Η κατάχρηση δεσπόζουσας θέσεως στον τομέα της ενέργειας κατά το ευρωπαϊκό δίκαιο.

Γκαϊδατζή Παρασκευή
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The role of competition in the European policy for energy markets has been always critical to achieve a number of goals, such as the liberalization of energy markets, being dominated by state-owned monopolies, the concerns about the security of energy supply, due to the increasing dependence of the Union on third countries as well as the promotion and implementation of environmental sustainability. ¹ The establishment of an efficiently operating competitive internal energy market is a prerequisite for the well-functioning of the single market as whole. ²

The decision to spur competition in the energy sector was not a smooth sailing. While this change was expected to increase the efficiency of the system, to bring prices to competitive levels and also to ensure security of supply, many commentators question the existence of actual benefits pointing at the way in which competition was introduced in the market. ³ They warned that competition would imperil security of supply and pointed at a range of operational and technical reasons including the unequal treatment of weaker consumers. ⁴

Energy undertakings are notoriously prone to abuses of dominant position due to long-existing state monopolies and the special, sensitive characteristics of the energy business, such as its importance for public welfare, for national interests and naturally for the significant costs linked with its operation. ⁵ Energy remains a strategic point for the economies of all Member States, which would not be entirely willing to leave it to the markets to regulate this sector. These particular factors surrounding energy, alongside the great controversies associated with the application of Article 102, create a topic for reflection and analysis with strong practical effects.

The European Commission’s objectives to liberalize the market and ensure efficiency, good quality of services and lower prices, were realised through the rule of competition law and the

³ Kroes (n 2) 1433.
development of sector-specific regulation. 6 Article 102 is an ex post rule against anticompetitive behavior on behalf of dominant undertakings. Looking at the hierarchy of rules of European Law, Article 102 TFEU is part of the primary law and poses at highest level of this pyramid. As a consequence, it prevails over other the Energy Directives and Regulations which are secondary sources of law. 7 The system introduced by the European legislation refers to ex ante controls for anticompetitive conduct and functions in parallel with Treaty Law. It has been emphasized that a system of ex ante regulation is necessary in sectors where competition problematic. 8 However, the structural remedies developed by regulation do not fully prevent competition shortcomings and distortions, which are addressed through its counterpart, general competition law. 9

This paper will illustrate the progressive application of Article 102 in electricity and natural gas sectors in the European Union and how the approaches taken by the European Commission and the Courts of Justice of the European Union have evolved. This evolution demonstrates the links between rules of competition law, such as Article 102 and regulation of the energy sector. In other words, the infringements of competition law in the energy sector are addressed both by regulatory measures and instruments of competition law. 10 Although there is no doubt that the two are complementary and cannot be isolated from each other because they pursue the same objectives, their function is very different.

The analysis will focus on abuses related to the sine qua non element of the liberalization, that is the right of third parties to demand access to the necessary infrastructure. The rationale of Third Party Access lies in the proposition that energy networks, either gas pipelines or transmission lines are ‘essential facilities’ and if the operators of these facilities deny access or impose discriminatory terms against certain parties without objective justification, this conduct is tantamount to an abuse of dominance. 11 Exceptions to this rule are justified only for certain commercial reasons and in case

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8 Almunia, (n 6)


11 Μ. Σταμάτη, Καταχρηστική εκμετάλλευση δεσπόζουσας θέσης από διαχειριστές συστημάτων μεταφοράς ενέργειας, 16 Δίκαιο και Ενέργεια (2001), p. 47, 49
of congestion, in other words, when there is lack of transmission capacity. In general, transmission capacity is necessary to allow the transports of energy products and this exception is very prone to abuses from undertakings wishing to conceal part or the entire capacity for their own benefit, at the expense of their competitors.  

The paper is structured as follows: The first chapter will explore the legislation adopted within the EU energy policy ands the European approach on the creation of integrated internal market for energy products will also be explained. The infusion of competition in the energy market took place through gradual steps and relied on the particular characteristics inherent with the nature of energy sector, which is a network-based industry. Monopolies or vertical integration and dominance have been the most serious obstacles towards the opening of the market and the entrance of new competitors. More specifically, taking into account the small number of businesses in the energy sector, due to economies of scale or high sunk costs in investments, vertical integrated undertakings form the most frequent corporate structure and show strong willingness to favor their affiliated companies.  

The fundamental principle upon which the opening of the European energy market is constructed, is known as the right of Third-Party Access. True, access to network infrastructure is necessary for undertaking to initiate its business in energy related activities. The rationale of this is that the construction of an alternative network for each undertaking is economically impossible. The network-bound nature of energy industry required brave regulatory initiatives to divest the structure which creates tremendous problems of conflict of interest and is not compatible with the rule of competition law. Once the Third Party Access was regulated, the separation of the network from other energy related activities took place through the mechanism of unbundling. This chapter will describe the initiatives taken so as to create competition in the market and fragment the historical monopolies.

The second chapter focuses on the application of Article 102 in relation to electricity and gas. Article 102 refers to unilateral practices embraced by undertakings with substantial market power.

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12 ibid. p. 49
13 Case COMP/39.315 - ENI, MEMO/09/120 - Antitrust: Commission confirms sending Statement of Objections to ENI concerning the Italian gas market (19.03.2009)
14 M. van der Woude, in C. Jones (ed), EU energy Law. (n 7)
16 ibid.
17 ibid. p. 24; Cameron (n 1) p. 32
Competition law does not condemn the possession of dominant position, but the abuse of this position in order to drive competitors out of the market. Article 102 introduces a restriction to the commercial freedom of undertakings, it may initiate lengthy proceedings and result in massive fines. Hence, the assessment of a conduct under Article 102 follows certain analytical steps, beginning with the definition of the relevant product and geographic market, followed by examining the degree of power maintained by the company in that market. Once the dominant position of the firm is established and if it geographically comprises the common market or a substantial part of it, the assessment of the potentially abusive conduct takes place.

The third chapter will examine the most frequent anti-competitive practices occurring under the umbrella of European competition law. In this regard, firstly the scope and the application of the doctrine of essential facilities in the energy sector will be determined and then focus will shift on the entailing access-related abuses. Refusals to provide access, can be expressed in multiple ways and is the most prominent practice which distorts competition in a network-based sector. Marathon saga is definitely a big-name in the literature for a dominant undertaking abusing its dominant position by refusing to grant access. The dispute began when Marathon, an American undertaking, complained against five large European incumbents in Germany (Thyssengas, BEB & Ruhrgas), France (Gaz de France) and the Netherlands (Gasunie), alleging joint refusal of access to their gas pipelines. The commitments proposed by the undertakings and were accepted by the Commission proved that competition is able to address possible defects in the system of access to infrastructure.

The second issue at hand, which is situated between exclusivity agreements, a distinct category of abuses of dominant position and results in a refusal of access, is the case of long-term exclusivity agreements. These agreements may concern supply of energy, either in the upstream or the downstream level, or capacity reservations included in long-term contracts which last for

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18 ibid.; Case C-23/14, Post Danmark A/S v Konkurrencerådet (Post Danmark II) EU:C:2015:651, para. 67

19 Case COMP/37.990 - Intel, Press Release, Commission imposes fine of 1.06 billion euros on Intel for abuse of dominant position; orders Intel to cease illegal practices - questions and answers, (13.05.2009). Intel was fined € 1bn for abusing its dominant position.


more than 25 years. 22 For instance, the contract between Gas Natural and Endesa for sale of gas for production of electricity was initially set for 36 years. This case raised serious concerns about the foreclosure of the market due to the exclusivity terms and the volumes tied in the contract. It is argued that exclusivity terms are not entirely compatible with the objectives of liberalization in the market because the scope of competition is limited and competitors are commercially paralyzed as they are unable to find customers while customers are also precluded from switching to a better offer. 23

The main objective of this paper is to analyze the competition concerns arising out of Third Party Access concerns, concentrating upon refusal of access and the particular case of long-term agreements and attempt to provide a legal taxonomy. Antitrust jurisprudence is not known for its consistency. Nonetheless, the enforcement of competition in the energy sector has demonstrated a flexible and dynamic approach which does not ignore the multiple interests and imperatives related to energy and the importance for security of supply and protection of consumers in Member States and the European Union as a whole.

Chapter 1
The long road towards Liberalization.

The opening of the market was a breaking point for the energy sector. Originally, electricity and gas markets were under the immediate control of the state. To protect consumers and ensure the security of energy supply, the operation of all energy activities in all levels, namely the import of gas, generation/production of electricity as well as transport of energy and supply to consumers, were bestowed upon state-owned monopolies. 24

The main reasons explaining this business model lie in the very characteristics of energy. A rather strong argument was the strategic importance of energy resources for the national economy as a whole, not to mention the military imperatives. 25 Moreover, the vital role of energy for the sole existence and development of societies justified this monopolistic model. In fact, these companies had an obligation imposed by the state, to provide their services and supply consumers while prices

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25 C. Iliopoulos, Το Διεθνές δίκαιο της Ενέργειας, (2009) 3 Ευρωπαϊκόν Πολιτεία, p. 583-610;
were also under the supervision of the state. What is more, one very important characteristic of energy industry is its dependence in large-scale investments with high sunk cost. In combination with the element of its multi-level operational structure and the high degree of technology, reliable investments were required to meet the demand and the needs of the national economy. State owned companies were usually able to bear the costs and invest in the entire network infrastructure. This corporate model facilitates the creation of vertical integrated companies which are active in all the above mentioned levels. Holding the position of natural or legal monopolies, these companies were offered long-term exclusivity and other privileges. Most worryingly, these firms controlled the network and naturally the access of third parties to it, creating significant obstacles to enter the market.

Network-bound industries are often prone to concentrations of market power to a unique producer or distributor, restricting the possible choices for consumers. In this vertical structure, production and delivery of energy were regarded as one single bundled product market and a natural monopoly. The monopolist takes advantage of the network infrastructure as well as of the extremely high cost required for the construction of a new system. Monopolies expose customers and end consumers to abusive practices such as higher monopolistic prices and rents.

However, production or generation and transport are two distinct product markets. More specifically, despite the fact that transmission and distribution services - transport market - are considered as natural monopolies the network infrastructure required, is in most cases, unique and the construction of an alternative is not an economically viable and efficient solution. On the other hand, the production of energy, if unbundled from delivery, it will enable the purchasers from wholesale and retail market to choose their supplier. In other words, the structure of the industry had to be modified in order to demolish monopolies and promote competition.

The basic idea of liberalization is to allow competition regulate the market by itself without the participation of the regulator. However, experience in similar industries dominated by state or natural monopolies shows that competition cannot naturally exist without the contribution of the

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26 Geradin, ‘Twenty Years of Liberalization of Network Industries” (n 5) p. 2
27 Spence, Can Law Manage Competitive Energy Markets (n 24) 767
30 Spence, (n 24) p. 772
31 Cameron (n 1)
regulator. The case of the Californian deregulation proves that the introduction of competition without severe state intervention may lead to the manipulation of the market by certain dominant companies, anti-competitive arrangements driving certain competitors to bankruptcy and end up in an energy crisis with rolling blackouts. 32

The First Energy Package.

The liberalization of the European energy market initiated in the beginning of 1990 and the main purpose was the removal of state monopolies and exclusivity rights, the unbundling of network operators from producers and suppliers, non-discriminatory access to network for third parties and interdependent regulatory mechanisms to monitor the efficient functioning of the market. 33

The European Commission (hereafter ‘the Commission’) had a vision for the single market as ‘an area without internal frontiers in which the free movement’ of energy could be a reality. 34

Since the early stage, the European legislator identified three main mechanisms to abolish the previous barriers in the market and establish an competitive and integral energy market, namely Unbundling, Third Party Access (hereafter TPA) and Independent Regulatory Authority. 35

Unbundling was considered as the most effective tool for an efficient and liberalized market. This technique is based on the restructuring of vertical integrated firms and the separation of the different levels of energy business. 36 The main purpose is to detach production and supply activities, as a measure to remove any prospect of prejudicial treatment against other competitors caused by the conflicts of interests existing in the vertically integrated undertakings. 37 Since the very primitive steps towards the liberalization of energy markets in the Union, it became rather


35 P. Cameron, (n 1) 30-34


clear that not only was the unbundling necessary but in order to tackle incidents of conflicts of interests, a significant degree of it was essential. 38

Unbundling may appear in different models. In particular, the First Energy Package adopted administrative unbundling, or “Chinese Walls”, commonly distinguished in management and accounting unbundling. 39 Management unbundling required the vertically integrated undertaking to keep the management of the network independent from the other energy activities, while accounting unbundling called for the accounts of the network operation to be separated from those referring to production and supply. Management and accounting unbundling were reserved for electricity whereas gas sector required accounting unbundling only. At that point the idea of ownership was left inact. 40

The First Energy Package included the first Electricity Directive, adopted in December 1996 to be implemented by February 1999 and was followed by the first Gas Directive which was adopted in June 1998 to take effect by August 2000.41 At this phase, there is already a particular interest to provide access to areas controlled by natural monopolies in return of a reasonable compensation. The core objective of the first package was to replace and most accurately to fragment the vertical integrated undertakings, which most possibly would also attempt to maintain a monopolistic position in the market, and move to a market structure which enables competition where it is possible. 42 Hence the essence of the first legislative initiative concentrates on the elimination of discrimination and foreclosure against existing or potential competitors through the introduction of TPA and an effective unbundling. 43

The implementation of these Directives quickly demonstrated their limited capacity and weakness to tackle the monopolistic and highly concentrated structure of the energy market. 44

38 See further: E Cabau, ‘Unbundling of Transmission System Operators’ in Christopher Jones, (n 29)
41 Directive 96/92, on the internal market for electricity, OJ 1996, L 27/20; and Directive 98/30, on the internal market for natural gas, OJ 1998, L 204/1
42 Kroes, (n 2) 1390
43 ibid.
Indeed, the requirements of the electricity and gas unbundling were very moderate and in conjunction with the inconsistent implementation of the Directives, further discrepancies were created in the internal energy market due to the different level of liberalization in each national market. Given also the restricted competition and the still ongoing discrimination in the market, it was necessary to speed up the liberalization of electricity and gas sectors in order to establish "a fully functional operational internal market".\footnote{\textsuperscript{45}}

**The Second Energy Package.**

The Second Package, which was enacted in 2003 and entered into force in 2004, aimed to reinforce the liberalization process by amending the unbundling requirements and eliminating exclusivity rights in order to ensure non-discriminatory TPA to the market.\footnote{\textsuperscript{46}} The second Electricity and Gas Directives impose legal and functional unbundling on energy transmission or distribution systems between upstream and downstream markets. The undertakings active in these business activities shall establish separate legal entities for each one.\footnote{\textsuperscript{47}} In other words, the Directives' objective is to detach business management from the development of the network, in a sense that the decisions with respect to the operation of the network must be taken by an entity independent from the parent company, without requiring a separate ownership status for the transmission system.\footnote{\textsuperscript{48}}

