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MARMARA ÜNİVERSİTESİ

AVRUPA ARAŞTIRMALARI ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

THE APPLICATION OF EU COMPETITION LAW IN THE EUROPEAN NATURAL GAS MARKET

YÜKSEK LISANS TEZI

HANDE BİLGİ

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Danışman: Doç. Dr. Mustafa Tayyar KARAYİĞİT

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ABSTRACT

THE APPLICATION OF EU COMPETITION LAW IN THE EUROPEAN NATURAL GAS MARKET

*The purpose of this thesis is to examine the application of European Union ("**EU**") competition law to the EU natural gas market ("**market**"). The market was chosen as an examination area due to the fact that it was a national issue for the Member States and the natural gas resources were operated by the monopolies and was not handled at the EU level beforehand of the liberalisation procedure. Moreover the market depends on imported natural gas as well as infrastructures such as gas pipelines and gas storage facilities, thus these dependencies affect the market pattern in terms of competition.*

*Examination shall be conducted by evaluating the developments in the market and its liberalisation process as well as reviewing the investigation of the European Commission and decisions of the Court of Justice of the EU ("**CJEU**"). Mainly, the characteristics of the natural gas agreements and dominant position of the undertakings operating in the natural gas market shall be analysed under Article 101 and Article 102 of the Treaty of the Functioning of the EU ("**TFEU**")*[1] *and also the proposed concentration in the market shall be assessed under the EU Merger Regulation.*

[1] Consolidated version of the Treaty on the Functioning of the European Union ("TFEU"), Official Journal C 326, 26/10/2012 P. 0001 – 0390.

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ÖZET

THE APPLICATION OF EU COMPETITION LAW IN THE EUROPEAN NATURAL GAS MARKET

*Bu tezin amacı Avrupa Birliği ("**AB**") Rekabet Hukuku kurallarının AB doğalgaz marketinde ("**market**") nasıl uygulandığının incelenmesidir. Marketin inceleme alanı olarak seçilme sebebi, bu alanın liberalizasyon sürecinden önce AB üye devletlerin ulusal sorunu olarak görülmesi ile doğalgaz kaynaklarının tekeller tarafından işletilmesi ve konunun AB seviyesinde ele alınmamasıdır. Ayrıca marketin ithal doğalgaza ve altyapı tesislerine, örneğin doğalgaz boru hattı ve doğalgaz depolama ünitelerine erişime bağlı olması ve bu bağlılığın rekabet açısından market koşullarını belirlemesi de tez konusunun seçiminde etken olmuştur.*

İnceleme, marketteki gelişmelerin ve liberalizasyon sürecinin değerlendirilmesi ve AB Komisyon soruşturmaları ile AB Adalet Divanı'nın verdiği kararlar ışığında gerçekleştirilecektir. Doğalgaz anlaşmalarının özellikleri ve doğalgaz marketindeki iştiraklerin hâkim durumu AB İşleyişi Hakkında Anlaşma'nın 101. ve 102. maddeleri kapsamında analiz edilecek ve ayrıca markette planlanan birleşme işlemleri de AB Birleşme Regülasyonu kapsamında ele alınacaktır.

ABBREVIATION

AB: Avrupa Birliği

Capex: Capital Expenditure

CCGT: Combined Cycle Gas Turbines

EC: European Community

EU: European Union

Commission / European Commission: European Union Commission

CJEU: Court of Justice of the EU

LNG: Liquid Natural Gas

LPG: Liquefied Petroleum Gas

Market: European Union Natural Gas Market

Member States: Member States of the European Union

PPC: Public Power Corporation S.A.

TAG: Trans Austria Gasleitung GmbH

TEC: Treaty Establishing the European Community

TENP: Trans Europa Naturgas Pipeline GmbH & Co. KG

TEU: Treaty of the European Union

TFEU: Treaty of the Functioning of the European Union

TPA: Third Party Access

the UK: United Kingdom

the USA: United States of America

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I. INTRODUCTION

The European integration started with the Coal and Steel Committee, which regulates the most important energy sector to prevent the war. This basically means that the unification idea set under the requirement of allocation of energy resources. Therefore the EU energy market has always been important to Member States of the EU. Since energy is a resource, having it naturally gives power to the countries and related energy companies to control the market.

Before the liberalisation process, energy was more likely a natural issue of the Member States and operated by the monopolies which were generally state owned companies. Thus, there was no competition in the energy market. This anti-competitive environment was accepted as normal due to the understanding that energy supply depends on infrastructures which require investment and therefore investors have a right to tie the customers for long duration in order to get benefit of their investments. On the customer side, it is thought that having a guaranteed energy supplier is benefit to ensure that their demands are matched and they are served accordingly.

In order to have internal energy market which is stated as one of the aims of the EU, the European Commission had accepted several energy liberalisation packages and set some rules which shape the market. The aim was to open the market to competition and serve for customers' welfare by securing the energy and ensuring the energy supply.

