LUISS GUIDO CARLI
LIBERA UNIVERSITA' INTERNAZIONALE DEGLI STUDI SOCIALI

DIPARTIMENTO DI GIURISPRUDENZA

A.A. 2014/2015

TESI IN EUROPEAN BUSINESS LAW

The Liberalization of Energy in the Gas Market

RELATORE: Prof. De Luca Nicola

CANDIDATO: Beatrice Cancrini
MATR: 106493

CORRELATORE: Prof. Ugo Patroni Griffi

INDEX

Chapter II

The implementation of the European legislation in Italy

Chapter III

The ENI conviction for abuse of a dominant position by the Italian Antitrust authority

Introduzione

Nel corso dell'ultimo decennio il mercato energetico europeo è stato investito da profondi cambiamenti, predisposti principalmente al fine di una progressiva liberalizzazione e privatizzazione dei settori dell'energia elettrica e del gas naturale. Le riforme deliberate, in primo luogo a livello europeo, e in seguito oggetto di recepimento da parte dei governi degli stati membri nei rispettivi ordinamenti giuridici, hanno modificato radicalmente gli assetti organizzativi delle industrie nazionali dell'energia.

Nel presente lavoro si è avuto modo di esaminare il mercato del metano, analizzandone nel dettaglio l'evoluzione dall'originario regime monopolistico fino ad arrivare al più recente processo di deregolamentazione. La trasformazione generale delle discipline giuridiche dei servizi di pubblica utilità, a cui abbiamo assistito a partire dagli anni Novanta, ha comportato, non a caso, il passaggio dalla situazione ormai nota, in cui nel mercato agisse esclusivamente un monopolista statale, verticalmente integrato quindi lungo l'intera filiera produttiva, ad una forma di competizione concorrenziale in cui più operatori economici sono chiamati ora a confrontarsi e gareggiare gli uni con gli altri entro i confini di un'unica piazza allargata maggiormente contendibile.

Alla luce della nuova politica della concorrenza instaurata dalla Commissione Europea allo scopo di creare concretamente un mercato energetico comune, al fine di poter svolgere una siffatta indagine è stato indispensabile scomporre la struttura industriale dell'offerta del gas naturale nelle differenti fasi che ne costituiscono la "catena del valore". Parallelamente a ciò è stato necessario far riferimento alle innovazioni e agli sviluppi del quadro normativo determinati dal legislatore europeo per ciascuna attività e funzione produttiva attraverso l'emanazione di apposite direttive di armonizzazione.

Ciò posto, il primo capitolo rappresenta una disamina dei più importanti interventi legislativi in materia: sono tracciati i punti chiave alla base della normativa comunitaria, ossia il riconoscimento di un diritto di accesso alle infrastrutture di rete non discriminatorio verso nuovi terzi attori e l'eliminazione del ruolo pubblicistico dello Stato, ora convertito in regolatore.

Tali provvedimenti perciò sono finalizzati a smantellare le concentrazioni in un unico operatore delle diverse fasi del ciclo energetico. In altri termini, il fine ultimo di tali interventi normativi è proprio la soppressione dei monopoli legali e delle connesse rendite a beneficio dei vecchi enti pubblici economici, ai quali negli anni passati era affidato il controllo delle cosiddette "public utilities" per via del carattere di monopolio naturale che coinvolge tali servizi

essenziali d'interesse universale per la comunità sociale. Nello specifico l'attenzione è indirizzata verso una delle tecniche di regolamentazione più rilevanti introdotte dal Parlamento Europeo, ossia l'"unbundling", quale mezzo per lo "spacchettamento" societario dei cruciali sistemi di trasmissione e distribuzione.

Nel capitolo secondo il recepimento della direttiva comunitaria di liberalizzazione all'interno dell'ordinamento giuridico italiano consente di approfondire nel dettaglio i criteri di riorganizzazione organica della filiera industriale e le tecnologie di produzione previste per il metano. L'analisi del decreto legislativo n. 164/00, noto come "Decreto Letta", permette di analizzare contemporaneamente sia la configurazione ed il funzionamento del mercato che le innovazioni legislative apportate in merito.

Nel terzo capitolo si è avuto modo di affrontare il caso ENI-TTPC, vale a dire la condanna per abuso di posizione di mercato dominante comminata inizialmente all'ENI nel febbraio 2006 da parte dell'autorità antitrust. La sentenza per la violazione di una norma a danno del libero gioco della concorrenza, come consueto, è stata accompagnata da una sanzione pecuniaria, nella fattispecie consistente in 290 milioni di euro, ossia la più alta pena mai imposta in Italia nei confronti di una singola azienda, seconda nel Vecchio Continente soltanto alla storica multa da 497 milioni di euro irrogata alla

Microsoft di Bill Gates dalla Direzione Generale della Concorrenza guidata dall'allora Commissario Europeo Mario Monti.

Si è avuto altresì modo di osservare come nel marzo 2009 la Commissione notificò all'ENI una comunicazione formale degli addebiti sostenendo, dapprima in via preliminare, la possibilità che l'impresa stesse abusando della sua posizione dominante sui mercati del trasporto del gas nei seguenti modi: rifiutando di concedere ai concorrenti l'accesso alla capacità disponibile sulla rete; concedendo l'accesso in modo poco fruibile; limitando strategicamente gli investimenti nel sistema internazionale di gasdotti di ENI. La domanda di accesso sia a breve che a lungo termine ai gasdotti era molto elevata. Tale situazione determinava, secondo la Commissione, sia un accumulo che un degrado della capacità, nonché un sottoinvestimento strategico.

Il procedimento antitrust volge al termine nel Settembre 2010, anno in cui la Commissione europea rese giuridicamente vincolanti gli impegni proposti da ENI, aprendo così l'accesso ai mercati italiani del gas naturale e creando al contempo una sana concorrenza e prezzi potenzialmente inferiori per la fornitura di gas alle imprese e alle famiglie in Italia.

Assumendosi tale impegno ENI dovrà cedere le partecipazioni

detenute in tre gasdotti transnazionali che trasportano gas in Italia: i gasdotti TAG, TENP e Transitgas. Questa soluzione ha lo scopo di garantire che le richieste presentate da terzi per accedere ai gasdotti siano trattate da un organismo indipendente dall'ENI, principale fornitore di gas in Italia.

E' opportuno evidenziare che, dopo le recenti decisioni riguardanti E.ON e RWE in Germania e GDF Suez in Francia, questa è ora la nona decisione di rilievo adottata da quando l'indagine sul settore dell'energia del 2007 ha concluso che l'inefficienza e gli alti costi dei mercati andavano a scapito dei consumatori e delle imprese.

Il comportamento abusivo ad infrazione dell'articolo 102 del Trattato che istituisce la Comunità Europea riscontrato nel caso ENI ci consente infine di comprendere in realtà come sia molto difficile innestare una forma di mercato concorrenziale in ambiti di monopolio naturale come quelli energetici, costantemente soggetti a pratiche lesive della concorrenza sferrate da parte dei cosiddetti "incumbent players".

Introduction

The European energy market has been affected by numerous changes during the last decades. These were primarily caused by a progressive liberalization and privatization of both the electrical energy and natural gas sectors. In order to achieve such goals reforms were enacted initially at community level, and have soon been transposed into the national legislations of the European Member States. These reforms have radically modified the organizational frameworks of national energy industries.

This dissertation is centred upon the analysis of the natural gas market, focusing, in particular, on its development from the original monopolistic regime to the recent process of deregulation. The progress hence evaluated was principally enhanced by the general transformation of the legislation in the sphere of public services, beginning in the 1990s. This transformation was characterized by a departure from the classic situation of the market being monopolised by one public entity, vertically integrated and thus operating in the entire production chain, to arrive to a quasi-competitive environment, in which many economic operators compete with each other.

In order to analyse the new competition policy adopted by the European Commission with the aim of creating a common energy market, it was ultimately necessary to dismantle the industrial structure of the natural gas supplies. Thus, it was possible to evaluate the different phases that contribute to the construction of the, so-called, "value-added chain". At the same time, throughout the dissertation, reference is made to the regulatory innovations brought forth by the European legislator for each activity and productive function of the supply chain by means of the enactment of harmonization directives.

The first chapter focuses on an assessment of the most important legislative measures adopted on the mater. It examines the key points of the European legislation that is directed at the granting of a non-discriminatory right of access to the infrastructures to third party actors, accompanied by a dismantling of the State's role as a public authority, and the endorsement of a new role as a "regulator".

The European legislative provisions are thus aimed at demolishing the concentration of the various phases of the energy cycle in one single operator. In other words, these regulatory measures have upheld the suppression of the legal monopolies of the old public entities that had previously been granted encompassing control over the "public utilities". Focus is specifically addressed to one of the techniques thus employed by the European Parliament, the, so-called, "unbundling".

The latter being, in fact, an effective corporate means of separating the natural gas transmission and distribution systems.

The second chapter is targeted at the analysis of the transposition of the European liberalization directive in the Italian legal system. It therefore endorses the examination of the criteria adopted for the industrial reorganization of the techniques operated for the production of methane gas. The evaluation of the Letta Decree (legislative decree n. 164/00) permits a thorough review of the functioning of the market and of the legislative innovations that have been adopted its respect.

In the third chapter, the focus of the discussion turns to the study of an important case initiated by the Italian Antitrust Authority: the ENI conviction for abuse of a dominant position of February 2006. The ruling for the violation of the competition legislation was accompanied, as is usually the case, by a pecuniary sanction. However, in this circumstance, the peculiarity of the penalty was its entity, 290 million euros, that has rendered it the highest sanction ever imposed in Italy on a single company, and the second highest ever imposed in Europe after the 497 million euros charged on Bill Gates's Microsoft.

In March 2009, the European Commission notified ENI in a formal Statement of Objections of its preliminary view that it may be abusing

its dominant position on the gas transport markets with the following practices: by refusing to grant competitors access to capacity available on the network; by granting access in an impractical manner and; by strategically limiting investment in ENI's international transmission pipeline system. Demand for both short- and long-term access to the pipelines was very significant. This, in the Commission's view, amounted to capacity hoarding as well as capacity degradation and strategic underinvestment.

The proceedings initiated by the Italian Antitrust Authority were finally settled in September 2010, when the European Commission rendered the commitments offered by ENI legally binding. This has enabled the Commission to fulfil its preeminent aim: to open up access to Italy's natural gas markets in order to promote healthy competition and potentially lower prices in the supply of gas to companies and to households in Italy.

The commitments ENI offered in order to settle the antitrust proceedings essentially implied that the Italian energy giant will divest its shares in three international transport pipelines to Italy: the TAG, the TENP and the Transitgas pipeline. This will ensure that third-party requests to access the gas pipelines will be dealt with by an entity independent of ENI, the main supplier of gas in Italy.

It is important to note that, after the recent decisions involving E.ON and RWE in Germany and GDF Suez in France, this is now the ninth major decision since the 2007 energy sector inquiry that had shown consumers and businesses were losing out because of inefficient and expensive markets.

Finally, the abusive behaviour of the ENI-TTPC case resulted in an infringement of (now) Article 102 of the Treaty on the Functioning of the European Union. This violation heightens the awareness of the difficulties that characterize the attempt to establish a competitive market in sectors, such as the production of natural gas, in which the establishment of a monopoly arises as a natural consequence of the functioning of the supply chain itself. Not surprisingly, gas production is constantly subject to practices that distort competition in the market, such as those carried on by the, so-called, “incumbent players”.

CHAPTER ONE

THE INTERNATIONAL SITUATION REGARDING ENERGY RESOURCES: THE LIBERALIZATION OF ENERGY IN THE GAS MARKET IN EUROPE

1. The European Union's energy policy

1.1 The International Gas Market.

The natural gas market emerged in Western Europe at the end of the Second World War and it became significant in the late 1960s and early 1970s when national governments were actively involved in the development of European gas and electricity industries. Such an involvement, in context of the post-war reconstruction, was due to the fact that governments started, more or less, from scratch. Natural gas reserves were (and still are) unevenly distributed and this contributed to the creation of the European gas monopolies.[1] The heavy transport charges and the natural monopoly characteristics of the natural gas network were a structural cause for the monopolistic organization of this sector.[2] In addition, there was a strong belief in central planning, whether in the communist context, or in the semi-socialist context in Western Europe and the biggest gas reserves were mainly found in politically sensitive regions. Finally, strong European orientation towards nuclear power anticipated big requirements of security.

---

[1] Roman Zyuzev "*Gas Market liberalization as a key driver of change of the European gas market and its influence on the* strategies of the main players", Centre International de formation Europeenne, Nice 2008.

2 Pirovska M. "*Interconnection of East European national markets: towards a cooperation between players?*" in Energy Policy Vol. 23 (2007), pp. 26-28.

At the heart of the market were State-owned national transmission companies that enjoyed monopolies in the import and distribution of natural gas. However, certain privately owned enterprises such as German "Ruhrgas" also held dominant market positions in natural gas transmission. European markets were separate and structured around national operators that were quasi–vertically integrated, regulated monopolies. Vertical integration downstream gave a domestic player a dominant position regarding imports, transportation, distribution/storage and supply of natural gas.[3]

The national transmission companies owned the pipeline systems and had sole access to them. This position gave them considerable market power with respect to customers, including the ability to charge discriminatory prices: each customer category was charged a price close to that of the available substitute (oil), thus being charged the maximum it would pay. Natural gas production was also in the hands of a limited number of companies, usually with significant State–ownership, such as Norwegian "Statoil" and Dutch "Gasunie". In most European countries, regional and local authorities also managed distribution in the form of local distribution monopolies. Still, there were also some countries, such as France, Spain and the United Kingdom, that chose to integrate distribution with gas transport monopolies. In Eastern Europe and the Union of Soviet Socialist Republics, the gas market was entirely controlled by the Government during the communist era. In these countries, natural gas was considered as a public good that was supplied locally at subsidized prices well below their market value. Government often

[3] United Nations Economic Commission for Europe – Committee on Sustainable Energy, Working Party on Gas Study "*The impact of liberalization of Natural Gas Markets in the UNECE region – Efficiency and Security*" (2012), p. 8.

retained a dominant role in the natural gas market through the respective State companies for years after the fall of the communist regime.[4]

As for the background described above, the European gas market before the liberalization developed on two separate levels.[5] On the national level, with the spread of national or regional transport or wholesale monopolies. These monopolies flourished with the growth of national production, and later on contributed to the setting up of the major gas importation infrastructures with the producers. The gas market was also established on the European level, which is characterized by a two–sided oligopoly, balanced between major producers and major national companies, with the exception of the United Kingdom, which has long since differed from the continental market. Therefore, the European gas market was mainly organized as an oligopoly of producer-exporters from countries outside European Union (Algeria, Norway, Russia) and a purchasers' oligopoly, including gas companies in European countries (such as Gaz de France in France or SNAM in Italy), which were in monopoly or quasi monopoly positions in their national wholesale markets. This scenario differed from one country to another.[6]

Liberalization started in the United States, in Canada, in the United Kingdom and in Australia. In the United States, the natural gas industry went through a metamorphosis following the enactment of the Natural Gas Policy Act of 1978. The industry changed from a heavily regulated industry to a virtually free, competitive market. Prior to liberalization starting in late 1980s, the British gas industry was structured with many natural gas producers feeding their output into British Gas, with the latter imposing its terms and

[4] *Ibid*., p. 9.
[5] Percebois, J. "*La politique pétroliere et gaziere de la France depuis 1945*", in Energy Policy, Vol. 27 (1999), No.1, pp. 9-16.
[6] Zyuzev, p. 20.

conditions on the upstream producers. The market was progressively liberalized between 1986 and 1996 and it was organized on a competitive basis, with production in the North Sea using a system of short-term contracts. Until construction of the interconnector, the market operated separately from the continental market.[7]

1.2 The European Union's regulation on natural gas and the problem of overall need of energy.

In the European Union, the rise of natural gas as an essential energy resource for the achievement of national energy policies objectives has been greatly influenced by three geopolitical developments. These succeeded one another in the three decades following 1970. The first development refers to the 1970 oil shocks. This pointed out the weakness in the European Union's energy policy. In the aftermath of the shocks, a need for energy diversification was triggered throughout Western European economies.[8] Secondly, around 1980, major changes occurred within national patterns of governance. As a consequence, traditional employment policies, which favored the production and use of a limited array of energy resources, [9] were challenged and dismantled. This opened the door for the growth of the natural gas industry. As for the third development, starting with 1990s, global environmental concerns emerged on the European political agenda and played a significant role in redefining the composition of the Member States' energy mixes by making the natural gas the fuel of choice for consumers interested in its low environmental impact. Protectionist approaches nurtured by some of the

[7] United Nations Economic Commission for Europe, p. 9.
[8] M. Waloszyk "*Law and Policy of the European Gas Market*", Edward Elgard Publishing Ltd (2014), p. 10.
[9] For example, coal.

largest Member States that endorsed traditional energy resources such as coal and nuclear energy were challenged by the adoption of the Kyoto protocol in 1997 and most recently by the nuclear incident at Fukushima, in Japan.[10]

Today natural gas represents the world's fastest growing primary energy resource and its consumption is supposed to double by 2030[11], overtaking oil, which has been the world's leading energy resource. Yet, from a legal point of view, gas appears to have a complex nature. This is reflected in its simultaneous qualification as a commodity, a service placed under public service obligations and a network industry, prone to thriving under monopoly. Understanding the complexity of this energy resource is a necessary step in comprehending the nature of regulation, competition policy and law applied to this sector and the obstacles to achieving the market liberalization goals.[12] The coexistence of these aspects influenced the intricacy of the legal framework accompanying the EU gas market. Furthermore, each feature of the natural gas is regulated by different European and national law provisions, which have to be taken into consideration. There is no unitary European energy law addressing the gas sector. Single market principles, environmental provisions, international law covering trade relations, competition law and policy interact with specific sector legislation in shaping the market.[13] Complementary to an elaborate legislative framework, the understanding of gas as a commodity, service or network industry attracts a specific institutional alignment, reflected in the organization of the market's institution at all layers of the regulatory structure.

There are different types of gas that are traded on Member States' energy markets and that can be distinguished from one another, depending on

[10] http://ec.europa.eu/energy/nuclear/safety/doc/20110525_eu_stress_tests_specifications.pdf
[11] M. Waloszyk, 2014, p. 11.
[12] Ibid.
[13] M. Waloszyk (2014), p. 11.

their energy quality.[14] In this sense, *gas as a commodity* produced from different fields is likely to field different energy content.[15] *As a service* gas is subject to public obligations, since the safety of its supply is essential to protect and satisfy the needs of end-consumers.[16] In its perception as both a *commodity* and a *service*, natural gas is primarily governed by the single market principle of free circulation of goods and services in the EU, sanctioned by the provisions of the TFEU and its predecessors.[17] In addition, the interpretation of gas as a *network industry* brings additional complexity to such legal framework, by underlying its infrastructural aspect, which, in the context of the single market project, has to respond to requirements of interconnection and interoperability of national grids, as well as network access demand.

At the very first stage, the European Commission published a white paper entitled "The Internal Energy Market" in 1988, with the aim of establishing a single energy market by 1992. However, the creation of a single market for energy presented far more serious obstacles than for other commodities. In addition to the European Commission's efforts to enact sector

[14] Cameron Peter D. "*Competition in Energy Markets Law and Regulation in European Union*". 2nd edn. Oxford University Press, Oxford p. 25.

[15] "Energy quality is an important aspect to consider when addressing energy efficiency objectives, security of supply, trade and safety, but also when ensuring the interoperability of transmission and distribution systems across Member States. Network users must provide the responsible transmission operator with information upon the quality of the gas they intend to supply. Should the natural gas for which access is demanded fail to meet the required parameters of the transmission system operator (TSO), the latter may refuse to transmit the gas" (Article 4.6 of the Operational Order of a Transmission System Operator EUSTREAM, 2007).

[16] Although both Telecommunications and Electricity are associated with the concept of universal service, this is lacking from the specific sector regulation of the EU gas market, while gas is a substitutable energy resources. However, this does not exempt the supply of gas from public service obligations, but limits its interpretation from a universal service point of view.

[17] Title II and Title IV of the TFEU. Please note that the double sided nature of gas allows the emergence of legal constraints to the application of this Treaty provisions to natural gas sector. Article 36 TFEU stipulates that the provisions related to the free movement of goods can be submitted to certain exemptions, should such be required for public reasons. During the past, Member States have invoked their security of supply obligations in order to elude the application of general rules on trade and competition to natural gas cases.

specific regulation, the European Courts have developed their own case law on energy issues, and especially those resulting from the specific structure of network industries. In a series of cases originating in 1990s[18], the Court of Justice of the European Union denounced the monopolies over the import and export of gas and electricity, justifying its findings on the basis of article 37 of the TFEU (former article 31 of the TEC).[19] Certainly the 1990s represented the beginning of the European Court's case law in the energy field and the decisions of the time reflected an attempt by the Court to maintain a balance between the Commission's novel ideas and Member States' sovereign rights upon national energy matters. The approach of the Court has been defined "cautious" *vis-à-vis* the European Commission's behavior. It was justified by the absence of Treaty provisions guaranteeing supranational competencies in this area, as well as by the inability to rely on sector specific secondary law, until towards the end of 1990s.[20]

Notwithstanding the Court's case law, the European institution that has advocated most fervently the idea of an energy internal market has been the European Commission.[21] Since 1992, the liberalization of gas and electricity markets has been a critical agenda for the European Commission. The promotion of Trans-European Networks added momentum to the political drive of liberalization of energy markets in the European Union. The Price Transparency Directive in 1990[22] and the Gas and Electricity Transit Directive

[18] *Commission v. France*, Case C-159/94, *Commission v. Italy*, Case C-158/94, *Commission v. Netherlands*, Case C-157/94.

[19] This required Member States to adjust progressively any state monopolies of a commercial character so as to prevent discrimination between nationals of different Member States regarding the conditions under which goods were produced and marketed.

[20] M. Waloszyk (2014), p. 18

[21] Talus-Kim, 2007a "Role of the European Court of Justice in the opening of Energy Markets". Springer Berlin/Heidelberg , Vol. 8, No. 3, pp. 435-448.

