MARKET ACCESS (GAS PIPELINES) THE MARATHON CASE

Subject: Market access

Industry: Gas pipelines
(possible implications for other industries)

Parties: Marathon (Norway)
Thyssengas GmbH

Source: Commission Statement IP/01/1641, dated 23 November 2001

(Note. This case can be read in two ways, which may be important for other industries. On the one hand, it can be regarded as a further step by the Commission to enable third parties to benefit from a system or infrastructure developed by the original manufacturer; almost as a kind of compulsory licence to third parties. There are many precedents for this type of action, not least the agreement reached between the Commission and IBM more than ten years ago. On the other hand, it is arguable, on the basis of the present case, that the justification for the Commission's insistence on access depends entirely on specific legislation introducing a legally binding third party access regime. In this case, the legislation takes the form of a Directive, specifically designed to liberalise the gas distribution market. It may even be said that this was not a competition case at all but a case involving the enforcement of the terms of an existing law: see the last paragraph of the Commission's statement)

The Commission has decided to close the Marathon case as regards Thyssengas GmbH following the German gas company's commitment to grant improved access to its pipeline network. The Commission's investigation, which relates to the alleged joint refusal to grant Norwegian gas producer Marathon access to continental European gas pipelines in the nineties, will continue as far as other European companies are concerned. "Refusal to grant third-party access to gas pipelines makes a farce of the European internal market and constitutes a violation of competition rules", Commissioner Mario Monti said, adding: "I hope that the commitments offered by Thyssengas will quickly become industry practice in Germany and also help improve the situation in certain other Member States, to the benefit of German and European industrial users as well as traders and ultimately all final consumers".

Refusal to grant access to pipeline

The Marathon case concerns the alleged joint refusal to grant access to continental European gas pipelines by a group of European gas companies, amongst them Thyssengas, a joint venture between German power company RWE and British-Dutch energy company Shell. The case was triggered by a complaint from the Norwegian subsidiary of US oil and gas producer Marathon. The complaint was withdrawn after Marathon and the European companies

reached a commercial settlement, but the Commission took the view that it was in the Community interest to continue the investigation.

Proposed undertakings

Of the companies involved in this case, Thyssengas - the smallest of the European operators - has put forward substantial proposals aimed at rendering access to its network more effective. The undertakings by Thyssengas relate to five areas:
(1) balancing,
(2) trade in capacity rights,
(3) congestion management,
(4) transparency and
(5) handling of access requests.

As regards balancing, Thyssengas will help shippers to avoid high imbalancing charges by introducing a free-of-charge online balancing system avoiding imbalances of nominated and actual deliveries. Thyssengas will also offer a so-called "extended balancing regime" increasing shippers' flexibilitiy from 15 to 25%. Additionally shippers may compensate imbalances within the following month either in natura (for example, extra deliveries of gas) or by swapping imbalances with other customers or by paying for the imbalance.

Thyssengas's commitments as regards the trade in capacity rights will mark a first step towards the development of a secondary market, in which capacity holders can trade capacity rights acquired from the pipeline owners. In this respect it is also important to note that Thyssengas is willing to offer transport contracts with a short duration - down to one day - and will allow several shippers to bundle transport contracts, thereby reducing costs.

With respect to congestion management, Thyssengas undertakes to introduce a "use it or lose it" principle for capacity reservations of its own gas trading branch. This commitment means that third parties are entitled to use, upon request, unused transport capacity originally booked by Thyssengas' trading branch in a valid manner. Thyssengas also undertakes to offer interruptible contracts, which generally lead to a continuous transport, unless an interrupting event occurs, for example a drop of temperature.

To improve the transparency of its access regime Thyssengas will publish a detailed map on its internet site showing the available capacity at the main entry points of Thyssengas's pipeline system. Similarly Thyssengas will create a computer system allowing shippers to obtain information on Thyssengas's transmission tariffs in a simplified manner.

Finally, Thyssengas has undertaken to improve its handling of access requests. Thus the company will develop standard forms and contracts and will limit the reasons justifying refusals to grant access to its pipelines. This will increase planning security and reduce transaction costs and prevent cases of refusal to grant access to the network.