Energy has importance due to the fact that it has shaped by the political, social, economic and environmental developments as well as it influences these areas as reciprocate. Regarding the EU energy market which mainly depends on import, having an energy strategy is inevitable. Moreover energy cannot be only considered at the national or at the EU level, it is also a worldwide issue which determines the balance between the power of countries, fair allocation of resources and protection of the environment.

The EU energy integration is a long standing project which is fastened via directives and energy packages adopted especially in the electricity and gas market and then in the green energy market on the purpose of the alignment of the environmental development and needs. The Member States of the EU were not willing to open up their energy market and allow undertakings from other Member States to use their energy infrastructures. At the beginning the Member States intended to save their current privileges on the energy market by using their national power such as having natural gas pipeline systems, storage facilities and closest borders to the imported energy. Moreover energy unification was not easy that each Member States has their own unique and national approach to the energy policies framed according to their financial structure, political will and regulatory framework. These constitutes obstacles on the way of liberalisation. However in the process of the unification in the other areas such as banking, finance and services, energy union is also developed.

Since the energy market is a dynamic area and its needs vary by the type of the energy source, competition rules play an important role to control the undertakings in the market and shape the market in line with the harmonisation requirements.

In this thesis, natural gas market shall be examined. Besides the above mentioned explanation regarding the general view of the energy market, which is also applicable to the natural gas market, it should be emphasised that having access to infrastructure is specifically important for natural gas market which consists of three main segments as upstream, mid-stream and downstream natural gas market.[2] Undertakings in this market operate via gas pipelines, therefore gas pipelines are accepted as *"essential facilities"* which means without having access to gas pipelines, undertakings cannot operate or survive in the natural gas market. Although the undertakings are powerful in terms of economy and finance, unless they have access to gas pipelines which are the key element in the natural gas market, these undertakings cannot be successful and they even cannot enter the market. Refusing to grant access to gas pipelines is one of the obstacles to natural gas market entry. Moreover regarding the infrastructure basis of the nature of

[2] Correlje, Aad. "*The European Natrual Gas Market*" published online on 25.07.2016 available at https://www.researchgate.net/publication/305626419_The_European_Natural_Gas_Market (online on 25.08.2019)

the market, it could be said that infrastructure is constructed for very specific purpose and usage and at the suitable location. Therefore once it is constructed it is difficult to remove it or use it for different aims.[3]

Most of the competition concerns regarding the natural gas market arise from the refusal to grant the access of the natural gas pipelines. Gas companies are accepted as natural monopolies due to the fact that duplication or reconstruction of the infrastructure is difficult and expensive. Besides that in the natural gas market, vertical market foreclosure is common. Regarding the fact that same gas company operates at the different market chain level such as producing, storing, supplying the natural gas, thus this integrated company structure strengths the dominance of the undertaking in the natural gas market. Capacity reservation on the gas pipeline, transmission system or storage facility is the crucial problem and only the dominant incumbent has a voice on the network system and uses it in favour of itself. As these problems show that the EU natural gas market is less competitive and more monopolize and depends on networks and investment. Additionally liberalisation process started in the natural gas market later than other market areas and even in the energy market liberalisation process, electricity market is chosen as a first market to liberalise and drafted the directives initially for it rather than natural gas. Therefore at the beginning of the liberalisation process of the natural gas market, there were relatively more competition concerns raised by the Commission's investigation which generally completed via commitments of the undertakings in question. Commission intervention to the natural gas agreements shaped the market, thus application of competition rules to natural gas market is essential in order to realise internal natural gas market aim which consist of security of supply, natural gas efficiency and interconnections in the market.

Within the framework of this thesis; firstly, developments in the EU energy market, specifically in the EU natural gas market, its liberalisation process and the purpose of increasing the competition in the market shall be examined. Secondly the characteristics of the EU natural gas market shall be analysed by referring the different types of natural gas agreements and their clauses which are considered as obstacles for

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[3] Ibid.

the market liberalisation. Then, competition rules in the TFEU which are mainly embodied under Article 101 and 102 of the TFEU shall be studied through the application of these articles to the EU natural gas market. Finally the application of the EU merger procedure in the concentration of the EU natural gas companies shall be assessed via examining the European Commission approach to the concentration proposals.

II. THE EU NATURAL GAS MARKET

Compared to the application of EU competition law to other markets, liberalisation process in the natural gas market was started later and at the beginning, competition policies did not affect the gas companies directly and/or robustly. The reason behind this situation was that gas companies were accepted as natural monopolies due to the fact that duplicating and or reconstructing the network, pipelines and other energy facilities are difficult and costly.[4]

Since operation of natural gas business depends on network, physical availability on the network that is decided by the network system operator company is important. Decision regarding the allocation of availability on the network system of the system operator is key for other companies in order to maintain their business in the market. Moreover characteristics of the energy type also play a role to shape the market needs. For instance, electricity has to flow and cannot be stored, transmission and voltage system control are important in the electricity market. However gas can be stored, therefore in the gas market, gas storage facility is needed and control capacity on the gas storage facility shapes the power of the undertakings in the gas market. Besides that, different than electricity, gas demand is seasonal and it is increased during the winter. Stored gas in summer has revealed in winter, hence storage facilities are important to control seasonal demand.[5]

It is common in the electricity and gas market that they are both national. Especially the electricity facility and network owners, their investors are all national undertakings and it is not easy to enter the electricity market as a foreign company. Furthermore, electricity capacity is used mostly for national demands and comparing to transmission lines inside of the related country, cross border interconnectors have lower

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[4] Green, Richard. *"EU Regulation and Competition Policy among the Energy Utilities"*, Institute for Energy Research and Policy University of Birmingham, December 2007, page 1, available at https://www.researchgate.net/publication/4909894_EU_Regulation_and_Competition_Policy_among_the_Energy_Utilities (online on 21.06.2019).

