[General Note. This report combines commentaries on the Gasunie and DONG Cases. The Commission has also published a survey of the series of cases leading to the liberalization of the gas market throughout the European Union.]

MARKET ACCESS (GAS): THE GASUNIE CASE

Subject: Market access
Transparency
Complaints

Industry: Gas

Parties: Nederlandse Gasunie NV
Marathon

Source: Commission Statement IP/03/547, dated 16 April 2003

(Note. This a classic case involving market access: in this instance, access to a gas pipeline network. By offering certain undertakings to the Commission, the Dutch gas company concerned has avoided penalties; and, in addition to the main undertaking regarding access, an important subsidiary undertaking provides for the requisite degree of transparency. The Commission's investigations were prompted largely by complaints made by a gas producer.)

The Commission's competition department has decided to close its probe into the suspected refusal by Dutch gas company Gasunie to grant access to its pipeline network to the Norwegian subsidiary of the United States oil and gas producer Marathon in the nineties. Network access is a key plank of European Community legislation to create a European single market for gas; and any unjustified refusal to grant access is a violation of the Community's competition rules. Marathon experienced difficulties in a number of European countries; but Gasunie, like Thyssengas in the past, has taken measures to improve transparency of its access regime and to better handle access requests. The investigation continues regarding the behaviour of three other incumbent gas companies in Europe, which had rejected Marathon's access request.

According to the Commission, this second breakthrough in the Marathon case shows how competition policy can contribute effectively to ensure a fair and non-discriminatory access to national gas pipelines. Access to gas pipelines is essential to the introduction of competition in the European gas markets to the benefit of industry users and, ultimately, the consumer. The Commission thanks the Dutch regulator for its co-operation in this case and hopes to continue working with other national authorities, particularly in France and Germany, where progress in the access regimes is most needed.

The Marathon case concerns the alleged joint refusal to grant access to continental European gas pipelines in the nineties by a group of five European gas companies, among them NV Nederlandse Gasunie and Thyssengas GmbH, a German gas company with which the Competition Department reached a settlement in late 2001. The other companies concerned with the case are large German and French operators. The case was originally triggered by a complaint from the Marathon's Norwegian subsidiary.

The European gas directive of 1998 provides for a so-called Third Party Access (TPA) regime: that is, a regime allowing gas suppliers and shippers to use the gas pipelines owned by the incumbent operators in the market. Refusal to grant access can also be, and has in the present case been, tackled as a potential abuse of a dominant position or, when the refusal is carried out jointly, as a restrictive concerted practice.

Following lengthy discussions with the Commission, Gasunie has undertaken on behalf of its transportation arm Gastransport Services to increase transparency as regards access to its network, to manage better the capacity available and to speed up its handling of access requests. This has led the Commission to close the case, since the undertakings will contribute to a better functioning of the gas transmission market in the Netherlands. The Commission co-operated closely with the Dutch energy regulator Dte in its handling of the case. Dte plays an active role in the Dutch market and will continue to monitor Gasunie's access regime.

The main undertakings entered into by Gasunie are as follows.

- To improve the transparency of its access regime Gasunie will publish on its Internet site - in absolute figures - the contracted transport capacity at all entry and all major exit points of its gas network. It will also carry information about the capacity still available. This undertaking relates not only to cross-border points, but also to domestic/national entry/exit points and will make it easier for shippers to obtain information about available transmission capacity.
- As regards balancing, Gasunie will assist shippers with a flexible supply source to avoid a situation in which the input and withdrawal of gas into the system are not identical or deviate from the forecasted volumes. In this respect Gasunie will introduce an online balancing system to avoid a situation in which suppliers or shippers are charged high prices for the gas supplied by Gasunie to cover an unexpected increase or decrease in consumption by one of their customers.
- Finally, Gasunie undertakes to improve its handling of access requests by introducing online screen-based booking procedures, which will lead to the elimination of the, at times lengthy, response times. Online bookings are particularly relevant for short term trading.

In addition to these main undertakings, Gasunie agreed to make available the opportunity to link other pipelines to its own pipeline system. For further details, interested parties can consult Gastransport Services' website shortly.

Following explicit requests from the Commission's Competition Directorate General as well as the Dutch regulator Dte, Gasunie has already improved its access regime. The improvements relate, in particular, to the introduction of short-term transport contracts for one day, the introduction of interruptible transport contracts for congestion scenarios and the introduction of a bulletin board allowing traders to bundle their access requests and balancing needs. The Competition Department welcomes Gasunie's early implementation of these undertakings.

The Commission services also accepted Gasunie's undertaking to maintain an entry/exit system for its access regime. The advantage of such a system is that shippers are obliged to book capacity only at the relevant entry and exit points and do not have to pay for gas transports along - often fictitious - contractual transport routes, which do not coincide with the physical gas flows. In this respect the Dutch system is superior to the system applied in other Member States.

The undertakings came into force on 21 April 2003 and will remain in place until January 2007. A trustee, who will report regularly to the Commission services, will monitor compliance.

The investigation was triggered by a complaint against five European companies. The investigation continues with regard to the other three companies in France and Germany. The complaint was later withdrawn after Marathon and the European companies reached an out of court settlement, but DG Competition continued its investigation as the settlement did not remove the suspected infringements.

