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Unitisation, Joint Development and Third Party Access

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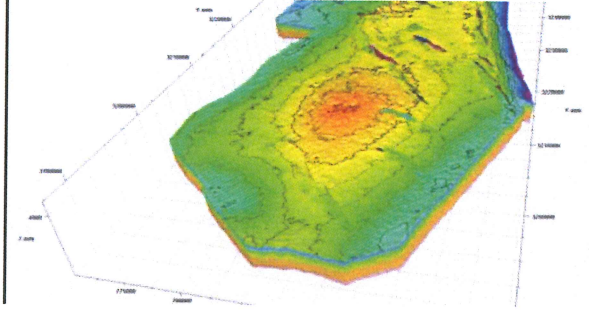
**Part I –
Introduction: a common objective**

**Resource management!
Resource management!
Resource management!**

- Not wasting resources. Good technical management of the reservoir.
- Maximising profits at the level of production fields.
- Profits shall primarily be taken out at the producing fields, and not in the transport infrastructure.
 - “God ressursforvaltning er målet med vårt arbeid og vår regulering av næringen. Det betyr blant annet optimal utnyttelse av funn” Tord Lien, Norwegian Minister of Petroleum and Energy, 1 March 2015, DN.no
- Again, See Section 1-2, Petroleum Act (PA):

“Resource management of petroleum resources shall be carried out in a long-term perspective for the benefit of the Norwegian society as a whole. In this regard the resource management shall provide revenues to the country and shall contribute to ensuring welfare, employment and an improved environment, as well as to the strengthening of Norwegian trade and industry and industrial development, and at the same time take due regard to regional and local policy considerations and other activities.”

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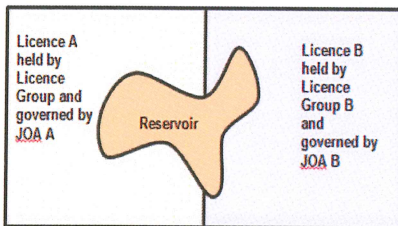


**Part II – Joint development of fields,
«Unitisation»**

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1. Defining unitisation

- = the regime allowing for the joint development of a petroleum deposit which extends across two or more license areas
- Reasoning back
- Origin of the concept: “the rule of capture”



Joint operating agreement ("JOA")

2. Legal basis in Norwegian law

Section 4-7 Joint petroleum activities

If a petroleum deposit extends over more than one block with different licensees, or onto the continental shelf of another state, efforts shall be made to reach agreement on the most efficient co-ordination of petroleum activities in connection with the petroleum deposit as well as on the apportionment of the petroleum deposit. This shall apply similarly when, in the case of several petroleum deposits, joint petroleum activities would obviously be more efficient.

Agreements on joint exploration drilling shall be submitted to the Ministry. Agreements on joint production, transportation, utilisation and cessation of petroleum activities shall be submitted to the Ministry for approval. If consensus on such agreements is not reached within reasonable time, the Ministry may determine how such joint petroleum activities shall be conducted, including the apportionment of the deposit.

3. Unitisation terms on the NCS

- Duty to seek for an agreement
- Agreement reached by licensees → submitted to the MPE for approval
- No agreement between licensees → MPE decides and sets conditions (discretionary powers – *fritt skjønn*), including apportionment of the deposit
- Link to the development plan – PDO

4. Content of the unitisation agreement

- Content of the unitisation agreement:
 - the apportionment of the deposit interests
 - who will be operator for the unitized deposit
 - the technical cooperation on the manner to develop and operate the field (utbyggingsløsning)
 - the production profile
 - split of costs for the development and operation of the field
 - payment of fees between licensees
 - split of revenues
 - voting rules
 - provisions on re-determination

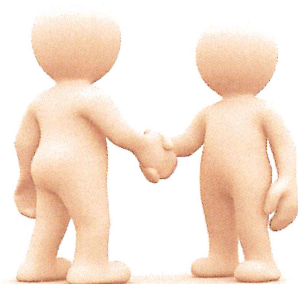
5. Cross border reservoirs

- Starting point: international law
 - Public international law principles: interstate cooperation and respect for sovereignty
 - Developments: 1973 United Nations Resolution 3129 (XXVI) relating to cross-border resources, UNCLOS, International Law Commission works on "Shared natural resources" concerning oil and natural gas resources
- General principal now: all agreements signed by Norway on the delimitation of its continental shelf with its neighbouring states (i.e., Denmark, the UK, Island, Denmark/Greenland, Russia) include provisions on the obligation to unitise cross-border petroleum deposits

