Access to gas pipelines: lessons learnt from the Marathon case

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1. Introduction

Access to gas pipelines is an essential prerequisite for the successful liberalisation of the European gas markets. If new suppliers do not obtain access to existing gas pipelines, the possibility for gas consumers to switch to a new supplier will remain theoretical (1). It is therefore not surprising that the Commission pays particular attention to any obstacles to an effective Third Party Access regime.

The Commission has two instruments to ensure Third Party Access to gas pipelines. There is on the one hand sector-specific legislation based on internal market directives (Directive 2003/55/EC (2) and Directive 98/30/EC (3)). The sector-specific legislation, which requires implementation into national law, provides for a Third Party Access regime including provisions on unbundling and an active role of a gas regulator. There is on the other hand European competition law, which obliges dominant operators to grant third parties access to their pipelines, either on the basis of the essential facilities doctrine or by relying on the principle of non-discrimination (once a dominant operator granted access to its pipelines, it has to offer the same service to other market participants) (4).

When making use of the second instrument (i.e. competition law), the Commission in principle has two possibilities to support the liberalisation process and the creation of an effective Third Party Access regime: it can either establish important precedents by formal decisions, on which market participants can rely in future, or it can informally settle cases with the companies, which allegedly infringed European competition law, in return for the companies improving their Third Party Access regime.

2. The Marathon case

The Marathon case, which was finally concluded on 30 April 2004, provides an excellent example of how the Commission’s enforcement of competition law through settlements can support the liberalisation process.

The underlying facts of the Marathon case date back to the early nineties, when the Norwegian gas producer Marathon — a subsidiary of an American oil company — requested access to the pipelines of five continental European gas companies, namely the three German companies Ruhrgas, BEB (a joint venture between ExxonMobil and Shell) and Thyssengas (today a full subsidiary of RWE), the Dutch gas company Gasunie (owned by the Dutch State, ExxonMobil and Shell) and the French company Gaz de France. These companies refused arguing that they themselves wanted to buy Marathon’s uncommitted gas. After some further attempts to obtain access Marathon decided to sell the gas to the European gas companies.

A few years later — following the termination by Marathon of its gas supply contract with these companies — the situation repeated itself. Marathon once again requested access to the gas pipelines of the European companies. They refused again on the ground that the contract was not terminated in a valid manner. Marathon therefore continued to sell the gas to the European gas companies.

Following the second attempt to obtain access to pipelines, Marathon eventually lodged a complaint with the European Commission arguing that the behaviour of the parties had amounted to a violation of European competition law. The complaint

alleged not only that the companies concerned unreasonably refused access individually, which would be a potential abuse of their dominant position in violation of Article 82 EC, but also that they colluded to refuse access to Marathon in violation of Article 81 EC. At the same time as filing a complaint with the Commission, Marathon and two of the companies involved entered into an arbitration proceeding, in which Marathon requested damages. When the arbitration case was concluded with an out of court settlement, Marathon withdrew its complaint. However the Commission took the view that it would be in the Community interest to pursue the matter on an ex officio basis. In this respect it considered that the Marathon case might be suited for a settlement: the alleged infringement dated back some years but repetitions could not be excluded if the Commission had taken a lenient approach, in the meantime the first gas directive had been adopted (i.e., there was no need to establish a precedent on access to pipelines in a formal decision) and commitments to improve the Third Party Access regime would probably be more beneficial for European gas consumers than a prohibition decision. The Commission therefore offered the companies the option to settle the case, which would allow them to maintain their legal position.

All the companies concerned eventually opted for the settlement route. Thyssengas was the first company to avail itself of this offer, followed by Gasunie (1), BEB (2), and recently also Ruhrgas and Gaz de France (3). The details of the respective settlements can be found on the websites of the companies concerned. It is however worth describing the approach followed by the Commission in settling cases informally under Regulation 17/62 (4).

In order to prepare the settlement discussions the Commission first identified the areas in which an improvement of the respective Third Party Access regime would be particularly desirable. It did so after conducting a market survey with market participants in the Member States concerned as well as potential entrants into these markets. In this respect the Commission established that progress was particularly needed with regard to transparency; treatment of access requests; congestion management; balancing; and access regime (entry-exit). All these areas were also identified later on as key areas in the so-called Madrid Guidelines (5), developed by the forum of European regulatory authorities, the European gas industry and the European Commission. However, contrary to the Madrid Guidelines, which apply across Europe, the Commission was prepared to adapt the commitments to the specificities of each of the gas transport markets concerned. At the same time the Commission kept in mind that common standards across Europe will facilitate cross-border transports and supplies.

During the subsequent negotiation process the Commission took into account the manner in which the companies had contributed to the alleged infringement and the measures they had taken in the meantime to create a Third Party Access regime. In this respect the Commission cooperated closely with the respective national authorities (including independent regulators where they exist). The Commission also showed significant flexibility with respect to the time when the companies wanted to carry out the discussions. However when it came to the substance the Commission was of the view that a company that opted for the settlement route later than the others should not benefit from the fact that in the meantime the market had developed further. As a consequence, the threshold for acceptable commitments became stricter over time.

Once a provisional agreement on the commitments was reached with the companies the Commission carried out a market test with market participants and associations representing the interests of gas consumers or trading companies. Their comments were taken into account before the Commission finally accepted the commitments. In return the Commission closed the case for the company concerned under the condition that the commitments would be respected.

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(1) IP/03/547, 16.4.2003.
(2) IP/03/1129, 29.7.2003.
(3) IP/04/573, 30.4.2004.
The commitments, which run for approximately four years from their signature, will be constantly monitored. As the Commission decided that it would not monitor the commitments itself, the companies and the Commission agreed on a trustee, which carries out the monitoring tasks and reports to the Commission once a year. The experience with these reports is quite satisfactory so far. The positive reactions of market participants also show that the commitments assisted in creating better functioning gas transmission markets, even if significant further efforts are still needed.

3. Conclusion

The Marathon case shows how the Commission makes effective use of competition law in order to improve the Third Party Access regimes in Europe. Combined with the efforts relating to the gas supply markets (see in particular cases ENI/Gazprom, Dong/DUC, GFU) (1) the Commission has also demonstrated its commitment to the successful liberalisation of the European gas sector, which is beneficial for the competitiveness of the European industry as a whole.