[22] Council Directive 90/377/EEC of 29 June 1990 concerning the Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users.

of 1991[23] can be regarded as first steps in the opening of the European energy markets to competition.[24] The latter Directive allowed the use of pipelines of other nominated gas companies, provided that gas crosses an internal European border.

Until the present day, European Union's efforts in creating an internal energy market are outlined in three consecutive energy packages. Each package has seen a gradual increase in the opening to competition of the EU energy market, an expanse of the regulatory oversight over market players, a bolder application of competition tools to market harming behavior, a reinforcement of the security of supply, a greater protection of consumers and ultimately deeper energy market integration.[25]

1.3 The First Gas Directive

During 1991 the European Commission started to work on its main proposal for the realization of a true internal energy market. This was ultimately stimulated by developments in the UK, where the liberalization of gas markets had already begun. Discussions on the liberalization of gas markets in the EU went on for several years, and a political agreement on a new EU Gas Directive was finally reached in December 1997. After being adopted by the Energy Council with a unanimous common position, the EU Gas Directive was finally approved by the European Parliament in June 1998 and entered into force on August 1998.[26] The First EU Gas Directive aimed to create a full competitive market in natural gas through common rules for transmission, distribution, supply and storage. In particular, the key objectives

[23] Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids.
[24] United Nations Economic Commission for Europe, p. 9.
[25] M. Waloszyk (2014), p. 22.
[26] Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas.

of that Directive were (i) to provide fluidity in gas flows and improve security of supply and industrial competitiveness (ii) to open up the transmission network and storage facilities to third party access, so that *eligible customers* could buy gas directly from producers if they wished to do so.

The First Gas Directive laid down a set of common rules and procedures relating to the organization and functioning of the natural gas sector. The key elements were:

- To establish a single natural Gas Market in Europe, which would be integrated, competitive and regulated at EU level. This objective was stated in the declaration of the European Council in Lisbon (2000) aiming to make the European economy the most competitive in the world. In order to create an internal gas market, national markets must be harmonized to some extent and new rules must be adopted to run the gas sector, previously managed at national level.
- To boost the competitiveness of European energy undertakings against international competitors by allowing the market to operate freely. The initial steps taken towards the changing of the industry structure and network access conditions regarded the introduction of legal unbundling.
- To improve the overall structural efficiency of the European gas market and ensure that households and industrial users are free to choose their suppliers. Thus, competitive pressure must be such that operators are forced to realize productivity gains and/or decrease their margins, i.e. via economy of scale.
- The negotiation and regulation of Third Party Access (TPA).[27]

[27] Nadine Haase "*Regulation for competition in European Gas Market: the impact of European Law and facilitating factors*" (2008) ECPR Standing Group on Regulatory Governance.

Such framework of rules will be analyzed in further details during the following paragraphs.

So, since 1998, things have been moving fast. Member States have prepared the implementation of the Gas Directive[28] to allow competition and market opening to take effect as from 10 August 2000, the date by which Member States were obliged to transpose the directive into national legislation. This date was a milestone in this process: it has marked the beginning of a new era in European gas market development and represented a fundamental change in the organization and operation of gas market.[29]

By opening up national markets to competition and by integrating the 15 national gas markets into one single market, free of artificial obstacles to cross-border trade, a wide scope gas-to-gas competition was created. Customer choice was the key to competition. As from 10 August 2000, so called "eligible customers" were free to choose their gas suppliers. In order to be effective, this freedom of choice of suppliers required non-discriminatory access to the gas network throughout Europe. Empowering the consumer through customer choice gave a push to many effects as it pressured all the operators along the gas chain to improve customer service, cut costs and reduce prices. Opportunities for new entrants into the gas market increased

[28] "In the 1st Gas Directive, only lenient account unbundling is applied to all gas systems and storage sectors. In this regard, a regulatory pattern could be found: Transportation=Distribution=LNG facilities=Storage.
However, three different sets of rules are adopted in the 2nd Gas Directive. TSOs and DSOs are required to adopt the rigid form of unbundling, combining account, functional and legal unbundling while the SOs for LNG facilities and TPA and Non-TPA Storage are subject to a lenient account of the unbundling regime. Besides, small DSOs can be excluded from all or certain part of the rigid unbundling, which means that the regimes in the distribution sector are less rigid than those in the transportation sector since there is no exception for TSOs. In this regard, a new regulatory pattern is formed: Transportation≥ Distribution ≥ LNG facilities=TPA & Non-TPA Storage."
For further information see, *The Third European Energy Liberalization Package: Does Functional and Legal Unbundling in the Gas Storage Sector go too far?*, ANTON MING-ZHI GAO, 2008, p. 13.

[29] Euractive article "*Liberalization of the EU Gas Sector: impacts and prospective of future development*" (2008).

this pressure to the advantage of consumers. So, new entrants were able to trade in the internal gas market and to embark on new infrastructure projects, hence expanding and diversifying supply capacity and enhancing the security of supply.[30]

The old Member States had to implement the First Gas Directive by the end of July 2000. In autumn 2000 the European Commission opened infringement procedures against France and Luxembourg for not transposing the First Gas Directive's provisions into national law. Later, France announced a delay of the transposition of the First Directive and the partial privatization of Gas de France until after the French parliamentary elections in 2002. Privatization of the state–owned company was considered too highly politically charged to tackle during the election campaign. As a consequence, the European Commission brought the case to the Court of Justice on 7 May 2001.[31]

1.4 The Second Gas Directive

In March 2001 and in April 2001 the Council Meeting in Stockholm and the Energy Council did not lay down the next steps to further accelerate the gas reform. Discussions were only about the Commission's Green Paper on security of supply. However, the European Commission proposed to amend the First Gas Directive and such initiative was supported by a Resolution of the European Parliament and by United Kingdom, Netherlands and Spain. France and Germany opposed any progress to be reached at these Summits and, in this context, there were strong indications that Germany and France

[30] VAN OOSTVOORN, F. BOOTS MG (1999) "*Impacts of markets liberalization on the EU Gas Industry*", the shared analysis Project Energy Policy in Europe and Prospects to 2020, Vol. 9 p. 86.
[31] EC Inform-Energy. (2001, May). France to be taken to Court. EC Inform-Energy (93), 12.

coordinated on a bilateral summit and Germany assured its support of France's liberalization position.[32]

On the opposite side, the Commission pushed for further liberalization at European level: it called for liberalized access for business consumers to be achieved by 2004 and for all consumers by 2005. It proposed to shift market regulation away from governmental supervision to control independent regulators. However, the first official benchmarking report was published by the Commission in December 2001 and, unfortunately, showed that competition in the European market was disappointing. In fact, European gas (and energy) markets were characterized by: (i) high prices; (ii) tariffs differentials; (iii) high degree of market concentration; (iv) insufficient unbundling; (v) lack of market based balancing regimes (vi) *ex ante* regulation.[33] In particular, the prices of electricity and gas were an important issue for the Commission: in some countries natural gas increased its shares in electricity generation (in Italy, for example, it was €77 per MWh)[34]. The price level proved to be important not only for the European Commission as a strategic goal to boost European competitiveness, but also to prevent protests against rising energy prices as has happened in the past when fuel prices went up.

Since the liberalization process was not encouraging, at the European Energy Minister meeting in December 2001, the Commission was oriented to accept a more distant date than 2005 for completion of the natural gas and electricity markets for domestic consumers, but it was inflexible with respect

[32] EC Inform-Energy. (2002, April). EU leaders fix deal on energy market opening but without domestic consumers. EC Inform-Energy (102), 4-7.
[33] EC Inform-Energy. (2004, September). An end of term report from DG TREN - and a look at the future. EC Inform-Energy, 3-5.
[34] EC Inform-Energy. (2001, December). Energy ministers agree on new law for the energy efficiency of buildings. EC Inform-Energy (99), 4-5.

to the final date for completion of 2003-2004 for all professional (including small one man business) and industrial consumers. Therefore the Commission, the Council of European Energy Regulators, consumers organizations and traders formed an alliance and claimed at the Fifth Madrid Forum "entry-exit" tariffs structure to be most favorable. According to this view, entry-exit meets the principles of cost-reflectiveness and facilitates efficient gas trade, market liquidity and gas-to-gas competition.[35]

However the draft of the Second Gas Directive came from an unexpected side in 2002. The European Parliament plenary session on 13 March 2002 closed with 160 amendments the first proposal for the Second Gas Directive by the European Commission. The most important amendments concerned the "unbundling" technique and the institution of regulatory authorities on the national and European level. In respect of the "unbundling" technique the European Parliament explicitly called for the "ownership unbundling" in the electricity sector and, clearly stated that "the transmission system operator must be *de jure* and *de facto* independent of the gas supply undertaking in regard to access to the assets necessary to maintain and develop the networks." With reference to the institution of the regulatory authorities the European Parliament introduced the idea to change the regulatory authority landscape on a Community level. One year later, this idea resulted in the foundation of the European Regulators Group of Electricity and Gas (ERGEG) as a nucleus for a Common European Energy Regulatory Authority and with the function of providing input to the regulatory process in order to support the European Commission, but without questioning the Commission's rights to initiate legislation.[36]

[35] EC Inform-Energy. (2002, February). Madrid Forum conclusions. EC Inform-Energy (101), 10.
[36] European Commission, 2003b.

As already stated, on June 26, 2003, The European Parliament and the Council adopted Directive 2003/55/EC[37], which laid down a set of additional common rules for the creation of an internal natural gas market. This Directive, which abrogated Directive 98/30/EC, included new measures that aimed at:

- Extending the legal deadlines for the complete opening of national gas markets to July 1st, 2004 for all industrial users and to July 1st, 2007 for households. In this respect, public authorities implemented a gradual liberalization program according to a specific schedule, making each Member State responsible for organizing deregulation on its own market. The progress made by individual Member States can be tracked by unveiling the theoretical "market opening" based on announcements made by national public authorities. Seven Member States (Austria, Denmark, Germany, Italy, Netherlands, Spain and United Kingdom) exceeded the requirements of the Second Gas Directive and fully opened up their respective markets to competition.
- Reinforcing the obligations to keep separate accounts. A new obligation stipulated that, until July 1 2007, separate accounts should be kept for gas supply operations involving eligible customers and those involving non-eligible customers.
- Separating transport network management from other gas sector activities. The Second Gas Directive required that incumbent operators must ensure that transport operations have a separate legal account from their other activities (one legal entity per activity); this provision

[37] Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

was to be effective from July 1 2004 for transport and no later than July 2007 for distribution.

- Enabling Member States to impose transparent, non-discriminatory public interest obligations on undertakings operating in the natural gas sector. These obligations were to regard safety, security of supply, regularity, quality and price for supplies, and environmental protection.
- Increasing the powers of regulatory authorities, particularly as regards the control of the level of transparency and competition on the market.

1.5 The Security of Supply Directive

After the internal market liberalization was absorbed in the legislative process, the Security of Supply Directive moved up on the agenda. Since 2002 the European Commission had been trying to harmonize oil stocks and gas storage policies and has thus attempted to transfer more competences to the supranational level[38]. This proposal would have ultimately implied a substantial shift in the economic governance of the natural gas market. So far, gas storage was treated as a *commodity*, subject to trade and perceived as private property since companies took decisions in its regard. Yet, the introduction of strategic storage by regulation would have implied the transfer of substantial decision-making power from private to public.[39] In this sense, the Security of Supply Directive proposed to treat gas storage as public property. In fact, the plenary session of the European Parliament on 22 September 2003 revealed the extensive disapproval of establishing the European Commission as keeper of European security of supply. This was also true for what concerned oil stocks but, in the end, the Directive on

[38] Nadine Haase (2007), p. 29.
[39] Ibid.

petroleum products was rejected while the Directive on gas security of supply received 19 amendments but was finally approved.[40]

The original proposal for the Directive on security of supply foresaw, for example, that Member States should impose minimum storage objectives on undertakings. However, the Commission was not only aiming to intervene in the market, but also to control when to release stored gas and the European Economic and Social Committee provided to the Commission the following opinion: " in the event of crises and in order to ensure solidarity between Member States, the Commission whishes to be able to take decisions to release stocks of gas held in the Member States and actually to interrupt supplies to the interruptible market."[41] The Commission also proposed the creation of a European Observation System for supply of hydrocarbons. Finally, all attempts to transfer decision competencies from the Member States to the European Commission were jointly rejected in the Council and in the Parliament and by the involved Committees.

Thus, when the Directive concerning measures to safeguard security of gas supply was published, none of the ambitious aims were included.[42] Instead, the European Commission increased their sector information by requiring the Member States to report the contract durations of supply arrangements. Furthermore, in the place of a full–fledged European gas crisis group equipped with decision–making power, a light version called the "gas

[40] EC Inform – Energy, 2003, October. Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply.
[41] European Commission (2003c). Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council concerning measures with regard to security of supply for petroleum products (p. 16-22): Official Journal of the European Communities.
[42] Nadine Haase (2007), p. 30.

coordination group" was established to enhance the coordination and information exchange between Member States.[43]

1.6 Regulation 1775

The aforementioned Madrid forum of 2002 also provided some guidelines for third party access (TPA) on a voluntary non-binding basis. After their revision, such guidelines provoked controversies at the Energy Council in June 2004 where three criticisms were brought forth. These concerned timing, the chosen regulatory measure and the scope of the measure. In fact, some argued that the Regulation came too soon, indirectly blaming the European Commission for regulatory over-eagerness and that such Regulation should have waited until the Second Gas Directive revealed its effects. As for the choice of the regulatory measure, some Member States preferred framework regulation instead of immediate regulation; they maintained that the former offered more discretion and thereby decision making power to the Member States because a regulation reduces the Member States' influence on the comitology procedure, in which national experts exercise an advisory role. Finally, the scope of the regulation was criticized by those who believed that it should have been limited to cross-border access instead of applying to the whole gas network.[44]

Regardless of the considerable effort with which opponents attacked the regulation, the European Commission was eager enough and successful "to tackle remaining barriers"[45] concerning network access conditions. Notably,

[43] Directive 2004/67/EC, Art. 6, 7.
[44] EC Inform Energy 2004, May. Moves to free up access to Europe's gas transmission network. EC Inform Energy 5-6.
[45] Regulation (EC) No 1775/05 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission network (OJ L 289, 3.11.2005, p. 1).

the European Commission justified this new intervention by stating that "additional technical rules are necessary, in particular regarding third party access services, principles of capacity allocation mechanisms, congestion management procedures and transparency requirements".[46] However, the European Parliament added some amendments, which had been the result of early negotiations with the Council before approving it on March 8, 2005. Yet, these amendments did not trigger any substantial changes, but rather stated more precisely the measures emphasizing the need to be cost-reflective.

2. The European Gas Market under the First and the Second Energy Package

The previous paragraphs provided a brief overview of the regulatory framework of the European gas market before the Third Energy Package. Such discipline shall be analyzed in further detail in order to understand the innovations proposed by the Third Energy Package, which will be deeply discussed in the following paragraphs.

Firstly, with reference to the *scope*, the European Union continuously expressed the aim to create one common European gas market and identified the completion of internal market as the first of six priority areas in many strategy papers.[47] In this respect, it is important to note that Recitals of the First Gas Directive[48] outline the overall objectives of the gas reform, while

[46] Recitals 1,3 and 12 of Regulation 1775/2005.
[47] "Sustainable, competitive and secure energy will not be achieved without open and competitive energy markets, based on competition between companies looking to become European-wide competitors rather than dominant national players." (European Commission, 2006: 5).
[48] Directive 98/30/EC.

Recitals of the Second Gas Directive[49] complement the First by stating the specific objectives the EU wishes to achieve through gas market reform. Thereafter, the EU aimed to increase efficiency, reduce prices, raise standards of service, and increase competition.

As for the *principles* regulating the gas market, the ninth Recital of Directive 98/30/EC appears to be insightful. In fact, it prescribes not only the Gas Directive as framework regulation, but also defines the role of principles that constitute the Gas Reform.[50] This clearly indicates that the European Union was not aiming to determine measures or instruments, but instead to formulate general principles. Moreover, the EU further specifies in Article 3 section 1 the context in which the general principles are set and thereby leaves no doubt about the binding character of the principles.[51] They are defined in relation to the objects of regulatory functions and grouped under the pillars '*Transmission, storage, Liquefied Natural Gas'*, '*Distribution and supply'*, '*Unbundling*', '*Network access*', and '*Organization of access to the system*'.

In particular, the First Gas Directive names six principles: objectivity, non-discrimination, (information) transparency, efficiency, economics, and security. With the Second Gas Directive, the EU expanded the list by another four principles: fair prices, cost-reflectiveness, environmental friendliness, and

[49] Directive 2003/55/EC, Recital 2.
[50] "Whereas a certain number of common rules should be established for the organization and operation of the natural gas sector; whereas, in accordance with the principle of subsidiarity, these rules are no more than general principles providing for a framework, the detailed implementation of which should be left to Member States, thus allowing each Member State to maintain or choose the regime which corresponds best to a particular situation, in particular with regard to authorizations and the supervision of supply contracts." (Directive 98/30/EC, Recital 9).
[51] "Member States shall ensure [....] natural gas undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive market in natural gas, and shall not discriminate between such undertakings as regards either rights or obligations". (Directive 1998/30/EC).

consumer protection, meaning that the choice of measures should be in line with the environmental policy of the EU.[52]

On the contrary, the Regulation 1775/2005 aims to specify regulatory functions rather than revise principles. Thus, it does not add new principles but, instead, it specifies the transparency requirements and the principles that have to be applied for the regulatory function of capacity allocation mechanism and congestion management procedures.[53]

In summary, the European Union postulates nine core principles Member States have to comply with. There is no indication that one can deduce the relative importance of one principle to another by referring to the order in which they are stated in the Directives. The Directives' inherent logic suggests they are of equal importance and complementary in nature.[54]

Having considered the objectives and principles of the First and Second Energy Packages, the analysis is now directed towards the *instruments* the legal provisions required. These are: *legal market opening*, *third party access*, *unbundling*, *balancing*, and *regulatory authorities*.

[52] Nadine Haase (2007), p. 45.
[53] Regulation 1775/2005, Article 6.
[54] Nadine Haase (2007), p. 45.

2.1 Legal market opening

The EU chose the definition of *eligible customer* as the key variable to facilitate legal market opening.[55] The First Gas Directive required that Member States specify 'eligible customers', defined as those customers inside their territory that have the legal capacity to contract for or to be sold natural gas according to the procedures set out in Articles 15 and 16 of such Directive. It required that initially two categories of customers – at least- be included as eligible customers. These are: (1) all final consumers consuming more than 25 million cubic meters of gas per year on a consumption site basis; and (2) gas-fired power generations, irrespectively of their annual consumption level.[56]

Thus, Member States were obliged to use the definition of eligible customer as an instrument to facilitate the required market opening. In the end, it was the Member State's responsibility to define the eligible customer in terms of consumer classes, assuming the achievement of the above-mentioned targets. For monitoring purposes, the European Commission asked for the annual publication of the countries' definition accompanied by all other appropriate information to justify the fulfillment of market opening.[57]

In 2003, the Second Gas Directive set more ambitious targets. Amending Directive 98/30/EC, the Second Gas Directive foresees the freedom of choice of supplier for all European non-households from 1 July 2004, and for all costumers from 1 July 2007.

---

[55] The First Gas Directive distinguishes between those countries that started to open their markets (e.g., Germany) and those that entered the reform process with a considerable degree of market opening (> 30%) such as the United Kingdom. The first category of new market openers "shall ensure that the definition of eligible customers referred to in paragraph 1 will result in an opening of the market equal to at least 20% of the total annual gas consumption of the natural gas market" (see Directive 1998, Article 18 (3)). Article 18 continues prescribing the market opening in later states. Accordingly, a legal market opening of 28% by 2003 and 33% by 2008 is compulsory. Countries in the category of advanced market openers shall ensure a market opening of 38% by 2003 and of 43% by 2008 (see Directive 1998/30/EC, Art. 18 (6)).

[56] Cameron P. (2002) Competition in Energy Markets. Law and Regulation in the European Union. Oxford: Oxford University Press, p. 178.

[57] See Directive 1998/30/EC, Art. 18 (9).

2.2 Third Party Access

Third party access is a pivotal instrument in introducing competition in the downstream part of the natural gas sector and had therefore already been a major topic in the pre- liberalization debate[58]. The First Gas Directive foresees both "negotiated third party access" (nTPA) and "regulated third party access" (rTPA)[59]. In general, under a system with negotiated third party access the pipeline owner, according to Article 15 of the Directive, is obliged to negotiate with those who wish to obtain access to the system but the Directive does not require any particular outcome that should result from negotiations. By choosing negotiated third party access, Member States can still favor

[58] Cameron P. (2002), p. 179.