[5] https://www.dioneoil.com/gas-storage.html (online on 25.08.2019)

capacity.[6] Whereas, in the natural gas market, EU countries depend on imported gas, thus cross border pipelines are necessarily used.

Within this sector view, the Commission has pursued gradual alignment procedure for natural gas market by (1) adopting liberalisation directives for natural gas market and its amended version in order to adopt to market development, (2) closely observing transactions between the natural gas undertakings such as merger conduct and signed agreements and (3) conducting sector inquiry.

A. AIM OF CREATING COMPETITIVE EU NATURAL GAS MARKET

Natural gas supply security and fair price in the effective and competitive internal natural gas market are the most important purposes of applying EU competition law to the EU natural gas market. Therefore harmonization rather than the monopolization is the key element in order to improve liberalisation in the EU natural gas market.

The aim of creating a competitive EU energy market was embodied specifically under Article 194[7]/1 of the TFEU which states as follow;

"1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;

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[6] Ibid, page 4.

[7] Rest of the Article 194 is as follows; "...2. *Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions. Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).*
3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature."

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks... "

As stated above, one of the aims of creating competitive natural gas market is to ensure the functioning of the natural gas market which aligns with the free movement of goods, services, capital and natural gas and other energy sources within the Member States.[8] Therefore free movement requires abolishing the barriers and even measures having equivalent effect. In the event of each Member States protect their own national privileges and do not open the market to the competition at the EU level, there will not be a functioning internal natural gas market in which the natural gas does not freely moved from one Member States to other one. In order to ensure the free movement of natural gas there must not be any legal, economic and political prevention of the Member States. Therefore energy issue was handled at the EU level via putting it to the shared competences area under Article 4 of the TFEU[9].

Ensuring security of the energy supply is another purpose. Since most of the Member States depend on imported natural gas, securing the supply is essential for the sake of the customers' welfare in the EU. Dependency causes no choice for customers and this leads to increased price of the natural gas. In order to have low price and ensure the access to the natural gas for all customers around the EU, realizing this aim is important.

Addition to that in line with the environmental concerns, another aim regarding the renewable form of energy was also set under Article 194/1(c) of the TFEU above.

[8] Talus, Kim. & Aalto, Pami. *"Competences in EU energy policy"* in the book titled *"Research Handbook on EU Energy Law and Policy"* Edited by Rafael Leal-Arcas, Jan Wouters available at http://www.eurebus.eu/images/2018-slides/8-Allegati/Talus---Aalto---Competences-in-EU-energy-policy.compressed.pdf (online on 14.07.2019) page 18.

[9] Article 4 of the TFEU : *".....2. Shared competence between the Union and the Member States applies in the following principle areas: .... (i) Energy....."*

This aim is specifically stated as a requirement of integration of environmental protection into all EU policies and to promote to sustainability under Article 11 of the TFEU.[10]

In order to realize these purposes the European Commission has set energy policy goals for 2020[11] which include supply security, energy sustainability, well-functioning energy market with competitive price that serves for consumer welfare and stimulate energy investment.

It is planned and desired that consumer will have sustainable natural gas access from the variety of gas incumbents with good service along with the reasonable prices. Moreover transparent measures imposed on gas incumbents is also considered as essential.

Besides the European Commission has referred to competitive internal energy market many times[12] with the intent of developing familiarity of this definition and empowering the applicability of its goals.

B. LIBERALISATION PROCESS IN THE EU NATURAL GAS MARKET

According to above mentioned Article 194 and as well as Article 114[13] of the TFEU, the European Commission mainly aims at consumer protection, sustainability and

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[10] Article 11 of the TFEU: *"Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development."*

[11] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, *"Energy 2020, A Strategy for competitive, sustainable and secure energy"* available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0639:FIN:EN:PDF (online on 15.07.2019).

[12] Ibid, Conclusion of the European Council of 8/9 March 2007, Doc 7224/07 of 9 March 2007, page 16.

[13] Especially Article 114/I and 114/ III of TFEU which stipulates; "*I. Save where otherwise provided in the Treaties, the following provisions shall apply* ***for the achievement of the objectives set out in Article 26.*** *The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee,* ***adopt the measures for the approximation of the provisions*** *laid down by law, regulation or administrative action in Member States which have* ***as their object the establishment and functioning of the internal market****...... III. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and* ***consumer protection****, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective."* (Emphasis added.).

security of energy. It ensures these aims via applying competition rules into the natural gas market through liberalisation directives and energy sector inquiry.

