1. Introduction

The European Commission has recently intensified its efforts to liberalise European gas markets. Whilst originally only internal market rules were used to push for market opening (1), over the last years the important role of European competition law has become ever more visible.

In the gas sector, DG Competition’s antitrust activities currently focus on two issues: (1) anti-competitive barriers for competition between suppliers and (2) anti-competitive obstacles for effective and non-discriminatory third party access. This article provides a short overview of the latest developments with respect to the first issue, most prominently the settlement of the GFU case relating to joint marketing arrangements for Norwegian gas.

2. The GFU case

2.1. Facts and Procedure

The GFU case concerns joint sales of Norwegian natural gas through a single seller, the so-called GFU (Gas Negotiation Committee), since at least 1989. The GFU was comprised of two permanent members, Statoil and Norsk Hydro, Norway’s largest gas producers, and was occasionally extended to certain other Norwegian gas producers. The main task of the GFU was to negotiate the terms of all supply contracts with buyers located in the EU — inter alia — on behalf of all natural gas producers in Norway. Norway is the third largest Non-EU country supplying gas to the EU, accounting for approximately 10% of all gas consumed in the EU.

In June and July 2001 the Commission initiated formal proceedings against approximately 30 Norwegian gas companies arguing that the GFU scheme was incompatible with European competition law (2). At a hearing in December 2001 the gas companies concerned as well as the Norwegian Government claimed that European competition law should not be applied, since the GFU scheme had been discontinued for sales to the European Economic Area (EEA) as of June 2001 following the issuing of a Royal decree by the Norwegian Government. They also argued that European competition law could not be applied, since the Norwegian gas producers had been compelled by the Norwegian Government to sell gas through the GFU system established by the Norwegian Government itself.

2.2. Settlement of the GFU Case

Following the hearing and whilst reserving their respective legal positions, the Norwegian gas producers and the European Commission explored the possibilities for a settlement. A distinction was made between (1) the permanent members of the GFU (Statoil and Norsk Hydro), (2) six groups of companies actually selling Norwegian gas through contracts negotiated by the GFU (ExxonMobil, Shell, TotalFinaElf, Conoco, Fortum and Agip) and (3) all other Norwegian gas producers, for which formal proceedings had been opened. All these companies, apart from those listed under (3), submitted commitments to the Commission to settle the GFU case. Based on these commitments, the Commission decided to close the case (3).

a) Statoil and Norsk Hydro

As regards Statoil and Norsk Hydro, the settlement consists of two main elements, namely (1) the discontinuation of all joint marketing and sales activities unless these are compatible with European competition law (for existing supply relationships this requires individual negotiations when contracts come up for review) and (2) the

(2) IP/01/830 of 13/06/2001: Commission objects to GFU joint gas sales in Norway.
(3) IP/02/1084 of 17/07/2002: Commission successfully settles GFU case with Norwegian gas producers.
reservation of certain gas volumes for new customers, who in the past have not bought gas from Norwegian gas producers. In the latter respect Statoil has undertaken to make available 13 BCM of gas to new customers on commercially competitive terms and Norsk Hydro has undertaken the same for 2.2 BCM. This gas has to be offered for sale during the commitment period running from June 2001 to September 2005. Since the commitment period had already started in 2001 and certain volumes have already been sold during the last 12 months, the volumes which are currently still available to new customers are lower than the total volume of 15.2 BCM. External auditors will monitor whether Statoil and Norsk Hydro respect their commitment to the Commission.

When accepting the commitments on the volumes for new customers, the Commission noted that a significant number of European customers (most prominently large industrial users, electricity producers and new trading houses) are known to have actively looked for alternative sources of supply in the past and continue to do so today. The commitment will thus facilitate the establishment of new supply relationships. This should also have a positive impact on the European market structure, which is still characterised by dominant suppliers in almost all national markets. Most of these dominant suppliers are already customers of the Norwegian gas companies and bought significant gas volumes under contracts, which will still run for many years and which in general contain price review clauses.

Finally and although not being part of the GFU case, Statoil and Norsk Hydro confirmed that they would not introduce territorial sales restrictions and/or use restrictions in their gas supply contracts. Both types of clauses are considered incompatible with European competition law as they prevent the creation of a single market, but are however considered necessary by certain market operators. The Commission welcomed Statoil’s and Norsk Hydro’s position as it demonstrates that gas can indeed be marketed in the Community without these anti-competitive clauses.

b) Other Norwegian Gas Producers

As regards the other Norwegian companies concerned by the GFU case, the Commission received commitments from six groups of Norwegian gas companies. These companies were sellers of Norwegian gas negotiated under the GFU scheme, namely ExxonMobil, Shell, TotalFinaElf, Conoco, Fortum and Agip. For these companies the settlement consists of written commitments similar to those given by Statoil and Norsk Hydro to discontinue all joint marketing and sales activities. For the remaining Norwegian gas producers the Commission decided to close the case under the assumption that they will sell Norwegian gas individually in the future.