[59] "The Directives accept some exceptions to the general principle of TPA, when the network owner can refuse to give access to third parties. In the electricity industry a technical condition on congestion is introduced, while in the gas industry a second case, beyond insufficient transport capacity, is admitted. If the incumbent, giving access to the competitors, is unable to deliver its own gas to cover the take-or-pay obligations, it has the right to refuse access due to financial motivations. Given the widespread use of take-or-pay clauses and the huge portfolios of long-term contracts held by the incumbent operators, this exception can create non trivial problems to the implementation of the TPA principle in the gas industry.
Third Party Access alone cannot avoid the distortion that the incumbent firm can create to foreclose the entry of new competitors. Some sort of separation of activities is therefore promoted, under the general heading of unbundling. Different solutions are left to the Member States, from the most radical, that prescribes proprietary separation of the monopoly activities from the competitive ones, to a milder legal separation, reached through the creation of different companies under a common holding, to the weakest version of accounting separation. The strategic opportunities to foreclose the market vary considerably in the three cases and they are hardly reduced in case of a simple accounting separation. Consequently, the scope and powers of the regulators cannot be defined without taking into account the degrees of freedom left to the incumbent.
The third cornerstone of the Directives is the opening of the demand side, through the notion of eligible customers, i.e. electricity or gas clients that have the right to seek for the most convenient supplier. These customers are identified by their yearly consumption and a timetable is set to widen the portion of liberalized demand by defining lower and lower consumption thresholds. Moreover, a Single Buyer for the franchise customers is suggested among the possible solutions.
Many other important elements of the picture are not adequately treated in the Directives, leaving their definition to the discretion of the Member States: among them, the desirable degree of fragmentation of the competitive segments of the industry, the kind of market organization (centralized pool markets, mandatory or not, vs. bilateral trading) of the industry, the role of State ownership in the different segments."
For further information see "*The Liberalization of Energy Markets in Europe and Italy*", M. Polo - C. Scarpa, Working Paper n. 230, January 2003, p. 18.

transactions based transmission and distribution services.[60] Although Article 15 Section 2 of the First Gas Directive requires the publication of the undertakings main commercial conditions for the use of the network, it leaves the information power and thereby the negotiation power in the hands of the incumbent firms. In contrast, regulated third-party access is based on published and common tariffs that offer more transparency and non-discriminatory network access to new entrants. Moreover, the First Gas Directive foresees for both nTPA and rTPA, the possibility of temporary derogations, "if a natural gas undertaking encounters, or considers it would encounter, serious economic and financial difficulties because of its Take-or-pay commitments accepted in one or more gas purchase contracts"[61]. In addition, Article 17 explicitly allows the refusal of network access in the case of capacity congestion caused by pre-liberalization Take-or-pay contract obligations.

One of the major revisions of the Second Gas Directive was the abolition of the "negotiated third party access". Instead, Directive 2003/55/EC and Regulation 1775 confirm the applicability of "regulated third-party access" and determine more detailed terms and conditions for this instrument. Accordingly, tariffs and their methodology shall be approved and published before their entry into force. [62] In particular Regulation 1775/2005 specifies "where a transmission system operator offers the same service to different customers, it shall do so under equivalent contractual terms and conditions, either using harmonized transportation contracts or a common network code approved by the competent authority".[63] The mentioning of a common network code reflects the continuing evolution of network access regimes

[60] J. Hetland and T. Gochitashvili "*Security of natural gas supply though transit countries*", Nato Science Series, 2003, p. 311.
[61] Directive 1998/30/EC, Article 25, section 1.
[62] Directive 2003/55/EC Article 18, (1).
[63] Art. 4 (1a) of Regulation 1775/2005.

within the reform process: beginning with nTPA under which the main terms and conditions were required to be published and moving on to rTPA with published tariffs and methodologies and envisaging a common network code in Regulation 1775/2005.[64]

2.3 Unbundling

The fundamental liberalization technique of "Unbundling" can be defined as the separation between the various components of the production chain of a vertically integrated undertaking aimed at introducing competition into a specific market[65]. In fact, unbundling promotes market opening in potentially competitive sectors (production, supply and sale), detaching them from monopolistic activities and promoting the real and non-discriminatory access of third parties to the infrastructures (Third Party Access, TPA). Unbundling operates on different levels[66]:

- *Separation of accounts:* the First Gas Directive required Member States to ensure the publication of accounts of integrated gas undertakings[67], but did not prescribe any further measure to secure the separation of

[64] "In particular, regarding third party access services, principles of capacity allocation mechanisms, congestion management procedures and requirements" (Regulation 1775/2005, Recital 1).

[65] "The requirements for legal and accountancy unbundling positively contributed to the emergence of liberalised energy markets in several Member States. However, later on, a discussion emerged that requirements of unbundling were not successful enough to prevent market concentration and anticompetitive facilities of vertical integrated incumbents. Vertical integration and monopolies were considered to be the reasons for the delay of the establishment of competition. The result was the lack of investment in infrastructure and the continuing situation of tight markets allowing no opportunities for new entrants. Another argument was that ownership unbundling or one of the other two alternative separation policies were a path to reducing consumer prices, ensuring security of supply and fencing out interference from non-EU members."
For further information see, *The European Third Energy Package: How Significant for the Liberalisation of Energy Markets in the European Union?*, MEHMET SUAT KAYIKÇI, 2011, p. 9.

[66] COPPEN F., *Liberalization of network industries: is electricity an exception to the rule?*, NBB Working Paper n. 59, 2004.

[67] See Directive 1998/30/EC, Art. 13 (3).

trade and transport in the natural gas markets.[68] In addition, the publication and separation of accounts applied equally to transmission and distribution operators.[69]

- *Legal unbundling:* legal unbundling was introduced in the Second Gas Directive. Thereafter, for the first time, vertically integrated distribution system operators and transmission system operators were required to be independent in legal form and in terms of organization and decision-making from other activities not related to distribution or transmission.[70]
- *Functional unbundling:* functional unbundling is usually addressed as management unbundling. This unbundling technique is based on the Transmission System Operator or Distribution System Operator having effective decision-making rights. These rights are to allow the Operators to make decisions in their own right and interests, independent from the interests of the trading branch of the integrated company. In addition, to ensure the independence of the transmission and distribution operators, the European Union formulated a number of criteria that have to be met.[71] The operators are obliged to establish a compliance program and report annually how the criteria are met; thereby discriminatory conduct shall be excluded.

[68] "Integrated natural gas undertakings shall, in their internal accounting, keep separate accounts for their natural gas transmission, distribution and storage activities" (Directive 1998/30/EC Article 13 (3)).
[69] "The aim of this requirement is to ensure non-discrimination and fair tariffs to avoid cross-subsidisation and the distortion of competition" (Cameron 2002: 181).
[70] See Directive 2003 Art. 9 (1) and Art. 13 (1)).
[71] "[...] The provisions of the Directive on management separation require firstly that the management staff of the network business do not work at the same time for the supply/production company of the vertically integrated company. This applies to both the top executive management and the operational (middle) management." (European Commission 2004: 8).

Finally, the legal provisions of the Second Gas Directive allowed two exemptions to the unbundling provisions, the so-called 100,000-customer exemption and the postponement option. According to the former, Member States had the discretion to exempt distribution service operators from the legal and functional unbundling requirements in circumstances where they serve less than 100,000 customers.[72] The postponement option, instead, enabled Member States to delay the implementation of the legal unbundling of the DSO beyond 1 July 2007.[73]

2.4 Balancing

As a result of the separation of gas trade and gas transportation due to the unbundling requirements, the formerly centralized model of gas flow management moved to a decentralized model. This implied the rearrangement of responsibilities between the transmission/distribution system operators and the shippers. Thus, in the course of the reform, each Member State tried to develop a balancing regime that equally guaranteed the fair distribution of responsibilities and business opportunities among the new entrants and the incumbent formerly integrated companies.

From the study of the legal provisions, it emerges that the European Union was generally in favor of a market based mechanism and called for regulatory authorities to step in and set up the necessary balancing rules. Yet, these balancing rules were not further specified and thus it was the Member States' task to determine their concrete application.[74] In Regulation 1775, the conditions balancing regimes have to fulfill were described in Article 7. This

[72] Directive 2003/55/EC, Article 13.
[73] Directive 2003/55/EC, Article 33 [2].
[74] See Directive 2003/55/EC, Recital 15.

Article calls for balancing conditions to be non-discriminatory, transparent, and cost-reflective. Additionally, the compatibility of balancing regimes across Europe was to be ensured.[75]

2.5 Regulator

The First Gas Directive did not provide for a common EU energy regulator or national regulatory authorities as separate and independent institutions. Reference was only made to the delegation of dispute settlement. In this context, Member States were asked to designate a competent authority to settle disputes that might arise from negotiations or refusals of access to the national network.[76] The introduction of National Regulatory Authorities in the context of the acceleration Directive had a significant impact on the governance of the European gas markets. Though most of the National Regulatory Authorities were already established before the entry into force of the Directive, the anticipation that the institution of these authorities would become a legal requirement together with the necessity of dealing with other regulatory requirements in light of the EU gas reform clearly pushed Member States to establish independent regulators.[77]

In general, the core responsibility of the regulatory authority should be the approval of network access tariffs, and conditions, including transmission.

---

[75] See Regulation 1775, Article 7

[76] The criteria this competent authority has to fulfill are not further specified. In the case of cross-border disputes, the competent authorities of each member states shall consult each other and settle the dispute in accordance with the Directives provisions. (See Directive 1998/30/EC, Article 21).

77 "The Member States shall designate one or more competent bodies with the function of regulatory Authorities. These authorities shall be wholly independent of the interests of the gas industry. They shall, through the application of this Article, at least be responsible for ensuring non-discrimination, effective competition, and efficient functioning of the market […] (Article 25 (1) of Directive 55/2003/EC).

Methodologies for tariffs and balancing services have to be set up *ex ante*.[78] The change with regard to the timing of decision making by shifting from *ex post* control to *ex ante* control is considerable.[79] In particular, the Regulator is responsible for monitoring and intervening if necessary in numerous areas such as publication of appropriate information, the effective unbundling of accounts to avoid cross subsidies and the unbundling compliance program, the level of transparency and competition.[80]

The normative innovations envisaged by the introduction of balancing rules brought forth a significant change in the governance of the gas sector. The sector was formerly based on self-regulation, whereas the aim of the legal provisions was to introduce and define public regulation.[81]

3. The European Gas Market Under the Third Energy Package

In 2004 and 2007, the enlargements of the European Union, which almost doubled the number of the EU Member States, entailed a legal and structural reform of the regulation of the energy market in the gas sector. In particular, by the end of 2007, there were 27 EU Member States[82] and this increased the pressure of regulatory convergence among national gas systems in order to achieve an internal EU gas market. In addition, ten of the twelve new Member States coming from central and South Eastern Europe were (and

[78] See Art. 8 together with Art. 25 (2) of Directive 55/2003/EC).
[79] See Directive 2003/55/EC, Article 25 (1, 2 & 4).
[80] For a full description of the areas of intervention by the Regulator please see European Commission. (2004b). The Role of the Regulatory Authorities. Note of DG Energy &Transport on Directives 2003/54/EC on the internal market in Electricity and Natural Gas. Retrieved from http://ec.europa.eu/energy/gas/legislation/notes_for_implementation_en.htm.
[81] Nadine Haase (2007), p. 50.
[82] The number of EU Member States is currently 28, with the accession of Croatia in 2013.

still are) dependent on Russian gas supply. These elements, along with the decline of the North Sea gas production, and the UK becoming a net importer of gas, have contributed to the increase in the total dependency of EU on gas imports.[83]

Ancillary to the above, other factors favored the adoption of the "Third Energy Package". Examples of these are: the anticipation of the adoption of the Lisbon Treaty, which was expected to create a concrete legal basis for the EU action in the energy market; the reinforcement of consumers' protection at EU level[84]; global environmental challenges which required a faster speed to achieve energy efficiency; and the strengthening of the use of competition law on the EU gas market, as a result of the adoption of a "modernized" legal framework for competition law at the EU level[85], which allowed to carry out gas investigations through the Commission's 2007 Energy Sector Inquiry[86]. The "Third Energy Package" was thus enacted and it is composed of A Directive[87] and three Regulations[88].

---

[83] "The "new" Member States have been defined as "minor" or "small" states due to their homogeneity with respect to their capacity of influencing EU policy individually, which was very reduced and nonexistent. However, they have been found to be more receptive to adopting common European policies, as a result of their inability to achieve certain national interests alone and owing to the direct benefit to them of being an integrated part of supranational and institutional arrangements. As a result, the presence of the new Member States in the European Council has titled the decision-making balance towards a more favorable approach to supranational authority on the EU gas market." For a detailed reading, please see Maas Mathias, 2007: "*Small States in the international society of States*". Paper presented at the workshop "*Small States capacity building*", Birmingham.

[84] Reported in the 2008 Commission's Green Paper on Consumers Collective Redress, available at http://www.astrid-online.it/Riforma-de6/Dossier--C/greenpaper_tutela-collettiva-consumatori_27_11_08_en.pdf
and in the 2008 Commission's White Paper on Damages Actions for Breach the EC Antitrust Rules, available at
http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf

[85] Mainly this refers to the adoption of Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 (now 101 of the TFEU) and 82 (now 102 of the TFUE) of the Treaty (2003) OJ L 1/1, as amended by Regulation EC no. 411/2004.

[86] Article 17 of Regulation (EC) No. 1/2003, allows the Commission to engage in reviews of sectors that appear to be resistant to competition.

[87]Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

In comparison to its predecessors, the new gas legislative package brings forth several novelties, aimed at establishing a real integrated market in gas. In fact, the new legislation enhances both substantive and institutional changes.[89] Regarding the former, it envisages the correction of problems identified during the Energy Sector Inquiry, as well as the increase of competition in electricity and gas markets. As for the institutional changes, the legislation modifies the agency structure by strengthening the power of national regulators, on the one hand, and by establishing new regulatory bodies on the other. Furthermore, since the goal of market liberalization had already been achieved to a certain extent, harmonization and cooperation become the key concepts in the new legislation, together with the strengthening of regulatory oversight, transparency and consumer protection.

The scope of the third gas legislative package extends over common rules for transmission, distribution, supply and storage, network access and security of supply, as well as the organization and the functioning of the gas sector. The developments prompted by this package are three fold and regard structural, functional and social aspects inherent to achieving an internal gas market.

3.1 The integrated EU Gas Market

While the first two energy packages focused on opening up the European gas markets to competition and referred to market integration as

[88]Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005. Regulation (EU) No 994/2010 of the European Parliament and of The Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC. Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.
[89] M. Waloszyk (2014), p. 25

solely a subsidiary achievement deriving from the accomplishment of a liberalized market, the new legislation clearly articulates the objective of an integrated gas market.[90] In fact, an integrated gas market is expected to stimulate competition between producers, contribute to allocative efficiency, market size enlargements and expansions of firms' production, and stimulate innovation through dissemination of technologies across Member States. In addition, the integrated market should provide a better response to security of gas supply crisis and should ensure the gradual absorption of isolated systems forming "gas island" in the Union.[91]

The legal instruments provided by the "Third Energy Package" are EU wide network codes, made legally binding by the Commission through the comitology procedure and non-binding framework guidelines, developed by the Agency for the Cooperation of Energy Regulators (ACER). Additionally, regional cooperation and regional market development are reinforced through the imposition of cooperation obligations on Member States, National Regulatory Authorities and other network operators.[92]

3.2 Effective Unbundling

One of the most important features of the new package regards the introduction of an "effective unbundling". [93] Since the Second Gas Directive proved to be inefficient in opening up the EU gas market to competition[94], new rules applicable to unbundling are detailed in Articles 9-23 of Directive

[90] Directive 2009/73/EC requires Member States to pursue regional integration of their national markets and cooperation of system operators only as an intermediary step before the achievement of a fully integrated common energy market.
[91] Article 7 of Directive 2009/73/EC.
[92] M. Waloszyk (2014), p. 25.
[93] Recital 6 of Directive 2009/73/EC.
[94] European Commission, 2006: Energy Sector Inquiry preliminary report, p.5.

2009/73/EC. According to those rules, the same person is not entitled to exercise direct control over an undertaking performing any of the functions of production or supply and, at the same time, exercise any right over a transmission system operator or a transmission system. The incompatibility of rights thus works both ways. This provision represents the essence of the *ownership unbundling* model and has triggered numerous academic controversies around it, which question its legitimacy in the light of property rights.[95]

As an alternative, article 14 of the Directive 2009/73/EC provides for the institution of an independent system operator (ISO), which should be independent from supply and production interests. This does not contradict the property rights of the vertically integrated undertaking, which may maintain its ownership of the network access.[96] To guarantee the ISO independence, detailed regulation is provided and an extensive regulatory control mechanism is put in place though regulatory tasks, which are to be exerted, by both national competition authorities and national regulatory authorities together. Moreover, the Directive provides for the institution of an Independent Transmission Operator, equipped with a Supervisory Body in charge of taking decisions with significant impact on the value of assets of shareholders[97].

[95] See e.g. A. Mc Haarg, B. Barton, A. Bradbrook, L. Godden (2010): "Property and the Law in Energy and Natural Resources", Oxford University Press, Oxford.
[96] M. Waloszyk (2014), p. 29
[97] Article 20

3.3 Consumers' protection

The Third Energy Package also pays particular attention to consumers' protection. In strict connection with general consumer law principles[98] and with Treaty provisions, requiring that consumer protection should be taken into account when defining and implementing other Union policies and activities[99], Directive 2009/73/EC provides for equal protection and advantages of consumers in a competitive market.[100] In addition, the quality of the provided gas service becomes a central responsibility of natural gas undertakings[101] and thus information asymmetries are reduced. Of a particular relevance in this sense is the obligation of Members States to ensure transparency of supply contracts signed between consumers and their gas providers.[102] The increase in contractual transparency presupposes that consumers have access to their consumption data and associated prices and to all necessary information regarding their rights, the current legislation and the dispute settlement means and mechanism.

3.4 Security of gas supply

In close relationship to the reinforcement of consumers' protection, lies the comprehensive approach adopted by the new legislative package with respect to the security of gas supply. Regulation 994/2010 establishes rules for ensuring a secure gas supply to consumers that should be protected. In

[98]For example those contained in Council Directive 93/13/EEC and Directive 97/7/EC of the European Parliament and of the Council.
[99] Article 12 TFEU.
[100] Recitals 1 and 3.
[101] Recital 48.
[102] Article 9.

particular these rules refer to consumers that find themselves under severe conditions[103].

One of the paths of ensuring a sufficient level of security of gas supply consists of the real integration of Member States' isolated markets within the EU gas market. This argument is supported by the connection that exists between the security of energy supply, the efficient functioning of the internal market and the integration of the so-called "isolated markets"[104]. In fact, closely associated with the integration of the gas market is the obligation upon Member States to cooperate for the promotion of regional and bilateral solidarity. Such cooperation is necessary in order to safeguard a secure gas supply throughout the internal market.[105]The responsibility for ensuring the security of gas supply is shared between Member States, gas undertakings and the Commission.[106]

[103] For example, 7 days of temperature peak, 30 days of exceptionally high gas demand or disruption of the single largest gas infrastructure under average winter conditions. Article 8(1) of Regulation (EU) 994/2010.
[104] Member States dependent on the supply of gas from a single external source and generally lacking the necessary infrastructure links with other Member States.
[105] Article 6 of Directive 2009/73/EC.
[106] Article 3.1.

CHAPTER TWO

THE IMPLEMENTATION OF THE EUROPEAN LEGISLATION IN ITALY

1. The national legislation: the implementation of community norms

As for the implementation of community norms, it is important to note that in 1999 and 2000 the Italian Parliament approved the liberalization plans for electricity and gas prepared by the Government according to the deadlines set in the European Directives. Although the two policies share the same general approach, they present significant differences[107].

The implementation of the EC Directive on electricity was achieved through the Bersani Decree (Law 79/99) in February 1999. This entailed the dismantling of the previous monopoly of Enel, and the introduction of several new principles[108]. Thus, with the Bersani Decree:

1) An independent system operator (the Gestore della rete di trasmissione nazionale, Grtn), which is owned by the State, now exercises the management and full control of the transmission network. However, Enel still maintains the ownership of the network (by means of a company called Terna). Furthermore, access to the transmission network is now open to third parties on the basis of conditions set by the regulatory Authority.

2) The wholesale market is organized as a Pool market, run by the Gestore del

[107] For a general analysis of the recent Italian experience on liberalization see OECD (2001).
[108] For further reading see "*The Liberalization of Energy Markets in Europe and Italy*", M. Polo - C. Scarpa, Working Paper n. 230, January 2003.

mercato elettrico, Gme (owned by Grtn). All transactions are supposed to bid. The Authority may exceptionally allow bilateral physical contracts. Although the market was supposed to start operating at the beginning of 2001, two years later operations had not begun yet.

3) In order to reduce Enel's market power upstream, no firm is allowed to have more than 50% of total installed power or to sell more than 50% of total energy, including imports. To this end, Enel has formed three companies, which have been sold in public auctions. The buyers are consortia of smaller Italian independent producers or public utilities, with the participation of some foreign producers such as Endesa, Edf, and Tractebel.

4) Thresholds for eligibility were established. These were aimed at accelerating the process of market opening in order to comply with to the dates set in the Directive. Eligible clients represent at the moment about 50% of total energy sold in the country. Yet, it is important to note that no date has been set for an opening of 100% of the market.

5) Distributors selling energy to franchise (non eligible) customers are obliged to buy the energy for these customers through a Single Buyer, which is also part of the State owned Grtn group.

Not surprisingly, the privatization process began short after the Bersani Decree. However, today, this process is at a standstill, and about two thirds of Enel is still in the hands of the Italian Government.

Among the several interventions after the Bersani Decree, the following are worth noting.

The Grtn has highlighted the risk of a shortage of electricity in Italy, where the age and efficiency of generating plants appear as problematic. Thus, in

March 2002, a new Decree was issued in order to make the building of generating plants easier. This hastened the authorization process in the hope to help the entry process. In addition, a second goal to be reached through this provision is an increase in the degree of competition in the wholesale market.

In September 2002 the Government decreed to block the price dynamics decided by the Authority. It also established that from that moment onwards – as opposed to what had been agreed in 1995 – the Government had the right to set principles that the Authority had to follow in deciding future price adjustments.

Finally, the Ministry of economic activities, through the Grtn, will manage the allocation of most of the energy imports, which in Italy amount at about 16% of total consumption. These have been reserved to large interruptible customers. The implication is that this energy will be kept out of the Pool market. The issue becomes controversial because this is probably the cheapest energy available in Italy, and this decision to allocate it through an administrative mechanism entails excluding the cheapest energy from the market.

2. *The Letta Decree: analysis of the criteria for organization of the production chain.*

The legislative Decree n. 164 of 23rd May 2000 (the so called "Letta Decree", after its signatory Minister) defined natural gas distribution as a public service activity, opening it to the so-called competition "for the field".

Before the enactment of the Letta Decree, Local Governments had carried out the mentioned service, either directly, by means of their departments (the so called "economy management"), or through a controlled and purposely founded company, or by granting it to private enterprises. In these cases the distribution service was carried out together with the sale activity on an exclusive right basis without the obligation of taking part into a competitive tender, not even for private operators.