Another key point to achieve efficient deregulation of a network-bound industry is the appointment of an independent regulatory bodies which will be entrusted with the task of monitoring the market and build up competition.\footnote{\textsuperscript{49}} By independence, it is meant that the regulator is autonomous from the companies involved in the industry and the influence of the state, so as to ensure equal and transparent treatment of all participants in the market and the entrance of new competitors.\footnote{\textsuperscript{50}} On the topic of the regulator, two particular issues have been raised. Firstly, attention has been drawn to the concept of independence in relation to the accountability of the body, mostly because of the heterogenous positions taken by the Member States. The second question raised is

\footnote{\textsuperscript{45} B Barton, Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment (OUP, 2004) 103}
\footnote{\textsuperscript{47} K. Talus (n 15) 279}
\footnote{\textsuperscript{49} P. Cameron (n 1) p.30}
\footnote{\textsuperscript{50} Kroes (n 2) 1419}
pertinent to the relations of this regulatory body with the competition authority because of the conflicts of jurisdictions which may occur. Notwithstanding the similarities noted, the two bodies differ in many aspects, such as in the time frame of regulation. Competition authorities are actually competent post facto. 51

Despite the measures adopted in the Second Liberalization Package, the level of unbundling and the structure of the markets in Member States were far from uniform. In practice, unbundling rules were implemented either incorrectly or partially or the transposition of the Directive into national law was delayed and network operators did not immediately comply with the new framework. 52


Meanwhile, the malfunctioning of the energy market in Europe was also investigated by the Commission’s Energy Sector Inquiry in 2005 (hereafter Sector Inquiry Report), which focused on the analysis of electricity and gas energy markets and its objective was to diagnose the elements restricting effective competition.53 The Final Report was published in 2007 and in its presentation, the European Commissioner for Competition acknowledged that “energy markets are not functioning properly. Its disappointing conclusion is that more than a decade after having launched the drive for liberalization, we are still far from having a single, competitive and well-functioning European energy market.”54 The Sector Inquiry Report repeated the obvious problem of high concentration, inadequate unbundling and significant deficiency in cross-border competition and demonstrated the structural defects of the market which last from the pre-liberalization era and still survived. 55

More specifically, the Report showed that market concentration had reached an alarming level. Companies had extremely high market share in their national markets and very little chances to allow the development of competition. Moreover, in most Member States there was a unique undertaking, as a result, not only the capacity available for cross-border competition was rather

51 P. Cameron, (n 1) p.30

52 Kroes (n 2) p. 1420


limited but also the absence of competition may enable the dominant undertaking to raise prices and to exercise its market power abusively. European energy market was far from being integrated and remained passionately national only, due to severe scarcity of physical capacity in gas and electricity. Competition was also hindered as a result of the transparency shortfall which created an uncertainty about the formation of the prices. 56

The phenomenon was even stronger because of the vertical integration maintained due to the insufficient unbundling. The measures enacted did not remove either the ability or the incentives of vertical integrated undertakings to reserve more favorable treatment to their supply chains. 57 The conflicts of interest remaining strong, the result is that there are still concerns for discriminatory treatment towards third parties. Experience shows that discrimination may take a range of forms which can be difficult to detect. Except for the case of complete foreclosure, delays in the connection, complicating contracts, significantly high prices, restrictions in the use of unused capacity, are some of the most frequent suspicious practices which hinder the entrance of third parties in the market. 58

Commercial transactions remain intra-group and the existence of long and exclusive contracts decreases the liquidity of the market and prevents the potential newcomers. Furthermore, vertical integration and the lack of effective unbundling had a strong effect on investment projects, which exclusively target the needs of the corporate group. Meanwhile, the weak unbundling does not promote investment incentives for other companies in the the downstream or neighboring markets as well, since the risk of discriminatory terms or foreclosure is not an attractive prospect for new entrants. 59

The Third Energy Package and new beginnings.

In September 2007, the Commission presented its proposals towards a Third Energy Package seeking to complete the liberalization of the energy market addressing its malfunctioning and further "meeting the challenges of climate change, increased energy import dependence and global

56 Sector Inquiry Report, para. 510
59 ibid. 172
One of the core measures to enable effective competition is the brave step towards unbundling. Most specifically, the main point for the Commission is to "ensure that the same person or persons cannot exercise control over a supply undertaking and, at the same time, hold any interest in, or exercise any right over, a transmission system operator or transmission system".  

The Third Energy Package gave three options of unbundling with different models of corporate structure, in order to compromise the political disagreements on behalf of certain Member States, such as Germany and France. Under this framework, Member States may choose between full ownership unbundling or Transmission System Operator (TSO) model, which requires the separation of the ownership structure between the electricity or gas network operator and the supply and generation business. It requires the establishment of a separate entity to take over the asset ownership of gas or electricity network operation from other activities of supply or generation. It is noteworthy that the Directive does not require the privatization of either supply or network activity, implying that both businesses may remain in public hands as long as their ownership is distinct. Ownership unbundling seems to be the most effective and preferred model to eliminate the conflicts of interest stemming from vertical integrated companies and to address discrimination, capacity bars and information distortion. Moreover, the TSO is vested with certain responsibilities such as the management of TPA and the operation, maintenance and investment on networks.

A derogation from ownership unbundling is the option of an independent system operator (ISO) in which the vertical structure of the undertaking is not fragmented and the ownership of the

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61 Article 9, Directive 2009/72/EC and 2009/73/EC


64 Kroes, (n 2) 1418


66 Article 16 Regulation 715/2009
network is untouched. In this case, the ISO is entitled to conduct all the duties awarded to a TSO.  

Lastly, available is also the option of the independent transmission operator (ITO), where the network owner may remain within a vertically integrated company, but there are several and strict provisions to ensure that the production and supply arms do not intervene in the operation of the network. The Interpretative Note assures that these three models provide investments incentives as well as access to newcomers under a transparent and efficient regulatory system.  

As one author comments, the heavily regulated energy market is far from being described as “free market”. The response of the market after the implementation of the Third Package is quite encouraging. Energy markets have undoubtedly become more efficient through the brave step towards ownership unbundling and the strict regulatory framework shaped. A quick look in the Commission’s report on Trends and Developments in European Energy markets testifies that consumers have more choices to pick their supplier, cross border trade in gas and electricity as increased but despite the certain degree of progress, concentration levels are still high. The most urgent need for the single energy market is the investment on infrastructure. The future of energy market should be planned well in advance with the strategic construction of transmission pipelines and cables, integrated offshore grid or electricity highways in order to meet the future transmission capacity demand and ensure a well-connected and integrated energy market.

Chapter 2 Abuses of dominant position

Article 102 TFEU refers to unilateral conduct on behalf of dominant undertakings. In contrast to Article 101 TFEU, which deals with anti-competitive agreements and other concerted practices, Article 102 targets the practices of a dominant firm taking advantage its market power to harm competition by eliminating the existing or the future competitors from the relevant market.

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67 Article 14 (et seq) of Directive 2009/73/EC.
Article 102 is not easy to study and apply because it deals with defective market mechanisms. Nevertheless, the possession of dominant position only is not prohibited and in certain cases is explained due to the historical state monopolies, such as in the case of energy industry. In addition, dominant position is a sigh of efficient competitiveness of certain undertakings, demonstrating the preferences of customers over other competitors. Nevertheless, the controversial approaches adopted by the Commission and the Court created rather vigorous debates on the application of Article 102. Eventually, the Commission reoriented its policy on 24 February 2009 and published the “Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings” (hereinafter Guidance Paper) to shed some light on the twilight zones in its antitrust policy. As underlined, “the aim of the Commission’s enforcement activity (…) is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice”.

In this chapter, the road towards the identification of an abuse of dominant position will be illustrated under the rule of Article 102 TFEU by sketching the analytical steps assessing an potentially abusive conduct. The first part will examine the definition of the relevant product and geographic market for the energy resources in question, namely electricity and gas. Once the relevant market is defined, the position of the dominant undertaking in this market shall be identified by assessing the degree of its market power. These two stages are crucial to demonstrate whether the undertaking holds a dominant position.

A. The definition of Relevant markets for energy products

Dominance is inevitably linked to a particular market. The Court has emphasized that “the definition of the relevant market is of essential significance” for the establishment of dominance. Practices shows that unless the market is properly defined, the Court will quash the Commission’s

72 M. van der Woude, in C. Jones (ed), EU energy Law. (n 7) p. 295
75 Case C-52/07, Kanal 5 Ltd and TV 4 AB [2008] ECR I-9275, para. 19.
76 Case 6/72, Continental Can [1973] ECR 215, para. 32
decision. 77 As has been particularly emphasized by the Court, the position of dominance cannot be established in a formalistic fashion. 78 The definition of a specific, relevant product and geographic market is an essential process which permits the evaluation of the competing forces in the industry investigated, by identifying the products, which according to the consumer’s perspective, are interchangeable as well as the possible competitive restraints which may occur amongst competitors by an assessment of their market power. Similarly, the definition of the geographic market involves a price exercise which takes a geographical dimension. Indeed a complex economic and econometric assessment analysis is necessary to delineate the boundaries of the market. 79

The definition of the market is a notoriously obscure area in the practice of Competition law. 80 In fact, the Commission has been repeatedly criticised for defining the markets very narrowly. Some commentators explain that this trend presupposes the existence of dominant position and markets are defined as narrowly as possible to justify this assumption. 81

In EU competition law, energy products such as electricity and gas are divided in a number of distinct product and geographic markets. 82 Market definition is even more sophisticated bearing in mind the ongoing sector-specific regulation and the great structural changes after the dissimilar liberalization realities in each Member State which do not allow uniform conclusions for all Member States. 83 These separate sub-markets bear specific characteristics, trends and possibly different users. The same applies for geographic markets which have different structure, participants or consumption features. 84

**Product Market.** The analysis is based on whether certain products can be regarded as interchangeable or substitutable, taking into account their characteristics, price and use. 85 The Commission and the Court apply the so-called “hypothetical monopolist” test to define the relevant market. Similarly, the Market Definition Notice mostly prefers a quantitative analysis than the

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77 The Court of Justice quashed the decision of the European Commission on Continental Can due to the absence of a comprehensive definition of the market from the supply side.
78 Case C-52/07, Kanal 5 Ltd and TV 4 AB [2008] ECR I-9275, para. 19.
79 E. Jane Carter, Market Definition in the Broadcasting Sector (2001) 24(1) World Competition, 93, 95;
81 ibid.
83 P. Cameron, Competition in Energy Markets: Law and Regulation in the European Union, (OUP 2007), 288
84 J. Faull & A. Nikpay (n 71) p. 1587
qualitative characteristics of the product. Most specifically, the Commission relied on the SSNIP test which examines whether a small and non-transitory increase of 5 to 10 per cent in the price of a product offered by a hypothetical monopolist would make the customers choose a different product be rendering the price increase unsustainable. 86 All other products that cannot be considered interchangeable, are categorised to a district market.

The EU energy market is divided into different sub-markets according to the specific characteristics of the energy resources. The most common and clear-cut distinction is between electricity and gas, which according to the Commission are considered to belong to different markets. 87 The rationale of this finding lies in the considerable costs required to switch from and to these different energy products, notwithstanding any price increase taking place. Hence, a customer would hesitate to replace electricity with gas, even if the price of the former significantly increases. 88

**Natural Gas market.** Natural gas is a primary source of energy consisting of hydrocarbons and is considered the cleanest non-renewable source, which is used as fuel or raw material for electricity generation. 89 The market of gas can be separated into further sub-markets. The Commission classifies gas into upstream and downstream markets according to the phases it passes through, from its production until the distribution to the consumer. The upstream market includes the phase of exploration, production and wholesale, as well as transmission through upstream network or LNG. 90

As far as the initial stage of exploration is concerned, as the Commission indicates, the discovery of new reserves is a distinct market but common for all resources since the content of unexplored reservoirs is unknown. 91 Therefore the establishment of separate markets at this point is both unrealistic and pointless. Distinct market in the upstream activities is also considered to be the development and first (upstream) sale of natural gas reserves, as its pricing and cost charging policy


87 Case COMP/M.1532 - BP Amoco/Arco, para 18.

88 Case COMP/M.3440 - ENI/EDP/GDP para 14.

89 J. Faull & A. Nikpay (n 71) 1587

90 E. Cabeau, in C. Jones (ed), EU energy Law. (n 29) p.113, K. Talus (n 21) 142

91 Case IV/M.1383 - Exxon Mobil, paras 15-16, COMP/M.4934 - Kazmunaigaz /Rompetrol; M. Raymond & W. Leffler, Oil and Gas Production in Nontechnical Language (PennWell, 2006)
differs. In the upstream market, the Commission regards pipeline transmission, processing as well as LNG as distinct markets.

The downstream market of natural gas consists of network utilities or infrastructure including the sub-markets of transportation and supply. The market related to transportation involves transmission, encompassing wholesale transport of gas via high-pressure pipelines and distribution taking place via low-pressure pipelines and reaches final consumers. The supply market, according to the decisions of the Commission, is divided in the sub-markets of wholesale and retail supply of gas. The former market is destined to further resale to other wholesale or downstream purchasers and the later concerns supply to final consumers. Depending on the destination of supplies, the Commission distinguishes between, large industrial customers, small customers, and gas-fired power plants.

**Electricity market.** Electricity is generated by a number of different technologies such as coal, gas, nuclear, wind and it is regarded as a commodity. Demands for energy supply vacillates periodically and daily while its price is traded in exchanges.

The Commission has distinguished segments of the electricity industry, which are considered to be distinct sub-markets. These subdivisions are based on the different physical stages of the industry as well as on distinct infrastructure and resources. The first sub-market of electricity covers generation and wholesale of electricity and includes the production of electricity in power stations, the imports via interconnectors as well as every form of wholesale trading. In the broad market of transportation, the Commission has distinguished between transmission market, which is operated through high-voltage grid and is usually a natural monopoly, and distribution market which takes place through medium and low-voltage systems and delivers electricity to other

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92 K. Talus (n 21) 142; Case M.5585 Centrica/Venture Production (2009), para 10, Case M.1532 *BP Amoco/Arco* (1999), para 14

93 Case IV/M.1573 - Norsk Hydro/Saga, para. 11, Case COMP/M.2745 - Shell/Enterprise Oil, paras 10-11.

94 Case COMP/39.316 - GDF foreclosure, Commitment Decision, para 14

95 Case COMP/M.3868 DONG/Elsam/Energi Commitment Decision, para 71.

96 Case COMP/M.4180 GDF/Suez, paras 78–81

97 Cases COMP/M.34 EDP/GDP/ENI Commitment Decision

98 Case COMP/M.4180 GDF/Suez para. 362–367

99 J. Faull & A. Nikpay (n 71) 1589

100 Case COMP/M.1673 *VEBA/VIAG* (1999), para 19
distributors or end customers. 101 The market of transmission consists of a natural monopolies without prospect to change this in the near future. The relevant market of supply, which refers to sales of electricity to final consumers, is also distinct.

