



UiO : **Nordisk institutt for sjørett**
Det juridiske fakultet

Gas sales and competition law

JUS5411 Petroleum law spring 2013

Henrik Bjørnebye

henrik.bjornebye@jus.uio.no

Associate Professor

Scandinavian Institute of Maritime Law

Department for Petroleum and Energy Law



Last lecture on access to infrastructure – brief summary

- Separate between the gas market and the gas transportation market
 - Regulation of the gas transportation market to facilitate competition in the gas market
 - Important: Third party access (TPA)
- Extensive EU regulation of TPA
 - But focuses on downstream issues (transmission and distribution)
 - Upstream: limited secondary legislation
- National TPA regulation
 - PA § 4-8 and § 4-9
 - Regulated access to upstream gas pipeline networks with third party use (Gassled), see PR Ch. 9 and the Tariff Regulation
 - Regulations on the use of facilities by others

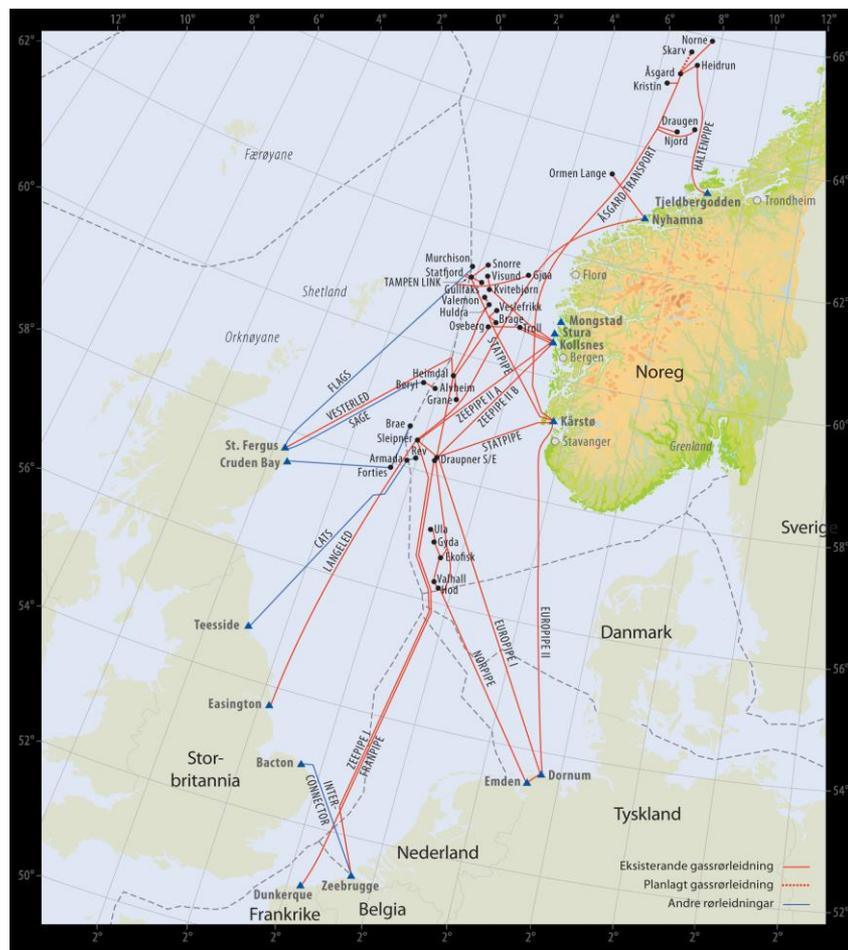
Today's lecture – overview

1. Topic
2. Competition law – overview
3. Market definition
4. A closer look at TFEU Article 101
5. The situations discussed in the curriculum
 1. Joint selling
 2. Joint production
 3. Exchange of information

1 Topic (1)

- Main topic
 - Gas sales and competition law
 - In particular: Article 101 TFEU and organisation of gas sales from the Norwegian Continental Shelf
- A brief look at the curriculum
- The object of this lecture