With the Letta Decree important changes have been introduced: first of all, gas distribution must be unbundled from gas sale; secondly all the existing concessions will come to an end, in spite of their natural expiry date, and re-granted on a tender basis after a transitory period. In other words, the legislator imposed the cessation of local monopolies and the calling, commune by commune, of a competitive tender for the granting of the natural gas distribution service[109].

The Italian legislator has recognized the natural gas distribution activity as a natural monopoly, granting the exclusive right for its management. Nevertheless, according to the liberalization goals, the government has decided to introduce a competitive contest so as to give the possibility, with every concession expiry, to new, and more efficient, operators to enter the

[109] For further reading see *Natural gas distribution in Italy: when competition doesn't help the market*, S. DORIGONI – S. PORTATADINO, Working Paper N.7, 2007.

market. Nowadays contests are held at a municipal level: every local administration grants the service for its territory on the basis of a previously published announcement.

The liberalization process targets consist in lowering total costs of the service (in order to promote efficiency) while achieving high quality standards. Quality regulation has been delegated to the Authority for Electricity and Natural Gas, while the tender is supposed to select the most efficient company in delivering the service.

To the present day statistics have shown that gas is almost everywhere in Italy, and the number of firms on the market has decreased to almost 350. In this context it must be highlighted that the legislator himself has stimulated the aggregation process[110]. Furthermore, also tenders are believed to be an effective instrument in promoting the distribution sector aggregation.

[110] See the Decree 164/2000.

3. The EU Third Package for Gas and the Gas Target Model

In July 2009, the EU adopted the Third Gas Directive and Regulation 715 (repealing the Second Gas Directive and Regulation 1775). These two documents form a part of a wider set of IEM Directives and Regulations that (together with a set of other documents) became known as the ‘‘Third Energy Package for Gas’’ (the “Third Package”).

The EU considers the Third Package as the means for creating a single liberalized EU gas market, and has aimed to achieve this goal by 2014[111]. As the Third Package became law in the EU in March 2011, it added a new impulse to the process of transformation of EU gas market structure started by the previous generations of gas Directives and Regulations.

The Third Package major requirements include:

- The unbundling of transmission (transportation) assets in the form of either ownership unbundling (OU), or independent system operator (ISO), or independent transmission operator (ITO)[112];
- The certification of transmission system operators (TSOs) meeting the unbundling requirements;
- Entry-exit (EE) organisation of access to transmission system networks

[111] European Council (2011).

[112] The issue of unbundling of transmission assets was fiercely debated during the drafting stage of the Third Package, with the EC advocating mandatory ownership unbundling if the transmission system operators (TSOs) would both own and operate a transmission network. However, due to a strong resistance of many Member States, two other (less strict) options – ITO and ISO – were also introduced. Under the ITO option, a TSO is preserved as part of the vertically integrated gas undertaking conditional on full compliance with the extensive list of requirements designed to ensure its independence from the latter. Under the ISO option, an independent system operator (ISO) is appointed upon a proposal from the vertically integrated gas undertaking, to operate a transmission network, while the network ownership would remain unchanged.

i.e. entry capacity must be booked independently from exit capacity, obligatory from September 2011, and the abolishment of the practice of setting tariffs on the basis of contract paths[113];

- The development (on the basis of non-binding Framework Guidelines (FG)) of 12 (binding) pan-European Network Codes (NCs) (as listed below[114]) on cross-border issues:[115]

    a. Capacity allocation and congestion management rules[116];
    b. Balancing rules;
    c. Rules regarding harmonised transmission tariff structures;
    d. Interoperability rules;
    e. Network security and reliability rules;
    f. Network connection rules;
    g. Third party access rules;
    h. Data exchange and settlement rules;
    i. Operational procedures in an emergency;
    j. Rules for trading;
    k. Transparency rules;
    l. Energy efficiency regarding gas networks

[113] Gas Regulation 715.
[114] Bartok (2010).
[115] These EU-wide Network Codes for cross-border issues are being developed in addition to separate national Network Codes.
[116] Although Capacity Allocation and Congestion Management rules were originally envisaged to be part of one NC, the decision was made later to develop these rules separately. Thus capacity allocation issues are covered by the Capacity Allocation Mechanisms (CAM) NC, whereas congestion management rules are covered by the separate annex ('Congestion Management Procedures') in Gas Regulation 715.

Two new EU-wide agencies – the Agency for Cooperation of Energy Regulators (ACER) and the European Network of TSOs for Gas (ENTSOG) – were created, which in consultation with the EC are developing the aforementioned FG and the NCs.

The new elements introduced in the Third Package are set to change the existing architecture of the EU gas market, both in terms of its structure and its (EU and non- EU) actors' behaviour. The usual difficulties associated with any transition will be multiplied by the fact that at the time when the Third Package was introduced, the EU gas market was not a single liberalised market but rather a collection of 27 national markets, each liberalising under its own model and at its own speed (tolerated under the First and Second Gas Directives and Gas Regulation 1775)[117]. Furthermore, the Third Package outlined only the major requirements for the single EU gas market, providing a general framework within which it should develop, and thus it has left many issues to be defined, and elaborated on, both with EU and national secondary legislation[118].

Ensuring that the adoption and implementation of the Third Package leads towards a creation of a single liberalised EU gas market – rather than towards further fragmentation – requires a clear vision, from all stakeholders, of the main characteristics of such a market. In particular, the end-point of the liberalisation journey, set in motion by the Third Package, needs to be defined, understood, and agreed upon by all stakeholders; once the end-point is

[117] EC (2012b). Since September 2011, the EC has launched 19 infringement cases for non-transposition of the Third Gas Directive. By 24 October 2012, only 12 cases had been closed and the rest of the proceedings are on going.
[118] In particular, the definition of an entry-exit (EE) zone, including its suggested size, and a list of envisaged EE zones were all absent.

defined, the process of how to get there (i.e. who does what and in what time frame) will also become clearer.

As the pan-European NCs, which are currently under development (with differing degrees of advancement[119]), will constitute the major building blocks of the single liberalised EU gas market, it is important that their provisions are also in line with the common vision of such market. In 2010, the 18th Madrid Forum invited the EU and the regulators to 'explore... the interaction and interdependence of all relevant areas for network codes and to initiate a process establishing a gas target model'[120]. A number of studies exploring and advancing various potential 'gas target models' were prepared both by the Council of European Energy Regulators (CEER)[121] and by external actors[122]. Building on this work, in July 2011 CEER produced its Draft Vision for a European GTM[123], and in December 2011, following the public consultation process, published its final conclusions paper CEER Vision for a European GTM[124], which was included in the 21st Madrid Forum in March 2012[125].

The CEER Gas Target Model (GTM) provides an overview of what a single liberalised EU gas market should be. It defines an end-point of the liberalisation process of the EU gas sector: the establishment of functioning wholesale markets that will be connected with one another as well as the ensuring of secure supply to and economic investment in these markets. It also suggests how this end-point might be achieved (with major provisions to be

[119] The Capacity Allocation Mechanisms NC was the first Network Code to be developed, and it is in the most advanced form, having reached the comitology stage. The next in line are Balancing, Tariffs, and Interoperability NCs.
[120] Madrid Forum (2010).
[121] CEER (2010), CEER (2011a).
[122] Glachant (2011); Ascari (2011); LEGG (2011); Clingendael (2011); Frontier Economics (2011).
[123] CEER (2011b).
[124] CEER (2011c).
[125] Madrid Forum (2012).

laid down in NCs)[126].

The GTM envisages that functioning wholesale markets will be structured as 'entry- exit zones, where entry capacity is allocated separately from exit capacity so that any gas that enters the zone can be delivered, at least commercially, to any exit point in that zone'; each EE zone is to have its own hub (or virtual trading point, VTP). However, putting in place entry-exit zones is not a sufficient condition for creation of a functioning wholesale market. The CEER GTM paper says that the following conditions also need to be met for such a market to be present: 'a sufficient presence and low concentration of players active in the wholesale market, availability of gas from diverse sources, multitude of customers (i.e. sufficient demand for gas), as well as a certain level of trade in terms of total volume of gas traded compared to the volume of gas consumed (i.e. churn ratios)'[127]. The paper details these provisions by giving a reference set of parameters (such as a churn rate of 8, a Herfindahl- Hirschmann index of less than 2000[128], gas from at least 3 sources, a total annual gas demand within the EE zone of at least 20 bcm, a residual supply index more than 110% for more than 95% of days per year). The crucial parameter in the GTM's 'definition' of the functioning wholesale market is the size of the EE zone - not less than 20 bcm. However, according to Cedigaz, in 2011 only six EU countries (UK, France, Germany, Italy, the

[126] CEER (2011c).

[127] CEER (2011c). This definition of churn echoes the definition provided in the Energy Sector Inquiry - the ratio between total volume of trades and the physical volume of gas consumed in the area served by the hub. Alternative definitions are provided by P. Heather, who describes churn generically as 'the number of times a 'parcel' of the relevant commodity is traded and re-traded between its initial sale by the producer and final purchase by a consumer', and gross market churn as 'total traded volume to the net delivered total amount, represented by the hub area's physical demand' including exports (see Heather (2010) and (2012)). The difference between Heather's definition of 'gross market churn' and the CEER's 'churn' appears to be that the former includes not only gas consumed inside the zone but also transit flows which are traded but not consumed inside the zone.

[128] The HHI (Herfindahl-Hirschman index) estimates an overall concentration level in a market and is calculated by summing the squares of the individual market shares of all the firms in the market, see EC (2004b).

Netherlands, Spain) and Turkey (within the wider European geography) had annual gas demand higher than 20 bcm[129]. This suggests that the GTM envisages creation of EE zones that include more than one EU Member State[130].

The GTM envisages that those EU Member States that are able to create a functioning wholesale market within their national territories will create national market areas (i.e. one EE zone per Member State). Whereas those Member States that are not able to create a market area within their territories will create either trading regions (i.e. a single EE zone for transmission and a single VTP for trading gas between at least two member states (or parts thereof), but maintain 'national end-user zones' in different Member States for distribution and balancing of forecasting errors), or cross-border market areas (i.e. a single EE zone for transmission and distribution with a single VTP, encompassing at least two Member States (or parts thereof)[131]. These proposals indicate that the GTM envisages a progressive reduction of the number of EE zones inside the EU and hence a reduction of the amount of cross-border interconnection points at which shippers would need to book capacity, thus potentially simplifying the process of (both existing and new/incremental) capacity allocation. In line with the GTM, national regulators were tasked to assess market liquidity and the degree of market integration by the end of 2012, with a view to potentially increasing (where necessary) both liquidity and integration by means of establishing

[129] Cedigaz (2012).
[130] This is supported by the fact that the 18th Madrid Forum Conclusions also contemplate 'the creation of cross-border balancing zones'.
[131] Draft Vision for a European gas target model, CEER. Also see Boltz (2012).

cross-border trading regions[132].

Yet, events on the ground might develop faster than the regulatory framework envisaged to underpin them (specifically, the NCs), and differently from the GTM's vision. Hence, the resulting gas markets might not 'fit' well with the regulatory framework and/or the GTM. This could potentially require them to adapt, although the adaptation process would be extremely arduous given the legal complexity of getting 27 Member States to agree on necessary changes.

3.1 *The transposition of the Third Energy Package in Italy.*

In 2009 the European Parliament and the Council finally approved Directive 73/2009/EC. In particular, this legislation provided the legal separation between the transport and the production undertakings. Within the possible unbundling models, the directive refers to the so-called *ownership unbundling*[133].

The actual choice of the ITO model is to be considered outlawed in the light of the new legislation in Italy. In fact, with d.l. n. 1/2012 (so-called d.l. "Concorrenza" or "Cresci Italia") the Italian government decided to adopt the Ou model, i.e. *ownership unbundling*. This was essentially in opposition to the legislation contained in the previous d.lgs. n. 93/2011.

For what regards d.l. n. 1/2012, it is important to note that Article 15, first paragraph, states that, in order to introduce elements of impartiality

[132] For example, an establishment of a trading region, which would include Slovakia, Czech Republic, possibly Hungary, and (part of) Austria, is currently under consideration.
[133] U. TOMBARI, *La separazione proprietaria e il nuovo ruolo dell'operatore di rete nel mercato nazionale del gas*, in Annuario di diritto dell'energia, 2014, p. 126.

within the transport networks, the criteria and the conditions necessary for the *ownership unbundling* of the SNAM S.p.a. must be outlined in the transposition legislation. The *ownership unbundling* model must be the one designated in Article 19 of d.lgs. n.93/2011, adopted for the implementation of Directive 2009/73/EC[134].

The d.l. "Concorrenza" thus refers to Article 19 of d.lgs. n. 93/2011[135] as the legislation applicable for the achievement of the *ownership unbundling* between ENI (the production undertaking) and SNAM (the transport undertaking). Such legislation provides the discipline for vertically integrated enterprises that chose to adopt the EU model. According to this legislation, the method used to ultimately achieve *ownership unbundling* is based on various prohibitions imposed on the relationships between the production and transport undertakings[136].
These prohibitions imply that the same person cannot:

a) Control, directly or indirectly, the production undertaking and, at the same time, control, directly or indirectly, the transport undertaking;
b) Name the members of the supervisory board, of the board or of the legal representatives of a transport undertaking, while exercising, directly or indirectly, the control of a production undertaking;

[134] *"Al fine di introdurre la piena terzietà dei servizi regolati di trasporto, di stoccaggio, di rigassificazione e di distribuzione dalle altre attività della relativa filiera svolte in concorrenza, con decreto del Presidente del Consiglio dei ministri, su proposta del Ministro dello sviluppo economico, di concerto con il Ministro dell'economia e delle finanze, sentita l'Autorità per l'energia elettrica e il gas, da emanare entro il 31 maggio 2012, sono disciplinati i criteri, le condizioni e le modalità, cui si conforma la società SNAM S.p.a. per adottare, entro diciotto mesi dalla data di entrata in vigore della legge di conversione del presente decreto, il modello di separazione proprietaria di cui all'articolo 19 del decreto legislativo 1° giugno 2011, n. 93, emanato in attuazione della direttiva 2009/73/CE."*
[135] This provision is also recalled in SNAM's statute (Article 23).
[136] For further information see, *Quali regole per il mercato del gas?*, in *Annuario di diritto dell'energia*, 2014, ed. Mulino.

c) Be a member of the supervisory board, of the board, or one of the legal representatives of both production and transport undertakings.

The third paragraph of Article 19 of d.lgs. 93/2011 states that, in order to apply such legislation in cases in which the "person" referred to is the State or a public entity, that exercises the control of both transport and production undertakings, the public entities shall not be regarded as "the same person"[137].

3.1.1 *The "legal separation" between ENI and SNAM*

The "decreto del Presidente del Consiglio dei Ministri" referred to in Article 15 of d.l. 1/2012 was enacted on the 25th of May 2012. The purpose f such a decree was to allow the reassignment of the principal shares of SNAM that at the time were held by ENI; these amounted to 52.53% of SNAM's shares. This objective was pursued in the attempt to balance two different aims: on the one hand, to favour the liberalization process in the gas market; on the other hand, to guarantee the maintenance of stability within SNAM, in order to assure the development of strategic activities, such as those concerning the devolvement of the services provided by the undertaking itself[138].

Coherently with these aims the decree arranged the *ownership unbundling* (i.e. the "legal separation") between ENI and SNAM through the

[137] See Article 19, third paragraph, d.lgs. n.93/2011 "*Ai fini dell'applicazione delle disposizioni di cui al comma 1, qualora le persone giuridiche siano costituite dallo Stato o da un ente pubblico, due enti pubblici separati i quali, rispettivamente, esercitino un controllo su un gestore di sistemi di trasporto di gas naturale o di trasmissione di energia elettrica o su un sistema di trasporto di gas naturale o di trasmissione di energia elettrica e un controllo su un'impresa che svolge le funzioni di produzione o di fornitura di gas naturale o di energia elettrica, non sono ritenuti la stessa persona giuridica*".

[138] See also the preliminary works on the above-mentioned ministerial decree, as well as Article 1, first paragraph of the latter.

assignment to the Cassa depositi e prestiti Spa (Cdp) of at least 25.1% of SNAM's shares (Article 1, second paragraph, of the said decree)[139].

In order to achieve the *ownership unbundling*, after only five days from the enactment of the aforementioned decree, ENI and Cdp subscribed a preliminary agreement having as principal object the assignment of 30% minus one share of SNAM's shares[140].

The agreement between the two companies therefore implied the assignment to Cdp of a greater number of shares with respect to the minimum percentage (25.1%) required by the ministerial decree[141]. The final transaction was concluded on October 15th 2012[142].

In addition, on the 15th of January 2013, ENI has entrusted a series of banks with the task of assigning 1.25 billion euros of bonds that are convertible into SNAM's shares to qualified investors. If all the investors will convert such bonds, the result will be that ENI will have ceded 8.54% of SNAM's capital. Finally, on the 9th of May 2013, ENI has officially declared to have successfully placed 11.69% of SNAM's shares through an *accelerated*

---

[139] Article 1, second paragraph, of the said ministerial decree provided that the assignment of the shares to Cdp had to be carried out within short time limits, and, in any case, no later than 18 months from the entering into force of the law implementing d.l. n. 1/2012. After the reform enhanced with d.l. n. 326/2003 Cdp became a limited company controlled by the *"Ministero dell'Economia"*: the *"Ministero dell'Economia"* (Mef) holds 80.1% of the shares, while the 18.4% is held by a group of foundations of banks, and the remaining 1.5% is constituted by private shares (see: www.cassaddpp.it). According to Article 5, paragraph 8 *bis*, of the above-mentioned d.l., Cdp can, however, freely acquire shares in strategic national companies in the gas and energy sector.

[140] In this occasion also the price for each share of SNAM was established (3.47 euros) and, consequently, also the total price (3.517 billion euros) that was to be paid in three instalments. See ENI's "Comunicato del 30 Maggio 2012": *"Eni cede il 30% meno un'azione di Snam a Cassa depositi e prestiti"*.

[141] Furthermore, it is of particular interest to underline that such an assignment is in truth a transaction between connected parts, as Cdp posses a substantive number of ENI's shares. This allows the former to hold a dominant position in the latter (in fact, Cdp holds 25.76% of ENI's shares. See: www.eni.com).

[142] See ENI's "Comunicato del 15 ottobre 2012": *"Eni completa la cessione del 30% meno un'azione di Snam a Cassa depositi e prestiti"*. The 18th of July 2013 ENI announced to have ceded another 5.28% of SNAM's shares. The transaction (that was achieved through a procedure of *accelerated book building* in favour of national and international public investors) was finalised at a price of 3.43 euros per share (see ENI's "Comunicato del 18 luglio 2012: *"Eni completa la cessione di un ulteriore 5% del capital sociale di Snam"*).

book building in favour of institutional national and foreign qualified investors. Following such financial operation, today, ENI holds "only" 8.54% of SNAM's share (that are however subject to the above mentioned convertible bond).

3.1.2 Article 2 of the "decreto del Presidente del Consiglio dei Ministri" of the 25th of May 2012: national company law and ownership unbundling

Article 2 of the "decreto del Presidente del Consiglio dei Ministri" dictates the criteria, conditions and the *governance* procedures that ought to be adopted in order to achieve the *ownership unbundling* and thus put into effect the provisions of Article 19 of d.lgs. 93/2011. In particular:

a) The first paragraph of the cited Article 2 states that, beginning on the 31st of May 2012 (date set in the d.l. "Concorrenza" for the issuing of the ministerial decree) or, if this represents an earlier date, from the moment of the final loss ENI's control of SNAM, the voting rights related to the shares held by energy or gas producers or distributers or by undertakings that control or are controlled by them are "limited" as provided for by the first and second paragraphs of Article 19 of d.lgs. n. 93/2011[143]. Notably, from the reading of this complex and not well

[143] According to such provisions of Article 19 of d.lgs. 93/2011: *"Le imprese verticalmente integrate che intendono conformarsi a quanto previsto dall'articolo 9, della direttiva 2009/73/CE, procedendo alla separazione proprietaria dei Gestori sono tenute al rispetto delle seguenti disposizioni: […] b) la stessa persona o le stesse persone, fisiche o giuridiche, non possono esercitare, direttamente o indirettamente, un controllo su un'impresa che svolge l'attività di produzione o di fornitura di gas naturale o di elettricità e allo stesso tempo, direttamente o indirettamente, un controllo o dei diritti su un gestore di un sistema di trasporto di gas naturale o di trasmissione di elettricità o su un sistema di trasporto di gas naturale o di trasmissione di energia elettrica; c) la stessa persona o le stesse persone, fisiche o giuridiche, non possono nominare membri del consiglio di vigilanza, del consiglio*

spelled out normative provision, it emerges that ENI cannot exercise (directly or indirectly) the "control", or any types of "rights", over an undertaking that operates in the transport of natural gas (Article 19, paragraph 1, letter b), d.lgs. 93/2011). However, it is important to note that, according to the second paragraph of Article 19 of d.lgs 93/2011 (to which Article 2 of the ministerial decree makes express reference) the "rights" referred to in the first paragraph comprise the right to vote and to name the members of the supervisory board of the Cdp or of the legal representatives of the latter;

b) The second paragraph of Article 2 of this ministerial decree imposes on Cdp (company designed to become the "new" majority shareholder of SNAM) to guarantee independence between the owner of the production undertaking and the owner of the transport undertaking. To that end, it was prescribed that the decisions related to the management of SNAM's shares have to be taken exclusively by Cdp[144], with the exclusion of both the political powers (that have to be attribute to the *"Ministro dell'Economia"* according to the provisions of d.l. 269/2003) and of the powers that are to be attributed to those legal or natural persons that, although part of the board of Cdp, are assigned the *"gestione separata"* of the latter[145];

---

di amministrazione o degli organi che rappresentano legalmente l'impresa all'interno di un gestore di sistemi di trasporto o di un sistema di trasporto, ne' esercitare direttamente o indirettamente un controllo o diritti sull'attività di produzione o di fornitura di gas naturale […] 2. I diritti di cui al comma 1, lettere b) e c), comprendono, in particolare, il potere di esercitare diritti di voto, di nominare membri del consiglio di vigilanza, del consiglio di amministrazione o degli organi che rappresentano legalmente l'impresa, nonché' la detenzione di una quota di maggioranza".

