

Congo

RECENT DEVELOPMENTS

Offshore production-sharing contract – refinery reopened

Shell has just signed a production-sharing contract with Hydro Congo for production in offshore block Marine-9. The other news is that the country's only refinery, which had closed down after a fire on 26 June, reopened in the week of 22 August. Coraf's capacity is 1 million tonnes per year, but its output is less than 500,000 tonnes. The rest of Congo's production (7.5 million tonnes) is refined abroad. This meant that the closure of Coraf led to a fuel shortage in Brazzaville. TL

France

RECENT DEVELOPMENTS

Oil imports – exploration activity

While French oil consumption fell by 6.8 per cent in June compared with the same month last year, to 6.6 million tonnes, French imports of crude oil have risen by 2.7 per cent in the first half-year, to reach 37.8 million tonnes.

In the period from July 1993 to June 1994, French imports have risen to 78.5 million tonnes, an increase of 8.6 per cent compared with the previous 12 months. Saudi Arabia remains the main exporter with 11.8 million tonnes (up by 10.6 per cent). Iran, traditionally in second place, fell back to fifth place with 3.3 million tonnes (a drop of 49.6 per cent). Instead Norway, with 4.5 million tonnes (up by 28.9 per cent) and Nigeria with 4.2 million tonnes were second and third, while the United Kingdom took fourth place with 3.8 million tonnes (up 74.5 per cent).

The first effects of the reform of the mining code under the new law of 15 July 1994 are yet to be felt. In the meantime it may be noted that four exploitation permits held by ESSO Rep in Seine et Marne have been extended until 7 April 1996.

It is also worth noting that major seismic activity is underway in the Gulf of Gascony off the Arcachon headland. TL

Gabon

RECENT DEVELOPMENTS

Lucina oil deposit

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Kelt Energie has bought back from the Shell/Elf partnership a 90 per cent share in the Lucina oil deposit. This is situated in the south of the country near the Congolese border and produces around 3,800 b/j.

Germany

COMPETITION LAW Control of concentrations

Acquisition approved by Commission

On 30 March 1994 the Viag company notified the EC Commission of its intention to purchase a share of 58.3 per cent of the capital of the Bayernwerk company which was held by the German Province of Bavaria. The purchase would increase Viag's share in Bayernwerk to 97.1 per cent. The Commission established that the intended purchase fell within the scope of Council Regulation (EEC) 4064/89 on the Control of Concentrations between Undertakings and found that it was not incompatible with the common market.

Council Regulation (EEC) 4064/89 on the Control of Concentrations between Undertakings

Article 1 of the Regulation establishes the applicability of the Regulation to all concentrations with a Community dimension, which is defined by reference to the annual world-wide or Community-wide turnover. According to Article 3(b) a concentration shall be deemed to arise where one undertaking acquires direct or indirect control of the whole or parts of another undertaking.

In the application of Article 2 of Council Regulation 4064/89 the Commission has to consider the need to maintain and develop effective competition within the common market in view of, *inter alia*, the structure of the markets concerned and the situation of the actual or potential competition, the market position of the undertakings concerned and their economic power, the alternatives available to suppliers and users, their access to supplies or markets, legal or other barriers to entry, supply and demand trends for the relevant goods, the interests of the intermediate and ultimate consumers.

Concentration in the Sense of Regulation (EEC) 4064/89

The Commission held that the intended purchase was concentration in the sense of Article 3 of the Regulation, since Viag would obtain full control of Bayernwerk. The concentration would have a Community dimension, because in 1993 the turnover of Viag within the Community amounted to ECU6.008 milliards and that of Bayernwerk to ECU3.240 milliards. (These figures do not only relate to the turnover achieved in the gas sector).

Appraisal of the Concentration by the Commission

(1) *The relevant market of products.* Bayernwerk, through its subsidiary Contigas, is engaged in the distribution of gas. It supplies gas to regional and local public utilities in six German provinces. Bayernwerk also holds a minority interest in the companies Bayerngas and Ferngas Nordbayern. Viag holds 50 per cent of the shares of Thyssengas, which is a joint subsidiary of Viag, Esso and Shell. Thyssengas supplies territorial and local public utilities in the German province North Rhine-Westphalia. The relevant market in which Viag and Bayernwerk are engaged through their subsidiaries is the market of the offering of the supply of gas by gas-importing undertakings and by big companies engaged with the supply of gas on the one hand and of the demand by the regional and local public utilities on the other hand. The relevant market concerns only the supply of gas. For the customers there is no possibility of substituting gas with other energy carriers, because regional and local public utilities depend on the supply of gas with regard to their distribution networks and fixed mains.

(2) *The territorially relevant market.* The Commission observed that in Germany a number of regional markets for the distribution of gas existed which are traditionally limited to the territory of activity of a single public utility and which are enforced by agreements on territorial demarcation between neighbouring public utilities. The Commission held:

Even though such agreements (on territorial demarcation) are, in principle exempted from the applicability of the German antitrust law,¹ they may violate Article 85 of the EC Treaty. . . . Even if the definition of the territorially relevant market cannot be founded upon the demarcation agreements themselves, the traditional system of the agreements on territorial demarcation entailed the consequence that the suppliers constructed fixed mains for the supply of gas within their territories of supply and concluded long-term contracts for supply with their customers. Also the concession agreements² which are concluded by the suppliers of energy carriers on the level of the distribution to end users contribute considerably to the delimitation of the energy markets. These circumstances would not be rendered ineffective immediately after a decision which held that agreements on territorial demarcation and concession agreements would, in whole or in part, be incompatible with the EC Treaty. Also other important factors will have to be considered which restrain the market access. In order to supply customers with gas within the territory of another supplier it is often necessary to obtain access to his distribution network. If the access is not possible at economically reasonable conditions, the potential customer has to finance the construction of its own fixed mains by means of those advantages which derive from the supply. At present it is not likely that the traditional system of supply will change within the next 2 to 3 years in such a way that public utilities concerned with the supply of . . . gas will be exposed to substantial competition by other public utilities . . .

