EU Competition Law

Oil and Gas Industry Mergers – Impact of European Competition Law

The proposed acquisition of BG by Shell highlights the importance of a thoughtful analysis of the impact of European competition law when considering a combination in the oil and gas industry, especially combinations that impact any aspect of the natural gas business in Europe. The European Commission has well developed precedents for defining energy markets and measuring the intensity of competition.

The Commission’s jurisdiction over combinations is triggered by the merging parties’ global and EU turnover (revenue). Consequently, the Commission can have jurisdiction over combinations involving parties with comparatively few (or even no) physical assets in the EU, but whose sales from exporting goods or services to the EU meet the applicable thresholds.

Since acquiring its merger review powers (in 1990), the Commission has reviewed a significant number of combinations in the energy sector. Unsurprisingly, it reviewed all of the major global oil and gas industry combinations in the late 1990s and early 2000s, as well as a number of smaller transactions since then. As a result of its extensive experience in the sector, the Commission has developed a clear, detailed analytical framework to assess the competitive effects of such combinations. This framework has also been adopted by EU member state competition authorities and, to a greater or lesser extent, by competition authorities outside the EU. This is particularly relevant for mergers involving companies engaged in any segment of the natural gas business. The EU Commission analyzes competitive effects in identified segments. These include exploration/production of oil and natural gas, wholesale sales of natural gas, wholesale sales of LNG, retail sales of natural gas, natural gas trading, natural gas transmission (via high-pressure systems), natural gas distribution (via low-pressure systems), natural gas storage, natural gas liquefaction services, natural gas regasification services and offshore natural gas transportation and treatment services.
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The Commission applies its methodology to determine whether the combination could “significantly impede effective competition” in the EU. In addition to assessing the effect of concentration from the combination, the Commission (and other competition authorities) may also, depending on the facts, take into account concerns regarding security of supply. In addition, competition authorities are increasingly interested in analyzing so-called vertical effects resulting from the ownership by merging parties of onshore and offshore gas transportation, treatment and storage infrastructure and LNG, liquefaction and regasification facilities. For example, the EU Commission’s review of the creation of the Angola LNG joint venture between BP, Chevron, ENI, Sonangol and Total (which had no operations of its own in Europe) included an analysis of whether the formation of the joint venture could lead to anti-competitive (exclusionary) effects in relation to LNG regasification terminals in Europe. While the connection between an LNG production joint venture in Angola and European gas infrastructure may appear tenuous, the case illustrates the wide-ranging analysis and high level of scrutiny that can be expected from European competition authorities even in circumstances where there would appear to be little impact on competition within Europe. As part of its analysis, the Commission reviewed the Angola LNG shareholders’ ownership interests and capacity rights in LNG regasification terminals in the European Economic Area and concluded that the creation of the joint venture would not detrimentally affect the ability of competing LNG suppliers to gain access to those facilities. In this regard, the Commission took comfort from the third-party access rules imposed by the EU Gas Directives which apply to regasification facilities, as well as other natural gas infrastructure in the EU.

The Commission’s merger review process may also involve close scrutiny of the parties’ key agreements, such as joint ownership or operating agreements for infrastructure and long-term gas sale agreements and gas transportation agreements. Depending on the circumstances, this review could lead to the authorities questioning the compliance of certain provisions in such agreements with EU competition law (for example, veto rights over infrastructure access, long-term exclusivity and destination restrictions in gas sale agreements). This highlights the importance of a thorough review of these agreements early on when considering a combination impacting the European natural gas value chain.

Given the complexity and global nature of the fast changing gas industry and gas markets, including LNG and pipeline gas and services involving relevant infrastructure, the impact of EU competition law needs careful analysis in the context of most major oil and gas industry mergers and acquisitions.

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