[144] Article 2, second paragraph, letter a), of the "decreto del Presidente del Consiglio dei Ministri" issued on the May 25th 2012.

[145] Article 5, paragraph 9, of d.l.269/2003, legislation that transformed Cdp into a limited company, provides for the powers of the "Ministero dell'Economia". The provision establishes that the Mef has the right to exercise the "gestione separata" of the company (which implies also the acquisition of shares). See also Article 5, paragraph 11, letter d), that the Mef is competent as for what concerns the

c) Article 2, second paragraph, letter c), of this ministerial decree, prescribes an absolute prohibition for the members of the board, of the supervisory board and the directors of ENI to hold, at same time, similar posts in Cdp, SNAM and in their controlled undertakings. In addition, these subjects are forbidden from engaging in any, direct or indirect, professional or proprietary relationship with such companies (Article 2, second paragraph, letter c) of the said ministerial decree).

Finally, it is important to note that Article 13, third paragraph, of SNAM's Statute (as modified in March 2013) prescribes that, according to the said ministerial decree, expressly recalled in the statute, the directors of SNAM cannot be invested with any function as directors or as members of the board or supervisory board of ENI and of the undertakings that are by the latter controlled. Furthermore, this provision also forbids SNAM's directors from engaging in any, direct or indirect, professional or proprietary relationship with such companies.

3.1.3 Conclusion

The most significant intervention concerns, clearly, the "limits" imposed upon the ENI's right to vote as a shareholder according to Article 2, first paragraph, of the "decreto del Presidente del Consiglio dei Ministri". Yet, although the issue is deemed to lose relevance in the near future with the sale

establishment of the criteria for the management of the shares owned by Cdp. According to Article 2, second paragraph, of the aforementioned ministerial decree, in the case that SNAM's shares are bought with funds coming from the *"risparmio postale"* and are assigned to the *"gestione separata"*, the decisions regarding such shares cannot be influenced by any person sitting on Cdp's board in accordance with Article 5, paragraph 10, d.l. 269/2003 (i.e. the "Ragioniere di Stato"; the "Direttore Generale del Tesoro"; three experts in financial matters, chosen by the "Conferenza dei Presidenti Regionali", the "Upi", the "Anci" and named with a "decreto del Ministro del Tesoro"). Mef's prerogatives are, instead, expressly confirmed with reference to the shares held by Cdp in ENI, although the full independence of the latter must be guaranteed as for what regards the strategic and operational choices (Article 2, second paragraph, letter b)).

of ENI's share in SNAM, it is important to note that the terms according to which such "limits" are to be implemented are not clear at all, and this causes numerous problems when a limited company (such as SNAM) is concerned. In other words, whether ENI (that is still a major shareholder in the company) has a total or partial prohibition to exercise any voting rights, and if so what are the actual limitations imposed upon such rights, is an issue that cannot be overlooked.

It seems possible to maintain that, despite the uncertainty that pervades the normative provision, Article 2 of the above-mentioned ministerial decree can be interpreted as providing for a total exclusion of ENI's voting rights, notwithstanding all the problems concerning the carrying out of the board's tasks that may follow this interpretation[146].

This implies a prohibition for ENI to exercise the control and, in particular, to exercise the right to vote. The latter is forbidden not only for the naming of the members of the board, but also with regard to any other subject matter. Essentially, ENI's voting rights are not simply "limited" but completely "excluded".

The conclusion reached allows to make some observations regarding the legal device used. It must be noted that a particular category of shares with limited voting rights has not been conceived. In other words, the legislator has not operated an *ex lege* conversion of the shares held by ENI in SNAM into special shares with limited voting rights.

In order to achieve the equal treatment of shareholders, the legal provisions simply prohibit ENI, as a shareholder, from exercising the right to vote as long as it maintains its shares in SNAM and, at the same time, continues its activity in the production of gas. Therefore, in the case that ENI effectively sells its shares, the buyer will be able to fully exercise his right to

[146] Issues regarding the quantifications of majorities could arise.

vote. Similar conclusions must also be reached for what concerns the conversion of bonds into SNAM's shares.

From a systematic point of view, it must therefore be held that there are "specific prohibitions" imposed upon a single shareholder. As a consequence, a sort of "personalization" of the position of the shareholder in a limited listed company is achieved.

It is worth mentioning that this "personal" interpretation is by no means detached from the general discipline concerning limited listed companies. In fact, the legislator has recently begun to allow, in certain special cases, a "personalization" of the shareholding[147].

Finally, the Statutes of the companies engaged in the *unbundling* provided for by the aforementioned ministerial decree must also be briefly analysed with a particular reference to the exercise of the right to vote. Given the difficulties in establishing the actual "limits" imposed on the right to vote according to Article 2 of the ministerial decree, it would have been desirable that some clarifications on the matter would be provided by the SNAM's Statute in order to better understand the normative provision. In addition, Article 13, third paragraph, of SNAM's Statute was expressly modified in accordance with the provisions of the said ministerial decree and now states that the members of the board cannot exercise any function on the board or supervisory board or as directors of ENI and its controlled companies, nor engage in any, direct or indirect, professional or proprietary relationship with such companies[148]. However, it is clear that this "new" statutory provision simply restates what has been provided for in the ministerial decree; it does not in any way furnish a clarification on the problems arising with respect to

[147] See *"Testo Unico Finanziario"* Article 127 *quater*.

[148] See Article 13, third paragraph, of SNAM's Statute: *"gli amministratori non possono rivestire alcuna carica nell'organo amministrativo o di controllo né funzioni dirigenziali in Eni Spa e sue controllate, né intraprendere alcun rapporto, diretto o indiretto, di natura professionale o patrimoniale con tali società"*.

ENI's right to vote. Nevertheless, as it has already been mentioned, the issue will definitely be resolved with the sale of ENI's share in SNAM. Yet, this will be achieved, from an optimistic point of view, in 2016. A clarification in the Statute would have thus been appreciated.

CHAPTER 3

THE ENI CONVICTION FOR ABUSE OF A DOMINANT POSITION BY THE ITALIAN ANTITRUST AUTHORITY

*1. **Regulations on Abuse of a Dominant Position***

At EU level, the abuse of dominant position was initially regulated by Article 82 of the *EC Treaty*, which has been currently replaced by Article 102 of the *Treaty on the Functioning of the European Union*.

The competition policy is closely monitored at EU level as anticompetitive practices can have a devastating effect on the domestic market. However, it is important to note that the dominant position of a company is not prohibited, but the abuse of a dominant position is considered illegal.

Article 102 of the *Treaty on the Functioning of the European Union* prohibits the abuse of a dominant position on a market by one or more companies. According to present legislation, abuse of dominant position concerns: the price fixing, limiting production and marketing of products as well as limiting technical progress at the expense of consumers; imposing dissimilar conditions to equivalent transactions among trading partners, conditioning the conclusion of contracts by the existence of some additional benefits[149].

[149] Consolidated versions of the Treaty on the Functioning of the European Union, 2010.

The company or companies that are in a dominant position have a responsibility not to distort competition. If only one company is on a dominant position, the phenomenon regards a unique dominant position, whereas, if more undertakings are dominant, collective dominance is at issue.

Competition authorities consider it necessary to intervene when a company commits an abuse of a dominant position in order to protect both consumers and competitors. In fact, at European level the abuse of a dominant position is defined as the situation where an enterprise has that much economic power that can act independently of both competitors, trading partners, and especially of consumers.

The analysis of the relevant market plays an important role for antitrust practices. Competition authorities are extremely thorough when settling both the relevant product market and the relevant geographic market. In order to clearly define both the relevant geographic market and the relevant product market, the competition authorities have to collect a series of information. This information can either already be in the hands of authorities or, sometimes, it may be necessary to request companies to provide it.

The market share held by a company in a relevant market is the first issue considered by the European Commission. A market share exceeding 40% in the relevant market is a warning; nevertheless, the period of time in which the respective market share is being held should not be neglected.

Additionally, the impossibility of some competitors to enter and expand in that market is another indicative matter for the competition authorities. The company holding a dominant position may impede competition to enter and expand in the relevant market through a variety of means: the existence of some contracts with suppliers and customers for very long periods of time, the

existence of a very well organized distribution network, privileged access to the raw materials required and the benefits from the existence of economies of scale and possession of the latest technology.

Yet, authorities in the field also examine the power of the pressure that clients put on a certain company in a dominant position. In fact, even if the company has a high market share, but its customers put such a pressure on it that they are ultimately able to influence the company's behavior, then the abuse of dominant position of that company is unlikely.

In addition to the aspects mentioned above, when analyzing the abuse of dominant position, the Commission considers a number of more specific factors. These factors refer to: low selling prices of products, imposing certain exclusive supply contracts on customers, offering customers conditional discounts on the volume of products or services purchased, tying or bundling of products sold to customers and unjustified refusal to work with new customers.

When facing a possible abuse of a dominant position, the European Commission considers both the general factors and the specific ones listed above, comparing them with the normal situation that should exist in a competitive market. The ultimate objective of the competition authorities, in terms of restricting the abuse of a dominant position, is to protect competition and consumers in particular, by enabling the latter to choose from a variety of products in the quantities they want and benefiting of the optimal price performance ratio.

2. *Overview on the Conduct of Proceedings for Abuse of a Dominant Position*

At European level the way of conducting proceedings for abuse of dominant position is regulated in detail. In a case of abuse of dominant position, the European Commission or the Member States' competition authorities, ex-officio or following complaints lodged by other companies or individuals, open investigations. Competition authorities of the EU Member States work closely with the European Commission throughout the investigation.

Before opening the investigation, there is an initial assessment. In the initial assessment the information is analyzed and, based on the knowledge available, there are two decisions that can be made: suspend the investigation if the complaint is not justified, because there is no infringement of Article 102, or start further investigations and requests for further information. Also, at this stage, the authority in charge with the case is set. The case can be assigned to the European Commission or the competition authority of a Member State of the European Union.

If, following the initial assessment, further investigations are considered necessary then the decision on the opening of proceedings will be issued. This decision is communicated to stakeholders and later published on the website of the Directorate General for Competition, together with a press release.

After issuing the decision to open the proceedings, the competition authorities may require certain information. The request for information is not only addressed to the involved companies, but also to other persons or companies able to provide information relevant to the case.

The communication between the competition authority and the investigated company can be carried out in one of the languages acknowledged in the European Union, according to the preferences of the company at issue.

During the investigation stage, there are numerous meetings aimed to help the investigation. During these review meetings, the parties may express their views.

Also, during the investigation stage, unannounced inspections at the headquarters of the companies involved can take place. Throughout the entire investigation the information unveiled is confidential.

The investigation stage may be concluded as follows: the competition authority considers that the allegations are substantiated and the investigation should continue; the parties propose a number of commitments aimed at ending the abuse of dominant position; the Competition Authority stops the investigation as complaints are unfounded.

In case the investigation continues, stakeholders are heard. Throughout the oral hearings the companies have the opportunity to answer to all objections made by the competition authority. This stage may have two results: the competition authority decides that Article 102 of the Treaty on the Functioning of the European Union has been violated, or they may decide to close the case on the grounds that the allegations were unfounded. Before issuing its decision of violation of Article 102, the Advisory Committee is also consulted.

If the abuse of dominance is found, the competition authority may impose a fine of an amount not exceeding 10% of the turnover of the previous financial year. Fines of 1% of the turnover of the previous financial year may

apply to companies that do not wish to provide the requested information or provide incomplete information.

Also, for each day of delay in the provision of information, the competent authority may impose a fine of 5% of the average daily turnover figure of the previous fiscal year[150].

If the company involved proposes a series of voluntary commitments to restore competition and to stop abuse of dominance, the competition authority should consider the proposals. Thus, the discussions regarding the commitments are initiated, followed by a preliminary evaluation. In the preliminary evaluation stage a series of meetings between representatives of the authorities and stakeholders are held.

This stage can be completed with the formulation of commitments on behalf of the company involved. These commitments must be disclosed within one month from the completion of the preliminary assessment. Before these commitments become binding, the competition authority carries out a market test.

Depending on the outcome of the market research those commitments become binding or they are improved, in which case the market test should be repeated. After the market testing, the opinion of the Advisory Committee is required, and subsequently the decision on commitments is issued.

The decisions of the Commission or the competition authorities of the Member States are made public to the interested parties as soon as possible. The decision at issue is made public through a press release and the summary of the decision is published in all official languages of the European Union in

[150] EU Competition Law Rules Applicable to Antitrust Enforcement, 2011.

the Official Journal of the European Union. The complete decision and the final reports are published on the website of the competence Authorities.

3. The ENI-TTPC Case

The origins of the ENI-TTPC case lie in the interruption of the expansion project of the TTPC pipeline, which allows the import of Algerian gas into Italy.

During the first half of 2002, Trans Tunisian Pipeline Company (TTPC), a wholly owned subsidiary of ENI, launched a project to increase transport capacity on the TTPC pipeline by 6.5 billion m3/year. The expansion of the TTPC pipeline was one of the measures devised by ENI to put an end to an abuse ascertained by the ICA in 2002[151].

In March 2003, TTPC signed ship-or-pay contracts with seven operators, which covered TTPC's entire additional capacity[152]. Such contracts would have entered into force only if, by 30 June 2003, a number of preliminary conditions would have been fulfilled[153]. As these conditions were not satisfied within the agreed term, TTPC granted an extension. At the expiry of the new deadline (30 October 2003), the preliminary conditions had still not been satisfied. TTPC then informed the shippers of its intention not to grant further

[151] Decision of 21 November 2002, No. 11421, Case A329, Blugas-Snam, Bulletin No. 47/2002.
[152] Under ship-or-pay contracts, shippers pay a monthly fee related to their allocated capacity even if they do not actually use the transport service.
[153] The conditions precedent were as follows: a) approval of the contract by the Tunisian authorities; b) provision of an adequate bank guarantee; c) issuance of an authorization by the Italian Ministry of Economic Development enabling the shipper to import gas into Italy; d) notification of the agreement between the shipper and the company managing the submarine pipeline connecting Tunisia and Italy for the transport of gas on this pipeline; and e) contemporaneous entry into force of shipping contracts capable of covering the whole additional capacity.

time extensions and to consider the contracts terminated. This effectively meant that TTPC would not proceed with the expansion project.

At the time of this decision, the market scenario was characterized by: (i) a forecasted growth in the demand of natural gas for the period 2004–2014 that appeared to be much lower than what had been previously estimated; and (ii) an expected increase in the amount of gas imported into the Italian market as a result of the construction of two additional LNG regasification terminals, which were expected to become operational in 2008. It appeared highly likely that such a market scenario would have resulted in an over-supply of gas in the 2008–2014 timeframe. In turn, this over-supply would have forced ENI to pay the onerous take-or-pay penalties provided for by long-term gas supply agreements, pursuant to which, in the event the contractual minimum volumes are not met, the buyer pays also for a portion of the gas volumes that it does not take. In this scenario, the envisaged expansion of the TTPC pipeline would have certainly increased the likelihood of the aforementioned over-supply and thus of ENI incurring significant take-or-pay penalties.

In December 2003, ENI therefore withdrew the measures submitted to put an end to the infringement established by the ICA (Italian Competition Authority) in 2002, including the expansion of the TTPC pipeline, and offered alternative measures shortly thereafter.

However, the latter were not considered adequate by the ICA. In October 2004, the ICA thus found that ENI had unduly delayed the implementation of the measures originally submitted and imposed a EUR 4.5 million fine for failure to comply with the 2002 infringement decision[154].

[154] Decision of 7 October 2004, No. 13644, Case A329B, Blugas-Snam, Bulletin No. 41/2004.

In 2006, in ENI-TTPC, the ICA held that the interruption of the expansion of the TTPC pipeline also amounted to a stand-alone abuse of dominant position.

The ICA recognized that the TTPC pipeline did not constitute an essential facility and that, thus, ENI was not under an obligation to grant access or, a fortiori, to expand it in order to facilitate competitors' entry. Nonetheless, the ICA held that ENI had committed an abuse as it had carried out 'a number of actions and omissions […] through its subsidiary TTPC' in order to undermine 'the success of the ship-or-pay contracts between TTPC and the shippers by relying on the non-fulfillment of certain preliminary conditions. According to the ICA, the abuse consisted of ENI's interference with the conduct of its subsidiary with a view to undermining the realization of the expansion project. This interference purportedly 'led to TTPC's decision to consider the shipping contracts legally rescinded'[155].

The ICA held that the contested infringement was very serious and imposed a EUR 290 million fine, which remains to date the highest fine ever imposed on a single company in Italy.

In 2007, the Regional Administrative Court of Latium (TAR) partially annulled the ENI-TTPC decision[156].

The TAR upheld the ICA's finding of abuse, but annulled the part of the decision relating to the fine. Upon further appeal, in 2010, the Council of State (i.e., Italy's Supreme Administrative Court), while confirming the ICA's finding of abuse, accepted ENI's arguments as to the erroneous determination of the amount of the fine on the ground that, through the contested conduct,

[155] Decision of 15 February 2006, No. 15174, Case A358, Eni-Trans Tunisian Pipeline, Bulletin No. 5/2006, para. 185.
[156] TAR, judgment of 30 March 2007, No. 2798.

ENI had sought to defend its legitimate economic interests rather than pursuing an exclusionary strategy. It thus reduced the fine from EUR 290 million to about EUR 20 million.

4. Opening of the Investigation Proceedings: ENI Case Study

Having given a broad outline of the outcome of the ENI/TTPC case and having analysed the process of the liberalization of energy in the gas market, it is now possible to examine, with a deeper understanding of the subject, the conviction of ENI of 2006 by the Italian Antitrust Authority for abuse of a dominant position.

The ruling in which ENI was convicted for the violation of competition rules provided a pecuniary sanction of 290 million euro. This is the highest sanction ever inflicted in Italy by the Antitrust Authority against a single firm and, notably, the second highest sanction ever imposed in Europe for a similar issue (second only to the 497 million euro sanction levied on Bill Gate's Microsoft by the European Commission).

The Commission's competition case concerning ENI's suspected abuse of a dominant position on the market for the transport of gas to Italy has its origin in the Commission's inquiry into the gas sector between 2005 and 2007. However, the proceedings against ENI cannot be considered as part of the energy sector competition inquiry, as will be explained below.

In accordance with the Commission's findings, the Italian Antitrust Authority, in the sitting of the 27th of January 2005, presided by Giuseppe Tesauro, ruled in favour of the opening of investigation proceedings targeting ENI and Trans Tunisian Pipeline Company Ltd. (TTPC).

The ultimate aim was that of ascertaining the violation of (now) Article 102 of the Treaty on the Functioning of the European Union that prohibits the abuse of a dominant position within the internal market. Such abuse had the effect of preventing the entrance of competing undertakings, independent from the ENI group, on the national market for natural gas production.

5. The Parties: ENI's Historical Background

The notice of the investigation opens the proceedings with an outline of ENI's business profile, which will thus be reported. However, diverging from the summary presented by the Italian Competition Authority in its original provision, here the business profile will be illustrated in more detail by selecting amongst the data available the figures that appear to be more relevant for the analysis of the conviction at issue.

ENI is definitely amongst the world's major energy and oil operating firms. In fact, it is active in the fields of oil, natural gas (along the entire production chain), in the production and sale of electricity, and in the petrochemical industries. Overall, with a turnover of approximately 70 billion euro, it is the sixth company in terms of reserves and the seventh in terms of productivity, after: Exxon Mobil, BP, Royal Dutch Shell, Chevron Texaco and Total. In Europe, it is the second for the sale of methane gas in the national markets, and the fifth in the refining business.

The corporate organisational structure can be divided in three great operating divisions: Exploration & Production, Gas & Power, and Refining & Marketing. The principal holding, ENI (a limited listed company), primarily controls six subsidiaries: Agip, EniPower, Italgas and Snam Rete Gas for the generation and marketing of electricity in Italy; Saipem for the supply of services to oil companies; SnamProgetti for the construction of energy infrastructures and for the operating of petrochemical industries.

The broad business portfolio is characterized by a strong vertical integration that permits the company to diminish the risks it faces due to both the growing instability of crude oil prices, and to the euro-dollar exchange rate. The diversification of the business sectors in which ENI operates allows the firm to be one of the least risky actors in the oil sector; in fact, ENI can efficiently provide for long-term planning. The only weak point of this six-fold corporation regards its relatively small dimensions with respect to each of the activities in which it is engaged: this hampers it from achieving economies of scale of the same level as those of its major competitors.

ENI is present in five continents, more specifically in seventy countries, and amounts to more than seventy-two thousand employees. It is a company listed on the New York Stock Exchange (NYSE) and on the Borsa di Milano (where it appears to be the leading company in terms of market value). By the 31st of December 2005 its market capitalization amounted to 87.3 billion euro, with a growth rate of 26% compared to the previous year.

ENI was privatized in 1995, after having been transformed from a public company to a limited company in 1992. Following its privatization its "market cap" increased fourfold: from 21 billion euro in 1995 to almost 98 billion euro in 2006. The Italian Ministry for the Treasury has placed 63% of ENI's share

capital on the market, banking a total amount of 30 billion euro, plus 6 billion euro of dividends and 15 billion of corporate income taxes.