1 Topic (2)



Source: Norwegian Petroleum Directorate and the Ministry of Petroleum and Energy, Facts 2012 – The Norwegian petroleum sector

2 Competition law - overview

- Prohibition on agreements and cooperation restricting competition
 - TFEU Art. 101, EEA Art. 53, NCA § 10
- Prohibition on abuse of a dominant position
 - TFEU Art. 102, EEA Art. 54, NCA § 11
- Merger control
- Regulation 1/2003 in brief

2 Competition law and energy market liberalisation

- The interaction between sector regulation and general competition law
- Competition law enforcement as a means to promote internal energy market development?
- Commitment decisions
- Law and policy

3 Market definition

Definition of the relevant market

- The significance of the market definition
 - «Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved [...] face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible inter alia to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article [now 101 TFEU]» (Commission Notice on market definitions, para 2)
- Two dimensions
 - Relevant product market
 - Relevant geographic market
- The market definition under different areas of competition law

Relevant product market (1)

- *“A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use”* (Commission Notice on market definitions, para 7 (emphasis added))
- The gas market in constant development
 - Market definitions may change
 - The importance of infrastructure and regulatory development
 - Product market must be assessed on a case-by-case basis

Relevant product market (2)

- Electricity and gas as separate markets
- Upstream markets
 - Exploration (oil and gas)
 - Development, production and sale (wholesale – forward gas)
 - Upstream pipeline transportation
 - LNG transport
 - Processing

Relevant product market (3)

- Downstream markets
 - Gas sales markets discussed in the curriculum
 - Regional distributors (wholesale)
 - Local distributors (wholesale)
 - Industry og enterprises (wholesale)
 - Consumers and small-scale enterprises (retail)
 - Development towards two markets (wholesale and retail)?
 - Infrastructure markets
 - Transmission
 - Distribution
 - Storage

Relevant geographic market

- “[...] *the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area*” (Commission Notice on market definitions, para 8)
- Markedets may change over time – for example due to changes in access to infrastructure

Relevant geographic market as discussed in the curriculum

- Upstream market
 - Market for development, production and wholesale dynamic
 - Point of departure: EEA Area ++ ?
- Downstream market
 - At the outset still national (?)
 - Cross-border markets likely to evolve over time due to internal market development
- Temporary constraints

4 A closer look at TFEU Art. 101

TFEU Article 101

«1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
- (b) limit or control production, markets, technical development, or investment;*
- (c) share markets or sources of supply;*
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,*
- any decision or category of decisions by associations of undertakings,*
- any concerted practice or category of concerted practices,*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.»*

TFEU Article 101(1)

«1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their **object or effect the prevention, restriction or distortion of competition within the internal market**, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.»

TFEU Art. 101 - summary

- The two main assessments
 - Art. 101(1): Prohibition on anti-competitive agreements and decisions
 - Art. 101(3): Evaluation of possible exemption
 - Four cumulative conditions
 - Assessment of pro-competitive and anti-competitive effects
- Prohibited agreements and decisions are void, cf Art. 101(2)
- Market definitions as a vital tool

Why application of TFEU Art. 101? (1)

- Point of departure
 - Prohibition governed by
 - TFEU Art. 101
 - EEA Art. 53
 - NCA § 10
- Parallel provisions – different areas of application

Why application of TFEU Art. 101? (2)

- Factual background
 - EU significant net importer of natural gas
 - Most significant import sources: Russia, Norway and Algeria
 - Most Norwegian gas production exported – primarily to EU Member States
 - Consequently: Norwegian gas primarily sold to actors in EU countries

Why application of TFEU Art. 101? (3)

- NCA § 5
 - NCA § 5 (1):
 - «*The Act applies to terms of business, agreements and actions that are undertaken, have effect, or are liable to have effect within the Realm of Norway*»
 - In practice of lesser importance for Norwegian gas sales
- What about EEA Art 53. and TFEU Art. 101?
 - Crucial: Whether the anti-competitive activities «*may affect trade between Member States*» (TFEU) or the contracting parties (EEA)
 - «effect on trade»-criterion

The effect on trade criterion

- Crucial: The agreement's *effect* on trade
 - Where the agreement is entered into not decisive
 - TFEU Art. 101 (and 102) also extra-territorial application
- The effect on trade threshold
 - Anti-competitive practises which directly or indirectly, actually or potentially may influence trade
 - Requirements for appreciable effects on trade
 - *De minimis*

Application of TFEU Art. 101 or EEA Art. 53?

