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# Antitrust Developments in the US and EU Energy Industries

## What you Need to Know

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December 5, 2013

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## *US Antitrust Restrictions on Energy Industry Conduct*

- Sherman Act Section 1 – prohibits agreements in restraint of trade
- Federal Trade Commission Act Section 5 – prohibits unfair methods of competition
- 2013 – these provisions have been used as the basis for government investigations and private litigation (Sherman Act only) against alleged anticompetitive activities by energy industry companies

## *EU Antitrust Rules and Energy-Specific Regulations*

- **Prohibition** of cartels and other restrictive horizontal or vertical agreements among companies (Art. 101 TFEU)
- **Prohibition** of abusive unilateral conduct by dominant companies (Art. 102 TFEU)
- **Prohibition** of national governments distorting competition by way of State aid (Art. 107 TFEU) or other forms of public intervention (Art. 106 TFEU)
- **EU legislation** (3rd energy package): effective unbundling of networks from up-/downstream business, mandatory third party access, regulated network tariffs (**ex ante**)

## *Institutional set-up in the EU*

- **Commission (DG COMP)** enforces EU antitrust rules against companies and Member states
- **National competition authorities** enforce national (and EU) competition rules against companies
- **National energy regulators** enforce national energy rules adopted by virtue of 3rd energy package
- **Commission (DG ENER)** monitors national energy rules and their implementation in practice, and sues Member states in case of non-compliance with 3rd energy package

## *Links between EU Antitrust and Energy Rules*

- Main **competition problems** in energy sector: market segmentation, territorial restrictions, long-term exclusive transport/supply agreements, third party access refusals (outright or constructive)
- Most of these issues **should be prevented** by 3rd package through ex ante action by national regulators
- But **antitrust rules apply** even on issues subject to ex ante regulation, as long as companies retain scope for independent action (different from US approach in *Trinko*)

## *In re: North Sea Brent Crude Oil Future Litigation*

- Began with European Commission investigation into whether BP, Shell, and Statoil manipulated the market-on-close (“MOC”) prices for North Sea Brent Crude and Brent Crude futures contracts.
- **May 14, 2013:** European Commission raids the offices of BP PLC, Royal Dutch Shell PLC, and Statoil ASA.



## *In re: North Sea Brent Crude Oil Future Litigation*

- **May 17, 2013:** U.K. Serious Fraud Office announces that it is investigating BP, Shell, and Stat Oil.
- **June 24, 2013:** Federal Trade Commission opens an investigation into how crude oil and refined fuel prices are set.



# *In re: North Sea Brent Crude Oil Future Litigation*

- **May 23, 2013:** Prime International Trading Ltd. filed first class action complaint in U.S. against BP, Shell, and Stat Oil alleging Sherman Act and Commodity Exchange Act Violations.
- **October 21, 2013:** Six related class actions centralized in the U.S. District Court for the Southern District of New York.

Case MDL No. 2475 Document 47 Filed 10/21/13 Page 1 of 3

UNITED STATES JUDICIAL PANEL  
on  
MULTIDISTRICT LITIGATION

IN RE: NORTH SEA BRENT CRUDE OIL  
FUTURES LITIGATION MDL No. 2475

TRANSFER ORDER

**Before the Panel:** Pursuant to 28 U.S.C. § 1407, plaintiff in an action pending in the Southern District of New York moves to centralize this litigation in that district. The litigation encompasses the six actions listed on Schedule A.<sup>1</sup> Five of those actions are pending in the Southern District of New York, and the sixth (*Harter*) is pending in the Middle District of Louisiana. With the exception of the *Harter* plaintiff, all responding parties support granting the Section 1407 motion.<sup>2</sup>

In opposing centralization, the *Harter* plaintiff argues, *inter alia*, that his action is brought on behalf of a unique putative class, and that it involves certain matters particular to the oil business in Louisiana and Texas. Many MDLs, however, encompass non-overlapping classes. See, e.g., *In re: Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Prods. Liab. Litig.*, 598 F. Supp. 2d 1372 (J.P.M.L. 2009) (centralizing five non-overlapping putative statewide class actions). In addition, Section 1407 “does not require a complete identity or even a majority of common factual issues as a prerequisite to centralization.” See *In re: Park West Galleries, Inc., Litig.*, 887 F. Supp. 2d 1385, 1385 (J.P.M.L. 2012). Here, the *Harter* action’s factual overlap with the other actions is extensive. See *Harter* Compl. ¶ 47 (expressly acknowledging that plaintiff had “liberally obtained information . . . from counsel’s pleadings in the [constituent] Prime International Ltd. case”). Indeed, the factual issues central to all actions (including *Harter*) – regarding whether defendants manipulated North Sea Brent Crude oil prices and the prices of Brent Crude Oil futures contracts – are undeniably complex. Further, with defendants headquartered in various locations in Europe, discovery is certain to be international in scope.