ENI's business profile is illustrated in the balance sheet (2005) below:

	2001	2002	2003	2004	2005	
Exploration & Production						
riserve certe di idrocarburi	6.929	7.030	7.272	7.218	6.837	*(mil. di boe)*
vita utile residua riserve	13,7	13,2	12,7	12,1	10,8	*(anni)*
produzione giornaliera di idrocarburi	1.369	1.472	1.562	1.624	1.737	*(mig. di boe)*
Gas & Power						
vendite di gas naturale a terzi	63,72	64,12	69,49	72,79	77,08	*(mld. di metri cubi)*
autoconsumo di gas naturale	2,00	2,02	1,90	3,70	5,54	*(mld. di metri cubi)*
vendite di gas naturale delle società collegate	65,72	66,14	71,39	76,49	82,62	*(mld. di metri cubi)*
e di imprese rilevanti (quota ENI)	1,38	2,40	6,94	7,32	8,53	*(mld. di metri cubi)*
totale vendite e autoconsumi di gas naturale	67,10	68,54	78,33	83,81	91,15	*(mld. di metri cubi)*
trasporto di gas naturale per conto terzi in Italia	11,41	19,11	24,63	28,26	30,22	*(mld. di metri cubi)*
produzione venduta di energia elettrica	4,99	5,00	5,55	13,85	22,77	*(terawattora)*
Refining & Marketing						
produzione in proprio di prodotti petroliferi	37,78	35,55	33,52	35,75	36,68	*(mil. di tonnellate)*
capacità bilanciata delle raffinerie	664	504	504	504	524	*(mig. di boe)*
utilizzo della capacità bilanciata delle raffinerie	97	99	100	100	100	*(%)*
vendite di prodotti petroliferi	53,24	52,02	50,43	53,54	51,63	*(mil. di tonnellate)*
stazioni di servizio (Italia + estero)	11.707	10.762	10.647	9.140	6.282	*(numero)*
erogato medio (rete Agip) (Italia + estero)	1.685	1.861	2.109	2.478	2.479	*(mig. di litri/anno)*
Petrolchimica						
Produzioni	9.609	7.116	6.907	7.118	7.282	*(mig. di tonnellate)*
Vendite	6.113	5.493	5.266	5.187	5.376	*(mig. di tonnellate)*
Ingegneria e Costruzioni						
ordini acquisiti	3.716	7.852	5.876	5.784	8.188	*(mil. di euro)*
portafoglio ordini	6.937	10.065	9.405	8.521	9.964	*(mil. di euro)*
Dipendenti	72.405	80.655	75.421	70.348	72.258	*(numero)*

Fonte: Bilancio consolidato ENI (2005).

The privatization of ENI has thus generated the highest aggregate revenues for the sale of a single corporation ever obtained by a national government in the European Union. In 1995, the consideration received thanks to the "Initial Public Offering", which amounted to approximately 6.5 billion liras, represented, at that time, the highest income ever achieved on a worldwide basis with an IPO. Instead, ENI3, in 1997, has been the most important Public Offering of Sale ever concluded in Italy and the greatest among those of secondary market placement at a global level.

The balance sheet (2005) below shows figures regarding those transactions:

azionisti	numero azionisti	numero azioni	% capitale
> 10%	1	813.443.277	20,31
3% - 10%	3	680.861.792	17,00
2% - 3%	/	/	/
1% - 2%	7	406.360.994	10,15
0,5% - 1%	9	271.287.295	6,77
0,3% - 0,5%	14	208.487.474	5,21
0,1% - 0,3%	44	300.548.130	7,51
≤ 0,1%	269.371	948.718.920	23,69
ENI S.p.A. (azioni proprie)		244.488.113	6,11
altri	n.d.	130.263.881	3,25
totale	*269.449*	*4.004.459.876*	*100,00*
partecipazioni pubbliche	numero azionisti	numero azioni	% capitale
Ministero dell'Economia e delle Finanze		813.443.277	20,31
Cassa Depositi e Prestiti S.p.A.		400.288.338	9,99

ENI: ripartizione dell'azionariato.

Fonte: Bilancio consolidato ENI (2005).

The composition of the company's shareholding structure in June 2005 (date in which the dividends were paid) can be reported as follows: 20.3% of

the share capital was held by the Italian government represented by the Ministero dell'Economia e delle Finanze, 9.9% held by the Cassa Depositi e Prestiti (indirectly controlled by the Italian government), 6.1% was held by ENI itself through the purchase of its own shares, 33.3% held by Italian institutional and private investors, 14.7% held by European investors, 4.8% held by North American investors and 10.9% by investors from the rest of the world.

Therefore, ENI's share capital is spread for more that two thirds amongst Italian investors: more than two million small investors have subscribed tranches of shares in the last decade. This allows ENI to continue generating almost 40% of its turnover in Italy, although it is now keen on expanding on an international level.

Finally, in 2005 ENI has achieved a turnover of 73.7 billion euro, an operating income of 16.8 billion euro and a net income of 8.8 billion euro. The daily production of hydrocarbons was of approximately 1.74 million oil-equivalent barrels, while reserves amounted to 6.8 billion oil-equivalent barrels. In fact, in 2005 ENI was classified as first amongst Italian firms and 30th in Forbes's ranking of the 2000 most important firms in the world in the field of business and finance. In addition, it was classified as first amongst the eight Italian corporations present in the ranking drawn on the basis of the S&P 350 index that identifies the most important companies in the world in terms of stock performance and budgetary indicators.

The following balance sheet (2004) reports the economic and financial results achieved after the privatization:

anno	2004	2003	2002	2001	2000	1999	1998	1997	1996
fatturato	58,346	51,487	47,922	49,846	48,843	31,008	28,341	31,358	29,79
risultato operativo	12,463	9,537	8,502	10,396	10,772	5,422	3,810	5,344	4,960
utile netto	7,273	5,585	4,593	7,751	5,771	2,857	2,328	2,643	2,299
ROS	21.4%	18.5%	17.7%	20.9%	22.1%	17.5%	13.4%	17.0%	16.6%
margine netto	12.5%	10.8%	9.6%	15.5%	11.8%	9.2%	8.2%	8.4%	7.7%
dividendi	0,900	0,750	0,750	0,750	0,423	0,361	0,309	0,289	0,247

ENI: andamento dei principali risultati economico-finanziari all'indomani della privatizzazione.
Fonte: Bilancio consolidato ENI (2004).

According to the data that was furnished in the first semester of 2006, ENI achieved a net income of 5.28 billion euro (with a growth rate of 21.5%) and a daily production of hydrocarbons that amounted to 1.79 million oil-equivalent barrels. The "total shareholder return" for 2005 was of 35.3%. In 2006, the Board of Directors has approved to propose to the Shareholders' Meeting the distribution of dividends that amounted to 1.10 euro per share (+22% with respect to the previous year) of which 0.45 euro had already been distributed as advance payments in 2005.

It is therefore possible to affirm that the maximization of profits and a generous dividend distribution policy have always been primary issues on Mattei's company's business agenda.

This concept can be fully grasped from the analysis of the balance sheet (2005) below:

ENI: principali dati economici e finanziari.

	Italian GAAP				IFRS		
	2001	2002	2003	2004	2004	2005	
					(milioni di euro)		
Ricavi	49.272	47.922	51.487	58.382	57.545	73.728	
utile operativo	10.313	8.502	9.517	12.463	12.399	16.827	
utile netto	7.751	4.593	5.585	7.274	7.059	8.788	
flusso di cassa netto da attività di esercizio	8.084	10.578	10.827	12.362	12.500	14.936	
investimenti tecnici	6.606	8.048	8.802	7.503	7.499	7.414	
investimenti in partecipazioni	4.664	1.366	4.255	316	316	127	
patrimonio netto e interessi di terzi azionisti	29.189	28.351	28.318	32.466	35.540	39.217	
indebitamento finanziario netto	10.104	11.141	13.543	10.228	10.443	10.475	
capitale investito netto	39.293	39.492	41.861	42.694	45.983	49.692	
							(%)
return on average capital employed (ROACE)	23,9	13,7	15,6	18,8	16,6	19,5	
Leverage	0,35	0,39	0,48	0,31	0,29	0,27	
					(euro per azione)		
utile netto per azione [(1)]	1,98	1,20	1,48	1,93	1,87	2,34	
dividendo	0,750	0,750	0,750	0,90	0,90	1,10	
dividendi pagati					*(milioni di euro)*		
pay-out	2.876	2.833	2.828	3.384	3.384	4.096	
redditività complessiva per l'azionista							*(%)*
	37	62	51	47	48	47	
	6	13,1	4,3	28,5	28,5	35,3	
dividend yield [(2)]	5,6	5,2	5,1	4,9	4,9	4,7	
							(milioni)
numero azioni in circolazione [(3)]	3.846,9	3.795,1	3.772,3	3.770,0	3.770,0	3.727,3	
							(miliardi di euro)
capitalizzazione di borsa [(4)]	54,0	57,5	56,4	69,4	69,4	87,3	

(1) calcolato come rapporto tra l'utile netto e il numero medio delle azioni in circolazione

nell'esercizio;
(2) rapporto tra dividendo di competenza e media delle quotazioni del mese di dicembre;
(3) con esclusione delle azioni proprie in portafoglio;
(4) prodotto del numero delle azioni in circolazione per il prezzo di riferimento

Fonte: Bilancio consolidato ENI (2005).

6. *Trans Tunisian Pipeline Company's Historical Background*

After having summarized the business profile of the giant Italian company, the Italian Competition Authority highlights ENI's different legal positions with respect to the numerous international infrastructures specialized in the transport of methane gas.

There are two possible ways of joining such major firms: the first one is through direct equity participation in the share capital of the companies that own gas pipelines; while the second one is by retaining the right of transit that is based on the transport capacity of the company concerned. The right of transit is usually granted to the firms that enter into exclusive usage contracts with the pipeline owners, offering on their behalf the management and maintenance of the pipelines.

It is now desirable to illustrate the broader picture of the international system of the high-pressure pipelines that have developed for more the 4300 kilometres. It is essentially though six "gas transit pipelines" that natural gas is imported in Italy:

- Three coming from Northern Europe: TAG (Trans Austria Gasleitung), TENP (Trans Europa Naturgas Pipeline) and Transitgas. These are responsible for the import of Russian, Dutch and Norwegian gas

respectively.

- Three coming from North Africa: Greenstream for the transport of Libyan methane, and finally TTPC (Trans Tunisian Pipeline Company) and TMPC (Trans Mediterranean Pipeline Company), both part of the Transmed system for the import of Algerian gas.

For what concerns more specifically the case at issue initiated by the Italian Competition Authority, the facts that have lead to the opening of the investigation proceedings regard the business plan for the enhancement of the transport capacity of the Algerian-Tunisian pipeline.

The analysis of the organization of such infrastructure reported below is thus essential for this case study:

Infrastrutture di trasporto internazionale: "pipelines" dirette in Italia.

Gasdotto	territorio	proprietà infrastruttura	diritto d'uso e gestione	quote di partecipazione nelle società di gestione	
TAG (1018 km) Trans Austria Gasleitung	Il sistema TAG attraversa l'Austria dalla località di Baumgarten, al confine tra Austria e Repubblica Ceca, fino a Tarvisio e Gorizia, per l'importazione di gas proveniente dalla Russia.	OMV	TAG Gmbh	ENI OMV	89% 11%
TENP (968 km) Trans Europa Naturgas Pipeline	Il sistema TENP attraversa la Germania dalla località di Bocholtz, al confine con l'Olanda, fino alla località svizzera di Wallbach, al confine svizzero-tedesco per l'importazione di gas proveniente dall'Olanda.	TENP Gmbh		ENI RURHGAS	49% 51%

TRANSITGAS (291 km)	Il sistema TRANSITGAS attraversa la Svizzera dalla località di Wallbach, fino alla località di Passo Gries e si connette con il sistema TENP per l'importazione di gas proveniente dall'Olanda, e con la rete di trasporto proveniente dalla Francia per l'importazione di gas proveniente dalla Norvegia.	TRANSITGAS		ENI SWISSGAS	46% 54%
TTPC (742 km) Trans Tunisian Pipeline Company	Il sistema TTPC attraversa la Tunisia dalla località di Oued Saf Saf alla frontiera con l'Algeria ed arriva nel Canale di Sicilia presso la località di Cap Bon per l'importazione di gas proveniente dall'Algeria.	SOTUGAT (società dello stato tunisino)	TTPC (titolare fino al 2019 del Diritto esclusivo di trasporto)	ENI	100%
TMPC (775 km) Trans Mediterranean Pipeline Company	Il sistema TMPC attraversa il Canale di Sicilia e connette il sistema TTPC con il sistema italiano per l'importazione di gas proveniente dall'Algeria.	TMPC		ENI SONATRACH	50% 50%
GREENSTREAM (520 km)	Nuovo gasdotto di collegamento Libia - Italia (Gela).	GREENSTREAM M BV	GREENSTREAM BV	ENI	75%

Historically speaking, by the end of the 1970s, methane gas started being considered the only alternative source of energy suitable for overcoming the crises caused by the oil embargos. ENI thus turned towards Algeria for the solution of the energy supplies problems that had been afflicting Italy already for many years. Algeria was a territory that had not yet been neither explored nor exploited in spite of its great potential in terms of natural resources, and therefore it was perceived as ideal to serve ENI's purposes.

The continuous discoveries of natural gas deposits, that are amongst the greatest on a worldwide basis, have lead ENI to realize that the construction of major infrastructures was necessary in order to export methane gas in Italy. Methane gas was ceded from the Algerian State agency Sonatrach through the conclusion of the first "take-or-pay" contracts.

The construction of the first pipelines, that had commenced in 1977, was finally completed in 1983, year in which the "Sistema di Metadotti Trans-Mediterraneo" (usually addressed as "Transmed System") was officially launched. However, due to the complexity that characterizes the massive project for the construction of more than 2500 kilometres of pipelines, the finalisation of the second pipeline was not achieved until 1997.

The Transmed System works in the following manner: after having received natural gas from the pipeline (built by SnamProgetti and Saipem, with an overall length of 550 kilometres) that connects the great natural gas reserve situated in the Hassi R'Mel area to the Oued Es Saf Saf site on the Algerian-Tunisian border, it begins its transport activity with the Trans Tunisian Pipeline Company starting from the border up to the Cap Bon site, on the Sicilian Channel. It thus crosses the entire Tunisian territory and develops for 371 kilometres (in truth the pipelines are two and therefore the overall extension is of 742 kilometres).

From Cap Bon methane is transferred in a second pipeline: the submarine pipeline TMPC (Trans Mediterranean Pipeline Company) that reaches a maximum depth of 600 metres for approximately 155 kilometres (in this case the pipelines are five so the overall extension is of 775 kilometres). This pipeline crosses the Mediterranean Sea and reaches the Sicilian coast of Mazara del Vallo, near Trapani. Once methane gas finally reaches Italy, it is further transported for another 1470 kilometres up to Minerbio, near Bologna.

Consequently, it emerges that it is the Trans Tunisian Pipeline Company Ltd (TTPC) that builds the pipelines. It does so together with ENI that owns 100% of TTPC's shares, and is thus the defendant in the proceedings initiated by the Italian Competition Authority. In fact, although the ownership of the pipeline is retained by the Tunisian State, since Scogat (the company belonging to the ENI group responsible for the development of the infrastructure) has ceded the ownership to the government of Tunis, what matters is not so much the ownership of the pipeline, but its management: not surprisingly the "pipeline company" is empowered with the exclusive right of usage of the transport system TTPC until 2019.

7. The Facts of the Case

As mentioned above, ENI is an Italian state controlled company active at multiple levels in the production, transportation and supply chain of natural gas and oil[157].

The initiation of proceedings against ENI originates from information obtained during the inspection carried out by the European Commission in 2006.

The alleged infringement regards capacity hoarding and strategic underinvestment in the transmission system leading to the exclusion of competitors and harm for competition and customers in one or more supply markets in Italy. These suspected practices constitute possible infringements of Article 102 of the Treaty on the Functioning of the European Union. The Commission maintained that these practices were engaged in by ENI S.p.a. and by its subsidiaries and companies under their control, including Trans Austria Gasleitung GmbH, Trans Europa Naturgas Pipeline GmbH & Co. KG, ENI Deutschland S.p.a. and Eni Gas Transport International SA.

The proceedings against ENI Group are not part of the energy sector competition inquiry, on which the final report was presented on 10th January 2007 (see IP/07/26 and MEMO/07/15). The energy sector inquiry has allowed the Commission to gain an in-depth understanding on the functioning, and in some respects malfunctioning, of the energy sector, which is of key importance for the overall competitiveness of the European economy. The knowledge acquired during the sector inquiry has allowed the Commission to

[157] ENI is a vertically integrated gas company, with activities in the production and import of gas, in the gas transmission and storage businesses, and in the downstream gas distribution business.

draw conclusions that will be helpful in enhancing the appropriateness and effectiveness of future Commission investigations based on competition law.

It is important to note that the initiation of proceedings does not imply that the Commission has conclusive proof of an infringement. It only signifies that the Commission will conduct an in-depth investigation of the case.

There is no strict deadline for the completion of such investigations. Their duration depends on a number of factors, including the complexity of each case, the extent to which the undertakings concerned co-operate with the Commission and the exercise of the rights of defense.

In April 2007, the Commission opened an *ex-officio* case[158] to investigate ENI's conduct in the operation and management of its international gas transmission networks, in particular with respect to the TAG, TENP and Transitgas pipelines, which together account for more than 50% of gas imports into Italy. The investigation begun with surprise inspections carried out at the premises of ENI and its subsidiaries active in the transport of gas and it had an overall duration of almost three years. Following this inquiry, the Commission came to the view that ENI may have infringed Article 102 of the Treaty on the Functioning of the European Union (TFEU) through its *constructive refusal* to supply transportation capacity. This assessment was communicated to ENI in a statement of objections issued in March 2009.

158 Case COMP/39.315 — *ENI*.

8. ***The Legal Base for the Decision***

The legal base of this procedural step is Article 11(6) of Council Regulation No 1/2003 and article 2(1) of Commission Regulation No 773/2004. Article 11(6) of Regulation No 1/2003 provides that the initiation of proceedings relieves the competition authorities of the Member States of their authority to apply Articles 81 and 82 of the Treaty. Moreover, Article 16(1) of the same Regulation provides that national courts must refrain from giving decisions that would conflict with a decision contemplated by the Commission in proceedings that it has initiated.

Article 2 of Regulation No 773/2004 states that the Commission can initiate proceedings with a view to adopting at a later stage a decision on substance according to Articles 7-10 of Regulation No 1/2003 at any point in time, but at the latest when issuing a statement of objections or a preliminary assessment notice in a settlement procedure. In the case at stake, the Commission has chosen to open proceedings before such further steps.

The Commission may disclose to the public the initiation of proceedings in any appropriate way. Before doing so, it has to inform the parties concerned. The Competition Authorities of the Member States concerned have also been informed.

Finally, it is provided that the company's rights of defense will be fully respected.

9. *The Italian Competition Authority's Theory of Abuse*

The theory of abuse embraced by the Italian Competition Authority (ICA) in ENI/TTPC is probably one of the most obscure and controversial matters in the Italian antitrust landscape. Considering the interruption of a voluntary expansion project as an abuse impinges on the delicate issue of whether and to what extent a dominant firm can be required to share its assets with its competitors.

An assessment of the contested conduct under the traditional principles on access to essential facilities would have raised substantial doubts. Did the TTPC pipeline truly constitute an essential facility? If so, is an obligation not only to grant access but to even make costly and risky investments to increase available capacity, to the benefit of actual or potential competitors, conceivable at all under competition rules?

Indeed, an attempt by the ICA to ground its theory of harm on the Essential Facilities Doctrine (EFD) would have probably failed from the outset given the difficulty of qualifying the TTPC pipeline as an essential facility. Several infrastructures could have been used as an alternative to the TTPC pipeline to import gas into Italy. Moreover, the Italian gas markets were characterized by a number of large firms (including multinational energy companies) that appeared capable of developing alternative infrastructures and had already undertaken, or were about to undertake, concrete initiatives in that direction[159].

Probably aware of the difficulty in framing the case as an abusive refusal

[159] Several projects for new LNG terminals and pipelines were launched at that time and in subsequent years. Only the LNG terminal of Rovigo (whose capacity was entirely allocated to competitors) has been subsequently completed, while other projects were either abandoned or delayed (although some of them are still under way). The realization of these other projects has been obviously impacted by the economic crisis and the dramatic reduction of Italian natural gas demand forecasts.

to grant access to an essential facility, the ICA did not rely on the EFD. It recognized that the TTPC pipeline did not constitute an essential facility and that, therefore, there was no obligation to grant access, let alone an obligation to complete the expansion project. According to the ICA, ENI's special responsibility as a dominant firm did not give rise to 'an obligation for the ENI group to expand the Tunisian pipeline, but rather an obligation for Eni not to adopt a conduct which, in directing the behavior of TTPC, would have induced the latter to behave contrary to the commitments . . . taken, with the sole purpose of protecting/strengthening the dominant position of the parent company in the Italian market for wholesale supply of natural gas'[160].

On appeal, the TAR confirmed that the alleged abusive behavior did not lie in a refusal to grant access to an essential facility, but rather in 'the specific conduct of the applicant, which interfered with the behavior of its subsidiary TTPC, thereby obtaining the "termination" of the contracts already concluded'[161]. According to the TAR, this behavior was unlawful because it reflected an exclusionary strategy implemented by ENI with a view to maintaining or strengthening its position on the downstream market[162].

The Council of State held that ENI's arguments alleging a violation of the EFD principles were not relevant, since the ICA had not considered the Tunisian pipeline to be an essential facility. Rather, the ICA had contested the failure to fulfill the commitment to expand a non-essential facility, which TTPC had voluntarily taken[163]. Next, the Council of State briefly analyzed the main evidentiary elements on which the ICA's theory of harm was based, and concluded that Eni and TTPC gave a rigid interpretation of the conditions

[160] Decision of 15 February 2006, No.15174, CaseA358, Eni-Trans Tunisian Pipeline, Bulletin No.5/2006, para. 187.
[161] TAR Lazio, judgment of 30 March 2007, No. 2798, para. 2.2.2.
[162] Ibid. para. 2.3.2.
[163] Council of State, judgment of 20 December 2010, No. 9306, para. 11.

precedent provided for by the agreements entered into with the shippers: while formally compliant with the above-mentioned agreements, this behavior was, from a substantive point of view, incompatible with the principle of good faith and the special responsibility that rests on dominant undertakings, according to which ENI/TTPC should have granted further time extensions for the fulfillment of the conditions precedent[164].

