



Gas sales – Competition law aspects

Petroleum Law - JUR5410
22-28 April 2009.

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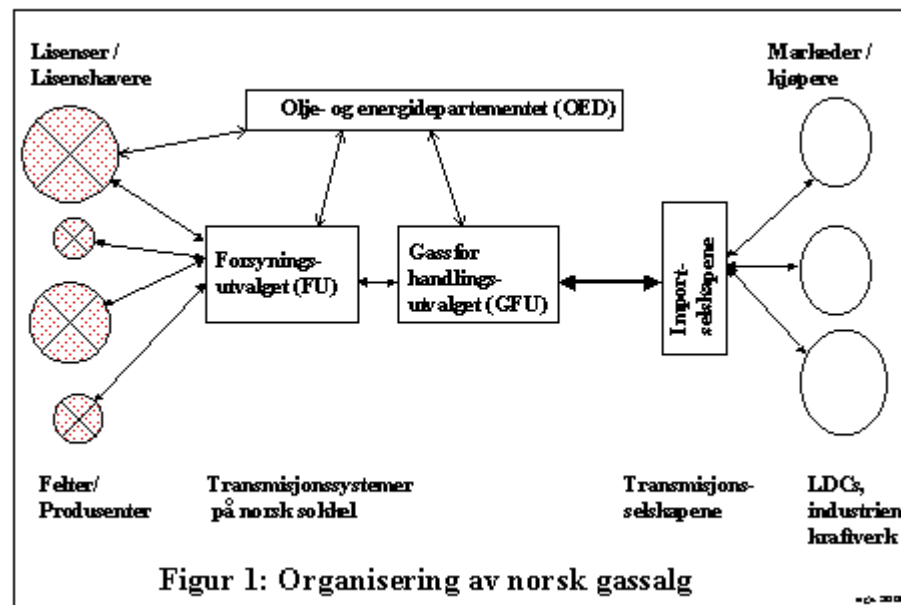
Introduction

- Distinction between gas market (commodity market) and transportation market.
- Situation today: each company is responsible for selling its own gas.
- What has changed:
 - removal of centralised gas sales;
 - abolition of Gas Negotiating Committee (GFU);
 - introduction of Company Based gas Sales (CBS).
- Starting point in the mid-1970s: “field depletion contracts”.
- 1986: Troll agreement and “supply contracts”.
- Introduction of a new regime – The 1996 “Statement of objections” issued by the European Commission and application of competition rules (Art. 81 ECT and Art. 53 EEA)

1. The former system of gas sales in Norway

Former structure of gas sales in Norway:

(From *Norwegian Natural Gas*, Ole Gunnar Austvik, 2003, p.32)





2. The removal of the common sales system and the abolition of the GFU

2.1. The reasoning behind the reform

- Official investigation opened in 1996. Facts: Saga wanted to sell directly to Wingas (Germany), but operation blocked by GFU.
- Statement of Objections (SO) issued by the European Commission in 2001. See SO procedure in relation to rights of defence in Art. 19.1 of Regulation No 17, and Art. 18.3 of the Merger Regulation.

2.2. The issue of jurisdiction

- Pursuant to Article 56 EEA Agreement, European Commission competent to apply Article 53 EEA Agreement (modeled on Art. 81 EC): trade in the EC affected to an appreciable extent. The “effect on trade” criteria. See *Britannia Gas Condensate Field* case.
- Reasoning of the parties. Arguments raised by the Norwegian government. Reference to the State compulsion doctrine.
- See *Pooling and Settlement Agreement Notification* case in England and Wales (1990): agreement between competitors in relation to Public Service Obligations.

2.3. The application of competition rules to the energy sector

- No specific provisions on energy in the EC Treaty.
- However, energy sector falls under EC competition rules.
- Definition of energy: good, service?
- See *Costa v. Enel* 6/64, *Campus Oil* 72/83, *C-393/92 Municipality of Almelo*, *C-158/94 Commission vs. Italy*



2.4. Review of competition issues in upstream gas supply contracts

- ECT competition law provisions prohibit two main types of anti-competitive activity:
 1. anti-competitive agreements between businesses (Art. 81 ECT)
 2. businesses abusing their dominant market position (Art. 82 ECT)
 - See Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
 - Exemptions to the prohibition addressed in Art. 81.3 ECT.
- Of particular relevance for joint gas sales are anti-competitive agreements between businesses (Article 81 ECT prohibition) – Review:
 - The meaning of “agreement”, “decision” and “concerted practice”.
 - Prohibition of horizontal and vertical agreements.
 - Types of agreements and appreciable effect on competition (in addition to the 10% market shares criteria), in particular: agreements which have as their effect of object:
 - direct or indirect price fixing; restricting or controlling production (quotas, volumes, etc.).
 - joint purchasing or selling; share of information.