On the basis of the papers filed and hearing session held, we find that the actions listed on Schedule A involve common questions of fact, and that centralization in the Southern District of New York will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. As mentioned above, all actions in this docket share factual issues arising

\* Judge Sarah S. Vance took no part in the decision of this matter.

<sup>1</sup> The Panel has been informed of three additional related federal actions, all pending in the Southern District of New York.

<sup>2</sup> The other responding parties are plaintiffs in the Southern District of New York *Sevy*, *Benvenuto*, and *White Oak* constituent actions, plaintiff in the Southern District of New York *Karkut* potential tag-along action, and defendants BP p.l.c. and Statoil ASA.

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RUBY J. KRAJICK, CLERK  
BY *Shante Jones*  
Deputy Clerk



## *U.S. Dep't of Justice Hydraulic Fracturing Investigation*

- **May 30, 2013:** U.S. DOJ opened a civil investigation into the market for pressure pumping services used in hydraulic fracturing.
- DOJ has issued civil investigative demands to Baker Hughes, Inc., Schlumberger Ltd., and Halliburton Co.



## *Cherry Canyon Resources LP v. Halliburton Co. et al.*

- **July 31, 2013:** Class action filed against Halliburton, Schlumberger and Baker Hughes claiming they conspired to raise fees for fracking services from 2011 to the present in violation of the Sherman Act.
- **October 8, 2013:** Named plaintiffs voluntarily withdrew suit. (Note: analyst had claimed suit was unlikely to succeed due to competitive nature of the industry.)



## *FTC Investigation re Ethanol*

- **August 2, 2013:** Senators Chuck Grassley and Amy Klobuchar sent a letter to the FTC and DOJ, asking the agencies to investigate allegedly anticompetitive practices in the oil industry. Letter asserted that the oil industry may be taking steps to curb the availability of gasoline with higher levels of ethanol.
- **August 19, 2013:** FTC agreed to open investigation.



## *Oneok Inc., et al. v. Learjet, Inc., et al. (In re Western States Wholesale Natural Gas Antitrust Litigation)*

- **December 2, 2013:** Supreme Court asked U.S. Solicitor General to weigh in regarding whether the Supreme Court should hear a case involving whether the Natural Gas Act (NGA) preempts a multidistrict litigation accusing energy companies of fixing the price of natural gas.
- At issue is whether the NGA gives FERC the right to oversee first or retail sales of natural gas and preempts state antitrust challenges to energy rates and practices relating to those sales.



## *Market Manipulation Rule*

- FTC tasked with examining and identifying market manipulation in the petroleum sector and taking action where necessary
  - Pursuant to Section 811 of the Energy Independence and Security Act of 2007
  - Targets “any manipulative or deceptive device or contrivance” “in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale”
  - Final rule became effective on November 4, 2009



# *FTC Final Rule Regarding Manipulation in the Petroleum Industry*

- Additional Developments
  - In April 2011 the FTC and Commodity Futures Trading Commission signed a memorandum of understanding to facilitate sharing non-public information regarding on-going investigations
    - FTC Chairman Jon Leibowitz said at the time: “With gasoline prices on the rise, we are committed to doing all we can to ensure the petroleum markets are competitive. . . . [T]his MOU improves the ability of the FTC and CFTC to take action if and when we find market manipulation.”
  - Also in April 2011, Attorney General Holder announced the creation of an Oil and Gas Price Fraud Working Group
    - Includes representatives from the Department of Justice, National Association of Attorneys General, CFTC, FTC, Dept. of Treasury, Federal Reserve, SEC, Dept. of Agriculture, and Dept. of Energy

# *FTC Final Rule Regarding Market Manipulation in the Petroleum Industry*

- Final rule prohibits market manipulation in the petroleum industry
- Specifically, the final rule prohibits any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, from
  - A) knowingly engaging in any act, practice, or course of business – including making any untrue statement of material fact – that operates or would operate as fraud or deceit upon any person; or
  - B) intentionally failing to state a material fact that under the circumstances renders a statement made by such person misleading, provided that such omission distorts or is likely to distort condition for any such product
- Penalties
  - Anyone violating the rule faces civil penalties of up to \$1 million per violation per day, in addition to any relief available to the Commission under the FTC Act

