089 – NORWEGIAN OIL AND GAS RECOMMENDED GUIDELINES

FOR

COMPETITION LAW

AWARENESS IN NORWEGIAN OIL AND GAS ASSOCIATION

Translated version

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1. Introduction

The purpose of competition law is to enhance economic efficiency by promoting and safeguarding competition and by punishing anti-competitive behavior.

Norwegian Oil and Gas Association is an independent association representing the Norwegian oil and gas industry and as such will always act in accordance with competition law.

During industry level discussions, due regard must be paid to potential competition law concerns. No discussion or exchange of information among competitors which could reasonably be viewed as anti-competitive should take place.

The aim of this report is to help individuals appreciate the legal risks involved and to handle them by conducting their affairs lawfully. The working group's general recommendation to Norwegian Oil and Gas and its members is to not balance on the knife-edge, but rather err on the side of caution with regard to the spirit of competition law principles.

The paper is organized as follows: In section 2, the background to this working group and its mandate is outlined. Section 3 then describes how present and evolving competition law poses identifiable risks to Norwegian Oil and Gas' members. In light of this discussion, some proposals are presented in section 4 on how to handle the problems identified. As a practical means of disseminating the main messages in this report, a list of don'ts attached as an appendix.

2. Background

This section provides the background to this working group and its mandate.

Article 81 of the Treaty of Rome applies to "associations of undertakings". Individual Norwegian Oil and Gas' members risk being fined if infringement of article 81 has taken place. This liability follows directly from a proposed new EU Regulation which includes a specific rule that explicitly imposes joint and several liability on trade and industry associations and their members.
Moreover, it could be argued that this liability regime even exists under the current regulatory framework.

Against this background, a working group was established by Norwegian Oil and Gas in January 2002. Its mandate was to propose a set of practical guidelines for individuals acting in a Norwegian Oil and Gas' context, either as Norwegian Oil and Gas' employees or on behalf of Norwegian Oil and Gas' members. According to the mandate, the proposal must be put to the Norwegian Oil and Gas Legal Committee and, if endorsed by the Committee, formally approved by the Norwegian Oil and Gas Committee for Industry Policy.

According to its Articles of Association, Norwegian Oil and Gas is an organization comprising approximately twenty oil companies and about fifty other companies doing business upstream on the NCS.

To perform both labor market relevant functions for its members as employers, and to promote its members' shared interest in rational and predictable policies and legal frameworks for upstream activity, Norwegian Oil and Gas is organized in four permanent committees and several subcommittees. The four permanent committees are the Labor Market Committee, the Committee for Exploration and Resource Development, the Construction and Operation Committee, and the Committee for Trade and Commerce.

The group has comprised the following persons:

Endre Stavang, Norsk Hydro – Chair
Signe Thomassen/Torhild Rossum, Norske Shell
Hans Olav Holmen, BP
Oluf Bjørndal, Norwegian Oil and Gas

The working group has had 7 meetings. During the course of these meetings, the mandates of each Norwegian Oil and Gas' subdivision have been screened for potential contradictions with competition law principles. In this screening process, the group has met with Norwegian Oil and Gas' employees with detailed knowledge of the activities in each of Norwegian Oil and Gas' subdivisions. Moreover, the group has met with lawyers from NHO and OGP.

3. Legal Starting Points

The most important competition law concept governing relationships between competitors is independence. Thus the guiding principle for any Norwegian Oil and Gas' member should be to act unilaterally and independently of their competitors.

However, it is recognized that far from all agreements or forms of cooperation between companies on the NCS violate the competition laws. It is the view of this working group that co-operation between license-holders in individual licenses necessary for the production of hydrocarbons must as a general rule be regarded as permissible. The Norwegian authorities have also required the license-holders to cooperate for this purpose and such cooperation is a prerequisite for business activity on the Norwegian Continental Shelf.

What kind of activities might then have illegitimate anti-competitive effects? Let's survey the most important types of potential violation:

First, in a classic illegal "cartel", a group of competitors systematically collude to their mutual advantage - for example, by agreeing not to sell their products below specified minimum prices, or agreeing not to sell their products to each other's designated customers or in each other's allocated territories. Participation in such a cartel is viewed as the most severe infringement of Article 81, and will almost always result in the imposition of fines.

Secondly, the Commission takes an extremely severe view of any agreement, understanding or concerted practice between competitors relating to the price at which goods are to be sold.
For this purpose, "prices" encompasses all matters relating to price - including collective discounts, rebates or profit margins, the collective fixing of base prices and the maintenance of common price lists. The use of common key contract terms may pose difficulties in relation to competition law. Coordination of purchasing or product specifications may also represent a problem in terms of competition law and will need to be subjected to a substantive legal evaluation in each individual case in order to ascertain whether the intended form of cooperation should be avoided.