**The Geographic Market.** Following the identification of the relevant product market, the geographic market analysis takes place, defining “the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from the neighboring area because the conditions of competition are appreciably different in those areas”. 102 At this stage, the Commission, relies on statistics comparing the pricing policies between Member States or at a regional level. 103

The relevant geographic market similarly depends on the distinction between upstream and downstream market. It is noteworthy that the sub-market of exploration which belongs to the upstream level is regarded as worldwide while the market of production and development refers to EEA, Russia and Algeria, the major importers of Gas in the EU. 104

**Gas.** Despite the liberalization outbreak, the Energy Sector Inquiry highlighted that the geographic boundaries of energy markets remain strictly national, due to the fact the the national markets remain highly heterogenous. In gas sub-markets for wholesale supply and retail, the Commission maintains that markets are not wider than national or even smaller, despite the opening of the gas sector in Europe.

An example of the reasoning consistently followed by the Commission is depicted the DONG/ELSAM case where the parties argued that the geographic market shall include not only Denmark but also Germany. The Commission rejected this allegation and took the view that the market is strictly national, taking into account two main factors. Firstly, the origin of the gas is significant for the determination of the geographic market. Relying on the fact that the gas was produced in Denmark, the Commission clarified that “contractual gas sales do not have the same security (and often not the same flexibility) of supply as physical gas” implying that the possibility of conversion of physical gas from Denmark to other markets is limited due to capacity constraints. Secondly, it was asserted that the volume of commercial exports was very low (only 12% between

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103 P. Cameron, (n 1) 291

2003-2005) of the total consumption in Denmark which did not convince the Commission that a significant competitive constraint actually exists.\textsuperscript{105}

However, it can be asserted that compared to electricity, gas markets are much more advanced in terms of infrastructure which may allow further integration and cross-border trade within the Union. It must be noted though, that not all regions can benefit from it mostly because of long-term agreements which reserve capacity and restrict the entry of new participants.

**Electricity.** Prior the liberalization of the energy market Europe, the market of electricity supply was strictly national.\textsuperscript{106} In the aftermath of liberalization, the separation between transmission and supply through effective unbundling, gave the right to foreign suppliers to penetrate the other national markets. In fact, the market of electricity supply show some signs of integration, such as the case of Central Western Europe or Nordic countries.\textsuperscript{107}

Despite the liberalization of the market, the Commission has not yet accepted the creation of a market as wide as the territory of the Union but remains no wider than national markets. For example, in EDP/ENI/GDP the Commission did not accept the argument that the electricity market is geographically wider.

**B. Definition of Dominance.**

The definition of dominance cannot be found in the text of the Treaty, but has been shaped and evolved through the jurisprudence of the European Courts. Nevertheless, the approaches about abuses of this character adopted by the European Commission and the jurisprudence are regarded to be a matter of extensive academic and practical controversy, mostly due to the absence of consistency in the analysis conducted by the Commission regarding the dominant position of an undertaking and the possible extend of abuses.

The declaration of dominant position is the most crucial and decisive point because it activates Article 102 and initiates a series of investigations and assessments on the undertaking’s behavior in the market. In the milestone decision of United Brands, the court adopted the following test to identify dominance:

\textit{65 The dominant position thus referred to by Article [102] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being

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\textsuperscript{105} Case No COMP/M.3868-DONG/Elsam/Energi E2, para. 71

\textsuperscript{106} Case COMP/M.3868, DONG/Elsam/Energi, paras 147–168 and 193.

maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. This proposition, as set by the Court, equates position of dominance with the notion of “substantial market power” as understood by economists. It can be further suggested that the Court links economic power to the ability to act independently of constraints created by other players on the market. The notion of independence, as explained in paragraph 10 of the Guidance Paper refers to the ability of a firm to increase its prices above the competitive level without becoming unprofitable. Therefore, the less competitive these constraints are in the market, the more substantial market power the undertaking enjoys over a period of time.

Later, in Hoffmann-La Roche, the Court confirmed and elaborated on this definition, by taking into account the ability of the undertaking to influence competition in the market. Despite the fact that the definition of dominance as formulated in United Brands and Hoffmann-La Roche is regarded as settled law, it is considered “problematic”. The element of “independence” is not the appropriate criterion to detect dominance because even dominant firms cannot disregard their consumers. It is also contended that the imprecise concept of independence which is required at least at an “appreciable extent” does not contribute to the consistent application of Article 102.

According to the theory and case law of competition law, dominance is a heavy burden to carry. The Court of Justice of the EU has adopted the concept of a “special responsibility” of the dominant undertaking not to distort competition. Although its content is quite unclear, this notion has been repeatedly employed by the Courts and is also included in the Commission’s Guidance Paper. The rationale of this concept is that a dominant undertaking is vested with a special responsibility, not to allow its conduct to impair competition in the market. In reality, this means

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110 Case 27/76, United Brands v Commission (1978) ECR 207, p. 65
112 A. Jones, B. Sufrin, (n 80) p. 286; Case C-457/10 P, AstraZeneca AB and AstraZeneca plc v Commission EU:C: 2012:770, para. 175
116 ibid.
that what is absolutely legitimate for non-dominant firms, it can be absolutely prohibited for those that are dominant. Evidently, this unclear concept of “special responsibility” reduces the commercial freedom of dominant firms. 117 According to the Court, the scope of this special responsibility “imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case which show that competition has been weakened” 118

The concept of dominance in the energy sector is most frequently identified in a vertical structure. Vertical dominance occurs when the dominant firm which is active in the upstream market, seeks to dominate the downstream or after-market. A quick glimpse at the jurisprudence shows a number of examples of vertical dominance. In modern manufacture, the products reaching the market go through a number of production stages and similar is the case with energy products, all already described. 119

C. Indications of dominance

The definition of a dominant position takes into consideration three basic factors, which if examined separately are not entirely determinative. 120 Paragraph 12 of the Guidance Paper lists the elements testifying dominance and includes the constraints imposed by the position of the undertaking and of its competitors in the market, the plausible threat of the dominant firm towards actual and potential competitors as well as the bargaining power of its customers. 121

A glimpse to the practice followed by the Commission in energy related cases offers a sufficient benchmark about the elements which are taken into account to establish the dominant position of an undertaking. For instance, in Distrigas:

“In the preliminary assessments the Commission took the view that Distrigas was dominant on the relevant market(s), within the meaning of Article 82 of the Treaty. This view was based on (a) Distrigas' very high market share more than five years after liberalisation of the gas sector, (b) the considerable barriers to entry to the relevant market and (c) other factors such as the vertical integration of Distrigas within the Suez group which strengthened Distrigas' position on the market.” 122

Market Shares.

117 M. van der Woude, in C. Jones (ed), EU energy Law. (n 7) p. 306
120 Case 85/76, Hoffmann-La Roche & Co AG v Commission [1979] ECR 461, para. 39; Talus, (n 15) p. 64
121 M. van der Woude, in C. Jones (ed), EU energy Law. (n 7) p. 315
The Court has systematically relied on the presumption that high market shares are a proof of dominance. In Hoffmann-La Roche, the Court, affirmed that “although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of dominant position”.124

In AKZO, the Court referred to its settled position in Hoffman - La Roche and concluded that 50% of market share can be considered as a proof of dominance.125 This proposition that undertakings which possess a market share of 50%, is known as the “AKZO presumption” of dominance. Thus, the burden of proof is on the side of the undertaking to demonstrate that is not dominant. However, commentators disagree about the legal binding effect which is attributed to the AKZO principle. In particular, Faull and Nikpay note that this threshold is only permissible according to the facts of the case and cannot extend to other cases.126

In Tetra Pack, the Court repeated its presumption and added that market shares between 70% and 80% is easy to create a presumption of dominance”.127 Microsoft itself exceeded 90% of the market which signifies an “overwhelming dominant position”.128 Similarly, in the Natural Gas/Endesa case, the Commission found that the undertaking maintained the 90% of the supply market, even three years after the liberalisation.129

However, there are certain examples of undertakings which were considered dominant with market shares under 50%, such as United Brands, the shares of which varied from 40 to 45% and while competition existed at some time periods.130 In British Airways, the Court uniquely ruled that an undertaking with a market share below 40% is dominant, relying on other indicators such as the significantly lower market shares of its competitors as well as its international transport network and its position in the global market.131

123 Guidance Paper, para. 12

124 Case 85/76, Hoffmann-La Roche & Co AG v Commission [1979] ECR 461, para. 41


126 Faull and Nikpay, (n 71) 4.158–4.160.


128 COMP/37.792, Microsoft, Decision (24/03/2004), paras. 448–464 and 515–540.

129 Case COMP/39.549 - Gas Natural - Endesa

130 Case 27/76, United Brands v Commission, p 207.

The absence of a clear cut solution excluding certain firms from competition scrutiny disappointed those who were looking for a “safe harbor”.\(^{132}\) As spelt in the paragraph 14 of the Guidance Paper, there is little likelihood that an undertaking with a market share not exceeding 40 percent will be considered dominant while the AKZO presumption is not endorsed, implying that these percentages are simply a ‘useful first indication’ for the position of the undertaking under scrutiny and the structure of the market.\(^{133}\) Instead, the establishment of dominance requires a holistic analysis of all specific characteristics of the case encompassing “the dynamics of the market the extent to which products are differentiated and the trend or development of market shares over time”.\(^{134}\)

Potential Competition. The dominant position held by an undertaking is easy to be found when it refers to natural or legal monopolies awarded with exclusivity rights. The Commission has particularly stressed that the effect on the existing competitors as well as the accessibility of the market by new entrants must also be assessed.\(^{135}\) It is correctly argued that competition is a “dynamic process” and therefore, an element which is also relevant is the assessment of competition restraints which are in place for a considerable time period which permit the dominant firm, disregarding the pressure from customers or competitors. Barriers to potential new entrants is another sign of an undertaking’s dominance in the market.\(^{136}\) Market foreclosure is further indicated by a number of elements which have been considered as obstacles and are mentioned in paragraph 17 of the Guidance Paper, such as legal barriers, discriminatory terms for access to energy resources or to distribution networks, switching costs, economies of scale. Currently, foreclosure is not really a very frequent phenomenon for the access to networks, which maintain their status as natural monopolies. Accessible is also the supply market. However, competitions can still be foreclosed in gas exploration and electricity generation markets.\(^{137}\)


\(^{133}\) Guidance Paper, para 13.

\(^{134}\) ibid.


\(^{136}\) J. Kenner, European Union Legislation 2012-2013, 516

\(^{137}\) M. van der Woude, in C. Jones (ed), EU energy Law. (n 7) p. 326
**Vertical Integration.** Vertical integration is considered to be a strong sign of foreclosure due to the discriminatory strategies reserved for the non-affiliated competitors. \(^{138}\) Most specifically, in United Brands the Court emphasized that it was the vertical integration of the firm that gave a strong advantage over its competitors. Vertical integration is not only the most prevailing business model in energy industry, but also a commonplace source of abuses investigated so far. \(^{139}\) In general, as also confirmed by the Sector Inquiry Report, vertical integration in production and distribution activities create conflict of interests and may put in danger the rights of third parties to access the network or reduce allocation or transparency in capacity mechanisms. \(^{140}\) Investigating Distrigas, the Commission detected a number of anti-competitive practices such as congestion on the entry points into the Belgian gas transport network and lack of competition in the market. These practices favored Suez, the group in which Distrigas was integrated and strengthened the firm itself as well. \(^{141}\)

**Other relevant factors.** The behavior of a company under scrutiny may also constitute a barrier to entry, such as the agreement of long term exclusive agreements or a refusal to deal with third parties. For instance, in Michelin I, the Commission’s decision on dominance was built on a very ambiguous circular logic which was followed by a well-deserved criticism. \(^{142}\) Michelin was found dominant because it had adopted discriminatory pricing and since it was dominant its discriminatory pricing policy constituted an abuse. The Court did not question this reasoning and affirmed that the undertaking had abused its dominant position. Despite the strong criticism, the Commission continued to apply this logic also in Eurofix-Bauco v Hilti in which the anti-competitive conduct of the company was considered to be a “witness to its ability to act independently of, and without due regard to, either competitors or customers”. \(^{143}\) Critical issue is also the size and the market power of other competing firms, which is an indication of the pressure an undertaking may face. Other indications from the undertaking itself are the profits made, its internal assessment and documentation which may recognize its dominance. \(^{144}\)

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\(^{138}\) A. Jones, B. Sufrin, (n 80) 340

\(^{139}\) Sector Inquiry Report, p. 7-8

\(^{140}\) ibid. p. 47, para. 116-119

\(^{141}\) Case 322/81, Nederlandsche Banden-Industrie Michelin v Commission [1983] ECR 3461, para. 105

\(^{142}\) R. Whish & D. Bailey, (n 71), 198


\(^{144}\) M. van der Woude, in C. Jones (ed), EU energy Law. (n 7) p. 316; Hoffmann-La Roche & Co AG v Commission, p. 461, gr 35; A. Jones, B. Sufrin, (n 80) p. 328
D. Is the dominant position held in the whole or a substantial part of the internal market?

Before the substantial issue of the abuse is analyzed, an element with significant jurisdictional importance must be noted. The application of the Article 102 is triggered when the dominant position held by a particular undertaking extends to the entire internal market or to substantial part of thereof. The main problem in this topic is the substantiality factor when dominant extends to the internal market as a whole, such as the case of Microsoft. However the Court has proven to be rather flexible with this element. Its jurisprudence has considered large airports, ports which are significant for intra-state trade such as the case of Genova. In the energy sector, the companies operating transnational gas pipelines or high voltage grids are covered by the substantiality element of Article 102. The approach taken by the Commission is illustrated in the investigations launched against RWE. The Commission concluded that “the affected geographic markets approximately cover the territory of the most populated German Bundesland, North-Rhine Westphalia. The volume of all gas sales within RWE’s core area is approx. 164,2 bn kWh, and most of RWE’s more than 3 million direct and indirect German customers are served via RWE’s grid in North-Rhine Westphalia. The affected markets for gas transmission and supply markets with RWE's grid are thus of such an economic importance in relation to the whole common market that they must be considered a substantial part of the common market.” On the other hand, national authorities are competent for abuses begun by operators of local distribution networks which affect the internal market only.

E. Abuse

Neither Article 102 TFEU nor the case law prohibits the possession of dominant position by an undertaking. It is the adoption of certain anti-competitive methods that may trigger its application. More specifically, the Court has emphasized that concept of an abuse is an objective concept and is considered independently from the position of dominance.

