Gas sales – Competition law aspects

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Introduction

- Distinction between gas market (commodity market) and transportation market (physical capacity 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”.

- Scope of the lecture: anti-competitive agreements. Out of scope but also relevant competition issues: merger control / market concentration.
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)

![Diagram of the former system of gas sales in Norway](image)
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.

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, now Art. 101 TFEU): 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 (Jf. Joined cases C-359 and C-379/95 Ladbroke Racing)

2.3. The application of competition rules to the energy sector

- No specific provisions on energy in the EU treaties before the adoption of the TFEU Title XXI (Article 194).
- Was determined by case law that the energy sector, as an economic activity, falls under EU competition rules.
- + Definition of energy as good (an sometimes 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

• **EU competition law provisions prohibit two main types of anti-competitive activity:**

  1. anti-competitive agreements between businesses (**Art. 101 TFEU**)
  2. businesses abusing their dominant market position (**Art. 102 TFEU**)

  – Exemptions to the prohibition addressed in Art. 101.3 TFEU.

• **Of particular relevance for joint gas sales are anti-competitive agreements between businesses (**Article 101 TFEU** 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 or 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 (now 101) provisions to the GFU case (COM/36.072)**

  - Horizontal issues in relation to joint selling of gas, through a single seller (GFU), from the whole Norwegian continental shelf (one single country). Evaluation of the nature of the agreement (GFU Cooperation agreement of 3 March 1989).
  - Infringement at least since signature of 1989, signature of the *GFU Cooperation Agreement* between Statoil, Norsk Hydro and Saga.
  - Issues: long term adverse effects; restriction of competition; all gas production from NCS encompassed; no individual sales; resulted and aimed to "uniform, artificially high prices."
  - 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 examination**

  - Joint marketing from a single field. Applied to exemptions Art.81.3 ECT (now Art. 101.3 TFEU) for the first 5 years, arguing measure necessary “to balance the countervailing purchasing power of the incumbent Irish companies.”
  - See Press Release: IP/01/578.
  - Examination closed after withdraw Corrib field owners and decision to market individually.
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: Zeebruge Hub ”Huberator”).
  – 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.
  – Interaction between physical and financial gas markets.
The natural gas value chain and gas sale agreements

- Production
- Purchase-Trading / Import
- Transportation & Storage
- Wholesale business
- Sales contracts
- distribution
- Supply to final customers
- Household business

Long-term supply contracts
Long-term transport contracts
4.2. Definition of the relevant market for competition law assessment

- **The relevant product market**
  - Substituability in energy markets: inter-fuel competition v. fuel specific competition.
  - Recent Commission practice: systematic approach by the identification of the different levels in the gas chain + distinction between customers

- **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* (joint forward sell): Commission identified 2 separate markets.
  - German wholesale transmission network (COMP/M.2822): regional wholesale of gas is the relevant product market.
4.3 Remaining horizontal issues of concern

A. Individual sales governed by Joint Operating Agreement (JOA)

• Art. 101 TFEU and JOA. Joint operating/production JV.
• Gas Lifting Agreements (GLA) agreed for each licence.

B. Exchange of information through licensees

• Possible infringement of Article 101.1 TFEU.
• See: British Gas Network Code Case.
• Nomination procedure under lifting and balancing agreements.

C. 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.
4.4 Vertical issues in gas competition

- A more recent practice from the European Commission. Includes: exclusive/long-term supply agreements, restrictions on use, and territorial restrictions on exports.

- Primarily, tooks at “destination clauses” and “exclusivity clauses”.

- Vertical issues under Art. 101.1 TFEU. 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); Gazprom/OMV (2005)
  - Nigerian gas: Nigeria LNG Ltd, destination clause + profit-splitting mechanisms (IP/02/1869).
  - Algerian gas: Sonatrach - Algerian gas supply contracts (IP/07/1074)
Indicative bibliography

- AUSTVIK Ole Gunnar, *The Norwegian State as Oil and Gas Entrepreneur* (VDM, 2009).
- DELVAUX, HUNT and TALUS (Eds.), *EU Energy Law and Policy*, 2nd Edition (Euroconfidentiel, 2010). In particular Chapters 2 and 3 under Section II on competition law.
- WILLIS Peter (Ed.), *Introduction to EU Competition Law* (Informa professional, 2005).

+ Distributed documents in class.