1. Liberalisation Package / Directives

The European Commission commenced to draft directive for liberalisation of the electricity market in 1991, but adopted this directive (Directive 96/92/EC[14]) in 1996. The aim of the first liberalisation directive on the electricity market was creating competition in the supply and generation part in order to reach large scale of the customers.[15] Following the electricity directive, first liberalisation directive (Directive 98/30/EC[16]) on the gas market was adopted in 1998. This directive was similar to the directive for the electricity market. First liberalisation directive on the gas market requires financial separation of undertakings in terms of transmission, storage, distribution activities of the gas undertakings, and therefore there had to be kept separate accounts per business activity. It is also required from Member States to gradually open their gas consumption to competition.[17]

It could be said that, via drafting and proposing first liberalisation directives for electricity and gas market, the Commission laid the foundations of the competitive internal energy market in order to reach more consumers.

Afterwards the implementation of the first liberalisation directives, it is found that prices are reduced especially in the countries where the market is opened

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[14] "*Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity*" available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31996L0092 (online on 22.06.2019).

[15] Green, Richard. "*EU Regulation and Competition Policy among the Energy Utilities*", Institute for Energy Research and Policy University of Birmingham, December 2007, page 1, available at https://www.researchgate.net/publication/4909894_EU_Regulation_and_Competition_Policy_among_the_Energy_Utilities (online on 21.06.2019).

[16] "*Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas*" available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1998.204.01.0001.01.ENG&toc=OJ:L:1998:204:TOC (online on 22.06.2019).

[17] It is requested to open 20% of consumption to competition from July 2000 and then after three years, from July 2003, rise this percentage to 28% and after 18 years from the beginning, from July 2018 increase the percentage to 33%.

significantly.[18] However it was also seen that, there were some market problems particularly arising from integrated companies which could prevent access to infrastructure and create foreclosure effect in the market. In order to resolve these issues, second liberalisation directives were issued in 2003.

The second liberalisation directives focused on the third party access and increasing the market entrance by preventing the market foreclosure. Hence it is requested to have regulatory body in the Member States and regulated tariffs which are transparent and available to all market players in a non-discriminatory manner. It is however observed that Member States implemented these second directives more slowly than the first ones, thus the European Commission sent notification to 18 of the Member States.[19]

It could be said that first directives had more general terms and aimed at opening the market to competition, thus it did not directly point to the Member States or business manner of the energy undertakings. However second ones were stricter and have a kind of hands-on approach where the Commission intervenes in the market manners, business flow, agreements, conduct and merger between the energy companies.

The Commission considered the difference between the regulation and directive which mainly is that regulation has to be entered into force at the same date and the same way among the all Member States, however directives are more flexible in terms of adaptation to the national law. The Member States are free to choose the adaptation way of the directives as long as they reach the same result. Since the energy had been a national issue for the Member States, choosing the directive rather than the regulation as a tool for harmonization of the EU energy market was more appropriate. In 2009, the EU accepted the third liberalisation package to apply in the EU electricity and gas market.[20] This liberalisation package came with the energy sector inquiry, which paved the way for

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[18] Green, Richard. *"EU Regulation and Competition Policy among the Energy Utilities"*, Institute for Energy Research and Policy University of Birmingham, December 2007, page 10, available at https://www.researchgate.net/publication/4909894_EU_Regulation_and_Competition_Policy_among_the_Energy_Utilities (online on 21.06.2019).

[19] Ibid, page 11.

[20] Internal energy market and developments in summary can be found at http://www.europarl.europa.eu/ftu/pdf/en/FTU_2.1.9.pdf (online on 16.06.2019).

harmonization and showed the opportunities for creation of competition in the EU electricity and gas market. Hence the EU energy market has not been provided uniformity, national authorities play an important role on the enforcement of the rules established in the liberalisation package.

2. Energy Sector Inquiry

The European Commission carries out sector inquiries when it thinks that the related markets do not work effectively as they have to. Inquiry might be into the markets and agreements especially within the scope of the application of the competition rules and policies. Legal basis of this market inquiry of the European Commission is embodied under Article 17 of the Regulation 1/2003 EC.[21] The European Commission obtains the information regarding the market from the companies, associations and consumers in order to evaluate whether there is a restriction of the competition. It is generally asked whether the market price is high, market entry is difficult and trade between the Member States is limited or not.[22] Afterwards of obtaining the information, the European Commission published a report regarding the inquiry and if it seems appropriate and necessary it goes beyond the market inquiry and started the investigation procedure for the related market players.

Since two directives were published for the EU electricity and gas market, the European Commission evaluated the developments in these markets and observe the advantages and disadvantages of application of the directives, market requirements and consumer needs.

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[21] Article 17 of Regulation 1/2003 EC: "*Investigations into sectors of the economy and into types of agreements:*
1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.
The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.
The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.
2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply mutatis mutandis."
[22] http://ec.europa.eu/competition/antitrust/sector_inquiries.html (online on 14.07.2019).