- Application of Art. 81.1 ECT provisions to the GFU case
 - GFU case: COM/36.072.
 - Horizontal issues in relation to joint selling of gas, through a single seller (GFU), from one single country.
 - Long term adverse effects (restriction of competition).
 - See Press release: IP/02/1084.
- The DONG/DUC case (COMP/38.187)
 - Similar case: joint selling from only one or several fields.
 - EC competition law issues:
 - Joint marketing of gas (horizontal), resulting in “joint coordination of sales”.
 - Restrictive provisions as contained in the gas supply contracts (vertical).
 - Exemptions Art. 81.3 ECT not applicable (no benefit on production), neither “joint distribution” of goods qualification under Regulation (EC) No.2658/2000.
 - See Press release: IP/03/566.
- The Corrib case
 - See Press Release: IP/01/578.



3. Remedies to the infringement of competition rules

3.1. The transitional regime adopted in Norway

- Remedies agreed in the GFU case with the European Commission.
 - 3 groups of undertakings: permanent members of GFU; six companies selling gas under conditions negotiated by GFU; other defendants.
 - Range of remedies: termination of joint marketing; review of existing contracts; reservation of gas volume to new buyers; removal of territorial restrictions (vertical issue – See point 4.6)
- Similar approach adopted in DONG/DUC case.
 - Similar range of remedies + removal of additional restrictions clauses (obligation on DONG to report to DUC, “use restriction”; priority right to DONG).

3.2. The new regime for gas sales in Norway

- Fully introduced in 2003.
- All parts of the gas chain concerned.
- Each company responsible for its own gas sales. Ex: Snøhvit.