## *Restrictive Agreements Sanctioned by EU Commission*

- **Market segmentation** agreement in context of joint pipeline project (MEGAL) between E.ON and GDF on German/French gas markets
- **High fines imposed** in 2009: 553 million Euros each, reduced to 320 million Euros by General Court in 2012
- Several **cases closed/settled** without fines after deletion or adaptation of territorial and use restriction clauses in transport/supply agreements
- Frequent subject in **international arbitration** (often involving Gazprom as supplier)
- This issue is typically **not covered by ex ante** regulation



## *Abusive Conduct by Dominant Operators*

- **Sector Inquiry Report 2007:** DG COMP found competition problems in EU gas and power markets, which has led to stricter 3rd package and many antitrust cases, e.g.
- **Exclusionary abuses:** preventing competitors' access to networks (RWE, ENI, GDF Suez, E.ON gas), to customers (Distrigas, EDF), or to production and trading (CEZ)
- **Exploitative abuses:** imposing price increases on customers (E.ON power, Svenska Kraftnät)
- None of these cases was sanctioned with a fine, all led to **binding commitments** being imposed by the Commission (fines can be imposed in case of non-respect)

## *Nature of Commitments*

- **Structural:** divestment of entire transmission systems (E.ON power, RWE, ENI) or of power plants (E.ON power, CEZ – April 10, 2013) to independent purchasers
- **Behavioural:** release of gas supply capacities (Distrigas), gas transport capacities (E.ON gas, GDF Suez), or power transport capacities (EDF)
- Some of these remedies could have been achieved with **ex ante regulation**, and some even went beyond what was required by 3rd package (e.g. asset divestments)

## *Main Ongoing Investigation: Gazprom*

- **September 4, 2012:** Open proceedings on abusive conduct, (i) market segmentation by hindering cross-border flows, (ii) prevent diversification of gas supplies, (iii) unfair pricing (gas-oil price link)
- **Next steps ahead:** Statement of Objections, defence statement, then possibly prohibition decision with a fine
- **Enforcement:** possible against entities located within EU, more complex vis-à-vis Moscow (e.g. Putine decrees)
- **Scope for settlement:** requires substantial commitments, strictly implemented over coming years (cf. Microsoft)

## *EU Action against Member States*

- **Commission decisions** against Greece in 2008/2009: exclusive access to lignite for public power company (DEI) reinforces DEI's dominance, contrary to Art. 106 TFEU
- **General Court (Sep 20, 2012)**: annulled decisions for not showing DEI's abusive conduct; Commission's appeal to EU Court of Justice: such conduct not needed under Art. 106
- **Selective State aid measures**: to be notified to Commission by Member states and approved, otherwise Commission may oblige Member states to recover aid (e.g. promotion of renewables, compensation and exemption rules)

## *US Compliance Issues*

- Common theme in all US matters – claim competing energy companies are engaged in an unlawful conspiracy
- Even assuming these claims have no merit – defending against antitrust investigations and litigation can be time-consuming and expensive – document requests, depositions, legal and expert fees
- Important to have a strong antitrust compliance program that:
  - Instructs employees that all decisions regarding pricing, other terms of sale, marketing strategy must be made unilaterally and independently.
  - Prohibits employees from exchanging information, discussing or agreeing with competitors about prices, marketing strategy, or other terms of competition.
  - Prohibits employees from agreeing with competitors whether to do business or not to do business with any customer or supplier, or to agree to restrictions on doing so (e.g., agreeing with competitor to instruct franchisees to limit sales of product X).
  - Instructs employees not to create documents, including e-mails, suggesting any such agreements or discussions are taking place.
  - Instructs employees on compliance with the FTC market manipulation rule and the FTC compliance guide at <http://www.ftc.gov/os/2009/11/091113mmrguide.pdf>.

## *EU Compliance Issues*

- Energy companies in EU must fully comply with regulatory obligations including unbundling and third party access
- Energy regulators have investigation powers and can impose fines/penalties on companies in case of violation
- But: sector-specific compliance provides no safe harbor under antitrust rules; Commission has gone beyond the energy rules in some antitrust cases
- Extra burden for incumbent operators, but wider scope for foreign entrants to bring complaints
- Every beneficiary of State aid must verify EU approval to exclude recovery risk

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# Questions?

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Thank You!





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