Energy market inquiry was found very useful in order to understand the needs, obstacles, speciality of the energy market and has enlightened the Commission to have framework of application and enforcement of competition rules in the energy sector.

After the energy market inquiry, the Commission pointed out eight competition concerns regarding natural gas market which are basically about[23]: (1) the market integration and insufficient cross border capacity (2) market concentration which is mainly at the national level, (3) price formulation, (4) lack of transparency about the information of price, capacity availability, etc. (5) vertical foreclosure which prevents new market entry, (6) lack of competition at the downstream market, (7) obstacles in balancing markets, (8) difference between supply of LNG in the upstream and downstream LNG markets.

It is found in the both electricity and gas market that long term agreements are one of the main preventions of competition in the EU energy market. Since the agreements between customers and suppliers which are generally the ones in dominant position, have long term or indefinite duration, tacit renewal clauses and unjustified penalty charges, customers do not tend to change their suppliers and thus are not open to new ones the fact of which makes the new entrants compete in a difficult and unjust competition environment. Additionally it is stated that long term basis agreement and the way of tying the customer in the energy market differs from one Member States to another one. According to inquiry, the electricity market could be opened to competitiveness more rapidly than gas market, since the electricity market is less concentrated.[24]

C. CHARACTERISTICS OF THE EU NATURAL GAS MARKET

Unlike the oil, the characteristic of natural gas is different.[25] These two energy source are subject to different pricing system and cost and belong to distinct product market in which oil mainly uses for transportation whereas natural gas predominantly

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[23] Green, Richard. *"EU Regulation and Competition Policy among the Energy Utilities"*, Institute for Energy Research and Policy University of Birmingham, December 2007, page 18, available at https://www.researchgate.net/publication/4909894_EU_Regulation_and_Competition_Policy_among_the_Energy_Utilities (online on 21.06.2019).

[24] Commission's Final Report of the Energy Sector Competition Inquiry IP/07/26 and MEMO/07/15.

[25] COMP/M.1532 – *BP Amoco/Arco*, para 14, COMP/M.1383 – *Exxon/Mobil*, para 16.

uses for power generation.[26] Regarding the fact that natural gas market depends on local infrastructure, special assets such as gas pipelines, LNG storage, capital expenditure and its necessity to guarantee a market at previous step of the gas project, even from the perspective of the producer, oil and natural gas are different.[27] In this respect the agreement concluded between gas producer and gas purchaser is vital for the project. Vitality of the agreement comes from both the perspective of the gas purchasers which aim at security of supply and the perspective of the gas producers whose purpose is the security of demand. Therefore contracting parties tend to sign long term agreements.

Comparing to the electricity market, the gas market is less competitive and more monopolized, has limited option for customers and more hindrances for new entrants. In addition to that, there is slightly more vertical market foreclosure in the gas market, since generally the same incumbent has been active in providing, storing and transferring gas. Moreover, the gas market is not wide open to new entry since dominant incumbents have booked the limited gas reserves and have key access points of cross border pipelines where the gas has been imported. Capacity of reservation has been expanded generally when the incumbents would like to use it for their own needs rather than for the new entrant.

Different than the electricity market shipping cost is also essential to fix the market price, since at the each border point the suppliers have to fulfil capacity reservation obligation.[28]

Natural gas market has been divided into sub categories generally as follows: "*gas and oil exploration, LNG liquefaction, wholesale supply, storage, transmission, distribution, retail supply, large industrial customers, small customers, CCGT electricity*

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[26] Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe, Commission Decision dated 24.05.2018 para 20.

[27] Talus, Kim. "*Long- Term Natural Gas Contracts and Antitrust Law in the European Union and the United States*", Journal of World Energy Law and Business, 2011, Vol. 4, No.3, page 261, available at https://academic.oup.com/jwelb/article/4/3/260/980055 (online on 11.06.2019)

[28] Cabau, Emmanuel. & Hancher, Leigh. & Kjolbye, Lars. & Landes, Valerie. & Salerno, Francesco. & van der Woude, Marc. "*EU Energy Law Volume II EU Competition Law and Energy Markets*" published in 2011 by CLAEYS&CASTEELS, page149, para 3.13.

generation plants, markets for bottled LPG, fuel LPG, mini-bulk LPG for private tanks..."[29]

Besides the EU natural gas market depends on imported gas from three main sources, which are from Russia, Algeria and Norway.[30] Imported gas consists of almost %90 of the gas in the market. Few of the EU Member States such as Netherlands and UK have natural gas resources only. Therefore there is an external dependency in the EU natural gas market which also makes market players conclude long term agreements in order to ensure the sustainability.

Moreover, regarding the liberalisation process, the EU natural gas market has been transformed from state controlled and monopolistic type to liberalised and more competitive one. Within the framework of the liberalisation process, regulation applied to natural gas transaction has been rapidly changed and new mechanisms such as third party access ("TPA") regime[31], unbundling[32], congestion management, etc. have been introduced in order to eliminate the competition concerns.