The DONG Case

SUPPLY AGREEMENTS (GAS): THE DONG CASE

Subject: Supply agreements

Industry: Gas

Parties: DONG (Danish Oil and Natural Gas)
DUC (Danish Underground Consortium)
Shell
AP Møller
Chevron/Texaco

Source: Commission Statement IP/03/566, dated 24 April 2003

(Note. Gas producers on the Danish market combined in a group, DUC, to supply gas to the distributor, DONG. The agreement had certain strings attached. One of them was an obligation on DUC, to which the Commission objected, to offer all their gas first to DONG. More broadly, the Commission objected to the joint marketing agreements which, in the Commission's view, fell

outside the scope of the Block Exemption Regulation on Specialisation Agreements.)

The Commission's competition department and the Danish Competition authority have settled an anti-trust investigation involving the Danish gas supplier DONG and the country's main gas producers Shell, A.P Møller and ChevronTexaco after the latter undertook to market their production individually. DONG also agreed to release the producers, grouped in a cooperative called DUC, from the obligation to offer all their gas first to DONG. The successful outcome follows the settlement reached in 2002 with the Norwegian gas producers and is another step towards the creation of a European single market for gas, which will lead to improved services and lower prices for businesses and consumers alike. The investigation also provides a good example of how the Commission and the national competition authorities can work together to foster a more competitive business environment. The Commission considers that the undertakings received will contribute to the creation of a competitive gas market in Denmark and neighbouring countries.

The investigation by the Commission's Competition Directorate General (DG Competition) of the joint marketing of North Sea gas by the parties to the Danish Underground Consortium (DUC) started in July 2001. DUC, which accounts for 90% of Danish gas production, comprises Shell (46%), A.P Møller (39%) and ChevronTexaco (15%). The investigation also concerned certain aspects of the supply relationship between DUC and DONG as established in Gas Sales Agreements in 1979, 1990 and 1993 between DONG and each of the DUC partners. By means of these contracts the DUC partners sell DONG enough gas to satisfy the entire Danish demand and to supply additional volumes to Sweden and Germany. In the course of its investigation the Commission learnt that these Gas Supply Agreements had been notified to the Danish Competition Authority.

The Commission initially focused its attention on the joint marketing arrangements and DUC's understanding that the scheme was covered by Regulation EC/2658/2000, which exempts certain forms of joint distribution (the Specialisation Block Exemption). DG Competition disagreed with the assessment of the parties and, following the example of the Norwegian gas companies in the GFU case, the DUC partners - while reserving their legal position - agreed to cease their joint marketing arrangements and to market their gas individually in future.

To facilitate the establishment of new supply relationships the DUC parties will also offer in total seven billion cubic meters of gas for sale to new customers over a period of five years starting 1st January 2005 or earlier if possible, that is to say, when new gas volumes are available. On an annual basis this corresponds to approximately 1.4 BCM, or 17% of the total production of the DUC parties. When accepting this undertaking, DG Competition noted that a significant number of customers inside and outside Denmark have actively looked for alternative sources of supply in the past and continue to do so today.

Both the Commission and the Danish competition authorities expect that this undertaking will facilitate bringing competition to the Danish market, which is still dominated by DONG, and will increase competition in neighbouring Netherlands and Germany. It is significant that the DUC parties and DONG have decided to build a new pipeline linking the Danish gas fields with the existing infrastructure to the European continent. This new pipeline is expected to be operational by 1 January 2005 at the latest.

In the course of the investigation, DG Competition and the Danish competition authority, which - following the explicit request of the parties - participated in the settlement discussions, also established that the gas supply agreements concluded between the DUC partners and DONG contained certain provisions, which were considered to be anti-competitive. These will now be ended. They include a provision obliging DONG to report to the DUC partners the volumes sold to certain categories of customers to obtain a discount or special prices and the obligation imposed on the DUC partners to offer all their future gas finds first to DONG. In the latter respect DONG undertook to refrain from buying the volumes dedicated by the DUC partners to new customers. DONG also undertook not to buy any new DUC gas during the period from today to three years after the commissioning of the new pipeline.

Moreover DONG undertook to release the DUC partners from the "necessary adjustment mechanism", which it interpreted as a right to reduce the volumes bought from the DUC partners when these start selling gas into the Danish market. DONG argued that the supply contracts with the DUC partners contained a "take-or-pay provision" obliging DONG to pay for the gas, even if not taken. DONG claimed that it would need the protection of the Danish market in order to respect the take-or-pay obligations. DG Competition and the Danish competition authority accepted this argument as long as DONG's ability to sell the gas outside Denmark were reduced due to limited interconnections. While reserving its legal position, DONG undertook to release the DUC partners from the clause six months after the commissioning of the new pipeline.

To facilitate the market entry of the DUC partners and potentially other suppliers into Denmark, DONG also undertook to introduce an improved access regime for its off-shore pipelines linking the Danish gas fields with the Danish main land. In this respect, DONG undertook in particular to increase the transparency of the system by publishing information on available capacity, to allow for short term trading in line with the access regime applying to its on-shore pipelines and to introduce interruptible transport contracts.

The Danish competition authority will monitor whether the DUC partners and DONG respect their undertakings to the two competition authorities. A non-confidential version of the undertakings will be published on the Internet site of the companies concerned. ■