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- Supplementary tool = a field-specific “unitization treaty”.
 - Details how the two state will cooperate in order to ensure that the reservoir will be developed and operated in accordance with the legislation applicable in each country.
 - Contains an obligation to oblige oil and gas companies to conclude a unitization agreement between themselves, and that each country must approve such agreement.
 - Experience: 1976 Frigg Unitisation Agreement, 1979 Statfjord, 1979 Murchison 1979
- Recently: bilateral cooperation agreements
 - Ex: 2005 Framework Agreement concerning Cross-Boundary Petroleum Co-operation, UK/NO
 - 2008 Agreement concerning transboundaryhydrocarbon deposits, Iceland / Norway

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**Part III – Joint Activities,
including development of several deposits**

Joint development of several deposits

- Similar reason: resource management
 - Avoid waste a resources for the licensees.
 - Allows for a better exploitation of spread reservoirs, of smaller size (ex: in mature areas)
 - Joint transport solution may save resources.
- Legal basis: Section 4-7, PA.
- Joint exploration drilling – MPE to be informed
- Joint production, transportation, exploitation or disposal – subject to MPE approval. Similarly, the Ministry, having full assessment competence, can fix conditions.



Part IV – Third Party Access to Production and Transportation Infrastructures

IV-1 The concept of Third Party Access (TPA)

Why is TPA important ?

- The big picture: Maximising the value of the national petroleum resources for the benefit of the Norwegian people and society. See Section 1-2, PA.
- The immediate objectives: Towards an effective resource management through a competitive, transparent and non-discriminatory access.

See Section 2, Regulations relating to the use of facilities by others (IR):
“[...] to achieve efficient use of facilities in order to ensure good incentives for licensees to conduct exploration and production activities with a view to promoting efficient resource management”.

- Be aware of the links between the gas sales market (next lecture) and the gas transportation market (this lecture).

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- TPA, a familiar concept in competition law: see "Essential Facilities Doctrine"
 - Definition of Essential Facilities Doctrine.
 - The concept of essential facilities (in particular applicable to network industries).
 - See Commission Decision Sea Containers/Stena Sealink (OJ [1994] L15, p.8).
 - Review of access to essential facilities under EU/EEA competition rules: under Art. 101-102 TFEU (formerly Art. 81 and Art. 82 EC Treaty).
 - The doctrine in EU case law: never recognised by ECJ; reference in several advocate general opinions:
 - Ex: Oscar Bronner, C-/97, of 28 May 1998.
 - ECJ ruling regarding preferential access to energy transport networks: C-17/03 of 7 June 2005.

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Access to infrastructure: scope of application

Historical background of TPA in Norway:
a regulatory framework largely influenced by EU legislation (see . TPA as a tool for establishing a competitive market in natural gas. Important reform performed in 2001.

Distinction between upstream and downstream gas infrastructures: Petroleum Act/Natural Gas Act

Distinction between the 2 categories of upstream pipelines within the Norwegian network. With 2 distinctive TPA-regimes (Section 69.1 PR):

General regime: PA Section 4-8 + parts of Chap 9 + Regulations relating to the use of facilities by others (IR). = **negotiated access based on negotiated prices**

Gassled: PA Section 4-8 + PR, Chapter 9 + TR; = **regulated access based on tariffs**

Details of the relationship owner/user: agreed upon in separate commercial agreements.

(Source: www.total.com)

TPA: legal basis in Norwegian law

- Act 29 November 1996 No. 72 relating to petroleum activities (**Petroleum Act - PA**).
- Regulations to Act to petroleum activities, laid down by Royal Decree 27 June 1997 pursuant to Act 29 November 1996 No. 72 relating to petroleum activities (**Petroleum Regulations – PR**).
- Regulations relating to the stipulation of tariffs etc. for certain facilities, laid down by the Ministry of Petroleum and Energy 20 December 2002 pursuant to section 10-18 first § and section 4-8 of th Act 29 November 1996 No. 72 relating to petroleum activities (**Tariffs Regulations - TR**).
- Regulations relating to the use of facilities by others, laid down by the Ministry of Petroleum and Energy on 20 December 2005 pursuant to Section 10-18, first § , and Section 4-8 of the Act of 29 November 1996 No. 72 relating to petroleum activities (**Infrastructure Regulations – IR**).
- Note: under the direct influence of EU law (see next lecture)
 - Primary law: EU competition rules (Abuse of dominant position : Art. 102 TFEU (former Art. 82 ECT) = Art. 54 EEA = § 11 Norwegian Competition Act)
 - EU secondary law: Art. 32, Gas Directive 2009/73/EC