According to the Council of State, the abuse did not result from the mere exercise of influence by the parent company over its subsidiary's behavior. In itself, this influence was considered neutral from an antitrust perspective. Instead, the abuse consisted in ENI's use of its control over its subsidiary to induce the latter to reconsider prior business decisions and commitments already taken[165], thus leading TTPC to forego the additional gas transport revenues it would have obtained through the expansion of the pipeline with a view to protecting ENI's interests in the downstream market.

The Council of State added that, although ENI believed that it was acting to protect its own legitimate economic interests, the decision to discontinue the expansion of the TTPC pipeline was not objectively justified. According to the Court, a defensive conduct would have been justified only in case of an actual risk, while ENI's behavior was based on a subjective assessment of a hypothetical future scenario[166].

The forecasted over-supply and the ensuing risk of incurring the take-or-pay penalties were not concrete enough and there was no certainty that they would materialize in the future. Moreover, even if a scenario of over-supply were to materialize, ENI could have relied on the specific legal remedies

[164] Ibid. para. 13.5.4.
[165] Ibid. para. 12.1.
[166] Ibid. para. 13.1.

provided by the Italian legislation implementing the EU natural gas liberalization directives.

Indeed, ENI could have applied for the derogation to third-party access obligations envisaged by Articles 24 and 26 of Legislative Decree No. 164/2000, pursuant to which the incumbent can exceptionally request that third parties' access to the national gas transmission system be denied in case it faces serious economic and financial difficulties related to take-or-pay agreements entered into before the entry into force of Directive 98/30/EC (the first EU natural gas liberalization directive). According to the Court, TTPC would also not have been harmed by the possible over-supply and ENI's subsequent application for the derogation set forth by Articles 24 and 26 of Legislative Decree No. 164/2000, because the ship-or-pay contracts would have ensured that the shippers would have paid the transport tariff for the entire capacity allocated to them even if they had not used it wholly or partly[167].

10. ***The Uncertain Elements of ENI and TTPC's Alleged Abuse***

The ruling of the Council of State did not dispel the serious doubts raised by the ICA's theory of abuse. First of all, the ruling endorsed the ICA's decision to punish the interruption of an infrastructure expansion even though the conditions set forth by the case law on the EFD were not met. The Council of State did not inquire any further into ENI's arguments in this respect on the ground that the ICA had not based its case on the EFD. However, the Council

[167] Ibid. paras 13.1 and 13.4.

of State did not answer the question as to whether it is possible to rely on the specific set of circumstances of the case at hand to impose an obligation to grant access to non-essential facilities or to make onerous investments aimed at granting such an access, thus eluding the stringent requirements established by EU case law to prevent an excessive proliferation of antitrust obligations to share assets with rivals. Ultimately, if a firm is not under an obligation to invest, it should not be compelled to complete an expansion project.

Even setting aside the issue of the application of the EFD principles, the ICA's theory of abuse, based on the unlawful influence of the parent company on its subsidiary's commercial conduct, remains questionable. As no provisions imposed a functional separation between ENI and TTPC, the influence of the former on the latter was not challengeable as such. Furthermore, according to the EU case law, a parent company may be held liable for the conduct of a subsidiary only when: (i) the subsidiary committed an antitrust infringement, and (ii) the latter can be attributed also to the parent company, in particular by virtue of the exercise of a decisive influence over the subsidiary's behavior[168]. Given that both the exercise of parental influence over the subsidiary and the interruption of the expansion project were not, as such, incompatible with Article 102 TFEU, the 'unlawful interference' theory introduced by the ICA thus implies that a dominant undertaking may face antitrust liability for having induced one of its subsidiaries to engage in admittedly legitimate conduct. In other words, lawful interference in a lawful behavior, according to this theory, may amount to an abuse.

Both the ICA and the Council of State held that the interference of the parent company was unlawful because it induced the subsidiary to reconsider

[168] See, e.g., Case C-286/98 P Stora Kopparbergs Bergslags AB/Commission [2000] ECR I-9925; Case T-309/94 KNP v. Commission [1998] ECR II-1007; Case T-196/06 Edison/Commission [2011] ECR II-3149.

prior business decisions and contractual commitments. ENI's influence led the subsidiary to forgo additional profits with a view to protecting the parent company's position in a distinct market. However, the expansion project was not independently undertaken by TTPC, but rather was promoted by ENI as a measure aimed at bringing a previous antitrust infringement to an end. As a consequence, one could argue that ENI had the right to alter this decision in the event that the underlying circumstances had changed. If anything, ENI could only have been held liable for its failure to implement the measure it had offered.

Moreover, the argument that the expansion project would have certainly turned out to be profitable for TTPC is not persuasive. The pipeline enhancement would have required a significant investment that could have been compensated only in the long-term. Thus, the decision to proceed with the project had to take into account a large number of variables, which rendered any estimate of the profitability of the investment extremely complex and uncertain. The risks and uncertainties surrounding the implementation of the project, heightened by the possible over-supply, were not excluded by the ship-or-pay clauses. The Council of State considered that, owing to the ship-or-pay clauses, TTPC would have been able to claim the payment of transport services even if the shippers had been refused access to the Italian gas network pursuant to the derogation provided for by Articles 24 and 26 of Legislative Decree No. 164/2000. However, such a claim would have likely led to lengthy and uncertain litigation[169]. Anyways, even the ship-or-pay contracts would not

[169] The impossibility to access the national gas network would have effectively prevented the shippers from using the transport services for reasons not related to their behavior, but to an initiative of TTPC's parent company. In such circumstances, in order not to pay for the transport service, the shippers could have tried to rely on a number of remedies provided by Italian law, such as the non-fulfillment of a tacit condition precedent, the extinction of the obligation due to impossibility, or the equitable reduction of penalty payments pursuant to Article 1384 of the Italian Civil Code.

have hedged TTPC from the risk of insolvency of the shippers, in the case that they would be denied access to the Italian market after having entered into long-term take-or-pay contracts.

As both TTPC's decision to interrupt the expansion project and ENI's influence on its subsidiary were lawful, the abuse identified by the ICA ultimately hinges on the alleged existence of an exclusionary strategy aimed at preserving or strengthening the incumbent's position on the downstream supply markets.

However, the existence of an exclusionary intent cannot per se constitute an infringement of Article 102 TFEU. It can rather be considered only as a factor relevant to the assessment of a dominant firm's conduct, or, at most, a constituent element of a broader abusive behavior[170].

In any event, the Council of State ruled that there was no exclusionary strategy. In the part of the ruling concerning the fine imposed by the ICA, the Council of State held that the contested conduct was 'objectively exclusionary', but was not intentional because ENI was 'subjectively convinced to act in order to protect its own economic interests' and 'did not intentionally pursue the exclusion of its competitors'[171].

The acknowledgement of 'a defensive aim related to the contractual commitments taken in the context of the take-or-pay contracts', as opposed to the exclusionary intent asserted by the ICA, induced the Council of State to downgrade the abuse from 'very serious' to 'serious' and, thus, to reduce the fine originally imposed by the ICA by over 90%. However, this finding should have led to a more radical conclusion: once the existence of an exclusionary

[170] See Case C-62/86 Akzo Chemie BV v. Commission [1991] ECR I-3359.
[171] Council of State, judgment of 20 December 2010, No. 9306, para. 20.2.

intent had been ruled out, the entire theory of abuse put forward by the ICA should have collapsed.

The grounds on which the Council of State held that no objective justification existed are also questionable. According to the Council of State, ENI should have waited for the forecasted over-supply to materialize before acting to defend its own interests. Once the situation of over-supply had become a reality, ENI could have asked for derogation from the obligation of third-party access to the Italian transport system pursuant to Articles 24 and 26 of Legislative Decree No. 164/2000. Assuming ENI had obtained such derogation, TTPC could have recouped the investments made by requiring the payment of transport services pursuant to the ship-or-pay clauses, even if the shippers would not have shipped any gas over the TTPC pipeline due to the impossibility of having access to the Italian gas network[172].

However, the chances of successfully relying on the tools indicated by the Council of State were relatively slim. The derogation envisaged by Articles 24 and 26 of Legislative Decree No. 164/2000 is an exceptional instrument, which is based on an uncertain and laborious procedure whose outcome would certainly have been influenced by the political will not to raise entry barriers in the recently liberalized gas sector (and, in fact, a similar derogation has never even been requested in the EU). Moreover, as noted above, it is at least questionable to assume that, had ENI obtained such derogation, TTPC would have been effectively able to collect the transport fees provided for by the ship-or-pay contracts.

Anyhow, even assuming that the routes envisaged by the Council of State were actually practicable, the court's reasoning leads to a paradox. In order to

[172] Ibid. paras 13.1 and 13.4.

legitimately protect their economic interests in a scenario characterized by over-supply, ENI and TTPC should have put in place a series of initiatives that would have harmed the shippers far more than the interruption of the expansion project. In fact, not only would the shippers have lost the possibility to market Algerian gas in Italy, but they would also have had to pay, on the one hand, the onerous penalties provided for by the take-or-pay contracts entered into with the gas supplier and, on the other, the transport fees provided for by ship-or-pay agreements entered into with TTPC and with the company operating the submarine pipeline TMPC, which connects Tunisia to Italy.

In conclusion, while it drastically reduced the amount of the fine, the Council of State's ruling confirmed that the interruption of an investment project could amount to an abuse. However, it did not clarify the shaky and unprecedented theory of abuse put forward by the ICA. As the administrative court recognized that the incumbent did not implement an exclusionary strategy, but only intended to defend its legitimate economic interests, ENI's alleged abuse amounted ultimately to lawful interference in lawful conduct in order to pursue a lawful objective.

11. ***Relevant Markets: Gas Network System as an Essential Facility***

Italy is a net importer of natural gas from both EU and non-EU countries[173]. The transport of natural gas to Italy is a distinct activity and

[173] The share of imports in national consumption has increased in the past ten years to over 80 %, see annual reports of the national regulator *Autorità per l'Energia e il Gas* (AEEG) from 2000 to 2010.

instrumental in downstream activities for the wholesale and retail supply of gas[174].

ENI was able to effectively control or influence, either by means of its ownership rights or by its rights to transportation capacity, the use of the infrastructures for the import of gas to Italy[175].

On the demand side, shippers willing to serve consumers in the downstream gas markets need to have access to viable transportation capacity. From a *consumer perspective*, it does not matter from where the gas originates, as long as there is a viable transportation route between origin and destination. On the supply side, there were no alternative routes to the ENI-controlled infrastructures that could be considered interchangeable or substitutable for shippers in terms of their characteristics, prices and effective use during the investigation period (2001-2008). Therefore, all of ENI's gas transport infrastructures were indispensible, since access to ENI's transport system was objectively necessary to import gas and compete in the gas supply markets in Italy. Third-party infrastructures were, and still are, insufficient to exert effective competitive pressure[176], and duplicating the existing infrastructure was, and still is, unreasonably difficult[177].

---

[174] See e.g. cases IV/493 — *Tractebel/Distrigas II*, paragraph 27 et seq.; COMP/M.3410 — *Total/Gaz de France*, paragraphs 15-16; COMP/M.3696 — *E.ON/MOL*, paragraph 97.

[175] The infrastructures are: the Trans-Mediterranean and Trans-Tunisian pipelines (TTPC/TMPC), which in 2007 carried imports of Algerian gas to Italy accounting for about 25 % of national consumption; the Greenstream pipeline, for importing Libyan gas to Italy, accounting for 10 % of the gas consumed in Italy; the TENP/Transitgas pipelines, owned jointly with E.ON Ruhrgas (TENP) and Swissgas (Transitgas), carrying gas from Northern Europe through Germany (TENP) and Switzerland (Transitgas) and accounting for about 17 % of national consumption; the TAG pipeline, owned jointly with OMV, which imports Russian gas through Austria to meet about 27 % of Italian demand; the Slovenian pipeline, carrying marginal volumes of Russian gas via Slovenia (less than 1 %); and the Panigaglia LNG (liquefied natural gas) Terminal, accounting for around 3 % of the gas consumed in the country.

[176] Only in 2009 did some limited new infrastructure became operational: namely the offshore LNG Terminal Rovigo (owned by Edison) with a capacity of 8 bcm (less than 10 % of national consumption).

[177] There are technical, legal and economic obstacles making it impossible, or at least unreasonably difficult, for would-be importers to duplicate ENI's transport infrastructure system (i.e. to create an infrastructure system capable of providing volumes comparable to ENI's or, at the very least, volumes

On this basis, the conclusion reached was that ENI's import infrastructures constituted a unique system that could be considered in its entirety as an essential facility[178] and that ENI's dominance in the provision and use of this essential facility (the market for gas transportation, i.e. the overall system of infrastructures used to transport gas to Italy) could not be challenged within the foreseeable future[179].

In addition, ENI was found to hold a dominant position on the downstream gas supply markets in Italy[180].

ENI also maintains a significant portfolio of long-term gas import contracts and remains a gas producer in its own right in Italy and abroad[181].

There are high entry barriers in the downstream gas supply markets due to difficulties in international gas procurement and existing bottlenecks in import capacity, combined with declining national production and difficulties with access to storage[182].

---

sufficient to exert an effective competitive constraint on ENI), alone or in cooperation with other users. See Case C-7/97 Bronner [1998] ECR I-7791, paragraphs 44 and 46; see also, in the different context of products covered by intellectual property rights, Case C-418/01 IMS Health [2004] ECR I-5039, paragraph 29.

[178] Since gas infrastructures are considered to have the character of a natural monopoly, the EU has imposed obligations to allow third-party access to existing networks (see Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC and the previous Gas Directives from 2003 and 1998 – `the Third Gas Directive', OJ L 211, 14.8.2009, p. 94, as well as the Communication from the Commission to the Council and the European Parliament, SEC (2005)1448, of 15 November 2005).

[179] As said before, ENI's dominance is based on its ownership of import routes to Italy and its rights to this transport infrastructure. ENI has exclusive or joint control over the TSOs operating all pipelines and the Panigaglia LNG Terminal, and holds significant capacity/use rights to those infrastructures.

[180] The statement of objections set out evidence of ENI's dominant position in the wholesale gas supply market and in the retail markets for gas supply to power plants and (large) industrial customers.

[181] ENI's share of domestic production was around 85 % in 2008 while imports ranged between 60-70 % (see Autorità per l'energia elettrica e il gas [AEEG], Annual Report, July 2008, p. 120). Furthermore, ENI holds interests in exploration, production and operation, as well as in the transport of natural gas from Libya to Italy.

[182] Recently, the Italian antitrust authority (Autorità garante per la concorrenza e il mercato, AGCM) conducted a sector enquiry into the gas storage system in Italy (decision No 19925 28/05/2009)

The relatively limited transport capacities available to suppliers other than ENI imply that the former hold equally low market shares on the downstream gas supply markets. In fact, the Commission concluded that ENI's competitors in the downstream supply gas markets in Italy neither have the ability nor the economic incentives to exercise an effective competitive pressure on ENI. This is because they lack a sufficient degree of access to independent gas imports or domestic production, so their dependence on ENI's sales renders them more likely to align their prices[183].

*12.**The Practices***

The 'theory of harm' set out in the statement of objections is that ENI may have intentionally operated and managed the TAG, TENP and Transitgas pipelines in such a way as to limit gas inflows into Italy. Specifically, ENI refused to grant access to its available transport capacity (*capacity hoarding*), granted access in a less attractive form (*capacity degradation*), and strategically limited investment in new capacity on its network (*strategic underinvestment*). This conduct took place at least during the period 2000-2008, despite a steady and significant demand for transport capacity from third parties to import gas to Italy on these international pipelines.

The Court of Justice has held that "refusal by an undertaking holding a dominant position in a given market to supply services to a rival undertaking

---

together with the national regulator (AEEG). The main finding is that storage has been systematically 'rationed' as upgrades have been too conservative. Other barriers are regulatory in scope.

[183]ENI sells gas to suppliers active in the Italian downstream gas markets, not only in the wholesale market in Italy (ENI's sales to competitors are around 25 %) but also directly at the Italian borders (6 % of gas imported is ENI gas sold directly at the border). Furthermore, though accounting for slightly less than 10 %, ENI has long-term capacity contracts with some competitors for Libyan gas transported via the Greenstream pipeline.

competing in a neighboring market, where these services are indispensable for the rival to pursue its business and to the extent that the conduct in question is likely to eliminate all competition on the part of that rival", constitutes an infringement of Article 102 TFEU, unless the refusal is objectively justified[184].

The same is true, according to the case law of the ECJ, if access is granted to competitors on terms less favorable than those applied to the dominant undertaking's own business unit active in the same market ('constructive refusal to supply').

13. ***Capacity Hoarding***

The Commission's investigation showed that demand from third parties largely exceeded the capacities offered. This led to *rejection* of third parties' transmission requests by ENI without objective justification. The Commission investigated whether some transportation capacity was indeed available on ENI's pipelines but not effectively offered on the market. In order to do so, the Commission requested, for the period 2001-2007, extensive data from ENI and the transmission system operators (TSOs) for the three pipelines concerned in order to establish hourly capacity utilization rates.

Based on this analysis, the Commission took the view that ENI may have hoarded available capacity that could have been profitably offered to third parties. In order to assess the likelihood of anti-competitive conduct by ENI, it is worth comparing the capacity available to third parties with ENI's capacity rights and utilization. It was acknowledged that ENI had capacity rights of no

[184] See ECJ judgment of 26 November 1998, Case C-7/97, *Bronner* [1998] ECR I-7791, paragraph 38.

less than 80%[185] while third-party competitors realistically could only hope to obtain on average less than 3.10% of the available capacity on the pipeline.

In addition, the investigation gave rise to further concerns, namely that ENI might have understated its technically available capacity. As a result, the scarce transport capacity may have been managed in a manner that prevented many competitors from gaining sufficient and viable access to it.

14. ***Capacity Degradation***

The Commission further gathered evidence indicating that, even when capacity on the pipelines was offered, ENI rendered its purchase more difficult and diminished its value for third parties by various means (*capacity degradation*).

One *capacity degradation* practice was to delay allocation of available capacity: i.e. by organizing sequential sales of capacity so as to engender expectations of scarcity. Another method was to offer capacity on a short-term basis (monthly allocations) rather than on a long-term basis (yearly allocations). Further, ENI may have organized auctions on complementary pipelines (such as TENP and Transitgas) in an uncoordinated way: capacity was offered on a standalone basis on each stretch of the network, whereas the value for a shipper wanting to import gas to Italy derives from access to the entire system; this rendered capacity on individual stretches of the pipeline useless. Occasionally, ENI may also have offered capacity in an interruptible

[185] Some of the capacity rights are available to stakeholders in the joint ventures (OMV in the case of TAG, E.ON Ruhrgas in the case of TENP and Swissgas in the case of Transitgas).

form[186] when it could have offered firm capacity. Finally, ENI may have imposed limitations on the amount of lots individual shippers could bid for.

The Commission took the view that all those practices would have reduced the value of capacity for ENI's competitors by making it more difficult for them to organize and plan their operations (from procurement of upstream gas to the contract with downstream clients) and rendering capacity less accessible by pushing up its price.

15. ***Strategic Underinvestment***

Concerns were also raised with respect to ENI's investment decisions regarding whether or not to expand existing transport capacity on its pipelines. Indeed, gas flows can be reduced not only by hoarding or degrading capacity, but also by limiting expansion.

There is evidence that ENI may have refrained from investing in capacity expansion that would have allowed it to respond to requests from third parties[187].

Rather, ENI's decisions to enhance transport capacity over recent years have mainly addressed its own new long-term contractual commitments, with the aim of ensuring that transport capacity to Italy (and as a consequence gas supply in Italy) does not become too abundant. This was despite the fact that ENI itself acknowledged not only that the existing pipeline capacity might be insufficient to satisfy the growing demand for gas in Italy but also that it had

[186] Interruptible capacity is more limited in scope, as the transmission system operator is entitled not to provide (i.e. to interrupt) the transportation service under certain circumstances.
[187] Documents show that different expansion projects were studied and that additional capacity would have been necessary to satisfy the significant and credible long-term capacity demand of third-party shippers on ENI's international pipelines.

an obligation as a holder of an essential facility[188] to provide third-party access and to give proper consideration to capacity expansion that third parties could duplicate only at greater cost, if at all[189].

Concrete evidence substantiated the Commission's concern that the absence of additional investment in transportation capacity was not driven by a lack of profitability, but rather by ENI's aim of keeping tight control over transport capacity and thereby ultimately over the quantity of available gas on the downstream market. Direct allocation of additional capacity to third parties would have indeed boosted competition on the downstream markets and jeopardized ENI's downstream margins[190].

The Commission took the view that, in the situation of scarce capacity that characterized the period under investigation, capacity enhancements were legally and technically feasible and also likely to be profitable from a TSO point of view. Legally, ENI was entitled to initiate the investments needed to enhance capacity on all pipelines. Technically, an existing pipeline system can always be expanded at a lower cost than a green-field project of the same size, and this would also have been economically possible especially in view of substantial long-term capacity demands from shippers. Furthermore, even

[188] The internal document in question referred to the expansion of the TTPC pipeline.

[189] In this context, it is noteworthy that the mere fact that current capacities are fully used by an essential facility holder is not sufficient to exclude an abuse under Article 102 TFEU (see e.g. Commission Decision of 20.11.1974, OJ L 117, 1/9; Sea-Link, 21.12.1993, OJ L 15/18; Decision of 21 December 1993 — Port of Rødby, OJ L 55, 26.02.1994, page 52; Frankfurt Airport, 14.1.1998, OJ L 72, 11.03.1998, page 30). In such situations, a dominant essential facility holder is obliged to take all possible measures to remove the constraints imposed by the lack of capacity and to organise its business in a manner that makes a maximum amount of capacity available.

[190] In its Report of 11 June 2008 to the Prime Minister regarding action to be taken in order to promote competition and enhance the economy (*AS453 — Considerazioni e proposte per una regolazione proconcorrenziale dei mercati a sostegno della crescita economica*), the AGCM pointed out that in the absence of investment in new import infrastructure and storage facilities, the share of gas flowing independently from ENI had not increased between 2000 and 2008, with a negative impact on the wholesale market in Italy in terms of market concentration and competition.

from a regulatory point of view, the investment cost could most likely have been recovered even under *ex-ante* tariff regulation[191].