In order to create non-discriminative market atmosphere, unbundling is crucial. Thus network operations of natural gas and supply of natural gas activities have to be

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[29] Diathesopoulos, Michael. "*Mergers in the Energy Sector: An Overview of EU and National Case Law*", 14.03.2019, e-Competitions Bulletin Energy & Mergers, Art. No 88842, para 11, available at https://www.concurrences.com/en/bulletin/special-issues/energy-mergers-en/mergers-in-the-energy-sector-an-overview-of-eu-and-national-case-law (online on 08.06.2019).

[30] COM/2008/781 Final, Brussels, 13.11.2008, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *"Second Strategic Energy Review An EU Energy Security and Solidarity Action Plan"* available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0781:FIN:EN:PDF (online on 16.06.2019).

[31] Minimum requirements of third party access ("TPA") regime for natural gas market was established under Directive 73/2009/EC which is very similar as TPA regime for electricity market. According to this requirements; tariffs and capacity availability have to be transparent and published at the companies' webpage or any convenient place on the non-discriminatory basis.

[32] There are different types of unbundling such as; (1) **Accounting Unbundling** which means separation of accounting of supply and generation activities from network activities, (2) **Management Unbundling** which requires network management to taken apart from rest of the activities of the related energy company. (3) **Legal Unbundling** that requires separate legal entity only for network activity. (4) **Ownership Unbundling** asks vertically integrated companies to divest their assets for benefit of third parties which do not take part in the generation or supply activities. Accounting and management unbundling were introduced by the first natural gas market directive, whereas ownership unbundling was mentioned in the third natural gas market directive. For more information about this topic Kim Talus, "*Long- Term Natural Gas Contracts and Antitrust Law in the European Union and the United States*", Journal of World Energy Law and Business, 2011, Vol. 4, No.3, page 265 and 266 available at https://academic.oup.com/jwelb/article/4/3/260/980055 (online on 11.06.2019).

unbundled. Otherwise there would be a privileged treatment in favour of vertically integrated gas companies.[33]

Besides in the unbundling and TPA regime, "*use it or lose it*" principle was also introduced to prevent capacity hoarding and refusal to grant third party access. This principle will be examined later when the related case law mentioned.

It is also found logical that companies have obligation to look out for its own interests and increase their group revenue, however realization of these aims via preventing third party access, market foreclosure contradicts with competition.[34]

Apart from the legal perspective and competition concerns, every transactions has their own economic rationale and political aspects as well. For instance when a new natural gas pipeline would like to be constructed, it is considered which neighbour countries will be included, how are the political and economic relationships between these countries, how much investment make on the project and how it is shared between the contracting parties, etc. Besides the sharing of the responsibilities, parties which burden the cost and obligations would like to know the outcome of their investment. Within this respect, long term agreements play an important role to ensure the outcome and security and stability of demand and supply.

Characteristics of the EU natural gas market could be summarized as:

(1) EU natural gas market is less competitive and more monopolized.

(2) Liberalisation process started in the natural gas market later than other market areas.

(3) EU natural gas market depends on imported gas and networks.

(4) Natural gas market is solely very technical and it is shaped to a large extent by competition law application.

(5) Disputes arising from the natural gas agreements are generally about competition concern.

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[33] Talus, Kim. "*Long- Term Natural Gas Contracts and Antitrust Law in the European Union and the United States*", Journal of World Energy Law and Business, 2011, Vol. 4, No.3, page 265, available at https://academic.oup.com/jwelb/article/4/3/260/980055 (online on 11.06.2019).

[34] Ibid.

(6) Gas companies are accepted as natural monopolies due to the fact that duplication or reconstruction of the infrastructure is difficult and expensive.

(7) Having access to infrastructure (gas pipeline system, storage facilities) is crucial to maintain in the market.

(8) Long term contracts whose term matches with the investment duration and generally are long as minimum 15 years;

(9) Net back pricing system which causes different price for the same product purchased at the same delivery point;

(10) Destination (territory sale restriction) clause which prevents reselling is one of the main competition concerns in the market;

(11) Capacity reservation on the gas pipeline, transmission system or storage facility is an important problem and dominant incumbent has a voice on the network system and uses it in favour of itself.

(12) Risks of the agreement are shared as volume risk is burden by the purchaser and seller assumes the price risk. Depending on gas to gas supply agreements purchaser also shares the price risk. Moreover there are economic, political and legal risks in the market which have to be carefully shared when the investment project has started.

(13) Natural gas market has an ongoing liberalisation process which enables us to observe the application of competition rules and market development accordingly.

(14) In the natural gas market, integrated company structure strengths the dominance of the company in the natural gas market.

III. COMPETITION RULES IN THE TFEU

Article 101 of the TFEU stipulates the prohibition of agreements, decisions, concerted practices which affect trade between Member States and prevent competition in the internal market.

Article 102 of the TFEU restricts the abuse of dominant position by giving examples of the situation which could be considered as abusive such as imposing unfair purchase price and/or dissimilar condition on equivalent transactions.

Article 106 of the TFEU requires that Member States not to grant privilege rights to any incumbents which distort the competition.

Merger control procedure is specified under EU Merger Regulation[35].