Thyssengas's undertakings will come into force on 1 December 2001 with the exception of the standard contracts, the computer system showing available capacity and the tariff system, which will follow shortly afterwards. They will remain in force until July 2005. During this period the undertakings will be monitored by a trustee, who will report regularly to the Commission. For further details, interested parties will be able to consult a non-confidential version of the commitments on Thyssengas's internet site (www.thyssengas.de, click on "Unternehmen", "Fakten", "Zusage") as from 28 November 2001.

The Commission welcomes the undertakings made by Thyssengas as they will contribute to a better functioning of the gas transmission market in Germany, even though the undertakings are based on the model of negotiated Third Party Access. In this respect it should be noted that the Commission is of the view that the mandatory introduction of a "regulated" access regime is warranted at this stage of the liberalisation process as is apparent from the Commission's proposal for the completion of the energy markets presented in March 2001.

Commenting on the case, Commissioner Monti also said: "The Marathon case clearly shows that the Commission is determined to render gas liberalisation effective and a success in Europe. The Commission will deal with all major restrictions of competition irrespective of whether the companies are located inside or outside the European Union".

Legal requirements on access

Third-party access is required by law. The European Gas Directive of 1998 provides for a so-called Third Party Access regime, that is, a regime allowing third parties to use the existing gas pipelines. Access to the existing pipelines is essential for competition to succeed on the European gas market, as gas consumers can normally be reached only by means of these pipelines. While the Gas Directive had to be implemented into national law by August 2000, in practice there are still significant imperfections rendering the Third Party Access regimes and gas-to-gas competition less effective than expected. ■

A case in the Court of Justice of the European Communities (Case C-221/99, *Conte v Rossi*), in which judgment was given on 29 November 2001, failed to provide the excitement it could easily have provoked. It concerned architects' fees; and the national court referring it to Luxembourg for a preliminary ruling asked various questions about the possible status of architects as "undertakings" and whether the architects' fee scales were contrary to the rules on competition. But the Court did not need to answer these questions, as the fee scales permitted architects to set their own rates. The Court therefore simply ruled that Articles 10 and 81 of the Treaty did not preclude national legislation which provided that the members of a profession might set at their discretion the fees for certain services they performed.

Cooperation Agreements and the Environment

In a series of reports last year, we discussed in some detail the Commission's guidelines on horizontal agreements. Among these was a report on the treatment of horizontal agreements which, while restricting competition, might nevertheless be justified on the grounds of environmental considerations. The recent decision in the CECED case illustrates the application of the guidelines to a case in which these considerations were paramount.

The Commission had examined two agreements notified by the European Committee of Domestic Equipment Manufacturers (CECED). Nearly all European manufacturers of dishwashers and domestic electric water heaters are party to the agreements, which are designed to improve the energy efficiency of appliances marketed in the European Union. To achieve this goal, manufacturers have undertaken, among other things, to stop producing high-energy consumption appliances. After examining the agreements, the Commission has concluded that the energy savings and environmental benefits outweigh the restrictions on competition. The Directorate-General for Competition has therefore closed its examination of these cases.

The two agreements notified on 20 June 2000 by the CECED aimed at introducing special additional measures to improve the energy efficiency of dishwashers and domestic electric water heaters sold in the European Union. These separate legal agreements were concluded under the auspices of the CECED, with the participation of most European manufacturers of dishwashers and electric water heaters. Under the agreements, the parties undertake to stop producing and importing into the Union high-electricity consumption appliances.

The implementation of the agreements will be monitored, with regular reports being presented to the Commission and made accessible to the public. The agreements were analysed in the light of the principles laid down in the guidelines on horizontal cooperation and in the Commission's favourable decision on similar CECED agreements for washing machines. In both cases the agreements have an appreciable effect on competition, so that the Commission had to assess whether they had substantial technical benefits and advantages for consumers. Objectively, the new electric water heaters and dishwashers will be more efficient and enable consumers to reduce their energy bills. Moreover, lower electricity consumption will indirectly help the Union achieve its environmental objectives.

In general, the Commission tends to favour cooperation agreements. Where they have positive environmental merits, they are still more likely to gain approval.

Source: Commission Statement IP/01/1659, dated 26 November 2001