The list of abuses mentioned in the text of Article 102 is not exhaustive and only sets certain examples abusive behavior that are generally most common. However, the classification of the various forms of abuses of dominant position into specific categories is not easy. The most frequent and broad distinction is between exclusionary and exploitative abuses. The first category refers to abusive conduct which aims to maintain and enlarge the dominance possessed by the firm by seeking to drive competitors out of the market. It must be noted that such practices may temporarily

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146 Case COMP/39.402 – RWE Gas Foreclosure, para. 20
147 Hoffman-La Roche, para 461
be quite advantageous to the consumers, but once the competitors are eliminated the dominant firm is free to increase its prices so as to recoup for its losses. Exclusionary abuses include practices such as long term exclusivity agreements, predatory pricing or refusal to deal. The other category relates to practices which enable the dominant company to take advantage of its position “by exploiting its customers or suppliers”. Nevertheless, the boundaries between exclusionary and exploitative abuses are quite blurred”.

As far as networks are concerned the most severe abuse appears to be the refusal of a dominant firm to provide access to a particular service which is absolutely necessary for the requesting undertaking to continue its business activities in a neighboring market. As a result, the later faces the risk to be excluded from the market while competition is being eliminated. The anticompetitive conduct employed by the dominant firm, which is frequently the network operator, may seek to strengthen its position in the upstream market or also in the downstream market of supply, by providing privileges to a firm which is active in that market but is integrated into the same corporate group. Similarly, an undertaking which is dominant in the upstream market may cease access to a particular customer in the downstream market, with an eye to expand its activity to that neighboring market too.

F. Procedural provisions.

Following the analysis on the substantial content of Article 102, a topic of particular interest is the procedural framework which is applicable in antitrust enforcement. Regulation 1/2003 introduced certain rules of procedure which awarded the Commission a broad spectrum of powers towards the assessment of competition related abuses. Except for the powers associated with the investigation of potential anticompetitive conduct and include unexpected inspections in the premises of an undertaking, as well as request of information, Regulation 1/2003 also permits the acceptance of commitments provided by the firm under investigation. Article 9 introduces a

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148 M. van der Woude, in C. Jones (ed), EU energy Law. (n 7) p. 326
149 As attempted in Commercial Solvents, Tetra Pak.
150 ibid.
152 Talus, (n 15) p. 67
settlement mechanism which enables the Commission to cease the investigation if the commitments proposed are satisfactory and make a formal and legally binding Commitments Decision. The settlement of Energy sector cases through the mechanism offered by Article 9 is rather frequent in practice. The majority of these cases concern issues of customer or input foreclosure and mostly access to the required infrastructure. The remedies concluded were both behavioral and structural and were combined with positive obligations which aimed to improve competition in the relevant market. Despite the fact that Article 9 provides a fast and efficient settlement mechanism which enables the Commission to avoid lengthy procedures and to save its resources, it is argued that this practices fosters the Commission’s tendency to open an infringement with a view to strengthen its negotiating powers and reach an agreement which satisfies its policy orientations. The Commission has been blamed for dwelling on weak cases in order to replace the role of regulators but the commitments finally agreed are unsuitable to tackle the anticompetitive restraints at hand.

Chapter 3 Abuses of Dominant position in Energy.

The Sector Inquiry Report published by the Commission in 2007 as well as the investigations followed, have demonstrated a series of practices which trigger Article 102 TFEU. The majority of abuses concentrate on the two core requirements for the effective opening of the market and the well-functioning of competition in the energy sector, namely access to network infrastructure and cross-boarder interconnector capacity availability in this network.

Energy industry is significantly depended on network infrastructure to operate. The construction and operation of gas pipelines or high voltage grids is essential for the production, supply or distribution of energy. Inevitably, networks are considered to be “essential facilities” for users active in the market of production and supply of energy. Nonetheless, undertakings, which are most often associated with previously state owned monopolies retain control of the infrastructure.

154 Talus, (n 15) , p. 67, Rab, Monnoyeur, Sukhtankar, (n 153) 178
156 European Commission, Press Release, Competition: Commission energy sector inquiry confirms serious competition problems (10.01.2007)
since undoubtedly energy networks cannot be easily duplicated for economic, technical and environmental reasons. 158

Most significantly, the vertical structures accentuate concentration and foreclosure of the markets in two parallel ways. Firstly, vertical integrated undertakings a remnant of the pre-liberalization era when state monopolies controlling the network/infrastructure, and particularly those maintaining the position of TSO, have a strong incentive to prevent TPA to the network and take their investment decisions on the interests of the group only, to the detriment of competition in the market. Secondly, long-term vertical agreements have a similar effect of foreclosure. Vertical are the agreements concluded between companies operating at different levels of production or distribution chain. 159 Given the concentrated markets, arrangements with a long duration exclude new entrants and existing competitors seeking to increase their market share because demand in gas or electricity as well as transport capacity is tied to a dominant player for a considerable period of time. 160

The essential facility doctrine was initially drained as “any input which is deemed necessary for all industry participants to operate in a given industry and which is not easily duplicated” 161, and reflects an obligation to grant non-discriminatory access to competitors unless they can create an alternative facility on their own. This obligations derives from the special responsibility assigned to dominant undertakings to protect competition in the particular and neighboring markets as already highlighted, but its scope and application is much more sophisticated. 162

Picturing the energy markets and the current competition conditions, one can discern three main characteristics relevant to the applicability of the concept of essential facilities. Firstly, undertakings which hold the position of network operators are natural monopolies and therefore not affected by competition. Secondly, historically vertically integrated energy companies demonstrate strong incentives to capitalize on their market power and leverage benefitting the group’ s interests in the neighboring markets. Thirdly, foreclosure is the most significant market failure in energy market. The exclusionary behavior adopted by several vertical integrated energy incumbents seeks

158 K. Talus, (n 21), p. 212
159 European Commission, Competition Policy in Europe. The competition rules for supply and distribution agreements (OOPEC, 2002) 7
160 Sector Inquiry Report, para. 119
161 M. Motta, Competition Policy: Theory and Practice, (CUP, 2007) p. 66
162 A. Jones, B. Sufrin (n 80) p. 132
to exclude competitors from the market by foreclosing access to an essential input, namely transmission capacity, which is necessary to reach customers.

In the following parts of this chapter, the content and the application of the doctrine of essential facilities in energy industry will be illustrated. The most significant question to be answered regarding the application of the doctrine is whether it can apply to cases concerning energy networks. It will be shown that despite the regulatory liberalization of the market and the TPA model, the doctrine of essential facilities is still applicable, especially in the gas market and it can be reconciled with the application of TPA. Furthermore, taking into account that energy networks are “paradigmatic” essential facilities, the circumstances under which the owner of the facility is obliged to provide access will be illustrated. Can the companies argue that this notion is contrary to their property rights or undermine their incentives to invest? In sectors which are largely dependent on infrastructure, the extensive and unconditional use of the doctrine may pose severe economic risks and eliminate investment prospects.  

Energy investments although made under principles of market economy are investments of large scale and require a long pay-back period which triggers even more the need for short term recoups. Therefore, the boundaries of the scope of essential facilities shall be sketched.

Once its scope has been delineated, the most frequent and serious abusive practices in the energy sector will be analyzed. Firstly, the most significant and frequent practice threat to competition which is under the constant scrutiny of DG Competition and national competition authorities is the refusal of a dominant undertaking to deal with an existing or a potential competitor and provide TPA. Under the qualification of refusal to deal, apart from the clear cut cases refusing to grant access to a facility, other network abuses coexisting are capacity hoarding and degradation as well as strategic underinvestment. These theories of harm are based on the necessity for transmission capacity availability on the network and refer to inappropriate capacity allocation and artificial congestion on the side of TSOs.

The second category of abuses refers to barriers to access created by exclusive agreements and most particular by vertical long-term supply contracts, concluded either between incumbents

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165 J T. Lang, Defining Legitimate Competition: Companies’ Duties to Supply Competitors and Access to Essential Facilities, (1994) 18 Fordham Int'l L.J 477,
166 Case COMP/39.315 ENI
and electricity or gas producers, or between incumbents and large customers, preventing access to downstream markets. Vertical long-term supply contracts were common in practice and were regarded as a means to guarantee security of energy supply in Europe. The Sector Inquiry Report prepared by the European Commission demonstrated that these contracts were responsible for market foreclosure and constitute a barrier to the liberalization of the energy market in Europe.  

In this sub-chapter, initially the special characteristics and the function of long-term agreements will be described. Their controversial nature will be demonstrated through an analysis of their theoretical background as phenomenon lying between two theories of harm, namely exclusive dealing resulting in a deliberate refusal to deal and provide access. In fact, the majority of the undertakings investigated by the European Commission for abusing their dominant position in the energy sectors were engaged in contracts with duration of over 15 to 20 years. Subsequently, the position taken by Commission and the Courts concerning the conformity of long term agreements with the rules of competition law will be examined. The study of the Commission’s stance has indicated certain criteria which attempt to strike a balance between the detrimental role of these contracts against efficient competition and their likely efficiencies for the market taking into account the changing position of long-term contracts. The main question to be answered refers to whether the stance taken by the Commission is capable to ensure the well-functioning of competition in the market as well as the investment incentives of companies. It will be argued that the energy market will benefit from a position balancing the particular circumstances’ of the energy sector with the rules of competition law taking into account the changes noticed in the energy markets.

1. The doctrine of essential Facilities

The doctrine of essential facilities has developed plays a very important role for the competition of energy markets but mostly in indirect manner. Indeed the doctrine has not been explicitly adopted in judicial proceeding but it has inspired the energy legislation and the Commission’s antitrust proceedings extensively. The most prominent reflection of the doctrine in the Electricity and Gas Directives is the principle of TPA, which has been one of the optimal feature and tool for the opening of the market. The scope and the application of TPA itself

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167 Sector Inquiry Report, para. 118
168 ibid. para. 123
169 S. Anderman, The epithet that dares not speak its name: the essential facilities concept in Article 82 EC and IPRs after the Microsoft case in Ezrachi, A. (ed), Article 82 EC: Reflections on its Recent Evolution (Hart Publishing 2009).
encompasses the concept of essential facilities, since it is based on the idea that energy networks are essential facilities which cannot be profitably duplicated, but access to them is a sine qua non condition to achieve competition in the markets. The practice followed by the Commission maintains that gas and electricity networks are designated as essential facilities and fall within the scope of Article 102.

This rather controversial concept is traced back in 1912 to the United States v. Terminal Railroad Association case decided by the US Supreme Court and seems to rely on a vertical relationship and the existence of two distinct markets, the upstream and the downstream. This case referred to a joint venture of fourteen rail companies which were active at the St. Louis Railway Station. The joint venture controlled the railway infrastructure including a bridge which was difficult to replicate for technical reasons. Hence, the Supreme Court judged that the undertakings not participating in the joint venture should also have access to the bridge which is an essential facility.\textsuperscript{170}

In this context, one company is active in both markets and the other is either active or desires to be in the downstream market.\textsuperscript{171} More specifically, an undertaking dominant in the upstream product market either supplied its downstream arm or was requested to supply a competitor in the downstream market.\textsuperscript{172} The doctrine of essential facility may confer antitrust liability to a dominant company foreclosing competitors from the market refusing to grant access to its competitors when there is strong evidence that competitors are unable to establish an alternative facility.\textsuperscript{173} However, the fact that an undertaking may be obliged to share its assets or resources with competitors is undoubtedly a “severe interference” with its rights.\textsuperscript{174} Therefore, its application shall be reserved for exceptional circumstances “where there would otherwise be a serious effect on competition irremediable by less intrusive measures”.\textsuperscript{175}

The EU Competition law has embraced the concept, which is systematically, but not consistently, applied by the Commission and the Court to cases related to refusals to deal. The difference between “pure” refusal to deal and essential facilities has been disputed. Despite the

\textsuperscript{170} United States v. Terminal Railroad Association, 224 U.S. 383 (1912)

\textsuperscript{171} J T. Lang, Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities, (1994) 18 Fordham Int'l L.J 477, 478

\textsuperscript{172} ibid

\textsuperscript{173} Case C-79/00 Telefonica de Espana [2001] ECR I-10057.

\textsuperscript{174} A. Jones, B. Sufrin (n 80) p. 502

\textsuperscript{175} ibid.
confusion created by its association with refusals to deal, the essential facility doctrine is considered as a “convenient label” or a “common denominator”, rather than a distinct abuse or an autonomous legal basis for abuses. 176

The European Commission and the Courts have judged on a number of facilities such as harbors, 177 computer software, 178 intellectual property rights, 179 high voltage electricity grids 180 and gas transmission pipelines. 181 As Slot and Johnston observe the essence of the doctrine is that these facilities “must be available for use by competitors when those competitors cannot, or can only by incurring very high costs, build their own ‘version’ of such facilities”. 182 It is further argued that this concept is used to generate what the regulators visualize as efficient competition and what the conduct of dominant undertakings should be like to serve the competitive process.

Despite the relatively harmonious approaches taken on a theoretical level, judicial practice is inconsistent and uncertain. In fact, an overenthusiastic interpretation of the doctrine may offer unlimited access and force undertakings to sacrifice their investments in order to temporarily improve competition and consumer’s welfare but destroy long-term efficiencies. 183 A very crucial objection to the blind application of the doctrine is that it limits the investment incentives, lowers the possibilities to recoup the costs and encourages free-riding. 184 Korah draws the attention to the disadvantages arising out of the imposition of a duty to deal to dominant undertakings. The first negative aspect is the reduction of investment and innovation incentives, which even leads to the absence of incentives to duplicate an investment even when it is economically efficient. Korah concludes that compulsory licensing requires heavy regulatory measures to determine the terms of access and the pricing issue included. On the other hand, the possession of super dominance or

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178 Case T-167/08, Microsoft EU:T:2012:323.


monopoly in infrastructure of energy is equally disadvantageous, especially in the case of vertically integrated firms. In these terms, not only are the customers deprived from choices but the undertakings also face acute disincentives to expand and innovate. This stagnation, as Szyszczak perfectly describes it, may result in the “cannibalization of its own products”.  

Case law was initially rather generous with the notion of essential facility but its scope was gradually narrowed down. An example of this primitive position is reflected in the Commercial Solvents case, a firm which was dominant in raw material and decided to expand its activity in the downstream market and ceased the supply of raw materials to its customer, Zoja. The Court found that raw materials amounted to an essential facility for Zoja which could not find an alternative supplier. It concluded that an undertaking which has a dominant position in a particular market, here aminobutanol, and refuses to supply a customer “with the object of reserving such raw materials for manufacturing its own derivatives,” it risks eliminating all competition on the market and therefore is abusing its dominant position”. This judgment provoked a certain criticism because the Court ruled that it is irrelevant to consider whether Zoja had an urgent need for aminobutanol for the period in reference or whether the company still had large quantities of this product which would enable it to reorganize its production in good time. This judgement clearly ignores the conceptual pedigree of the doctrine which requires that access to the product or service is absolutely necessary for the existence of competition.