(3) *Market-dominating position.* The Commission found that between the existing market dominating positions which the subsidiaries of Viag and Bayernwerk enjoyed were not enforced by the concentration, so that the purchase of Bayerngas by Viag would not affect the position of the parties concerned in the relevant gas markets.

The Commission stated:

With regard to the present efforts which are directed towards the deregulation of the energy markets, one may proceed upon the assumption that in the medium- or long-term the above-mentioned restraints in the German energy carrier markets will no longer be present. Further, it is predictable that the suppliers of energy carriers will, through the use of a system of transmission rights, be able to supply customers through the mutual use of the existing fixed mains. Such a development would lead to larger markets which could comprise Germany and other parts of Europe. Proceeding upon the assumption of an already existing larger market the concentration would not lead to a market dominating position . . . In the national market for the supply of gas Viag and Bayernwerk together would have a market share of 15 per cent. The main competitors would be Ruhrgas with a market share of approximately 50 per cent and BEB with a market share below 20 per cent. Further, it has to be taken into consideration that the territories of supply of the subsidiaries of Viag and Bayernwerk are relatively

1 On agreements on territorial demarcation see Vahrenwald, 'Gas Supply in Germany and Anti-trust Law', [1993] 6 OGLTR 174 to 183 at 176.

2 On concession agreements see Vahrenwald, Note 1 above at 178.

split up so that the concentration of the undertakings would not lead to a corresponding increase of market power.

The Commission decided that for these reasons it would not oppose the notified concentration and declared that it would be compatible with the common market.

Comment

Whereas the development of the Community nourishes the hope of the establishment of a common market, the Commission seems to be developing in the opposite direction by discovering even smaller than national markets. In the *ELF/Occidental* decision of 13 June 1991,³ the relevant market for the product natural gas related to the territory of France. Admittedly, in the *Viag/Bayernwerk* decision the Commission rejected the view that the relevant territorial market would be identical with the territory which the regional undertaking protected through agreements of territorial demarcation and concession agreements; however, its reasoning that it would not be necessary to define a territorially relevant market, because the existing restraints on the German national market would disappear, seem illusory. The restraints are based on the German Act Against Restraints of Trade with the aim of avoiding the duplicated laying of fixed mains in the interest of a reasonably priced and secure supply of gas, and it does not seem that the relevant provisions in the Act would be repealed in the near future.⁴ The reference of the Commission to a possible future system of transmission rights which would create a national market may also confuse matters, because here we are concerned with the market of the supply of gas and not with a market of transmission rights for gas through fixed mains. The Commission thus should not have refrained from explaining the territorially relevant market, in particular, since both companies were active in territorially different parts of the German market, and because in the assessment of the dominating position the Commission referred to the national German market.

The Commission makes clear that agreements on territorial demarcation and concession agreements concluded by undertakings engaged in the supply of gas may violate Article 85 of the EC Treaty. The European Court of Justice held on 27 April 1994 in Case C-393/92 that a business term, according to which a regional undertaking engaged in the supply of electricity prohibited its customers which were local distributors of electricity from purchasing electricity for public distribution from other suppliers, violates Article 85 and constitutes an abuse of a dominant position in the sense of Article 86 of the Treaty. However, the Court also held that it is necessary to examine whether the business term was necessary for the fulfilment of the regional undertaking's tasks in the general interests in the sense of Article 90(2) of the Treaty. It may be inferred that agreements on territorial demarcation, concession agreements or agreements for exclusive purchase concluded by undertakings engaged in the supply of gas will not be prohibited by the Treaty of Rome insofar as they serve the general interest.

3 IV/M.085.

4 The Draft Bill Concerning the Amendment of the Energy Economy Law (see the News Section report by Vahrenwald, [1994] 5 OGLTR C-93) is unlikely to pass in Parliament and it is doubtful whether the new Government after the elections in October would approve of a similar project.

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Ireland

LICENSING Petroleum exploration New licensing round announced

In January of this year, the Irish Minister for Energy announced a petroleum exploration licensing round, to be held in 1994, in relation to 172 blocks and one part-block of the Porcupine Basin. The Porcupine Basin is situated in an area approximately 100 to 250 kilometres west of Ireland. The blocks which are to be the subject of the licensing round have been specified by the Minister as a 'Frontier Area', which means that the area is considered to be an area with special difficulties related to physical environment, geology or technology. Application for these Frontier Exploration Licences (the 'Licences'), together with a non-returnable fee of IRE6,000 (only one fee is payable by a specific bidding group making a number of applications), must be submitted to the Department of Transport, Energy and Communications in Dublin not later than 12 noon on 15 December 1994.

The Licences will be issued under the Irish Petroleum and Other Minerals Development Act, 1960 and will be subject to the Licensing Terms for Off-Shore Oil and Gas Exploration and Development which were issued by the Minister in November 1992 (the 'Licensing Terms'). The Licensing Terms are not statutory in nature but indicate the manner in which the Minister will exercise the discretion to grant exploration licences given to him by the 1960 Act. The Licensing Terms set out provisions generally applicable to frontier exploration licences, covering, *inter alia*, their duration, the exploration obligations of a