Furthermore, it is important to underscore that ENI neither estimated capacity demands, for instance via an '*open season'* procedure, nor did it explore the willingness of third parties to commit financially to an expansion project. On the contrary, it did not even follow up specific co-financing offers made by some shippers.

Finally, ENI's long-term capacity management decisions were also not objectively justified in the light of both the First and the Second Gas Directives, under which gas TSOs had a special obligation to carry out commercially viable investment necessary to meet capacity demands[192].

[191] The TENP pipeline had not yet been made subject to *ex-ante* tariff regulation by the German regulator at the time of the investigation, since a request by ENI for exemption from such regulation was still pending. The Transitgas pipeline is not subject to tariff regulation under Swiss law. The TAG pipeline has been subject to regulated third-party access (rTPA) only since 2006. An obligation on TSOs to carry out '*capacity enhancements corresponding to need in accordance with the approved long-term planning of the balancing zone leader'* was also introduced. Network tariffs for cross-border transports must be based on the principles of non-discrimination and cost-orientation.

[192] Article 7(1) of the First Gas Directive (Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998) and Article 8(1)(a) of the Second Gas Directive (quoted) require each transmission system operator to '*operate, maintain and develop under economic conditions secure, reliable and efficient'* transmission facilities. The Third Gas Directive made this even more explicit, as Article 13(2) states that each '*transmission system operator shall build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity'*. Recital 6 of the Third Gas Directive goes even further by stating that '*Without effective separation of networks from activities of production and supply (effective unbundling), there is a risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks*.'

16. ***Rationale of the Conduct***

Access to ENI's international network to transport gas into Italy is crucial for suppliers to effectively compete in the downstream gas markets in the country, where ENI continues to be a dominant company. However, due to the market caps on gas inflows imposed by Italian law on ENI[193], limiting its possibility to expand in terms of market share in reaction to price competition, ENI's strategy consisted of maintaining and securing its supply margins by preventing the development of effective competition in the downstream markets. Indeed, any incentive for ENI, as a transport operator, to increase the profits of its transport business by expanding the infrastructure to accommodate third-party requests would have been more than outweighed by the negative repercussions of the additional influx of gas into Italy on the profitability of its own gas supply business downstream.

To protect its profits downstream, ENI retained control over the transport routes, by embarking upon a strategy of deliberately keeping capacity *tight* in order to limit third parties' access to import infrastructures and therefore foreclose downstream gas supply markets.

The Commission considered that capacity hoarding, capacity degradation and strategic limiting of investment in additional capacity were all forms of behavior ultimately aimed at reducing the amount of gas flowing into Italy. By implementing this operation and management strategy, ENI engaged in a systematic and constructive refusal to supply. Such behavior may have

[193] Under Legislative Decree 164/2000, during the period 2002-2010 no operator was allowed, directly or by way of affiliated companies, to import or produce more than 75 % of annual domestic gas consumption. This market share cap was progressively reduced by 2 percentage points each year down to a limit of 61 % at the end of the period.

undermined, specifically on the TENP/Transitgas and TAG pipelines, the opportunities for ENI's competitors to independently supply gas to Italy, and restricted their ability and incentives to effectively compete downstream to the detriment of competition in those markets.

*17.**The Structural Remedies: Paving the Way for More Competition***

To address the Commission's concerns, ENI offered to divest its current shareholdings in companies connected with international gas transmission pipelines (TENP, Transitgas and TAG) to a suitable purchaser approved by the Commission that is *independent* of and *unconnected* to ENI and does not raise *prima facie* competition concerns[194].

With respect to TAG, the commitments stipulated that the purchaser should be Cassa Depositi e Prestiti (CDP), an Italian state-controlled bank, or another public entity directly or indirectly controlled by the Italian government. ENI also undertook not to prolong or renew any transport contract or enter into any new transport contract for the pipelines at stake[195].

In response to the market test notice published on 5 March 2010 under Article 27(4) of Regulation 1/2003, the Commission received a significant

[194] In other words, ENI committed to divest its stakes in the transmission system operators (the TSOs), and if applicable in the companies holding shares in the TSOs. In particular, ENI will divest its shares in Eni Gas Transport GmbH (100 %), which is the co-owner of the pipeline TENP (49 %), jointly owned with E.ON Ruhrgas, and its entire participation in Eni Gas Transport Deutschland S.p.a. (100 %), the TSO for ENI's share of the pipeline; its participation in Transitgas AG (46 %), which is the owner of the Transitgas pipeline, jointly owned with Swissgas, and its entire participation in Eni Gas Transport International SA (100 %), the TSO for ENI's share of the infrastructure; and its participation in Trans Austria Gasleitung GmbH (89 %), which is the TSO for the TAG infrastructure, jointly owned with OMV.

[195] ENI will not be excluded from participating on those pipelines in future auctions and/or other public allocation procedures, but only for reverse flow transportation capacity towards markets other than the Italian market.

number of responses from interested third parties representing different kinds of market participants. Most respondents welcomed the commitments as necessary for improving competition on the market for gas transmission.

The Commission took the view that the commitments are *sufficient* to address the concerns identified in the statement of objections, i.e. the constructive refusal to grant access to transport capacity needed for third shippers to compete downstream. The commitments are *appropriate*, as the competition concerns arose from ENI's interests as a vertically integrated undertaking, active in both the provision of gas transportation services and gas supply in Italy. In particular, in the light of ENI's incentive to protect its downstream supply margins at the cost of comparably lower additional transportation revenues, only a structural separation of ENI from its transport business would eliminate those incentives.

The commitments are also *proportionate* as there is no equally effective alternative to the divestment of ENI's shares in its transport network businesses. Without structural unbundling, the incentives of a vertically integrated gas company, such as ENI, to continue to pursue the alleged anti-competitive behavior would not be removed, with the risk that the alleged infringement could not be effectively brought to an end[196].

As a result, the Commission decided to declare the commitments binding upon ENI and to end its investigation.

With this decision, the Commission ultimately aims to restore proper incentives for managing and operating gas transport networks in Europe. In

[196] According to the case law, compliance with the principle of proportionality requires the Commission only to ascertain that the commitments address the problems it has identified and expressed to the undertakings; see Case C-441/07 P Commission v Alrosa Company Ltd.

order to ensure this, *suitable buyers* for the TENP and Transitgas pipelines should be operators independent from and unconnected to ENI without any activity on the downstream markets, and thus willing to run the transportation business with a view to maximizing this activity. As far as the TAG pipeline is concerned, the Commission has already verified in its decision that CDP fulfills these criteria. In particular, CDP can be regarded as independent from and unconnected to ENI. Indeed, under the Commission's practice, notably in the field of merger control, two undertakings owned by the same state are to be considered independent of and unconnected with each other if they are part of different economic units with independent power of decision, and the Commission was satisfied that this was the case for CDP[197].

18. ***The Commitment Decision***

On 29 September 2010, the Commission adopted a commitment decision addressed to ENI Spa (ENI) under Article 9 of Regulation 1/2003. With this decision, the Commission made binding on ENI the commitments it had offered to address the Commission's preliminary concerns regarding potential abuse of its dominant position in the market for gas transportation services.

The Commission's competition case concerning ENI's suspected abuse of a dominant position on the market for the transport of gas to Italy has its origin in the Commission's inquiry into the gas sector between 2005 and 2007[198]. In

[197] According to the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C95, 16.4.2008, p. 1), points 52 and 53.

[198] On 20 April 2007, the Commission decided to initiate antitrust proceedings in case COMP/B1/39315 . ENI within the meaning of Article 11(6) of Council Regulation No 1/2003 and Article 2(1) of Commission Regulation No 773/2004.

the Final Sector Inquiry Report[199], the *insufficient unbundling of networks from the competitive parts of the gas sector (downstream supply)* was described as leading to a *systemic conflict of interest*. This structural conflict of interest, also at the heart of the ENI case, was identified as distorting incentives on the network segment (for example, for giving access to capacity or investing in additional capacity) due to substantial adverse supply-side interests of the same vertically integrated undertaking.

The competition concerns in the ENI case appear to follow this logic and relate to practices resulting in a possible anti-competitive foreclosure of competitors in the gas supply markets in Italy, through the limitation of access to transport capacity. In particular, ENI's refusal to supply transport capacity to third-party shippers, to allow them to import gas into Italy, evidently arises from the inherent conflict of interest resulting from the vertical integration of ENI, dominant in both the transport business and the supply of gas on downstream markets. In order to resolve the conflict of interest and address these concerns, ENI committed to divest its shares in the three companies operating the relevant international transport pipelines, TAG, TENP and Transitgas, which bring gas to Italy from Russia (TAG) and northern Europe (the TENP/Transitgas system). This structural divestment will ensure that

---

The proceedings were opened with a view to adopting a decision in application of Chapter III of Council Regulation No 1/2003 and concern capacity hoarding and strategic underinvestment in the transmission system leading to the foreclosure of competitors and harm for competition and customers in one or more supply markets in Italy. These suspected practices, constituting possible infringements of Article 82 EC, are allegedly engaged in by ENI S.p.a., its subsidiaries and companies under their control, including Trans Austria Gasleitung GmbH, Trans Europa Naturgas Pipeline GmbH & Co. KG, ENI Deutschland S.p.a. and Eni Gas Transport International SA.
The initiation of proceedings does not imply that the Commission has conclusive proof of an infringement. It only signifies that the Commission will further investigate the case as a matter of priority.

[199]Competition Division, Organization for Economic Cooperation and Development, Paris, France, formerly European Commission, DG Competition, Unit B-1, Energy and Environment Antitrust.

third-party requests to access the gas pipelines will be dealt with by an *independent* entity *unconnected* to ENI.

The decision of 29 September 2010 is noteworthy, as the commitments entered into by ENI consist of a structural divestiture of its international transportation activities to import gas to Italy. The rationale for this decision is to tackle competition problems on those pipelines that play a crucial role in creating a competitive single European gas market. The implementation of the commitments will bring about a substantial change in this sector, and will lay the foundations for more competition in the downstream supply markets.

19. ***Conclusion***

This case is the ninth major decision since the 2007 Energy Sector Inquiry, which has shown that consumers and businesses were losing out due to a lack of competition on electricity and gas markets.

At variance with these other major cases, the ENI case presents some peculiarities, both in terms of procedure and outcome.

With regard to procedure, the commitment decision in this case was not based on a 'preliminary assessment' as provided for in Article 9 of Regulation 1/2003 but followed an in-depth investigation and the issuing of a statement of objections detailing the theory of harm and the available evidence.

In contrast to the commitments accepted in the other recent decisions concerning gas operators, such as E.ON gas[200] in Germany or GDF Suez[201] in

[200] Commission Decision of 4 May 2010 in case COMP/39.317 — *E.ON gas foreclosure*.

France, where capacity releases were offered to meet competition concerns, the ENI decision relies on structural separation. Arguments have been presented according to which ENI could also have released capacities in similar magnitudes as in the case of E.ON or GDF Suez. What these commentators overlook is the fact that the theory of harm in the ENI case differs substantially from the other antitrust cases mentioned above. In the present case, the Commission's investigation showed that ENI had designed a constructive refusal-to-supply strategy consisting of capacity hoarding, capacity degradation and strategic underinvestment in capacity aimed at limiting the total amount of gas flowing into Italy. In contrast, in the other gas cases referred to above, the long-term reservations by dominant shippers were found to be problematic, diverging from the way transmission networks were operated by a vertically integrated TSOs, as in the ENI case. In these cases, the foreclosure was not motivated by the aim of maintaining a tight control on total gas inflows but rather by the goal of limiting the number of competitors active in the downstream market at given gas inflow levels.

However, the ENI case follows a line started with the E.ON electricity and RWE cases[202], in that a competition problem created by the conflict of interest inherent in vertically integrated energy incumbents owning and operating the electricity or gas transmission network while also supplying electricity or gas in their network area is solved through a structural remedy that separates ownership of the critical infrastructure from the supplier. The Commission's decision in the ENI case demonstrates that structural remedies are a legitimate and proportionate means to solve competition problems created by anti-competitive conduct.

---

[201] Commission Decision of 3 December 2009 in case COMP/39.316 — *Gaz de France*.

[202] Commission Decision of 26 November 2008 in cases COMP/39.388 — *German Electricity Wholesale Market* and COMP/39.389 — *German Electricity Balancing Market*; Commission Decision of 18 March 2008 in case COMP/39.402 — *RWE gas foreclosure*.

Bibliography

Armstrong, M., Sappington, D.E.M., 2006. Regulation, competition and liberalization. *Journal of Economic Literature* 44: 325–366.

Ascari, S. (1985), *Il metano in Italia: mercato, prezzi e sistema distributivo, Economia e politica dell'energia*, Franco Angeli, Milano.

Baldwin, R., Cave, M., 1999. *Understanding regulation. Theory, strategy and practice,* Oxford University Press, Oxford, UK.

Beck, N., J. N. Katz, and R. Tucker. 1998. *Taking time seriously: Time-series-cross-section analysis with a binary dependent variable*, *American Journal of Political Science* 42(4): 1260-1288.

Bjørnskov, C., Potrafke, N., 2011. Politics and privatization in central and eastern Europe. A panel data analysis. *Economics of Transition*: 19 (2), 201–230.

Bortolotti, B., Cambini, C., Rondi, L., 2013. Reluctant regulation. *Journal of Comparative Economics*, forthcoming.

Bortolotti, B., Cambini, C., Rondi, L., Spiegel, Y., 2011. Capital structure and regulation: do ownership and regulatory independence matter? *Journal of Economics & Management Strategy*: 20(2), 517-564.

Bortolotti, B., Faccio, M., 2009. Government control of privatized firms. *Review of Financial Studies*: 22 (8), 2907–2939.

Bortolotti, B., Fantini, M., Siniscalco, D., 2003. Privatization around the world: evidence from panel data. *Journal of Public Economics*: 88 (1-2), 305-332.

Bortolotti, B., Pinotti, P., 2008. Delayed privatization. *Public Choice*: 3, 331–351.

Carlton, D.W., Perloff, J.M. (2005), Organizzazione industriale, 2. ed., McGraw-Hill, Milano.

Cameron, Peter D. 2002. *Competition in Energy Markets: Law and Regulation in the European Union*. New York: Oxford University Press.

Cameron, Peter D. 2007. *Competition in Energy Markets: Law and Regulation in the European Union.* 2ed. New York: Oxford University Press.

Campobasso, G. (2003), Manuale di Diritto Commerciale, UTET, Torino.

Cassese, S. (2004), La nuova Costituzione economica, Laterza, Bari.

Cervigni, G., D'Antoni, M. (2001), Monopolio naturale, concorrenza, regolamentazione, Carocci, Roma.

Chaberlie, M.F. (2007), Gas Price Indexation and Strategies: A European Market Perspective, Presentation at 2nd Asia Gas Buyers' Summit.

Commission for Energy Regulation. 2004. "A Regulatory Framework for Storage." http://www.cer.ie/GetAttachment.aspx?id=e5cd79d4-5f74-43eb-9aa1- c7e21f2f8dee (accessed 23 September, 2008).

Consiglio Nazionale dell'Economia e del Lavoro (2003), Sistema energetico italiano: la rete infrastrutturale ed il processo di liberalizzazione, Roma.

Corali, E. (2000), Il mercato del gas naturale in Italia, Crs Proaqua, Centro Ricerche sui Servizi Pubblici, Franco Angeli, Milano.

Durante, D., Moglia, G., Nicita, A. (2001), La nozione di essential facility: tra regolamentazione e antitrust, in Mercato, Concorrenza, Regole, anno 2, numero 2, Il Mulino, Bologna.

Erbetta F. and Fraquelli G., Produttività e redditività nella distribuzione locale di gas naturale in Italia: proprietà, diversificazione e scala operativa, *CERIS-HERMES*, Working Paper 3, 2003.

Erbetta F. and Rappuoli L., Estimatine optimal scale and techinical efficiency in the Italian gas distribution industry, *CERIS-HERMES*, Working Paper 6, 2003.

Euractiv article (2008), Liberalization of EU Gas Sector, (http://www.euractiv.com/en/energy/liberalisation-eu-gas-sector/article-171067)

Eurogas (2008), Eurogas annual report (http://www.eurogas.org/publications_annualReport.aspx).
European Commission (2000), Opening up to choice - Launching the single European gas market, Luxembourg, Office for Official Publications of the European Communities.

European Commision (2005), Energy sector inquiry - Issues paper, European Commission, http://www.eurostat.org/.

Falce, V. (1999), La normativa comunitaria per il gas naturale: la direttiva 98/30/CE, Archivio Ceradi, Centro di Ricerca per il Diritto d'Impresa della Luiss Guido Carli, Roma.

Faleschini, G. (2005), Il quadro normativo nel settore del gas naturale, Ambiente Diritto, www.ambientediritto.it.

Foresti, G., Malgarini, M. (2000), La proposta di liberalizzazione del mercato del gas in Italia, Centro Studi di Confindustria, Roma.

Gobbo, F. (2001), *Il mercato e la tutela della concorrenza: introduzione all'economia e alla politica della concorrenza*, Bologna, Il Mulino.

Gómez-Acebo & Pombo Abogados, S.L., Charles Russell LLP (2005), *Unbundling of electricity and gas transmission and distribution system operators: final report*.

Grassini, F.A., Gobbo, F., Noce, A., Pontarollo, E., Rovizzi, L., Fraquelli, G., Martoccia, M. (1998), *La concorrenza nei servizi di pubblica utilità*, Il Mulino, Bologna.

Guston D., Principal-Agent theory and the problem of science policy, in *Science and Public Policy*, Volume 23, nr. 4/96.

Kohutek, K. (2010) '*Impact of the New Approach to Article 102 TFEU on the Enforcement of the Polish Prohibition of Dominant Position Abuse*', *Yearbook of Antitrust and Regulatory Studies*, Vol. 2, pp. 93-113.

MacAvoy, P.W. (2000), The *natural gas market: sixty years of regulation and deregulation*, New Haven, London, Yale University Press.

Minuto Rizzo A. (2000), *La liberalizzazione del mercato italiano del gas naturale,* I Quaderni di Impresa Artigiana, n. 16, Grif - Gruppo di ricerche industriali e finanziarie, Luiss Guido Carli, Roma.

Minuto Rizzo A. (2001), *Una prima valutazione del Decreto Letta di liberalizzazione del mercato del gas naturale*, I Quaderni di Impresa Artigiana, n. 42, Grif - Gruppo di ricerche industriali e finanziarie, Luiss Guido Carli, Roma.

Mihai B., Andreea-Florina, F., *The abuse of dominant position – restricting competition practice. Case study: ENI*, Department of International Business, Faculty of Economic Sciences, University of Oradea, Oradea, Romania.

Motta, M. (2009), *'Michelin II – The Treatment of rebates', in Bruce, L. (ed.) Cases in European Competition Policy. New York: Cambridge University Press.*

Polo M. (2002), Autorità Indipendenti: una analisi economica e una proposta di riordino, Analisi Giuridica dell'Economica, v.2

Polo M., Scarpa C. (2002), Entry and Market Segmentation in the Natural Gas Industry, mimeo.

Portatadino S. (2005), *La liberalizzazione del mercato del gas naturale in Italia: verso un hub del gas?*, Ambiente Diritto, www.ambientediritto.it.

Russo, F., Schinkel, M.P., Gunstel, A. and Carree, M. (2010), *European CommissionDecisions. Economic Perspectives on Landmark Antitrust and Merger Cases, Cambridge: Cambridge University Press.*

Sappington d. and Stiglitz J., Privatization, Information and Incentives, *Journal of policy Analysis and Management*, Volume 6, nr. 4, 1987.

Sauter, W. and Langer, J. (2007), 'Competition Policy', in El-Agraa, A. (ed.) *The European Union. Economics and Policies*, eighth edition, Combridge: Cambridge University Press.

Scognamiglio Pasini, C.L. (1987), *Economia industriale*, Giuffrè, Milano.

Scognamiglio Pasini, C.L. (2005), *Adam Smith XXI Secolo*, Luiss University Press, Roma.

Sharkey W., The Theory of Natural Monopoly, Cambridge University Press, 1982.

Spanjer, A. (2006). European Gas Regulation: A change of focus. Department of Economics Research Memorandum 2006.04 Retrieved 20 December, 2006, from http://www.law.leidenuniv.nl/general/img/AS2006%2E03_tcm1112504.pdf.

Spanjer, A. (2007, 18-21 February). Do TPA exemptions Solve the Hold-up Problem on European Gas Markets? Paper presented at the Papers and Proceedings of the 30th Conference of the International Association for Energy Economics, Wellington, New Zealand.

Stiglitz, J.E. (2003), *Economia del settore pubblico*, Hoepli, Milano.

Train, K.E. (1997), *Optimal regulation: the economic theory of natural monopoly*, Massachusetts Institute of Technology Press.

Utton, M.A. (2003), *Market Dominance and Antitrust Policy*, 2nd edition, Cheltenham: Edward Elgar Publishing.

Vickers, J. (2007), 'Abuse of Market Power', in Buccirossi, P. (ed.) *Handbook of Antitrust Economics,* Cambridge: The mit Press.

Vickers, J. (2009) 'Some Economics of Abuse of Dominance', in Vives, X. (ed.) *Competition policy in the UE. Fifty years on from the Treaty of Rome*, New York: Oxford University Press.

Williamson O.E., Franchise bidding for natural monopolies, in *The Bell Journal of Economics*, n. 7, October 1976.

Williamson, O. E. (1997), *Transaction economics and public administration*, in P. Boorsma, K. Aarts & A. Steenge (Eds.), Public Priority Setting: Rules and Costs. Dordrecht: Kluwer Academic Publishers.

Williamson, O. E. (1998), *Transaction cost economics: How it works; where it is headed*, in *De Economist*, 146(1), 23-58.

Williamson, O. E. (1999), *Public and Private Bureaucracies: A Transaction Cost Economic Perspective*, *Journal of Law*, Economics and Organization, 15(1), 306-342.