This erratic proposition was similarly adopted when United Brands refused to supply bananas to Olsen, a distributor, because the latter promoted a competing brand of bananas. The Court concluded that the conduct in question was abusive without assessing whether the competitor was excluded from the market. The reasoning of the Court relied on the hypothesis that while a dominant firm can take measures in order to protect its commercial interests, it cannot decide to stop supplying a long standing purchaser, involved in ordinary trade activities, because not only is it harmful for consumers but it is a discriminatory tactic to prejudice efficient competition.

approaches are criticized for ignoring the economic effects which appear as well the contractual freedom of the dominant undertaking which may be set aside only when access to the facility is absolutely indispensable for the well-functioning of competition in the market.  

The Court had the chance to rethink its conclusions in Telemarketing, which is a typical case involving a dominant company taking advantage of its market power in one market to leverage the secondary market. When RTL, the dominant television channel in Belgium decided to extend its activity in the market for TV advertising through its subsidiary IPB, the Court concluded the undertaking had an abusive conduct because it retained certain activities which were considered to belong to a neighboring and definitely separate market. As it was affirmed later in Tetra Pack, leveraging cases include also the possibility that an dominant undertaking abuses its dominant position through its activity in a market in which is not dominant.

The next phase for the application of the doctrine is illustrated in Sealink. The Commission regarded that the port of Holyhead in the UK was an essential facility because it was the only one which enabled transport by ferries between UK, France and Ireland. Therefore, it was held that the dominant firm, Sealink had abused its dominant position as owner and operator of the port because it maintained a discriminatory policy against its competitors to benefit the undertaking belonging to the same group. The decision was prone to criticism regarding a principal element of essentiality, inherent with the application of the essential facility doctrine. The decision seems to neglect the analysis on whether the downstream firm had any business alternatives and more precisely a different route between U.K. and Ireland.

A comprehensive approach on the doctrine of essential facilities in the EU law was established in the seminal decisions for Magill and Oscar Bronner. In Magill, three television companies in Ireland and Northern Ireland which published their weekly listings of their own programmes, refused to provide Magill a license to publish the listings in a combined TV guide, invoking their protection by the Irish copyright law. The Court found that the three channels had abused their dominant position because the protection of copyright cannot foreclose the market and

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192 Case 311/84, Centre Belge d'Etudes du Marché-Télémarketing SA (CBEM) v CLT & IPB, [1985] ECR 3261, para. 27


ignore the potential consumer’s demand for a new product. The Court required the three channels to provide the listings to third parties but under a legitimate fee.

The constructive argumentation made in the Magill case provides a number of useful remarks for the use of essential facilities. Firstly, the Court indicated that access to bottleneck facility, the listings which are protected as intellectual property, shall be granted in exceptional circumstances only. In fact, the Court underlined that a facility is considered to be essential only if there is no substitute available for access to the market. Secondly, the Court emphasized that the refusal precluded the creation of a new product. The judgement went on to clarify that compulsory licensing is essential to ensure the TPA in a underdeveloped market which is potentially beneficial for consumers while it did not prejudice the investment incentives of the TV channels. It is emphasized that the incentive of such companies to continue printing their listings weekly does belong to the upstream market and was not hindered by Magill.

In the landmark decision on Oscar Bronner, the Court constructed a more coherent approach and certain concrete criteria on the application of essential facilities. In this case, a local newspaper publisher, Oscar Bronner was refused by Mediaprint, a group active in newspaper publications in Austria with total share of about 47%, access its early morning distribution system. Oscar Bonner complained to the Austrian courts claiming that Mediaprint abused its dominant position and requested an order obliging Mediaprint to accept Bronner’s paper in the distribution system with a reasonable fee in return, arguing that because of Bronner’s small size it could not profitably establish an alternative delivery service.

However, Advocate General Jacobs did not entirely appreciate the approach presented by Bronner. Instead, he emphasized that the scope of the doctrine of essential facilities shall be as narrow as not to eliminate the incentives to invest. The Advocate General further had the chance to set certain criteria to be taken into account when rendering access to an essential facility obligatory for its owner or controller.

Distancing itself from the approach endorsed in Magill, the Court held that an abuse of dominant position takes place only when the refusal to supply has the potential to eliminate the all

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197 C. Ritter, "'Refusal to Deal and 'Essential Facilities': Does Intellectual Property Require Special Defence Compared to Tangible Property?'" (2005) 28 World Competition 3, 281
199 Case C-7/97, Oscar Bronner GmbH & Co KG v Mediaprint, Opinion of the Advocate General Jacobs [1998] ECR I-7791, para. 43, 47
the competitive capacity of the dependent firm. The Court also adopted certain criteria, less that those proposed by the AG, but rather strict.

41. Therefore, even if that case-law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever, it would still be necessary, for the Magill judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article [102] in a situation such as that which forms the subject-matter of the first question, not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person’s business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme.”

This approach demonstrated that an interference with the dominant firm’s freedom to organise its commercial policy must be defined narrowly. The refusal shall have the effect to eliminate competition from the market in absolute terms and not merely create significant burdens for competitors. Avoiding to use the term “essential facility”, the Court underlined that this particular case did not fulfill as the element of indispensability since other methods of distribution were available, such as postal delivery, kiosks and tabac sales. Explaining the criterion of indispensability, the Court recognised that these distribution networks were less effective than early morning home delivery, but in the absence of legal, economic or technical barriers, the fact that this solution is the most convenient, alone could not support the mandatory access to the network. In conclusion, the criteria of indispensability and the risk to eliminate all competition not being satisfied, the Court ruled that Mediaprint did not abuse its dominant position.

The reasoning of the Court in Oscar Bronner established a significant barrier in the invocation and application of the essential facilities doctrine. In this regard, the plaintiff has the evidentiary burden to prove the indispensability of the access right requested and the lack of an existing or potential substitute. In particular, as already mentioned, the Court requires “technical, legal and economic” hurdles which impede the duplication of the facility, under reasonable economic circumstances.

200 Case C-7/97, Oscar Bronner GmbH & Co KG v Mediaprint [1998] ECR I-7791 para. 42
201 ibid. para. 45-46
203 ibid. para. 44
It has been repeatedly noticed by commentators that the criterion of indispensability, although appears quite broad, it “seems excessive and nearly impossible to satisfy”. Others commented that this judgement displayed that “facilities are not lightly to be considered ‘indispensable’”.204 However, the restrictive scope as formulated by the Court is not similarly applied to all cases due to the different categories of abuses and heterogenous characteristics of each case. In particular, it is observed that the doctrine is applied in more generous fashion when it deals with utility infrastructure constructed with public funds.206 Monitoring the decisions concerning the application of the concept of essential facilities in the energy sector, Petit notices that the Commission “stretches” the doctrine beyond its original scope and the indispensability element. Instead of limiting its application, the Commission seems to be invoking the doctrine to request access and capacity expansions under the umbrella of Article 102 TFEU.207 This trend derives from the liberalization strategy which is in place for these industries. To put it in the energy context, access to the incumbents bottleneck facility is a basic component of the liberalization wave in the energy markets.

1.1 Essential facilities in the Energy industry

Despite the flexibility demonstrated by the European Commission a propos of essential facilities in energy related abuses, the application of the doctrine in transmission networks or interconnectors is representative of the complex attempts to balance its scope between long-term and short-term efficiencies. Again, the most significant challenge of its application in energy infrastructure is the criterion of indispensability. For instance, although electricity streams cannot be reoriented, transmission of gas may take place through a number of different routes.208

The application of the essential facilities doctrine in the Commitment Decisions in ENI and GDF Suez, sheds some light on the holistic fashion followed. In GDF, the Commission found a web of long-term import capacity bookings in conjunction with strategic underinvestment. According to

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208 M. van der Woude, in C. Jones (ed), EU energy Law. (n 7) p. 309
the findings of the preliminary assessment, the import capacity booked is considered to be an essential facility because access to this infrastructure was an indispensable requirement to supply natural gas to the French market.  

Applying the Bronner formula, the Commission concluded that the reproduction of the infrastructure was not a feasible option either. The Commitments proposed by GDF included the immediate release of a considerable share of import capacity and the gradual reduction of its bookings over 50% by 2014.

More specifically, the Commission tends to perceive the “overall set of infrastructures as a single facility” However, many commentators express their doubts about the rightness of this approach. It has been repeatedly argued that not the entire infrastructure is essential to enable the entrance of competitors in the market and to safeguard efficient competition.

As already mentioned, the input is considered to be indispensable, when there is no viable possibility for the competitor to find an alternative or duplicate the infrastructure required, as was pointed out in Bronner. However, the network may provide alternative, although less economical, transportation routes. Put it differently, not all pipelines are equally important in the network, as confirmed also by Regulation (EC) No 715/2009, which acknowledges competition between pipelines.

The distinction between those infrastructures ticking the box of indispensability and those that do not depends on their nature and use. For example large transit or import pipelines are economically speaking, large-scale investments and most of the times hard to duplicate. Evidently, the incentive to retain the entire or a large proportion of transmission capacity in a sort of de facto exclusivity to the firm affiliated in the group is rather strong. The perks for the group are obvious. Apart from the commercial interests, what triggers mostly the Competition regulators is the underlying strategy to eliminate competition by hindering competitors’ access to the market and subsequently to seize the opportunity to fix prices and manipulate the market. For this reason, the

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209 Case COMP/39.316 - GDF foreclosure, Commitment Decision, para. 28.

210 M. Pietro & F. Gianluca, ‘Strategic Underinvestment as an Abuse of Dominance under EU Competition Rules’. (2013) 36 (4), World Competition, 513, 531

211 K. Talus (n 21) p. 211

212 Regulation (EC) 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks. Preamble 8; Regulation 1775/2005 also recognized that competition among pipelines should be taken into consideration when tariffs are set.

213 M. van der Woude, in C. Jones (ed), EU energy Law (n 7) p. 310, K. Talus (n 21) p. 211-212

214 K. Talus (n 21) 212
absence of actual or potential substitute renders the essentiality element in import/transit pipelines self-evident.

The analysis about the essentiality of networks shall also take into consideration multiple relevant circumstances and not only the element of costs. In fact, the cost of transmission or construction of an alternative pipeline or grid is not alone the factor which proves its indispensability. Environmental concerns are a significant aspect mostly due to the environmental strategy and strict rules imposed by certain Member States and the Union, but also because of the local activist groups resisting to the construction of energy infrastructure. The construction of networks also requires a specific input. In the case of natural gas, a source with the necessary volume of gas is an issue which may render the construction of a new pipeline troublesome. Last but not least, concerning long-distance transit routes, the construction of a second pipeline is not only economically risky but also an issue of international relations, which is another factor to consider when examining potential alternative routes.

In light of these, it can be suggested that essentiality shall not be examined for each pipeline individually, but as a whole network including the import facilities. Based on this proposition, Talus argues that if the same TSO controls the entire network and prevents access to importation capacity and accordingly to the network as a whole, all import points will be considered as essential facilities. This approach was mirrored in ENI.

In this case, the Commission found that “ENI's transport infrastructures to import gas may be considered an indispensible infrastructure since access to ENI's system of transport was objectively necessary to import gas and compete in the gas supply markets in Italy”. This interpretation finally assessed the entire import infrastructure instead of examining each pipeline individually and concluded that “there are technical, legal and economic obstacles capable of making it impossible, or at least unreasonably difficult, for the would-be importer to duplicate ENI's system of transport infrastructure”. However, what the Commission overlooks is the parallel investment constructed by third parties and the capacity bookings made by other shippers in ENI’s network. For instance, the upcoming operation of the LNG terminal Ravigo and the capacity reserved in TTPC and TAG pipelines, following the commitments undertaken by ENI to the Italian Competition Authority, raise

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215 ibid.
216 Sector Inquiry Report, para. 47
217 K. Talus, (n 21) 213
218 Case COMP/39.315, ENI, para. 42
serious concerns about the essential character of ENI’s entire transmission system. A careful reading of the case might lead to the conclusion what matters in the case of essential facilities is the actual use of the infrastructure and not its owner or operator. In other words, the share of capacity bookings made by ENI’s competitors, provide significant evidence regarding the exercise of “effective competitive pressure” on ENI.\textsuperscript{219} The holistic application of essential facilities follows the flexible approach adopted by the Commission towards a less strict interpretation of the doctrine, particularly for the energy sector. This tendance seeks to boost competitiveness in the energy markets by opening the market as much as possible.

Furthermore, despite the opinions arguing that the doctrine has no longer any usefulness for the energy industry, taking into account the sector specific regulation in place and most particularly the right of TPA, these approaches overlook the essence of the liberalization process. In fact, the structure of the market as well as the nature of these legislative initiatives are built on the doctrine and on the proposition that access to network is an indispensable component of the liberalization package.

It can further be argued that the doctrine of essential facilities may be employed in order to address the tension between TPA and investment incentives.\textsuperscript{220} As the Commission provides in paragraph 82 of the Guidance Paper:

“In certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects on the input owner's and/or other operators' incentives to invest and innovate upstream, whether \textit{ex ante} or \textit{ex post}. The Commission considers that this is particularly likely to be the case where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could also be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources.”\textsuperscript{221}

Despite the fact that the Commission refers to the telecommunications sector, energy sector can benefit from its proposition as liberalized network industry. The concept of essential facilities is not only the foundation stone of TPA but also an interpretative tool which maintains a balance

\textsuperscript{219} \textit{ibid.} para. 42.

\textsuperscript{220} Guidance Paper, para. 24

\textsuperscript{221} \textit{ibid.}
between necessity for access to the input and other objectives such as commercial freedom, protection from free-riding and investment incentives. To put it differently, this concept reconciles short-term with long-term efficiencies and functions as a counterbalance for the negative effects of obligatory TPA in investment planning. Therefore, the application of competition law is not unsuitable and restricted for an industry with heavy regulatory initiatives and enables the adoption of analytical approaches which support efficient competition.

2. Refusal of Access

As has been repeated already, one possible effect of dominance is that access to services or to infrastructure of the upstream or downstream market is regulated by its owner, which is a dominant firm. The Gas and Electricity Directives explicitly impose an obligation to the owners/operators of networks to provide access to parties unrelated to the economic group, which retains the control on the network. The system introduced aiming to liberalize the gas and electricity markets leaves to TSOs very limited margin of appreciation to deny access to a requesting third party. Most particularly, access shall be provided “to all eligible customers and applied objectively and without discrimination between system users”, according to published tariffs and under the auspices of the principle of proportionality.

