [meeting with the Panel on Economic Development](#), the HKCC said that its investigation strategy had changed from a complaint-led approach (i.e. initiating investigations when the HKCC receives complaints) to a more proactive approach under which the HKCC is commencing investigations on its own initiative. The report stated

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that, since June 2022, four of the ten initial assessments were not from complaints, compared with only around a quarter of cases since the HKCC was established.

The HKCC also revealed that it had invoked its statutory power to investigate suspected anti-competitive conduct across various sectors, including real estate and property management, food and groceries, and particularly fuel and energy resources, amid public concern about conduct in these sectors. We can also expect a stricter stance on enforcement options going forward, with Patrick Kwok, the new Executive Director of the HKCC stating in the panel meeting its “*ultimate target for each and every case is litigation*”.

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