The regulatory approach to TPA

Modalities of access: negotiated vs. regulated

According to the EU Directive (implemented through EEA Agreement), Member States may organise access to the infrastructure in one of the following ways, even combining them:

- **Regulated access:**

Access is regulated on the basis of tariffs and/or other published provisions and obligations for use of the network;

- **Negotiated access:**

Access is negotiated between parties on the basis of the publication of the main commercial conditions for use of the system.

IV-2 Third Party Access to facilities, including production

- **Objective, defined in Section 2 IR:**
 - ensure an efficient use of the resources on the NCS.
 - More precisely: ensure continued/increased exploration following the expansion of production areas on the NCS, in particular in mature areas; effective and transparent negotiation process for access; secure revenues to the State as high as possible (see Section 1-2 PA).
- **Legal basis:**
 - PA Section 4-8 (same rules applicable);
 - Regulations relating to the use of facilities by others (FOR 2005-12-20 nr. 1625) – Entry into force: 01.01.2006.
 - Previous guidelines from the Norwegian Oil Industry Association (Oljeindustriens landsforening, OLF) repealed.
- **Definition of “other infrastructures”:**
 - other existing offshore facilities than gas infrastructures (Gassled).
 - Cover both development facilities, oil pipelines and some gas pipelines falling within the scope of application of IR. Covers production, transportation or exploitation of petroleum for those facilities
 - Some grey zones may remain: The practical distinction with the infrastructures like “facilities supplying technical services incidental to such access” (PA Section 4-8) may be problematic.

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- **Access regime for third parties to other infrastructures:** general principle defined in PR, i.e. negotiated TPA with exceptions (Gassled).
 - **Balance to strike:**
 - Principle: profits from production shall primarily be earned by the production field
 - Balance: maintain facility owner's interest to maintain the facility in operation and make necessary investments
 - **Duty to negotiate:** a right to the user (Section 4, IR); provided protection of owner's interests (Section 4-8 PA, 4, IR); "in a spirit of integrity and good faith" (Section 4. IR)
 - IR: **negotiated access with regulation of negotiating process** –
 - Request for use, deadlines, duty to make arrangements for additional capacity if not available. If grounds for negotiations → progress plan (Section 7)
 - Terms and conditions of the agreement: services, petroleum specifications, priority, liabilities and compensation, pricing principles, dispute settlement (Section 9, IR)
 - Standard terms and conditions
 - reporting obligations to the MPE. Discretionary powers to stipulate/amend tariffs and other terms to ensure good resource management and reasonable profit
 - A common frame for the negotiating process – Does not fix all the details.
- **Relevant document for negotiating the agreement:**
 - "Terms and Conditions for Third Party Use of Installations - Presented in the context of a tie-in and processing agreement"

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Petroleum Act section 4-8

"The Ministry may decide that facilities comprised by Sections 4-2 and 4-3, and which are owned or used by a licensee, may be used by others, if so warranted by considerations for efficient operation or for the benefit of society, and the Ministry deems that such use would not constitute any unreasonable detriment of the licensee's own requirements or those of someone who has already been assured the right of use. Nevertheless, natural gas undertakings and eligible customers domiciled in an EEA State shall have a right of access to upstream pipeline networks, including facilities supplying technical services incidental to such access. The Ministry stipulates further rules in the form of regulations and may impose conditions and issue orders relating to such access in the individual case.