All these articles of the TFEU and as well as EU Merger Regulation, as source of EU competition law, shall be explained generally and examined in details in the view of application on the EU natural gas market by referring the related EU case law.

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[35] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004R0139 (online on 16.06.2019)

IV. ARTICLE 101 OF THE TFEU

Under Article 101 of the TFEU[36], three activities have been mentioned as potential prevention of competition in the internal market which are (1) agreements between undertakings, (2) decisions by associations of undertakings and (3) concerted practices *which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.*

Agreements between undertakings means any kind of agreements regardless of form requirement thus agreements may be in written, oral, explicit, implicit, etc. Moreover the meaning of undertaking is interpreted broadly, therefore entities which

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[36] Article 101 of TFEU (ex Article 81 TEC) is as follows;

"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: — any agreement or category of agreements between undertakings, — any decision or category of decisions by associations of undertakings, C 326/88 EN Official Journal of the European Union 26.10.2012 — any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. "

conduct economic activity is considered in the scope of undertaking disregarding their legal form, profitability, being private or public company etc.

Concluding an agreement between undertakings is not enough to evaluate that it is against the competition. If signing the agreement may create actual and/or potential risk on the trade between Member States especially regarding prevention of competition in the market and also have bad influence on consumer welfare, then this agreement comes into focus of Article 101 of the TFEU.[37]

Not only the actual risk of prevention of competition but also potential risk is under the scope of Article 101 of the TFEU. For instance, when two undertakings established in different Member States, produce competing goods conclude an agreement which has sale restriction for both undertakings in the counter party's country, even which may not cause real risk in national market, may cause potential risk in the internal market. Therefore competition between the undertakings which conclude agreements and as well as competition in the market among the other third parties should be assessed.[38]

Moreover, if the parties of the agreement could create good reasoning of concluding the agreement, such as decreasing prices, improving the quality of their goods and services, bringing innovation for customer welfare, etc., the agreement could be out of scope of Article 101. This is called efficiency defence and stems from Article 101/3 of the TFEU whose application rules embodied under the Guidelines.[39]

The burden of proof for the efficiency defence is on the dominant undertakings.[40]

With the view of Article 101 of the TFEU; Article 101/1 stipulates the restrictions. Article 101/2 states the legal result of not to obey these restrictions which makes the agreements and decisions automatically null and void. Article 101/3 gives

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[37] Case T-168/01,GlaxoSmithkKline, para 118.

[38] Cabau, Emmanuel & Hancher, Leigh & Kjolbye, Lars.& Landes, Valerie.& Salerno, Francesco. & van der Woude, Marc. "*EU Energy Law Volume II EU Competition Law and Energy Markets*" published in 2011 by CLAEYS&CASTEELS, page157, para 3.31.

[39] Guidelines on the application of Article 101/3; Case C-238/05, Asnef-Equifax, ECR 2006,p.I-11125,para 49.

[40] Judgement of the Court of Justice dated 27.03.2012, Post Danmark, C-209/10.

opportunity to those who conclude agreements to get out of scope of Article 101/1 and be in the exception status.

Application of Article 101/3 of the TFEU is especially important in the energy sector which highly depends on investment. Energy companies could claim that they bring services and infrastructure, which are not easily reachable in the market and require huge amount of money to build. By doing so, they show that the advantage of their conduct outweighs the negative side of it.[41]

Article 101/3 of the TFEU is another rescuer amongst with the Block Exemption Regulation[42]. When the agreement cannot benefit from block exemption regulation, it is checked that whether the four cumulative and exhaustive conditions of Article 101/3 of TFEU are fulfilled or not and to be asked following questions to check whether the agreement support to have better distribution of the goods or services, whether the agreement assist to technical or economic improvement or whether the agreement increase the variety of the product or services.

A. CHARACTERISTICS OF NATURAL GAS AGREEMENTS

Considering the characteristics and structure of the natural gas market, agreements classified on the basis of the market chain level as vertical agreements and horizontal agreements.

Horizontal agreements are concluded between the undertakings operating at the same market chain level such as an agreement signed by two natural gas suppliers whereas vertical agreements are signed by the undertakings operating at the different market chain level for instance an agreement between a gas producer and a gas supplier. In the first example two undertakings operate at the same supply level, however in the second example one undertaking operates at the production level whereas other one

[41] Scholz, Ulrich. & Prups, Stephan. "*Survey The Application of EC Competition Law in the Energy Sector*", Journal of European Competition Law & Practice, 2010, Vol.1, No.1, page 41.
[42] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010R0330 (online on 16.06.2019).

operates at the supply level. These kind of agreements could be signed both in the upstream and downstream markets.

It should be said initially that, the provisions, which have been under the competition concerns and subjected to the Commission investigation, are the same or almost similar in these two types of agreements, but the impact of the provisions differs on the different market players.

As in the energy market, it is very common to conclude long term agreement in the natural gas market. Regarding the upstream natural gas market, long term agreement is seen as a guaranteed supply which also serves for the security of supply aim of the internal EU energy market project.

