

National Reports

Argentina

GAS INDUSTRY

Natural gas export licences

Argentina approved the principle of automatic grant of natural gas export licences

The Argentinian Secretariat of Energy has recently approved the automatic granting of natural gas export licences provided that a number of specific conditions are met.

Resolution 131/2001 provides that the Secretary shall grant the licences within 30 days from the date of the request, provided that:

- (1) the natural gas reserves recovery index calculated according to a given formulae is higher or equal to zero;
- (2) for the purposes of guaranteeing domestic supplies, the ratio of reserves to total gas production is higher than 12 (it being understood that, for the purposes of calculating the available reserves, all supplies previously committed, in the domestic market or abroad, shall be discounted).

In 2000, natural gas production in Argentina reached 45,000 million cubic metres, representing a 7 per cent increase from 1999. Exports, mainly to Chile, reached up to 4,500 million cubic metres (a 36 per cent increase on the previous year). The same year also witnessed the commencement of exports of natural gas to Brazil, Aldea Brasileira, through Uruguayana and Uruguay.

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GAS INDUSTRY

Competition law—abuse of a dominant position

Provision of access to gas transmission grids by a dominant market participant

District Court of Dortmund, Germany
September 1, 2000
WuW/2000/1233

Legislation considered:

Article 19 of the German Act Against Restraints of Competition (Abuse of a Market Dominant Position)

19(1) the abuse of a market dominant position is prohibited.

19(2) An entity is market dominant with regard to a specific kind of goods or services, if, as a supplier or customer:

1. it has no competitors or is not exposed to any substantial competition;
2. it enjoys a prevailing position in the market as compared to its competitors taking into consideration its market share, its financial power, its access to supply or distribution markets, its affiliations with other undertakings, the legal and factual barriers for other entities to access the market, factual or potential competition through entities established within or outside the territory where this law is applicable, the capacity to adapt its offer or supply other goods or services and finally the possibility for its customers to make use of alternative entities.

Two or more entities are market dominant if there is no substantial competition between them with regard to a specific kind of goods or services, and if they together satisfy the requirements set out above.

19(3) An entity is presumed to be market dominant if it has a market share of at least one third.

19(4) There is abuse, in particular, if a market dominant entity (whether on the supply or demand side of a specific kind of goods or services):

1. intrudes upon the ability of other entities to be competitive without reasonably justifiable grounds;
2. demands remuneration or other business terms which deviate from those which would be highly likely to result from working competition; in this regard, particularly, the conduct of enterprises in similar markets with working competition should be taken into account;
3. demands unfavourable remuneration or business terms different from those which are demanded by the market dominant entity from similar customers in other comparable markets, unless such difference can be justified on reasonable grounds;
4. refuses to grant access to its own networks, installations on infrastructure to another entity for appropriate remuneration, if it is not possible for the other entity

for legal or factual reasons to be a competitor in the market of the dominant entity without joint use of that infrastructure, whether at that level or a different level of that market; however, this is not applicable if the market dominant entity proves that the joint use is not possible or not acceptable for management or other reasons.

Article 940 of the German Code of Civil Procedure: Preliminary Injunction for the Ensuring of the Legal Peace

Preliminary injunctions can be obtained for the purposes of a preliminary ruling on a controversial legal relation, insofar as such ruling appears to be necessary for the avoidance of substantial disadvantages or for the prevention of imminent force or any other reasons.

Facts: The plaintiff traded in energy (gas and electricity), but did not have its own grids for transmission of gas or electricity. The defendant was a company engaged in long-distance distribution of gas. The defendant had created a supra-regional network of pipelines and large gas containers. It distributed gas to local energy companies, power stations and companies engaged in the supply of gas.

On May 25, 2000, the plaintiff asked the defendant to transmit its gas, a request which was rejected by the defendant. However the defendant declared it was prepared to distribute the plaintiff's gas until the end of June 2000. The plaintiff renewed its demand in a letter of July 19, 2000 and indicated, by telephone, which recipients should be supplied. In a letter of July 24, 2000 the defendant again refused to provide transmission arguing that it feared the risk that its customers would sue it for breach of contract for violation of the duty of good faith (in particular on the ground that there was a risk of supply to their competitors). The plaintiff insisted that the defendant transmit its gas, in letters of July 25 and 27, 2000, and declared it was prepared to pay remuneration for the transmission. The defendant rejected the offer, additionally arguing that the plaintiff could make use of alternative methods of transport, and that the plaintiff had not proved its point.

Held:

- (1) Within the scope of the protection available as a preliminary remedy it may be necessary to order a mere duty of transmission, if this is the only means to give effect to the plaintiff's claim for a contract to be concluded with the required speed.
- (2) The members of an oligopoly may not refuse a request for transmission on the ground that transmission may be effected by other members of the oligopoly.

In support of its decision the court explained that a request for a preliminary injunction was well founded. The court stated:

[First, there is a controversial dispute in the sense of Article 940 of the German Code of Civil Procedure. Additionally, if compliance with an order would have the effect of giving effect to the plaintiff's claim, it is very likely that the plaintiff's claims are well-founded. These conditions were fulfilled. There were many reasons to presume that the plaintiff had a claim for transmission (in the sense of the cartel law) according to Articles 33 and 19(4) of the German Act Against Restraints of Trade (GWB).]