Thirdly, the application of Article 81 to "concerted practices" means that, even in the absence of an explicit agreement on prices, there may be an infringement if Norwegian Oil and Gas member's prices are coordinated or if information on prices or price increases is shared. The mere fact of parallel price movements is not sufficient to create an infringement, but if there is also evidence of contacts between the competing parties, this may lead to an inference of a concerted practice regarding prices.

Fourth, an agreement or concerted practice between competitors as to the price or other terms to be submitted by bidders in response to an invitation to tender will generally be prohibited under Article 81. There will also be an infringement where, as a result of collusion, competitors have knowledge of each other's proposal tenders even though there is no actual agreement on the price or other terms to be submitted in response to the invitation to tender.
Collusion which leads a company to refrain from a bid is equally dangerous.

Fifth, participation in agreements or concerted practices designed to limit, control or share markets (product markets, customers or geographic markets) is strictly prohibited. Because one objective of EU/EEA law is to ensure a Single European Market, market sharing is viewed with particular severity. No agreement or concerted practice which involves allocation among competitors of national markets within the EU/EEA could ever be subject to an exemption.

Sixth, although any competitor is entitled to take a genuinely independent decision to increase or cut its production or capacity (e.g. based on its own forecast of demand), Article 81 specifically prohibits undertakings from agreeing to limit their production or capacity.
Exemptions for production or capacity limitation agreements can be obtained only in very specific circumstances - for example, where the Commission recognizes the need for a "crisis cartel" under economic conditions where there is excess capacity throughout an industry.
Agreements between partners regarding production levels must be confined to reservoir management, technical or operational reasons such as maintenance or tie-in operations for the relevant production license.

Seventh, although it is recognized that it is important to the competitiveness of Norwegian Oil and Gas' members that they know as much as possible about the market in which they operate and about their competitors, exchanges of information between Norwegian Oil and Gas' members may lead others to suspect improper collusion. The exchange of data relating to *individual* companies - such as figures on quantities of oil, gas and NGL produced and sold, prices, discounts, plans to increase or

reduce production or capacity, etc. - is normally prohibited under Article 81 - except where that information is so outdated that it could not be used as the basis of any concerted practice. However, Norwegian Oil and Gas' members are not prohibited from independently obtaining information about competitors from independent third parties or from obtaining publicly available information.

It is primarily up to Norwegian Oil and Gas' members themselves to take the steps necessary to prevent the violations listed above. However, while membership of a trade association is of course not in itself prohibited, Article 81 applies to "associations of undertakings". In theory, and probably also on practice, individual Norwegian Oil and Gas' members risk fines for infringement of Article 81. As stated above, this liability follows directly from the proposed new Regulation, which includes a specific rule which explicitly imposes joint and several liability on trade and industry associations and their members.

Against this background, it is imperative that not only Norwegian Oil and Gas' employees but also Norwegian Oil and Gas' members take utmost care to ensure that Norwegian Oil and Gas-related activities have no anti-competitive effect.

4. Recommendations

1. Proposal for amendments to the mandates of the Norwegian Oil and Gas committees

In order to eliminate any potential doubt regarding the lawfulness of present Norwegian Oil and Gas' mandates and action plans for the Norwegian Oil and Gas committees, it is recommended that all mandates be provided with the addendum "with due regard to competition compliance".

2. Norwegian Oil and Gas employee competence development

It is recommended that companies participating in Norwegian Oil and Gas' activities, and Norwegian Oil and Gas itself, offer competition compliance training to their staff. Moreover, Norwegian Oil and Gas (JUR) is encouraged to organize a legal seminar on competition compliance on the NCS to sustain the high quality of legal work in this area.

3. Competition Law Awareness in Norwegian Oil and Gas Guidelines

The working group recommends that the enclosed Guidelines be issued by Norwegian Oil and Gas to its own staff and Norwegian Oil and Gas members.

See Appendix

Appendix:

COMPETITION LAW AWARENESS IN NORWEGIAN OIL AND GAS

The purpose of competition law is to enhance economic efficiency by promoting and safeguarding competition and by punishing anti-competitive behavior.

As an independent association for the Norwegian petroleum industry, Norwegian Oil and Gas will always comply with competition law.

During industry level discussions, due regard must be paid to potential competition law concerns. No discussion or exchange of information among competitors which could reasonably be viewed as anticompetitive should take place.

In order to minimize the risk of falling foul of these concerns, it is essential that participants in Norwegian Oil and Gas meetings observe the following guidelines:

DO NOT:

- discuss prices, margins, discounts, credit terms and other essential commercial terms relating to your company's products or services with your competitors;

- discuss tendering or contract terms in any way that might give the slightest indication of anticompetitive behavior;

- discuss quotas or market division/market sharing with your competitors;

- discuss anything else that might reasonably be viewed as anti-competitive in nature;

- supply production figures to your competitors or discuss shutting down production or producing limited volumes.

You should always seek legal advice if you are in any doubt, even the slightest doubt.

As a matter of good practice, Norwegian Oil and Gas will always issue agendas before meetings, and record minutes of proceedings.

Norwegian Oil and Gas urges all its members to offer competition law training to its staff.