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Market regulation: EU competition law and gas market regulation

The Norwegian gas regime under EU scrutiny

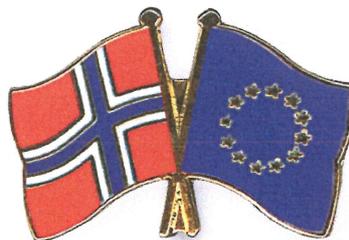
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**Part I –
Norway, the EEA Agreement and EU energy policy**

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- International obligations as regards EU legislation:
 - Norway: party to the European Economic Area (EEA) Agreement (agreement between the EU and 3 members of the European Free Trade Association)
 - EEA Agreement negotiated during the period 1989-92.
 - signed in May 1992

- Scope of application of the Agreement:
 - Basically the internal market around the free movement of goods, persons, services, and capital between EEA countries
 - New challenges created by Lisbon Treaty, in particular new acts based on Art. 194 TFEU (energy)

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Reminder of legal architecture between the different agreements:

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Article 194 TFEU

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;
- (b) ensure security of energy supply in the Union;
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- (d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

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Part II – Liberalisation and the internal market for gas

The liberalisation process in a European context

- Refers to national reforms implemented since the 1990s
- Purpose: opening energy markets to competition and moving towards market-based pricing
 - **Already** made clear in 1st Gas Directive 98/30/EC:
«Recital (3) *Whereas the establishment of a competitive natural gas market is an important element of the completion of the internal energy market.*»
 - Proposal for 2nd Gas Directive: **again** an objective
 - 2015: Completion of the IEM **still** an objective (!)
- Implementation 3rd liberalisation package:
«a precondition for the development of an open, integrated and competitive energy market in the EU, serving the higher objectives of competitive energy prices, energy security and sustainability» (European Commission, 2011).
- Liberalisation as the introduction of competition in the energy market

Diversity of tools used in the liberalisation process, competition law among the most efficient ones

- From the beginning: use of competition provisions in the Treaty
 - Reluctance of the Member States to agree on harmonised legislation
- Competition: an instrument used to attain objectives of higher value
 - Efficiency, innovation, cost reduction, progress, investment, etc.
 - Ultimate goals of EU energy policy

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Not all the segments of the gas value chain can open to competence in the same manner

Entails different regulatory needs and approaches:

Production	• Competition
Transport	• Regulation
Gas market/trading	• Competition
Distribution	• Regulation
Retail / customers	• Competition

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... until and in addition to Internal Energy Market (IEM) legislation

- 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** (and sometimes service).
 - See *Costa v. Enel* 6/64, *Campus Oil* 72/83, C-393/92 *Municipality of Almelo*, C-158/94 *Commission vs. Italy*.
 - “goods” = “products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions”

• **Steps in creation IEM:**

- 1986 – Single European Act ; 1987 White Paper on Completing the Internal Market
- 1988 – Commission’s report “The Internal Energy Market”
- 1992 – new attempts, but not agreed
- 1995 – Green Paper “For a European Energy Policy”
- 1998 – First Gas Directive 98/30/EC (common rules for the internal market in natural gas)
- The “eligibility” criteria. Progressive opening of the market
 - Ex: definition of third parties having access to upstream gas pipeline network
- 2003: second Gas Directive (2003/55/EC)
- 2007: Energy Sector Inquiry
- 2009: 3rd liberalisation package, Directive 2009/73/EC

L 233/94 [LEX](#) Official Journal of the European Union 14.5.2009

DIRECTIVE 2009/73/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 13 July 2009
concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC
(First with EEA reference)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 47, and Articles 17 and 59 thereof,
Having regard to the proposal from the Commission,
Having regard to the opinion of the European Economic and Social Committee,
Having regard to the opinion of the Committee of the Regions,
Acting in accordance with the procedure laid down in Article 234 of the Treaty,
Whereas

1. The Commission of the Communities of 10 January 2007 entered an Energy Policy for Europe (1) which had the objective of completing the internal market in natural gas and of creating a single energy grid for all natural gas, and making available to the Community the best energy resources of the Commission of 10 January 2007 entered a Progression for the internal gas and electricity market and Energy progress in Article 17 of Regulation (EC) No 1227/2005 for the European gas and electricity market (2) Report (3) on the progress in and measures to be taken to complete the internal market in natural gas and electricity in a well-functioning internal market.

2. Whereas progress reports on the internal market in natural gas and electricity (4) show that there is a need for a common approach to the operation of the gas market, but also in the operation of the natural gas pipeline network, and in the operation of the gas pipeline network.

**Part III –
Harmonised EU law: Gas Directive 2009/73/EC**

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- Role of harmonisation provisions
 - See Approximation of laws - Article 114

- Last development: Third Liberalisation Package. For gas:
 - Directive 2009/73/EC concerning common rules for the internal market in natural gas
 - Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks
 - Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators

- EU Gas Directive: 3 stages (see above)
 - Core principles remain

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Gas Directive 2009/73/EC, review of main provisions for upstream/midstream gas

- Chapter III – Transmission, storage and LNG
 - Art. 9 - unbundling of transmission systems and transmission system operators
 - Art. 10 – designation and certification of TSOs
 - Art. 14 - independent System Operators
 - Art. 15 – unbundling of transmission system owners and storage system operators
- Chapter IV – Independent transmission operator
- Chapter V – Distribution and supply
- Chapter VI – Unbundling and transparency of accounts
- Chapter VII – Organisation of access to the system (see next slide)
- Chapter VIII – National regulatory authorities (NRAs) (see also role ACER)