It is uncontested that a dominant company enjoys freedom of contracts and is entitled to exercise its property rights without being obliged to deal in a contract that does not satisfy its commercial interests. In all modern market economies, dominant firms are equally able to select their trading partners and to reject commercially unreasonable choices. Indeed, the majority of dominant firms investigated by the Commission and reached the doorstep of the Court, referred to practices adopted to protect their commercial interests. Albeit, the refusal to provide access expressed by certain dominant companies has been characterized as abusive behavior and a breach of Article 102.

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222 K. Talus (n 21) p. 217
223 According to Article 32 of the Directive 72/2009, tariffs shall be approved by the energy regulatory authority, as Article 37 sets.
224 Case C-17/03, VEMW, [2005] ECR I-4983
It has been indicated that a refusal of access, unless justified to protect the operator’s commercial interests, is considered as an abuse, regardless of the operator’s intent. The jurisprudence of the Court accepts that the intent to hamper competition is a necessary element when examining an abuse of dominance. As confirmed in the British Airways case, the anticompetitive conduct adopted by a firm and its potential harm to competitors in the market demonstrates the presumed intent required. Due to the nature of networks as essential facilities and the natural monopolies in the relevant market, it is doubtful whether the element of intent is necessary to be considered, taking into account that a competitor is basically driven out of the market if access to the system is denied.

Refusals may be straightforward or indirect, “constructive” or “disguised” by suggesting offering the service requested under commercially irrational, discriminatory terms or severe delays, which is actually the most frequent case of behavior seeking to restrict competition in the market. Common anti-competitive practices under the same umbrella of refusal of access include, capacity hoarding and capacity degradation, strategic underinvestment.

The Report has underlined that given the vertical structure of most energy related undertakings, as a result of the historic state monopolies in gas and electricity sectors, the owner or the operator of the system will have a strong incentive to provide more beneficial terms and priority access to the supply arm belonging to the same corporate group and impose discriminatory terms against extra-group suppliers. The Report underlines the case of selling primary capacity on transit pipelines to its shareholders, the excessive documentation required from certain users as well as the discriminatory assessment procedures.

The Commission also expressed its concerns about the quality of services provided by operators to unrelated companies in comparison to their affiliates as well as the absence of a transparent framework regulating access rights. Information advantages exist when the affiliates have access to customer information or when network charges are not announced. The Report

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227 M. Σταμάτη, (n 11) p. 49
228 C-95/04 British Airways v. European Commission para. 144.148
229 M. Σταμάτη, (n 11) p. 49
230 K. Talus (n 21) p. 199
231 Sector Inquiry Report, para. 168
232 ibid. para. 493
233 Sector Inquiry Report, para. 510
emphasizes that “Repeatedly, respondents complain that affiliated supply companies approach customers with improved offers when their intention to switch is reported to the network branch.”

Classical examples of TSO pursuing to prevent its competitors from having access to the gas transmission market is ENI, a vertically integrated company which was investigated for providing preferential treatment to its generation and wholesale arm. ENI was blamed for restricting the entrance of newcomers in the market of balancing services, but also for the increase of the prices for such services harming both its own competitors and the end consumers. Except for the national wholesale and distribution markets, ENI is also active in the market of the national transport network. ENI was caught red handed when it refused capacity in its transit pipelines TENP/Transitgas and TAG pipelines.

The complaint submitted by the American undertaking Marathon against gas operators in Germany, France and the Netherlands demonstrates one of the earliest examples regarding access right of new entrants to the network. The underlying facts begin from the request made by Marathon to acquire access to the pipelines of five European gas companies. These companies refused access but proposed and agreed with Marathon to purchase its uncommitted gas. Later, by the time this contract had expired, Marathon requested again access which was again denied. As in the majority of similar cases, these investigations also ended informally, with a settlement between the Commission and the gas operators. Apart from the expected commitments related to the obligation of gas operators to release the unused capacity, for the sake of transparency, one of the commitments agreed with these undertakings was to publish information concerning the capacity availability for all entry and exit points as well as to offer unused capacity to third parties. The companies also went a step further providing online bookings in order to deal with delays.

In the electricity market, E.ON was investigated by the Commission when it abused its dominant position in the wholesale market of electricity in Germany, by limiting the generation capacity on the network with a view to gradually increase electricity tariffs.

234 ibid.
235 Case COMP/39.315 – ENI para. 15
236 ibid. para. 43
238 Case COMP/39.317 - E.ON, Commitment Decision,
practice also reached the balancing market when it increased its own cost in order to pass it to final consumers. 239

2.1 Capacity Allocation

Access to network requires availability of transport capacity. However, the Electricity and Gas Directives do not provide a detailed framework regarding the allocation of interconnectors and transmission capacity. As the Commission’s Sector Inquiry reached, the lack of transport capacity, as well as the control of networks by vertically integrated incumbents, may create an exclusionary effect preventing competitors from access to the network which is necessary to conduct an energy transport and meet the needs of their customers.

Non-discriminatory capacity allocation and congestion management is a key issue both for electricity and gas networks. The responsibility to allocate transport capacity is assigned to the TSO, which according to Regulation 715/2009 shall transparently ensure both firm and interruptible TPA on a non-discriminatory basis and on both long and short-term terms to all users of the network. Most importantly, the allocation of capacity shall be estimated according to the overall available transmission capacity technically permitted by the network rather on a basis of contractual availability. 240 In fact, if the capacity allocation was measured according to contractual congestion, this would result in discriminatory refusal of access to certain users. 241

A significant risk associated with capacity allocation is the power conferred to the TSO to grant priority access to certain network users when it is objectively justifiable and does not prejudice the rights of other eligible users. 242 If the capacity granted to a particular user is not justified on objective technical and economic criteria and constitutes a serious restriction in the capacity availability, then a refusal of access against another user is an abuse of competition law. To facilitate access, TSOs shall apply “use-it-or-lose-it” or “use-it-or-sell-it” mechanisms to surrender capacity which is not used. 243

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239 The balancing market concerns services which aim to balance the electricity procurement and supply.

240 Μ. Σταμάτη (n 11) 53

241 ibid. p. 47.

242 Σταμάτη (n 11) 53

2.2 Capacity Congestion.

Capacity Congestion is another issue where significant issues stem from. The lack of capacity availability on an infrastructure is considered as an occasion in which the refusal of access is justifiable. 244 Even though the dominant undertakings are not required to expand their infrastructure in order to cover the demand of competing firms or allow new entrants, 245 the Commission has emphasized that if congestion occurs due to inappropriate management of existing capacity or dominant undertaking’s indifference or reluctance to make the necessary organisational restructuring, it is equivalent to refusal of access. Evidently, the character of transmission capacity, which is usually a natural monopoly, triggers the doctrine of essential facilities. In parallel with the application of the criteria established in Bronner, the network operator, also the TSO, has a positive obligation according to Articles 16 of Regulation 715/2009 and 714/2009 to make the necessary arrangements in order to tackle congestion.

The case of Swedish Interconnectors provides an aspect of congestion-related manipulation. The Swedish TSO, Svenska Kraftnät, raised concerns of abusing its dominant position due to its congestion management practices in electricity transports. More specifically, Svenska Kraftnät curtailed cross-boarder transmission capacity so as to address internal congestion. As the Commission found: “by treating requests for transmission for the purpose of consumption within Sweden differently from requests for transmission for the purpose of export, SvK may have artificially segmented the market and prevented industrial and other users located outside Sweden from reaping the benefits of the internal market.”246 The Commitments agreed for the Swedish TSO included its obligation to subdivide transmission system into two or more bidding zones in order to be able to address unexpected changes and adapt to future congestion without limiting capacity on interconnectors. 247

2.3 Capacity Hoarding and Degradation.

Capacity hoarding is a form of congestion management deriving from the ineffective use of the technical capacity allowed by the network, which is precisely employed by the TSO and aims to decrease the capacity available for third parties to their own benefit. 248 Despite the absence of a coherent legal definition of capacity hoarding and its relatively new nature, its “spill-over” effect is

246 Case COMP/39.351 Swedish Interconnectors, Commitment Decision (14.10.10) para. 27
247 ibid. para. 47
not at all rare in the energy industry. In capacity hoarding, the undertakings “conceal” the primary or secondary transport capacity for their own use and decrease the capacities available to their competitors. Despite the general difficulty to define practices closely related to capacity hoarding, the Commission adopts the distinction between primary and secondary capacity hoarding and capacity degradation.

The concept of primary capacity hoarding is practically illustrated in RWE. In this case, the Commission took the view that the company abused its dominance by understating the capacity which was technically accessible to the potential competitors. The data analysis provided by RWE showed that the technical capacity of the system exceeded by far the capacity provided to users while the company kept on refusing access to third parties. Put differently, the dominant company reserved and used more capacity than the maximum level indicated by the TSO. The Commission concluded that despite the wide margin of flexibility awarded to network operators over the management and the calculations of transport capacity provided to requesting users, the asymmetry between the actual capacity used by the TSO and the declared technical capacity indicated the dominant company’s strategy to minimize the available capacity with an intend to foreclose the potential transport customers.

The abusive effect of primary and secondary capacity hoarding is depicted in Commission’s investigations over ENI, the Italian energy conglomerate which has been in the eye of DG Competition for a range of reasons. ENI had hoarded primary capacity when the TSOs, also controlled by ENI, refused to grant the entire existing capacity and did not also establish to address congestion and to provide efficient capacity allocation. The investigations held by the Commission also showed that ENI hoarded its secondary capacity that could have been used by other participants, as almost 80% of the capacity was used by ENI and other parties’ capacity reached could reach 3-10%. As reported by the Commission ENI intentionally employs a strategy to

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249 O. Koch/C. Gauer (n 10) p.216


251 M. Pietro & F. Gianluca. ‘Strategic Underinvestment as an Abuse of Dominance under EU Competition Rules’. World Competition 36, no. 4 (2013): 513, 529

252 Koch/Gauer (n 10) 216

253 Case COMP/39.402, RWE gas foreclosure, Commitments Decision (18.03.2009) para. 26

254 ibid. para. 29

255 Case COMP/39.315 ENI, para. 49
reinforce its interests in the downstream market by foreclosing its competitors at that market from imports of gas. 256

The Commission’s proceedings regarding the gas foreclosure practices of ENI, discovered another “constructive” form of refusal known as capacity degradation. According to the Guidance Paper a “constructive” refusal to supply dwells in onerous access conditions imposed, the unjustified delays in the supply or the capacity allocation materialized “in a less attractive manner”. 257 Delays in capacity allocation as well as the short-term packages offered to other competitors, while long-term capacity is possible, were considered as symptoms of capacity degradation. In this context, the Commission found that the dominant undertaking actually intended to put significant obstacles in their business planning by reducing the value of capacity for its competitors. It was further asserted that the troublesome scheme employed by ENI lead to a separate, uncoordinated sale system on complimentary pipelines and deterred the acquisitions of capacity making them a less attractive product for shippers. 258

2.4 Strategic Underinvestment.

An undertaking may adopt an abusive behavior in relation to its investment planning. In particular, vertical integrated companies seem to base their investment projects related to capacity extensions on the capacity needs demonstrated by their supply arm and not on the bulk of capacity required by its competitors. Indeed, competition rules do not intrude to the right of these undertakings to design their investments and oblige them to consider the entry of new competitors when planning the expansion of their system. 259

Nonetheless, the Commission has found that the lack of capacity is not justifiable when the dominant firm shows its “unwillingness to consider organizational solutions capable of overcoming the alleged capacity constraints”. 260 Moreover, the Third Energy Package Directives explicitly stipulate that TSOs shall be equipped with the appropriate financial resources in order to plan its future investment projects and the replacement of existing assets. Part of the tasks assigned to

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256 ibid. para. 50
257 Case COMP/39.315 ENI European Commission, MEMO/10/29 , Antitrust: Commission welcomes ENI's structural remedies proposal to increase competition in the Italian gas market, (04/02/2010); Guidance Paper, para. 79
258 Case COMP/39.315 - ENI, para. 43, 51
259 European Commission, Defining what is legitimate competition in the context of companies’ duties to supply competitors and to grant access to essential facilities, in OECD Policy Roundtables, The Essential Facilities Concept, 1996, 99
transmission operators is also the maintenance and development of a secure, efficient and economic transmission system. In view of the above, the refusal of an operator to address the congestion of the network through organisational adjustments or necessary investments, is equivalent to refusal to grant access and is not justified due to lack of capacity.  

Deciding not to invest on future capacity mechanisms which are necessary to overcome the congestion restraints, dominant undertakings and especially TSOs abuse their dominant position because their conduct is an indirect attempt to foreclose competitors from the market invoking an artificial congestion. Hence, the strategically decided underinvestment policy is a practice which distorts competition and has a strong effect of foreclosure in the market.

The decision of the Italian Competition Authority (ICA) on 15 February 2006 illustrated this issue, not without controversies though. The turmoil started when Trans Tunisian Pipeline Company Limited, a subsidiary of ENI, launched a project to expand its transmission capacity on the import pipeline from Algeria to Italy. The investment was decided after ENI acknowledged its obligation as the operator of the essential facility to satisfy the increasing demand. In reality, the project served a second objective too, to terminate a previous incident of abuse revealed by ICA.

The materialization of the project called for certain measures to guarantee for the fluctuation of demand due to the parallel construction of other energy investments. To avoid over-supply gas and back-breaking take-or-pay penalties, TTPC concluded ship-or-pay contracts with seven shippers and covered the entire future capacity. These contracts contained certain conditions which were not fulfilled on the shippers’ behalf. As a result, ENI terminated these contracts and ceased its expansion project.

Examining the potentially anticompetitive character of ENI’s practices, ICA ruled that the mere termination of investment was an abuse of dominant position. Paradoxically enough, the ICA found so, without considering the TTPC pipeline as an essential facility. Therefore, ENI was not under a duty to expand the transmission capacity in order to provide access to requesting parties. Nevertheless, ICA found that ENI had abused its dominant position due to “a number of actions and omissions [...] through its subsidiary TTPC” which has an objective to impair “the success of the

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261 ibid. 513- 517; No. 2854, Case A61, De Montis Catering Roma/Aeroporti di Roma, Bulletin No. 9/1995, para. 37; Στομάτη (n 11) p. 56

262 Case COMP/39.315, ENI, para. 60

ship-or-pay contracts between TTPC and the shippers by relying on the non-fulfilment of certain conditions precedent”. 264

The theory of harm, which the reasoning for ENI relied upon is rather unconventional and raises significant doubts about the rightful interpretation of the essential facility doctrine. Most importantly, this decision again demonstrated the need to strike a delicate balance between the access rights and the extent to which a firm is forced to share its assets. However, ICA was fully aware that TTPC does not qualify as an essential facility and based its theory of harm on the undertaking’s special responsibility “not to adopt a conduct which, in directing the behaviour 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”265

The European Commission later confirmed the conduct of ENI constitute strategic underinvestment, which is a face of refusal to provide access. In contrast to the reasoning adopted by ICA, the Commission applied the essential facilities doctrine. In particular, the Commission found that access to the infrastructure held by ENI was indispensable to enter the market of gas sales in Italy, as for technical, legal and economic reasons it is impossible or unreasonably difficult to duplicate the system. Therefore, by refusing access to its transport system, ENI abused its dominant position. 266

When GDF Suez took the decision to terminate the construction of it Montoir de Bretagne LNG facility also caught the eye of the European Commission. GDF was found to abuse its dominant position, amongst others, by refraining from its investment project. 267 The decision pointed out that the development of the LNG terminal was ceased because another shipper had requested a long-term capacity contract in the open season procedure and not because of the alleged economic unprofitability of the project. The limitation of its investment plans had as an objective to prevent the long-term capacity reservation requested by this competitor as well as generally to foreclose access to the transmission system for the future due to its strategic underinvestment. 268

265 ibid. para. 187.
266 Case COMP/39.315, ENI, para. 41-44
267 Case COMP/39.316 - GDF foreclosure, Commitment Decision,
268 ibid. para. 37
3. Long-Term Agreements.