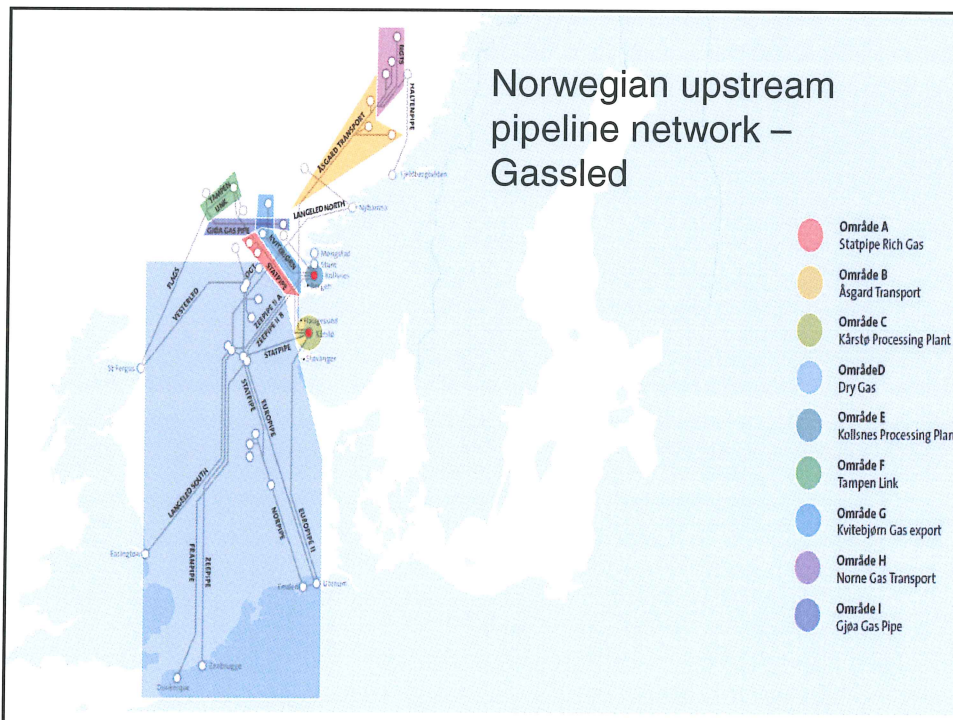
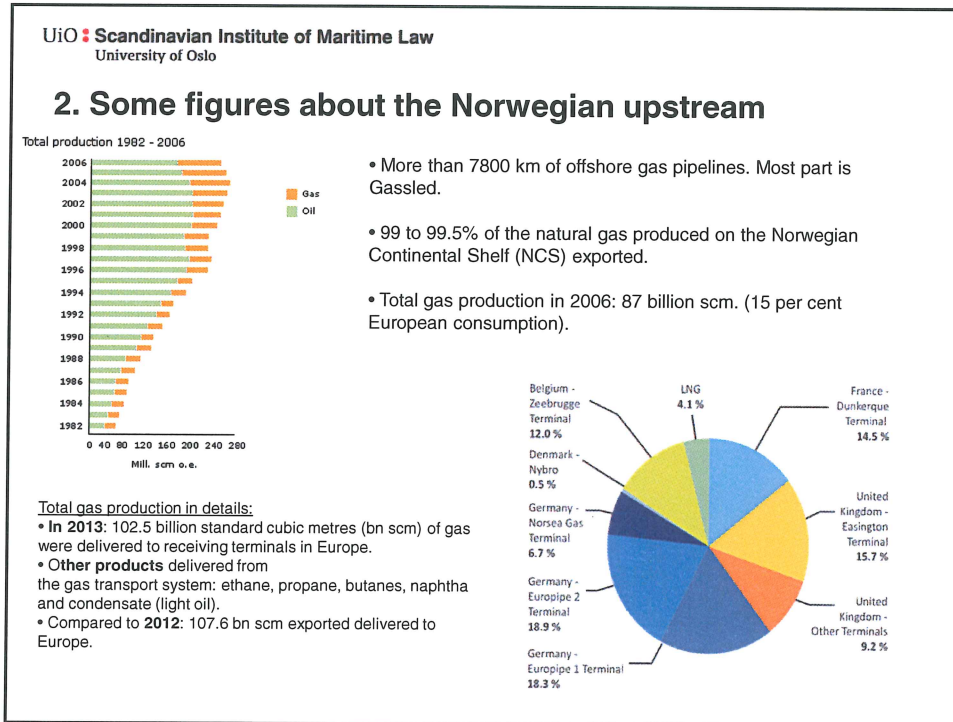
Any agreement on the use of facilities comprised by Sections 4-2 and 4-3 shall be submitted to the Ministry for approval unless otherwise decided by the Ministry. The Ministry may on approving an agreement according to the first sentence, or in the event that no such agreement is reached within a reasonable period of time, as well as in the case of an order according to the first paragraph, stipulate tariffs and other conditions or subsequently alter the conditions that have been agreed, approved or stipulated, in order to ensure that implementation of projects is carried out with due regard to considerations relating to resource management and providing the owner of the facility with a reasonable profit taking into account, among other things, investments and risks.