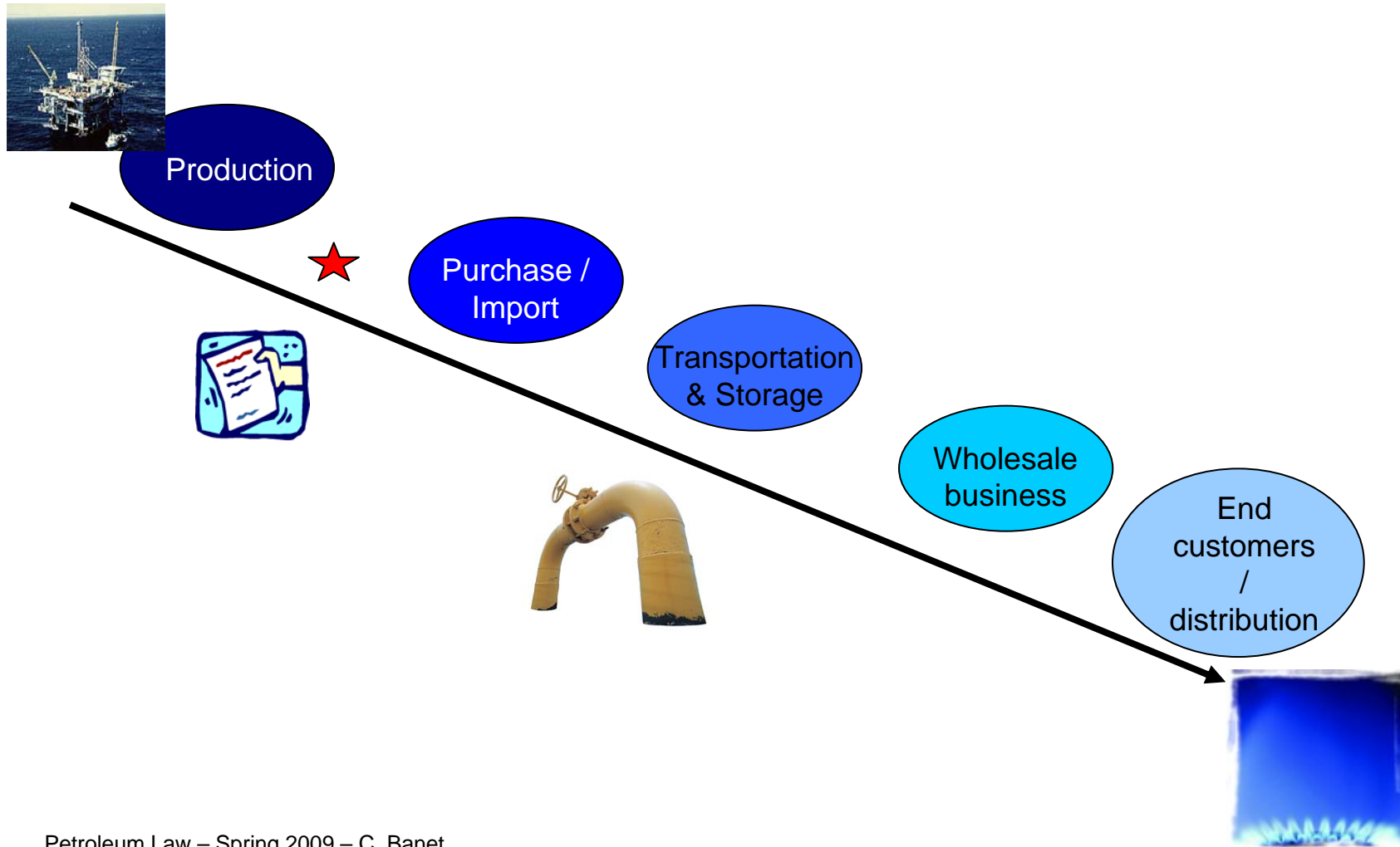


4. Competition law under the new gas sales regime: persistent and new issues

4.1. The shape of today's gas market

- From the qualification of the value traded ...
 - Particularities of the gas market.
 - Definition of the value traded: natural gas as a "commodity". Global nature of gas marketing? The role of [LNG](#). Competition on the price element.
 - Existing trading markets for natural gas.
 - Relation to trading hubs (Ex: [Zeebrugge Hub](#)).
 - The different levels of trading (see supporting document + next slide).
- ... To the structure of the trading market.
 - The different contractual forms of trading: evolution of gas sales contracts.
 - The development of gas trading hubs and trading contracts.
Ex: Zeebrugge Hub Natural Gas Trading Terms and Conditions (ZBT 2004)
 - Evolution: towards standardisation of gas sales contracts?!

Value chain in gas sales business





4.2. Definition of the relevant market for competition law assessment

- The relevant product market
 - Substituability in energy markets: interfuel competition v. fuel specific competition.
 - Recent Commission practice: systematic approach by the identification of the different levels in the gas chain + distinction between customers
 - See European Commission's *Notice on Market Definition* (1997).
- The relevant geographic market
 - Definition: see the Notice.
 - Again, approach of the Commission: separation of the different parts of the value chain (production, transport, transmission, distribution, retail).
- Impact of liberalisation on the definition of the relevant market
 - See *Britannia* case: Commission identified 2 separate markets.
 - German wholesale transmission network (COMP/M.2822): regional wholesale of gas is the relevant product market.



4.3 Individual sales governed by Joint Operating Agreement (JOA)

- Art. 81 ECT and JOA
- Gas Lifting Agreements (GLA) agreed for each licence.

4.4. Exchange of information through licensees

- Possible infringement of Article 81.1 EC Treaty.
- See: *British Gas Network Code Case*.
- Nomination procedure under lifting and balancing agreements.

4.5. Joint buying of forward gas (= indirect joint selling)

- The argument of security of energy supply.
- The purpose of joint buying of forward gas from other producers: production or resale.



4.6. Vertical issues in gas competition

- A more recent practice from the European Commission.
- Primarily, looks at “destination clauses” and “exclusivity clauses”.
- Vertical issues under Art. 81.1 ECT. Definition and possible Block exemptions. See:
 - Commission Notice “Guidelines on Vertical Restraints” (2000);
 - Commission Regulation (EC) No. 2790/99 on the application of Article 81.3 ECT.
- Recent cases:
 - Russian gas: Gazprom/ENI (2003); Gazprom/E.ON Ruhrgas (2005); Gasprom/OMV (2005)
 - Algerian gas: Sonatrach - Algerian gas supply contracts (IP/07/1074)



Conclusion – Futures perspectives

- The European Commission's energy inquiry – Jan. 07.

Communication from the European Commission, *Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors*, COM (2006) 851 FINAL, 10.01.2007.

- Third Energy Package, September 2007.
- The international gas market.



Indicative bibliography

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 - FAUL Jonathan and NIKPAY Ali, *The EC Law of Competition*, Oxford, 1999. In particular, Chapter 10: Energy.
 - WILLIS Peter (Ed.), *Introduction to EU Competition Law*, Informa professional, 2005.
- + Distributed documents in class.