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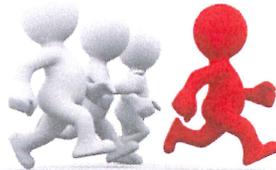
- In particular **Chapter VII – Organisation of access to the system**
 - Art. 32 : Third Party Access
 - Transmission, distribution and LNG facilities
 - Regulated access on published tariffs
 - Art. 33 – Access to Storage
 - **Art. 34 – Access to upstream pipeline networks (!)**
 - Art. 35 – Refusal of access (list of criteria)
 - Art. 36 – New infrastructures

- Comments on implementation in Norway
 - status of Norway as «emergent market» for gas at downstream level

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- Some reinforced elements of relevance compared to previous directives:
 - Unbundling / ownership regime
 - Regulator and national regulatory authorities (NRA)
 - Independent System Operator
 - Note: Gassco, an ISO
 - See settlement in merger proceedings, MEMO/06/424

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**Part IV –
EU competition law applied to the upstream gas sector
(principles)**

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Introduction

- Role of competition law
- Commission has used competition before adoption of EU harmonised legislation
- Favoured tool also due to explicit powers
 - Based on competence European Commission / EFTA Surveillance Authority
- Several key competition law provisions:
 - Merger control
 - Anti-competitive agreements
 - Abuse of dominant position
 - State aid
 - Public procurements

Merger Control

- Council Regulation (EC) No 139/2004 of 20 January 2004 on the [control of concentrations between undertakings \(the EC Merger Regulation\)](#)
- Some major achievements in the energy sector, in case of cross-border transactions between national companies. Ex: EDF/ENBW case
- Mandatory prior notification
 - Ex: T-332/09 Electrabel
- Companies ready to accept commitments to avoid negative decisions.

Anti-competitive agreements between businesses (Art. 101 TFEU / Art. 53 EEA)

- Control of: cartels, collusion between companies, other anti-competitive practices affecting the EU (or EEA)
- Applies to both horizontal and vertical agreements.
- Some few exemptions foreseen and interpreted restrictively:
 - Exemptions to the prohibition addressed in Art. 101.3 TFEU
- Of particular relevance for joint gas sales:
 - 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.

Abuse of dominant position (Art. 102 TFEU / Art. 54 EEA)

- Prohibits firms which holds a dominant position on a determined market to abuse that position.
- Ex: unfair prices, limitation of production, refusal to innovate / invest, etc.

Jurisdiction issues: European Commission vs. ESA

- 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 EU 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*)
- See *Pooling and Settlement Agreement Notification* case in England and Wales (1990): agreement between competitors in relation to Public Service Obligations.



**Part IV –
Physical gas market – Upstream
Third Party Access to infrastructures**

- See provisions Art. 32 Directive 2009/73/EC
- If necessary, application of test through:
 1. Definition of the **relevant product market** + the **relevant geographic market**
 2. Assessment = **indicators of dominance**
- Previous attempts to challenge Norwegian sales and transportation system: Marathon Case

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

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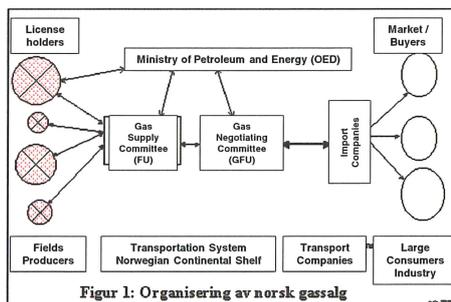
**Part IV –
EU gas commodity market**

(i) Joint selling

The former system of gas sales in Norway – The GFU case

Former structure of gas sales in Norway:
(From *Norwegian Natural Gas*, Ole Gunnar Austvik, 2003, p.32)

- 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. 101 TFEU and Art. 53 EEA)



Figur 1: Organisering av norsk gassalg

What has changed:

- removal of centralised gas sales;
- abolition of Gas Negotiating Committee (GNF);
- introduction of Company Based gas Sales (CBS).

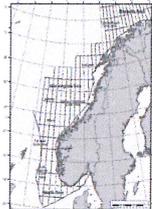
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The reasoning behind the reform

- 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.
- Negative effects of the past system: concentration of Norwegian gas production on few large fields (not efficient management of the resources); concentration on a few companies and owners.

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- **Application of Art. 101 TFEU (ex. 81.1 ECT) 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.



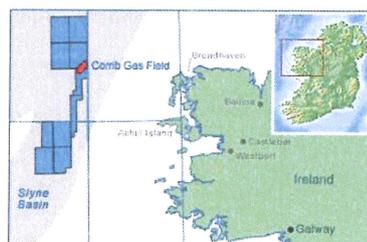
The DONG/DUC case (COMP/38.187)

- 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.



Remedies to the infringement of competition rules

- 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).
- 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.

(ii) Joint purchase

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

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(iii) Vertical issues

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

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- 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)
- Latest development:
 - Statement of Objections sent by European Commission to Gazprom for alleged abuse of dominant position on the Central and Eastern European gas supply market, contrary to EU antitrust rules.
 - Press release (IP/15/4828, 22 April 2015):



Picture © European Union 2015

“Gazprom is breaking EU antitrust rules by pursuing an overall strategy to partition Central and Eastern European gas markets, for example by reducing its customers’ ability to resell the gas cross-border. This may have enabled Gazprom to charge unfair prices in certain Member States. Gazprom may also have abused its dominant market position by making the supply of gas dependent on obtaining unrelated commitments from wholesalers concerning gas transport infrastructure.”

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Conclusion

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