Exclusive dealing and most particularly long-term exclusivity agreements have been one of the core issues in cases which were related to the liberalization of electricity and gas markets. The existence of long-term exclusivity agreements is a phenomenon, which the opening of the market was brought to deal with. Indeed, the core of liberalization is the abolishment of these defective market structures. At the same time, any efforts to open and unify the internal market are pointless unless the problems stemming from long duration arrangements are addressed.

Long-term contracts have been described as a “backbone” in the EU energy policy and their contribution in security of supply in Europe. Functioning as a guarantee of demand, long term agreements are significant to ensure the certainty and stability required for the accomplishment of large-scale investment which are necessary for the exploration, production and transmission of energy. Through arrangements with a long duration, price volatility due to demand fluctuations is further avoided and ensure the stability of the energy market but also consumer’s welfare. Moreover, the EU is a solid importer of energy and highly dependent on resources arriving from non-EU countries, such as Russia, Algeria and Norway. As a consequence these long term contracts have also great geopolitical value for the energy security of the Union.

Indeed, the attitude of the Commission has been more sympathetic towards long-term agreements in the pre-liberalization era. Typical example of this approach is the case of Scottish Nuclear Ltd, which entered into two agreements of a duration of thirty years with Hydro-Electric and Scottish Power. According to the arrangements made, Scottish Nuclear was not able to conclude another contract for supply of electricity without the permission of the two, while those were

269 Sector Inquiry Report, p.13
270 D. Geradin (n 5) p.19
272 K. Talus, 'Long-term natural gas contracts and antitrust law in the European Union and the United States', (n 40) 263
obliged to cover their total needs from Scottish Nuclear. When the European Commission started its proceedings against the parties, the duration of the contract was reduced to fifteen years in order to comply with the rules of competition law.  What should be highlighted in this decision is the attitude of the Commission on the exclusivity terms. It is underlined that parties need to safeguard their large-scale investments. This period is keen to provide stability and allow the undertaking to maker their long-term planning.

Yet, the introduction of competition in the European energy market and the new European energy policy imperatives which aimed at the creation of competitive and efficient markets of gas and electivity, changed the scene for long-term supply contracts. Long term contracts became notorious for excluding new entrants and protecting monopolies, as a result prices end up at monopolistic high levels, to the detriment of end consumers. Due to the existing long-term contractual terms, dominant undertakings foreclose the activity of existing competitors seeking to increase their market share while potential new entries have to launch business in a saturated market.

The anticompetitive effect of long-term contracts and the efficiencies have created a long-standing controversy which may also be overestimated. In fact, the evolution and expansion of energy infrastructure such as international pipelines, LNG spots and the ability to gas storage, have also significantly altered the essential character of long term commodity contracts the role of which has started to fade. It is argued that currently, there are multiple mechanisms of supply that long term contracts are no longer indispensable. Their role also diminished after the liberalization wave which targeted state monopolies by measures such as unbundling or the establishment of non-discriminatory TPA and raised questions about the compliance of long term contracts with the new system.

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278 ibid. para. 40


In general, the debate regarding the role of long-term agreements and their conformity with competition law has been in vogue for a long time. It is argued that the liberalization of energy networks leaves any ground for such contracts and their significant foreclosure effect. On the other hand, the Gas and Electricity Directives have not explicitly dealt with the curious case of these contracts. Market player realized that the formerly accepted duration will not be accordant with the opening of the market, but in the absence of a clear-cut rule, they pinned their hopes on case law. Some commentators have concluded that “the balancing between the efficiency gains of long-term contracting for a few individual market players and the potential negative effects on social welfare are at the heart of the antitrust dilemma with LTC (long-term contracts) in energy.”

However, the case-by-case methodology by an “I-know-it-when-I-see-it” standard followed to discern the foreclosure effect of long-term contracts was rather obscure and did not guarantee the legal uncertainty which was necessary to enable the large energy investments which would ensure the security of supply of the European energy market. The following analysis will demonstrate that the viewpoint of the Commission which carefully seeks to strike a balance and achieve legal certainty and efficiency in the market. As it is established, long-term contracts are not anticompetitive per se.

3.1 Characteristics of long term contracts.

Long-Term contracts are a form of exclusivity agreements, a very effective method to foreclose the entrance of new competitors and reinforce the dominant position of a company by either prohibiting or tying the customers in a way that are unable to deal with competing undertakings. Put it differently, exclusivity obligations refer to a customer who is obliged to purchase all or most of its demand requirements for the relevant product from one supplier.

These contracts were traditionally concluded in the pre-liberalization era and incarnated governmental imperatives. The main theory of harm about long-term agreements market

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285 M. van der Woude, in C. Jones (ed), EU energy Law (n 7) p. 328


foreclosure, by offering a favorable commercial framework and locking suppliers to a specific producer through a contract over a relatively long period of time. These long-term arrangements may result in customer, input and network foreclosing. Evidently, market entry requires the existence of energy resources and capacity availability. Indeed, competitors are precluded from penetrating the market and attracting customers if local and dominant incumbents have exclusive conditions of access to energy production and to wholesale markets or exclusive bookings in transmission or distribution capacity. Small or medium undertakings are excluded from competition and are unable to compete with large suppliers because all customers are exclusively tied.\textsuperscript{288} This practice not only reinforces the dominant position of larges suppliers but also drives the market to a monopolistic structure.

This abusive practice, as described in the Commission’s Guidelines, may take different forms. It is an anti-competitive conduct, either as a contractual term or de facto exclusivity.\textsuperscript{289} Contractual exclusivity occurs when the purchaser is obliged to buy the entire or a very large proportion of its total demand by a single seller. De facto exclusivity exists when, even though there is no contractual obligation, the way the arrangements concluded are tantamount to exclusivity obligations. Minimum purchase obligations are a frequent example of de facto exclusivity.\textsuperscript{290}

In its Guidelines, the Commission employs an effects-based analysis on whether an exclusivity term should be considered as an abuse. The relevant assessment of exclusive arrangements is a factual issue and will take into account the impact of the exclusivity on existing and potential competitors as well as whether there are any benefits for the end consumer.\textsuperscript{291}

In general, the Commission takes the view that an agreement of exclusivity is not abusive when the obligations included do not result in foreclosure by excluding other competing undertakings due to the long duration of the contract and switching obstacles. Usually, non-compete clauses with short duration and covering a limited quantity are not harmful while the longest the duration of the agreement, the most probable it is for an exclusive arrangement to be abusive.\textsuperscript{292} However, in paragraph 36 of the Guidance Paper, the Commission suggests that if a dominant undertaking is also considered as “unavoidable trading partner”, even an exclusivity clause with short duration may hamper effective competition.

\textsuperscript{288} M. van der Woude, in C. Jones (ed), EU energy Law. Volume II (n 7) p. 334-334

\textsuperscript{289} V. Rose and D. Bailey, Bellamy and Child : \textit{European Union Law of Competition} (OUP, 2013) p. 813

\textsuperscript{290} Case T-65/98, Van den Bergh Foods Ltd v Commission [2003] ECR II- 4653

\textsuperscript{291} Guidance Paper, para. 34.

\textsuperscript{292} C-393/82 Almelo ECR 1994, p. I-1477
The impact of exclusive obligations must be also assessed in purely economic terms. It is reasonably argued that exclusivity contracts enable firms to undertake their investment projects and expand their infrastructure to meet the capacity needs. In particular these agreements show some efficiencies and allow investors to recoup for their investment costs. For instance, if a gas distributing company launches a project to expand transport capacity, it can secure a return for its investment by agreeing on long term exclusivity with a large purchaser.

3.2 Assessing the long-term contracts in terms of competition law

The conclusions stemming from the Sector Inquiry Report demonstrate that the concentrations created by long-term contracts are an eminent threat to competition and require careful balancing. Despite of tying large buyers and foreclosing the downstream market, these contracts are beneficial in the upstream market and ensure the security of supply in the Union, an effect which could possibly outweigh other disadvantages. Nevertheless, the Commission has recognized the importance of these contracts and attempted to sketch a system of in concreto assessment, assessing the overall conditions of the market, such as the position of the undertakings involved in the market, the potential restrictions and the prospects of a competitor entering the market.

Before assessing the compatibility of long-term contracts with the rules of competition law, a significant distinction shall be made. In practice, the European Commission distinguishes between downstream and upstream supply contracts. The difference lies in the level in the production chain. Therefore, suppliers enter into upstream contracts with producers and into downstream with final users. One commentator reasonably argues that long-term contracts made in the upstream level are reflected by similar contracts in the downstream market. Some authors also detect the existence of a midstream level, which encompasses contracts in the transportation market while others consider those contracts as downstream.

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293 R. Bork, Antitrust Paradox (Free Press, 1993) 281-309


295 Sector Inquiry Report, para. 235 (gas), 284 (electricity).

296 P.-J. Slot, ‘The impact of liberalisation on long-term supply energy contracts’ in D. Geradin, (n 5) p. 298

297 K. Talus (n 40) 260, 270

3.2.1 Downstream Market

As a ‘guidance in an appropriate form on the compliance of downstream bilateral long-term supply agreements with EU competition law’ 299 will be used one of the most significant relevant cases decided by the Commission, Distrigaz, as well as the criteria used in Gas Natural/Endesa, Repsol and E.ON Ruhrgas.

The potentially anticompetitive effect of a long-term contract was investigated by the Commission the Gas Natural case in 2000. The agreement was concluded between Gas Natural, the Spanish dominant gas supplier, and Endesa, one large electricity producer. The Commission focused on the contract which would cover Endesa’a needs on natural gas for more than 20 years and its impact on market foreclosure. Considering that both firms were dominant in their respective market, the Commission took the view that the exclusivity conditions impeded the entry of new competitors and hampered the liberalization of the Spanish gas market while reinforcing the monopolistic position held by Gas Natural. 300 Moreover, the resale of gas restriction term imposed risked Endesa’s development and competitive position in the gas market. The undertakings agreed to modify the contract in compliance with competition law and a cap on the quantities included in the contract as well as on its possible duration was imposed. The commitments offered by the firms were accepted by the Commission since the anti-competitive effect of exclusivity eclipsed.

Later, the Commission intervened in the long term agreements concluded between Distrigaz, an undertaking dominating the Belgian market of gas supply and large industrial customers. The Commission focused on the anti-competitive effect of the particular long term agreements taking notice that this category of customers is linked to only one supplier and competition is restricted until the termination of this contract. 301 In this situation, new competitors shall expect the expiry of a contract and until then competition is extremely limited in the market. The commitments agreed with Distrigaz provided that the duration of its existing contracts will not exceed the period of four years while its new gas supply arrangements with resellers will be limited to duration of two years and maximum to five years with industrial customers and electricity producers. 302 As far as the volumes are concerned, Distrigaz undertook to allow a minimum of 65 percent annually and a

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300 COMP/37.542—Gas Natural - Endesa.

301 Case COMP/37.966 - Distrigaz, para. 5

302 ibid. para. 27
minimum average of 70 percent for all calendar years sold by itself and connected companies to industrial users and electricity producers in Belgium will return to the market, allowing alternative suppliers to make a competing offer to the customers concerned.

The above commitment decisions between the Commission and energy companies abusing their power provide a rich and comprehensive background which allows a legal taxonomy in the assessment of long-term agreements. The approaches taken by the Commission demonstrate that five important criteria may be drawn for the assessment of long-term agreements.

1. The first criterion to be taken into account refers to the conditions in the relevant market. At this stage, the Commission will examine the possibilities of new entry, the demand and the degree of competition in the market. According to the findings of the Commission in Synergen, the prospect of a new competitor entering the relevant market is linked with the existing national or foreign incumbents. Describing also what a potential competitor is, the Vertical Block Exemption Regulation considers it as “an undertaking that, in the absence of the vertical agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market”.

2. Once the market conditions are clear, the position of the supplier in the market shall be assessed. The general presumption is that where there is only one supplier in the market, the possibility of foreclosure is stronger. Market shares have an important role to play in this phase as a first indication of dominance and potential cumulative market foreclosure. The Commission has also underlined that the supply agreements with undertakings that are not dominant will less likely be able to be caught as anticompetitive under Article 102. In case of more than one supplier in the market, not maintaining a dominant position, the Commission will assess their conduct

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collectively to identify whether these non-dominant suppliers together create obstacles and prevent newcomers to the market.

3. The **duration** of the contract is an element of outmost importance and a criterion which shall be examined carefully. Inevitably, a long-term contract poses an impediment to new competitors as customers are unable to switch to a different but similar or more efficient supplier. 

Although there is a presumption that the longer the contracts are the more serious is the threat to competition, the time frame is examined by the Commission in concreto. It must be observed though, that the Commission seems to be gradually restricting the duration criterion which used to be up to fifteen years and recently reached five years or less. The decisions on E.ON Ruhrgas and Distrigas create the useful presumption that the exclusive agreement does not infringe competition law when the contractual arrangements do not exceed the duration of five years. This inclination indicates that the Commission does not agree that the benefits of long-term agreements in price stability could outweigh the risk of market foreclosure.

Adopting a more economic approach, the question of duration shall delve into other elements as well, such as the position of the other party in the market. For instance, the Commission has approved a contract with a duration of five years when one of the parties is an established reseller. Shorter duration and therefore stricter treatment was adopted in more recent occasions though and the permissible limit seems to be set at two years. The Commission demonstrated a more lenient treatment towards long-term agreements related to new investments and as confirmed in Distrigas, new investments are exempted from restrictions on the duration of contracts.