The Ministry may, on conditions equivalent to the conditions set out in the first paragraph first sentence, decide that facilities may be used by others in connection with treatment, transportation and storage of CO₂. The second paragraph shall apply accordingly."

- **IV-3 Third Party Access to upstream transportation infrastructures**

1. The Norwegian context

- Focus on gas export:
 - Increase gas export from the NCS (see: Langed www.ormenlange.com , [Snøhvit](#), [Gjøa Gasseksport](#) ; Shtokman). New opportunities: Aldous/Avaldsnes discovery (2011), Johan Sverdrup.
 - As of today, few amounts of domestic gas consumption:
 - See St. meld. Nr. 9 *Om innenlands bruk av naturgass* (2002-2003);
 - Towards an increased commercial use of natural gas at domestic level: establishment of an "arena" by Gassco, approved by MPE (press release 11.09.2009).
- Historical background of TPA in Norway:
 - a regulatory framework largely influenced by EU legislation (towards a European gas market), but not only. TPA as a tool for establishing a competitive market in natural gas (see next lecture).
 - 2001 reform.
 - The necessity to constantly refine TPA upstream.



3. Definition of the upstream gas infrastructures in Norwegian law

- **Section 1-6 (m) PA.**

"Any pipeline or network of pipelines operated or constructed as part of an oil or gas production project, or used to convey natural gas from one or more production facilities of this type to a processing plant, a terminal or a final landing terminal. Those parts of such networks and facilities that are used for local production activities of a deposit where the natural gas is produced are not regarded as upstream pipeline networks."

Consistent with definition in Article 2.2 Directive 2009/73/EC.

Interpretation: see Ot. prp. Nr. 43 (1995-1996) *Om lov om petroleumsvirksomhet*, p. 17.

Further details:

- **Section 4-8, al.1, PA:** "... facilities comprised by Sections 4-2 and 4-3, and which are own by a licensee, ..."

- **Section 4-8, al. 1, 2nd sentence PA:**

"access to upstream pipeline networks, including facilities supplying technical services incidental to such access".

- **Section 59 PR, al.1:** "*need of transportation and/or processing*" (Section 69, al. 2, PR)

4. Actors in the upstream gas pipeline network

- Ministry of Petroleum and Energy (MPE).
- **Gassled**, owner of the gas pipeline network. (See def. Section 60, § 1, PR.)
- **Gassco**, operator of the gas pipeline network = Independent System Operator.
 - System operation
 - Infrastructure development
 - Capacity management
- **Third parties:** gas undertakings and eligible customers.



NB 1: modification of Section 1-6 (o), PA. From and after 1 July 2007, eligible customers are all customers (except households). In accordance with market opening agenda defined in Article 37.1 of Directive 2009/73/EC (Market opening) (formerly Article 23.1 Directive 2003/55/EC).

NB 2: The right to access (Section 59 PR, 1 al.) goes together with an obligation for the owner (Section 61, 1 al. PR).

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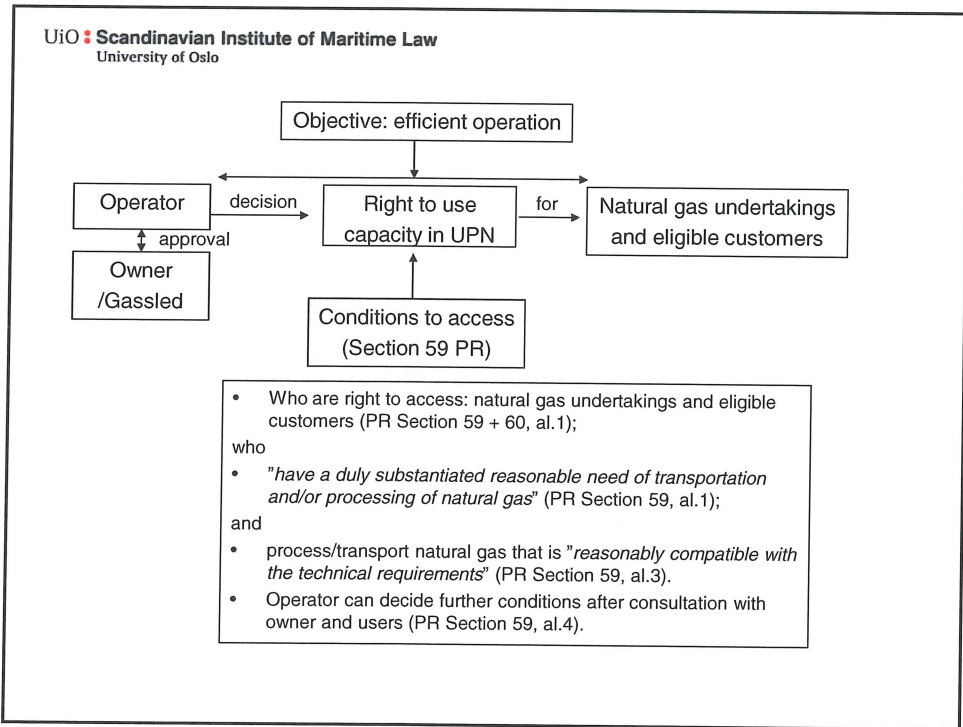
5. Capacity reservation and allocation

