DOMINANT POSITION (GAS PIPELINES): THE MARATHON CASE

Subject: Abuse of dominant position
Access to facilities

Industry: Gas supply

Parties: BEB
Marathon

Source: Commission Statement IP/03/1129, dated 29 July 2003

(Note. Some of the cases involving access to necessary facilities are not "pure" competition cases, since they involve statutory requirements over and above the competition rules. Thus, in the present case, there is a statutory requirement that access to gas pipelines should be available: the European gas directives of 1998 and 2003 provide for a so-called Third Party Access regime. However, as the Commission Statement points out, refusals to grant access can also be, and have been in the present case, tackled as a potential abuse of a dominant position or a restrictive concerted practice.)

The Commission's competition department has closed its probe into the alleged anti-competitive behaviour by BEB, a German joint venture of ExxonMobil and Shell. The investigation focused on BEB's refusal to grant Norwegian gas producer Marathon access to its Northern German pipeline network. In return for the closing of the case, BEB offered to make further improvements to its access regime for gas pipelines and storage facilities, which will facilitate third parties' use of BEB's network. BEB undertook in particular to abandon the transport system currently applied across Germany (including the area covered by BEB's network) and to replace it with a new user-friendly system for its network (the so-called entry/exit system).

The Commission considers that the settlement of the Marathon case with BEB means a significant step forward for the German gas market, which is currently lagging behind in the liberalisation process. It welcomes the fact that BEB is willing to introduce an entry/exit system for its network, which better reflects physical gas flows and costs incurred when transporting gas: other German companies are encouraged to follow BEB's example. In the medium term the Commission also hopes that Germany develops into one large entry/exit zone covering all networks be they supra-regional, regional or local. The Commission is fully committed to fostering the liberalisation process by chasing anti-competitive behaviour.

BEB's current system is based on capacity reservations for each pipeline section in accordance with the "contractual path", even if the gas does not physically flow through these pipelines. The new system will allow users to book the capacity at the points where they intend to inject gas (entry points) and separately at the points where they envisage to off-take gas (exit points). It is expected that the so-called entry/exit model will facilitate domestic as well as cross-border transport for third parties as it does already in other Member States. The closure of the case for BEB follows similar settlements with the German gas company Thyssengas, a subsidiary of the electricity company RWE, and Dutch gas company Gasunie, one of the largest European gas companies, in which ExxonMobil, Shell and the Dutch state hold stakes. The investigation of the two other European gas companies, which had rejected Marathon's access request, will be continued.

The origins of the case date back to the nineties, when the Norwegian subsidiary of US oil and gas producer Marathon requested, on various occasions, access to the pipelines of five continental European gas companies. In the past the Commission services have reached a settlement of the case with the Dutch company Gasunie and the German company Thyssengas. The remaining two companies concerned by the case are large German and French operators.

Refusals to grant access to gas pipelines are not only incompatible with the European gas directives of 1998 and 2003, which provide 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 other operators. Refusals to grant access can also be, and have been in the present case, tackled as a potential abuse of a dominant position or a restrictive concerted practice (in the latter case when the refusal is carried out jointly).

In the case in question the Commission services and BEB reached a settlement of the dispute. The undertaking offered by BEB focus on five points:

a) transparency,
b) balancing,
c) booking procedures,
d) congestion management and
e) entry-exit system.

To improve the transparency of its network BEB will publish and update regularly on its Internet site - in absolute figures - the available transport capacity at all entry and all major exit points of its transmission network. The same applies to its storage facilities. This will make it easier for shippers to obtain information about available transmission and storage capacity.

As regards balancing, BEB will help shippers having a flexible supply source to avoid imbalances, by means of the introduction of a free-of-charge "on-line balancing", which will ensure that input and output of gas in the BEB system will remain in balance at all times. At the same time BEB will introduce a bulletin board which will allow shippers to make contact with each other to optimise their transport and storage requirements. Finally, BEB will allow companies to use its storage facilities even if the technical minimum flow requirements are not fulfilled. The only condition is that at the same time other shippers (individually or jointly) fulfil the minimum flow requirements (the so-called back pack principle).

BEB also undertakes to improve its handling of access requests by introducing, as of July 2005, online screen-based booking procedures, which will lead to the elimination of what are at times lengthy response times. Online bookings are particularly relevant for short term trading. In the meantime BEB will shorten its maximum response time for replying to access request.

As regards congestion management, BEB undertakes to introduce a "use it or lose it" principle for capacity reservations of its own gas trading branch. This undertaking means that third parties are entitled to use, on request, unused transport capacity originally booked by BEB's trading branch. BEB will also facilitate the creation of a secondary market by allowing customers to sell or sublease capacity booked from BEB.

Last, BEB is offering to introduce a so-called entry/exit regime. Under this regime shippers book capacity at the relevant entry and exit points separately. The fees to be paid for transport (entry charges and exit charges) no longer relate to a hypothetical "contractual path", that is, the distance between the entry and exit points, which is currently applied in Germany. BEB is, however, entitled to take existing competition into account. The current German system in many instances neither reflects the physical flow of gas nor the cost that this entails. The entry/exit system removes this concern and is therefore considered superior. It also facilitates booking procedures as it no longer requires a capacity reservation for each pipeline section "used for the fulfilment of the transport contracts". An important aspect of the undertaking is also that BEB is open to discuss with adjacent pipeline system operators possible cooperation to extend the entry/exit system to larger territories.

Most of the undertakings will come into force immediately; however, for certain additional IT, preparation is required. The undertakings will remain in place until January 2007. An independent auditor, who will report regularly to the Commission services, will monitor compliance. For further details reference may be made to BEB's internet site where the non-confidential version of the text setting out the undertakings will be published. The Commission services believe that BEB's undertakings will lead to a significant improvement of BEB's Third Party Access regime, particularly the entry/exit model, which has been discussed in Germany for more than two years. It therefore decided to close the Marathon case for BEB in return for the undertakings taking effect. The investigation of the remaining operators will continue. ■

Framework Directive for Electronic Communications Networks

The European Community has adopted a new regulatory framework for electronic communications networks and services; this came into force on 25 July 2003. The aim is to introduce a streamlined process in this sector based on competition law principles.

Source: Commission Statement IP/03/1089, dated 23 July 2003