The defendant is a monopolist or a member of an oligopoly in the market (materially and territorially) for the transmission of gas. It is well known to the court that property in the grids for the transmission of gas belongs to few entities, *inter alia*, the defendant. Thus, a presumption of a market dominant position is justified in the sense of Article 19(2) sentence 2 of the Act. The ownership of the grids remained a barrier to market access after the amendment of the German Energy law in 1998.

Whether the plaintiff could use alternative ways to transmit its gas is irrelevant with regard to the question of the market dominant position. A market dominant position still subsists if there are alternatives for the claimed transmission. In particular the members of an oligopoly may not refuse transmission with the argument that the claimant could use the grids of other members of the oligopoly.

The defendant is caught under the provisions of Article 19(4) No. 4 of the German Act Against Restraints of Competition. In this regard it is sufficient to fulfil the requirements of the law if the person who has been requested to give access is the owner of the grids and is active in the energy supply market. Article 19(4) No. 4 of the Act was conceived to prevent an existing market power (in the sector of the market in which the infrastructure is relevant) from having an impact on subsequent levels of the market; in this case that of distribution. The defendant is active in the market for the supply of gas.

Contrary to its assertion, this market is not limited to the supply of individual customers. Such a narrow view of the market is not compatible with the meaning of Article 19(4) No. 4 of the Act, nor is it justified with regard to the facts. The parties are competitors in the market of the supply of gas which is territorially not limited to the territory of the grids of the defendant, as supply through adjacent grids is possible. However, Article 19(4) No. 4 of the Act is also relevant here; without transmission the plaintiff would be unable for legal and factual reasons to participate as a competitor in a subsequent level of the market; that of distribution of gas.

For the defendant, transmission is possible and acceptable. The principle of unbundling in the gas sector derives from the aim of Article 19(4) No. 4 of the Act and the E.U. Directive on natural gas of June 22, 1998 which has to be used to interpret German law. The aim of the German and European law-makers, namely the liberalisation of the gas market through opening access to grids, cannot be achieved if problems relating to distribution cannot be solved on the level of the mere use of the grids. The owner of a network for transmission of gas does not commit a breach of its contractual duties towards its other customers if it performs its legal duties according to Article 19(4) No. 4 of the Act. This is also the case even if the activity required by law supports conduct by other parties which might interfere with the contractual obligations of the defendant. It is not up to the owner of the grid to decide whether there is such conduct and, in any event, such conduct cannot affect its interests.

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Mexico

GAS INDUSTRY Transportation capacity and gas sales

*Extension of open season and
transition phase domestic natural gas
sales rules*

On January 30, 2001 Mexico's Energy Regulatory Commission (*Comisión Reguladora de Energía*) (CRE), extended the open season for transportation capacity reservation in Pemex's natural gas transportation system, as well as the transitory regime for the applicability of the recently issued domestic natural gas first-hand sales rules (the so-called "VPM Rules").

The "Chinese wall rules" applicable to Pemex's natural gas transportation and marketing departments were approved by the CRE in the last week of January; however, Pemex continues to be banned from selling natural gas at points other than its gas processing plants, until the price catalogue and credit guidelines are approved by the CRE. The VPM Rules, on the other hand, require Pemex to confirm gas sales to current users first, and do not allow Pemex to execute new gas supply agreements until the end of the transitory regime.

On February 13, 2001 the CRE also approved the request by Pemex to enter into domestic natural gas supply agreements for the period between January 1, 2001 and December 31, 2003, for pre-determined gas amounts, at a fixed reference price of US\$4/MMBtu. The fixed price VPM contract was available for Pemex's current users only, and until February 22, 2001.

On January 31, 2001 Mexico's Federal Competition Commission (*Comisión Federal de Competencia*) (CFC), published in the Federal Register the commencement of an antitrust investigation *sua sponte* against L.P. gas distributors and marketers operating within different states of Mexico. At the beginning of March, the CFC held that preliminary evidence on the existence of monopolistic practices was found, recommending the implementation of preventive measures. Consequently, the Ministry of Energy (*Secretaría de Energía*) has imposed price caps on L.P. gas marketing and distribution services.

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Pakistan

GAS INDUSTRY Underwater gas pipeline

Gazprom's visit to Pakistan called off

India is pursuing the laying of an underwater gas pipeline from Iran and is said to have asked the Russian energy firms, Gazprom, to look into the feasibility of a possible route through the Arabian Sea. Gazprom, however, remains more interested in the Turkmenistan-Afghanistan-Pakistan pipeline because of the high costs involved in the maintenance and repair of underwater pipelines as compared to land route pipelines.

The Chairman of Gazprom, who was accompanying the Russian President Putin to India last autumn, was scheduled to fly to Pakistan later on to discuss gas pipeline projects with Pakistan authorities. The visit was finalised after the visit of Serge Yesterzhembsky, President Putin's special envoy to Islamabad in September 2000. However, Gazprom cancelled the visit at the last moment and Pakistani officials felt that this was due to pressure from India.

Pakistan's Petroleum Ministry had planned a warm welcome for the Russian delegation in view of the strategic importance of the Russian energy firm in the project. Russia has tried to placate Pakistan by saying that the visit was