2.3. The consequences of the GFU Case

The consequences of the GFU case are very far reaching. The commitments submitted by the Norwegian producers will contribute to the creation of a single market for gas, since European gas purchasers will have a wider choice between gas suppliers from Norway. This – as well as the commitment to make available certain volumes for new customers – will facilitate the establishment of new supply relationships, which should assist to improve the market structure on a lasting basis.

In order for European customers to effectively benefit from the new choices, it must now be ensured that Norwegian gas can be transported through European gas pipelines without any artificial obstacles. When closing the GFU case the Commission therefore underlined once again (1) that it will pursue with vigour any and all refusals to grant access to European pipelines. In this respect the speedy adoption of the so called Acceleration Directive (2) will also be of importance.

Finally, the GFU case underlines the importance of competition in the upstream sector for the successful creation of a common gas market in Europe. It demonstrates that competition issues between non-EU gas producers and the Commission can be tackled successfully. It also shows that the Commission is capable of taking account of the commercial interests of the parties whilst ensuring that European competition law is respected.

3. Other Important Gas Cases Concerning Supply Competition

The GFU case is not the only antitrust case in which the Commission aims at improving the supply structure in European gas markets. Two types of cases can be distinguished: (1) restrictions in vertical supply agreements either preventing the buyer from using the gas for other purposes than agreed upon (use restrictions) or from selling the

(1) IP/01/1170 of 02/08/2001: Commission insists on effective access to European pipelines for Norwegian gas.

gas outside an agreed supply area (territorial sales restrictions) (1) and (2) joint marketing arrangements of gas producers.

As regards the first category the leading case so far has been GasNatural/Endesa (2). In this case the Commission successfully opposed — amongst other things — the introduction of a use restriction in a gas supply contract between the Spanish gas wholesaler GasNatural and the Spanish electricity producer Endesa.

As regards the second category — joint marketing of gas producers — the Commission’s interest is not limited to joint marketing arrangements for one country (e.g. Norway in the case of GFU), but also relates to joint marketing arrangements of gas producers that concern a single gas field. It is worth noting that joint production and joint marketing are still common features in the upstream gas sector, where gas producers cooperate closely with each other in order to minimise risks and to ensure maximum sales revenues. Thus the Commission recently carried out an enquiry into the Irish gas field Corrib, for which three Irish gas producers had requested an exemption for their project to market the gas jointly for five years. The Commission could however close the case following the decision of the gas producers to withdraw their application for an exemption and their declaration that they would market the gas on an individual basis (3).

In a similar case, which is not yet concluded, the gas producers concerned argued that their joint production and marketing arrangements would be covered by ‘Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81 (3) of the Treaty to categories of specialisation agreements’ (subsequently ‘specialisation block exemption’). They argued in particular that — whilst article 5 (1) of the specialisation block exemption prohibits joint price fixing — article 3 lit. b of the specialisation block exemption explicitly foresees the possibility of ‘joint distribution’. They claimed that their joint marketing arrangements would amount to such joint distribution.

The Commission services did not agree with this interpretation. They explained — amongst others — that ‘joint distribution’ in the sense of article 3 lit. b of the specialisation block exemption requires more than the mere coordination of sales between independent gas producers relating to the conclusion of a few long term gas supply contracts covering essentially all the gas available to the gas producers. The Competition services also took into account that the coordination of sales between independent producers generally does not improve the production or distribution of goods within the meaning of Article 81 (3) EC (4). A different analysis is only warranted if the gas products form a full-franchise joint venture.

4. Conclusion

Competition policy significantly contributes to the liberalisation process in the European gas sector. In the antitrust area, apart from cases relating to third party access, the Commission currently focuses on restrictions to competition between suppliers. In this respect it is considered that the settlement of the GFU will lead to a lasting improvement of the supply structure for the European gas market. Similar cases will follow reinforcing this approach and increasing the choice of customers between suppliers.

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(1) Territorial Restrictions and Use restrictions are hard core restrictions of EC competition law, cf. Article 4 of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21). Profit pass over schemes (also referred to as profit splitting mechanisms), which oblige the buyer to pass over a certain part of the profit to the supplier if the gas is sold for a different purpose than agreed upon or outside the agreed territory, amout to the same, cf. Commission Notice — Guidelines on vertical restraints, recital 49 (OJ C 291, 13.10.2000, p. 1).

(2) IP/00/297 of 27/03/2000: Commission closes investigation on Spanish company GAS NATURAL. See also M. Fernández Salas, Long-term supply agreements in the context of gas market liberalisation: Commission closes investigation of Gas Natural, Competition Policy Newsletter 2000, issue 2, 55 et seq.

(3) IP/01/578 of 20/04/2001: Enterprise Oil, Statoil and Marathon to market Irish Corrib gas separately.

(4) Cf. also 8th recital of the specialisation block exemption, which reads: ‘Agreements on specialisation in production generally contribute to improving the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. Agreements on specialisation in the provision of services can also be said to generally give rise to similar improvements. It is likely that, given effective competition, consumers will receive a fair share of the resulting benefit.’