- Both provisions may in principle be applicable
 - The GFU case as example – The Commission applied both (now) Art. 101 TFEU and Art. 53 EEA
 - In practice
- Which authority to enforce application of Art. 53 EEA?
 - See Art. 56 EEA

5.1 Joint selling

Organisation of gas sales from the NCS (1)

- Production license, cf PA § 3-3
 - The entry into JOA as condition, cf PA § 3-3(4)
- Approval of production schedule, cf PA § 4-4

Organisation of gas sales from the NCS (2)

- JOA Art. 22
 - Art 22.1 (1): Company based sales
 - «*Each party has the right and obligation to take in kind and dispose of a share of produced Natural Gas which shall be equivalent to its Participating interest.*»
 - Art 22.1 (2): Agreed delivery point
 - Art 22.2: Entry into gas lifting and balancing agreement

Situations discussed in the curriculum - overview

- Joint sales from several fields
 - The GFU case as example
- Joint sales from one single field
 - Commercial fields
 - Example: Britannia and Corrib
 - Marginal fields
- Indirect joint sales
 - Procurement of forward gas

Joint sales from several fields: GFU (1)

- Background
- Time span 1988-2001
- GFU established 1988 – negotiated all gas sales agreements
- FU (from 1992) as advisory body
- Field neutral gas sales
 - Contract fields and supply fields

Joint sales from several fields: GFU (2)

- Commission opened formal procedure against gas companies
 - Comprised all gas sales agreements entered into under GFU from 1989
 - Argument: Sales cartel
- State compulsion

Joint sales from several fields: GFU (3)

- Settlement
 - Different categories of actors
 - Ending of joint gas sales, individual contract administration, reservation of gas for new buyers, removal of territorial restrictions
- The DONG/DUC case
 - Comparable procedure

Joint sales from one single field: Britannia (1)

- Commercial field on British Continental Shelf
- Infrastructur solution to Scotland – sales in the UK in wholesale market (forward gas)
- Lisencees agreement on joint sales
- Notified to the Commission

Joint sales from one single field: Britannia (2)

- The Commission's evaluation
 - Lack of infrastructure between the UK and continental Europe (at the time) – UK and the Continent different markets
 - Not appreciable effects on trade between Member States – not in breach of (now) Art. 101(1) TFEU
- Today: The significance of new infrastructure for the determination of the market definition

Joint sales from one single field: Corrib

- Commercial field West of Ireland
- Application for joint sales the first five years of production
 - Background: The market position of the buyers
- The Commission's evaluation
 - The buyers a strong market position, but points at marked development – objections
 - Application withdrawn and investigations concluded

Joint sales from marginal fields

- A brief look at marginal fields
 - More limited discoveries, higher production costs, etc
 - Marginal return on investment – need for investment security
- Appreciable effect on trade, cf Art 101(1)
- Possible application of Art. 101(3)
 - The conditions

Other potential scenarios discussed in the curriculum

- The situation: Producer A procures gas from producer B
 - For production purposes (injection etc)
 - for resale to the market
- Procurement of gas for reservoir injection
- Procurement of gas for resale
 - The situations
 - Price risk

5.2 Joint production

- Background: Entering into JOA as a condition, cf PA § 3-3
- Establishment of license groups
 - Assumed by the License Directive
 - Custom on the NCS and other places
 - Reasons
- Company based sales, cf the JOA Art. 22
 - The questions discussed in the curriculum
 - The JOA's rules on investments
 - Lifting arrangements

5.3 A brief look at information exchange

- Information as a competition law topic
- REMIT (Regulation 1227/2011)