4. The next element refers to the **volumes** tied by the contract. In certain cases the purchaser undertakes the obligation to buy all or the largest part of its demand exclusively from one single supplier. The Commission underlines that either due to contractual or de facto exclusivity, this situation is problematic because when demand is tied, there is no room left for new competitors in the market. Therefore, the absence of buyers available is a strong disincentive for new entrants

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310 Sector Inquiry Report, para. 776


312 Case COMP/B-1/37.966 - Distrigas, para. 3.
which subsequently reinforces the dominant position of certain companies enabling them to arrange the conditions of the market and obviously the prices. Gas Natural/Endesa case constitutes a very prominent example of contractual exclusivity. In this case, the buyer was required to cover its total demand from Endesa. The commitments proposed by Gas Natural included the reduction of volumes tied in the contract by almost 25% so that Endesa is able to look for other suppliers in the market. 314

Assessing this particular element, a point which shall be also considered is the commercial patterns in the industry, such as the costs which can be significantly higher when only a small part of the demand is covered. 315 The practice followed by the Commission determined the acceptable threshold for supply agreements at no more than 20% of the purchaser’s demand so as to allow sufficient volume availability for supply agreements with other supplying companies. For instance, Distrigas in its commitments proposed, undertook to return a minimum average of 70% of gas volumes to the market, annually. 316

It has been suggested that the criteria of duration and volumes of the contract are interrelated and shall be regarded together. 317 This combined analysis is also supported in general terms by the Commission’s Guidelines on Article 102, which suggests “in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect”. 318 In line with this proposition, Bundeskartellamt, the Germany competition authority, set certain thresholds for the compatibility of long term contracts with competition law linking the volumes arranged and the duration. The rationale followed by Bundeskartellamt in E.ON Ruhrgas is simple: contracts the duration of which exceeds the time limit of two years while the volumes agreed satisfy over 80% of the total demand are deemed to be anticompetitive. Samely, contracts with a duration of over four years and an arrangement of over 50% of the demand is not accepted. 319 This decision provides a clear cut guidance which gained the approval fo the European Commission.

314 COMP/37.542—Gas Natural - Endesa.


316 Case COMP/B-1/37.966 - Distrigas, para. 3.


318 Guidance Paper, para. 20

5. The fifth criterion is the assessment of cumulative share covered by long-term contracts and their effect on the market.\(^{320}\) It is generally presumed that if the existing contracts extend to a significant part of the market, in the absence of potential clients, existing or new competitors will have a difficulty in remaining or entering the market respectively, as the number of available buyers in the long term will not be attractive. The Commission accepts that when the overall market demand covered by these particular contracts does not surpass 30% of the demand globally.

This particular criterion must be assessed in combination with the duration and the volume quotas set by the Commission, to determine the precise competition conditions in the market. In Distrigas, the commitments accepted by the Commission included a provision requiring a minimum of 80% of the relevant market to remain unrestricted from long-term agreements, the duration of which exceeds the threshold of one year.\(^{321}\) It is alleged that this threshold also relies on the limit for maximum duration which has been set at five years, in order to maintain the possibility of switching to another supplier.\(^{322}\)

6. The last criterion concerns the assessment of possible efficiencies stemming from the conclusion of a long-term contract which may offset the negative effects generated by competition restraints.\(^{323}\) The stance of the Commission follows the spirit of the Guidelines on the application of Article 101(3) which underlines that long-term agreements are prohibited unless specific efficiencies are provided to compensate for the market foreclosure. In general, the Commission is very dubious about the possible benefits from these contracts towards consumers and economic process of competition but recognizes their potential efficiencies in the long term and mostly refers to investment projects.\(^{324}\) Investments in infrastructure are essential for long-term security of supply, the enhancement of competitiveness in the internal energy market and promotion of renewable energy sources.\(^{325}\) Investment stagnation and the absence of incentives to innovate are

\(^{320}\) Sector Inquiry Report, para. 788-789

\(^{321}\) Case COMP/B-1/37.966 - Distrigas, para. 3.

\(^{322}\) ibid; A. de Hauteclocque, (n 320) p. 8;


\(^{324}\) Cases COMP/E-4/37.732—Synergen, COMP/37.542—Gas Natural / Endesa; A. de Hauteclouque, (n 320) p.8

\(^{325}\) European competition policy: The case of the energy markets”, in Glachant, Finon and Hauteclouque (Eds.), Competition, Contracts and Electricity Markets: A New Perspective (Edward Elgar, 2011), 259
among the Commission’s strongest headaches, which shall be taken into account when assessing the compatibility of long-term agreements with competition imperatives.

In the energy sector the creation of infrastructure increases the capacity of the system and allows more competitors to gain access. To this end, the Commission promotes the construction of pipelines or grids and is willing to provide exclusivity privileges of a certain duration in order to allow the development of the infrastructure. For instance, the settlement about Viking Cable underlined that sub-sea cables covering long distances in deep waters is a very capital intensive investment and long-term arrangements (25 years) are necessary to ensure the viability of the investment. This favorable treatment extends only to new investments and long-term agreements made by dominant undertaking and referring to existing infrastructure are considered to be anti-competitive.

Long-term arrangements may further enable new competitors to launch business in the market, functioning as a means of certainty for new entrants and a way to compete with other undertakings in the market to increase their market share. Prices are also an advantage out of the conclusion of long term contracts. To claim the price related efficiencies entailed, the link between the long duration and the final price shall be demonstrated. It is argued that the Commission is relatively flexible when it comes to energy sector and the cost imposed on the final consumer of energy products. Therefore, the lower cost ensured through long term contracts will be regarded as an efficiency.

3.2.2 Upstream Market.

The challenges of the long-term agreements in the upstream market are very different from those already described for the downstream level. The gas supply contracts at the upstream level are entered into with gas producers and refer to imports of gas, which unlike downstream supply contracts, involve parties originally from countries that are outside the EU boarders. Hence,
there arrangements raise not only legal but also important political and economic concerns. Despite the enormous dependence of the Union on external energy producers and suppliers, other factors that shall be taken into account is the security of supply imperatives and the promotion of high-fixed costs investments on infrastructure, along with the requirement for legal certainty. Thus, although European competition rules are applicable to external producers, the Commission seems really skeptical to proceed to enforcement procedures and apply the aforementioned criteria.

The European Commission has acknowledged that ‘long-term contracts will continue to be an important part of the gas supply of Member States and should be maintained as an option for gas supply undertakings in so far as they do not undermine the objective of this Directive and are compatible with the Treaty, including the competition rules.” Taking into account the advantages of these contract as illustrated already, the Sector Inquiry Report observes that “the concentration of gas import contracts in the hands of a few incumbents is one of the main reasons why competition at the subsequent level of trade does not take off. Whilst this does not as such put into question existing and future upstream contracts, it requires attention with respect to their effects for the downstream markets”

In the light of the above, the potentially anti-competitive nature of a long-term contract in the upstream market, between gas producer and its customers has not been completely resolved but using the existing case law it is possible to distill certain crucial elements and attempt to strike a balanced approach on the treatment of long-term agreements. Assessing the anticompetitive effect of long-term agreements in the upstream market, the most important element that shall be considered is the proposition emphasized by the Commission that the long duration is not alone a sign of hindering efficient competition. Their anticompetitive nature is exhibited through the volumes of energy sources tied which has as a consequence to lock the market and through its cumulative effect to exclude new competitors.

331 K Talus, ‘Long-Term Upstream Natural Gas Contracts and EC Competition Law—Efficiencies Under Article 81(3) and Objective Justifications Under Article 82’ in B Delvaux, M Hunt and K Talus (eds), EU Energy Law and Policy Issues (Euroconfidentiel 2010) p. 139

332 ibid.


334 Sector Inquiry Report, 324.


Starting from the proposition that long duration is necessary in the upstream market agreements, not only because large producers demonstrate strong preference to it, but also to ensure security of supply on a long term basis, investment incentives and price stability, the element which has to be tackled is foreclosure. The problem begins from the monopolistic or oligopolistic structure of the market and the national incumbents, which are overwhelmingly or even exclusively tied by one single supplier. The absence of alternative suppliers derives from the fact that the total demand is exclusively supplied by a single undertaking and therefore their is no commercial interest for other potential competitors. Similarly, the existing infrastructure supports limited capacity which is either designed to meet the monopolist’s demand or the transmission capacity is exclusively booked by a single firm. Therefore the solution appears to be twofold. Firstly, the reduction of the volumes permitted in a long-term contract shall be enforced and secondly, the promotion of investments on network infrastructure in order to provide transmission capacity to other suppliers.

The first element of the solution proposed, focuses on the absence of alternatives. Adopting this solution, the Commission concludes that by limiting the volumes or the capacity that an incumbent may exclusively book. This approach is reflected in the decisions taken for GDF Suez and E.ON.

According to the Commission, GDF had hampered competition in the French downstream market of gas supply by concluding long-term reservations of transport capacity and import agreements. GDF proposed to release immediately a large part of its long-term capacity bookings at the disposal of third parties, both in the pipelines and in the LNG terminals. This action did not restrict GDF to continue its reservations for a short duration, which is reduced to one year, also in accordance with Regulation 715/2009. Observing the commitments accepted by the Commission, it is remarkable that the undertaking was not obliged to free 50% of the import capacity reserved, but only an immediate 10%. In addition, the long-term release was decided to be gradual and reach 50% until 2014, allowing the undertaking the plan its investment in order to increase capacity.

E.ON proposed similar commitments when it was caught having reserved the entire capacity of the network, as a result the complete foreclosure of its competitors from the market. In

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337 For example Greece and Austria import more than 80% from a single supplier while Sweden, Estonia, Bulgaria, Latvia and others are exclusively dependent to one supplier.

338 K. Talus, (n 21)

339 COMP/39.316—GDF foreclosure. Proposed commitments

contrast to other Commission’s decisions, the commitments agreed with GDF and E.ON require the immediate release of capacity, which may result in a 'permanent structural change' of the market. In its decisions, the Commission repeated its rationale in Distrigaz imposing specific percentages which imply until which degree the capacity reservation is not considered as anti-competitive. In principal, the Commission abandoned its method of calculation based on the volumes supplied and founded its 50% threshold on the "workable balance between the rights of companies and the need to create competitive conditions", so as to allow adequate capacity and enable competition in the network.

These cases demonstrate that competition law is applied differently in upstream agreements. The investigations in E.ON and GDF Suez also indicated that although duration is not a serious concern, the volumes agreed remain a challenge. The rationale of the position maintained by the Commission is based on the acceptance that long-term commodity and capacity reservation contracts can be problematic due to their foreclosure effect but the underlying risk may be tackled either by targeting the infrastructure foreclosure. From the case law already mentioned, it seems that the Commission employed the later method seeking to ensure access to infrastructure and strike a balance between competition rules and other issues related to politics or economic interests. This solution provides legal certainty to a significant extend and a guarantee on the protection of investment incentives.

**Concluding Remarks**

Due to its nature, as a network-based industry, access to network infrastructure is essential in order to enter the energy industry. As a result, market foreclosure has been the most significant threat to competition in the energy markets. Electricity and gas incumbents still maintain an overwhelming dominant position in the market and are capable to distort competition in multiple ways. This analysis focused on a rather frequent and significant category of abusive conduct against Article 102 TFEU which are related to the principle of Third Party Access, as shaped and evolved by the European energy legislation and the jurisprudence of competition law. The analysis made on

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341 K. Talus (n 40) 260, 279


343 K. Talus (n 40) 260, 279.

the refusals to grant access and the dilemma of long-term agreements allows certain important conclusions to be drawn.

The application of the doctrine of essential facilities is fully compatible with the Electricity and Gas Directives as well as applicable in the energy infrastructure. Facilities which qualify as essential in the energy field are pipelines, high voltage grids. The doctrine, as part of general competition law, functions hand in hand with the principle of TPA, as part of its conceptual pedigree and is considered as a useful interpretative mechanism so as to harmonize TPA with the concerns raised by dominant undertakings about the unlimited access rule. In particular, undertakings usually invoke crucial business objectives and lack of investment incentives in order to justify their refusal to grant access to their competitors.

Despite the strong position endorsed by the competition jurisprudence regarding the application of essential facilities and the strict criteria which must be fulfilled in order to make access to another firm’s infrastructure mandatory, the Commission shows a lenient and generous attitude for the case of energy. The rationale behind this trend is that the majority of network infrastructures were constructed under state funding. In these conditions, the use of the network by third parties does not undermine the efforts of the investor. In the absence of an economical risk, the dominant undertaking should not be compensated for not investing.

As far as the most crucial point is concerned, that of indispensability, it was argued that not every part of the network marks the checkbox. Despite the broad stance taken by the Commission, there are alternative routes which can be used. It was argued that long-distance import or transit pipelines cannot be easily substitutable. This is not the case with regional networks, in which alternatives, even not as fast or inexpensive, can be found. The alternative interpretative solution proposed was to examine the essentiality of the entire network together with its import points. In this case a refusal extends to the whole network which is perceived as essential facility.

Once the conceptual boundaries of essential facilities are delineated, the particular practices qualifying as refusals of access are being detected. Even though the property rights granted to dominant undertakings are unquestionable, its special responsibility creates exceptional circumstances of mandatory dealing. As holders of essential facility, dominant undertakings in the energy sector are bestowed with certain duties inherent with their position and the requirement to provide access.

The strict rules regarding TPA, especially after the implementation of the Third Energy Package, have provoked the abusive imagination of undertakings. Indeed, “constructive” refusals of dominant position are rather frequent and appear as manipulations of capacity allocation, either as
artificial congestion, capacity hoarding and degradation or as strategic underinvestment. Despite the fact that every case so far has been settled unofficially and did not allow the Courts to express their opinion, the Commission has investigated a number of undertakings for abuses of dominant position by refusing access, especially in the aftermath of the Sector Inquiry Report in 2007.

A very exceptional theory of harm which lies between refusal of access and exclusivity agreements, is the special case of long-term supply or capacity reservation contracts. As it was analyzed the existence of these agreements raise significant dilemmas in the practice of competition law after the liberalization wave in the energy sector. Absent being a clear cut answer on the side of the secondary legislation, general competition law is applicable and will seek to strike a balance the above mentioned efficiencies guaranteed by these contracts in order to offset their strong anticompetitive impact. Respecting the necessary distinction between upstream and downstream market, the applicable test conducted by the European Commission was illustrated. As it was argued, long-term agreements shall not be regarded as anti-competitive per se, either in the downstream or the upstream level. Instead a careful in concreto assessment is required. On the one hand, as far as The Commission has employed a set of criteria which examine the actual possibility of foreclosure in the market. The situation is quite different in the upstream level. Recognizing the political issues involved and the need to safeguard the security of supply in the Union, the Commission maintained the duration which as a prerequisite to avoid discrepancies in investment planing, price fluctuations and security of supply and correctly seem to target the volumes tied by the contractual arrangements. This practice, not flawless, is rather efficient so as to allow the promotion of very much needed investment planning in the energy industry.
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