5.1 The notion of "spare capacity" as starting point

- Definition: Section 60, al.2, PR
- Determination of available/spare capacities (Section 61, al.1-2, PR). Fundamental role of the operator.

5.2 Common conditions for access

- a) *"a duly substantiated reasonable need of transportation and/or processing of natural gas"* (PR Section 59, al.1);
- b) *"reasonably compatible with the technical requirements"* (PR Section 59, al.3).



5.3 Procedure for reservation and allocation of capacity

- Distinction between primary and secondary markets. Benefits of the establishment of **capacity markets**.
- Reservation and allocation of capacity **on the primary market** (Sections 61 and 62, PR).
 - Time monitoring under reservation and allocation procedure (Section 61, al. 3, PR).
 - Assistance mechanism between users in case of delivery problems: Section 6 "Help etc.", TR.
- Access to capacity **on the secondary market** (Section 64, PR)
- See "Booking" under Gassco websiden: <http://www.gassco.no/> og <http://www.gasviagasled.no>

5.4 Derogation regime: Case of refusal of access to the system (Section 59, al. 5, PR.)

- Access given on objective and non-discriminatory basis (Section 59, al.1. PR).
- Access can also be refused. (Section 59, al.5, PR).

6. Regulation of the tariff access

6.1. Definition. Section 60, al. 5, Petroleum Regulations:

- Tariff means "*payment for the right to use capacity in upstream pipeline network*".
I.e.: "*tariff per unit for the right to use an entry, exit or processing*" (TR, Section 4).
- See Recital (22) of former gas directive II 2003/54/EC: "*Further measures should be taken in order to ensure transparent and non discriminatory tariffs for access to transportation. Those tariffs should be applicable to all users on a non discriminatory basis.*"

6.2. Regulated tariffs in the primary market:

- Section 63 PR:
 - Owner must follow the rules of PR for payment (Section 63, al.2, PR);
 - Capacity fee (Section 63, al. 2, PR);
 - 2 tariffs elements: **capital** and **operating**.
- Regulations relating to the stipulation of tariffs etc. for certain facilities: tariff determining procedure.
- The tariffs have from 1 July 2013 been substantially reduced (capital element reduced by 90%) for gas to be transported after 1 October 2016. Trial before Oslo District Court Spring 2015.
- See [Gassled Tariff Zones](#): A to I. See TR and [GasViaGasled](#).

6.3. Negotiated prices in the secondary market (Section 64, PR).

Relevant documents concerning access to capacity in Gassled:

- Terms and conditions for transportation of gas in Gassled;
- Company Agreements;
- Booking Manual;
- Shipper Manual;
- Standard Agreement for Trading of capacity in the Secondary Market.

7. Enforcement aspects of TPA

7.1. Discretionary powers of the MPE (Section 67 PR)

- In the control of the implementation of TPA rules to UPN.
- Can order to give third parties capacity rights.
- Can order distribution and redistribution of capacity.
- Compensation in case of losses.



7.2. Agreements for use of capacity (Section 65 PR)

- Standard agreement elaborated by Gassco and approved by MPE.
- Possible notification of capacity contracts.

7.3. Dispute settlement procedure (Section 68, PR)

- Art. 34.3 Directive 2009/73/EC: "have in place dispute-settlement arrangements, including an authority independent of the parties."
- UPN = MPE (DPN = NVE)

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