When there is a long term natural gas supply agreement, not only the supply is secured for the long term, but also buyer could predict the transportable volume of the gas and needs of the market which will shape its investment project and strategy.[43]

Although, long term agreement is good for security of supply and demand, it is considered under some conditions as anticompetitive. It is found that long term agreement prevents new market entry and causes market foreclosure. Moreover, it is also evaluated that agreements concluded in the upstream market not only have foreclosure effect in their own market, but also they effect downstream market and generally cause market foreclosure in the downstream market.[44]

Agreements signed with industrial customers in the downstream market are specifically under the competition concern that volume of the natural gas is higher than the ones signed with household customers.

Both in the upstream and downstream natural gas market, especially (a) long term or indefinite duration and volume commitment, (b) destination, (c) use restriction[45],

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[43] Ibid, page 277.
[44] Ibid.
[45] European Commission Press Release Database, IP/03/566, Brussels, 23.04.2003, "*Commission and Danish competition authorities jointly open up Danish gas market*" available at http://europa.eu/rapid/press-release_IP-03-566_en.htm (online on 15.06.2019).

(d) profit sharing/splitting, (e) oil price indexation, (f) take or pay clauses in the natural gas agreements are found as anticompetitive and as preventive for natural gas liquidity in the market. In Addition to those, tacit renewal clauses, high and unjustified penalty charges and non-compete clauses also make the agreement anticompetitive.

Firstly common competition concerns regarding the natural gas agreements shall be examined and then the natural gas agreements shall be analysed as vertical and horizontal agreements in a specific way.

B. COMMON COMPETITION CONCERNS REGARDING THE NATURAL GAS AGREEMENTS

1. Long Term Duration and Volume Commitment Clause

These two clauses are main bottlenecks in the liberalisation process of the natural gas market. Due to the fact that length of the contract duration and volume commitments tied the parties and force those to fulfil their obligation till the end of the contract term in order not to pay penalty, parties could not easily switch their suppliers or producers. Moreover these clauses create obstacles for market entry.

The features of these clauses, their effects on the market competition concerns regarding them and the Commission approach to the issue with the analyse of parties commitment will be evaluated in details by case law examination in order to reflect the situation in the natural gas market. For instance *Distrigas* case is an example that the Commission accepts parties' commitments by limiting the duration of the agreement.

Long term contracts also cause market foreclosure. In order to evaluate the contracts whether they have a foreclosure effect the following elements should be checked: (1) market power of the parties, (2) duration of the contract, (3) whether there is an exclusivity right under the contract, (4) whether there is any justification for exclusivity or long duration, (5) percentage of the customers' demand and overall market

share tied under the agreement, (6) whether there is any efficiency defence which shows the benefit of the anticompetitive conduct.[46]

2. Destination Clause

This clause is also known as "*territorial sale restriction clause*" which on the one hand prohibits buyer to resell the natural gas, on the other hand, enables supplier to supply the natural gas to different buyers in various prices at the same delivery point.[47]

Territorial sale restriction is accepted as limiting the buyers' freedom and empowers the supplier to apply different price for the same good. Two examples from upstream agreements (*Gazprom- ENI*[48] and *Gazprom – OMV*[49]) and as well as one downstream agreements (*E.ON Ruhrgas – GDF Suez*) regarding the destination clause will be examined as follows;

a. Gazprom – ENI

Pursuant to existing agreement between Russian gas producer Gazprom and Italian gas company ENI, on the one hand ENI was prevented from reselling the natural gas provided by Gazprom to outside of Italy, on the other hand Gazprom sale inside of Italy was also subject to consent of ENI.

This is found against to EU competition law with the aim of creation of competitive EU natural gas market. Afterwards the Commission's long investigation, it is concluded with settlement on the grounds of parties' commitment.

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[46] European Commission Press Release Database, MEMO/07/407, Brussels, 11.10.2007, "*Antitrust: Commission Increases Competition in the Belgian Gas Market- Frequently Asked Questions*" available at http://europa.eu/rapid/press-release_MEMO-07-407_en.htm (online on 24.06.2019); Ulrich Scholz and Stephan Prups "*Survey The Application of EC Competition Law in the Energy Sector*", Journal of European Competition Law & Practice, 2010, Vol.1, No.1, page 40.

[47] Talus, Kim. "*Long- Term Natural Gas Contracts and Antitrust Law in the European Union and the United States*", Journal of World Energy Law and Business, 2011, Vol. 4, No.3, page 281, available at https://academic.oup.com/jwelb/article/4/3/260/980055 (online on 11.06.2019).

[48] European Commission Press Release Database, IP/03/1345, Brussels, 06.10.2003, "*Commission Reaches Breakthrough with Gazprom and ENI on Territorial Restriction Clauses*" available at http://europa.eu/rapid/press-release_IP-03-1345_en.htm?locale=en (Online on 15.06.2019).

[49] European Commission Press Release Database, IP/05/195, Brussels, 17.02.2005, "*Competition: Commission secures improvements to gas supply contracts between OMV and Gazprom*" available at http://europa.eu/rapid/press-release_IP-05-195_en.htm?locale=en (online on 15.06.2019).

This settlement was accepted as milestone in order to create a competitive EU natural gas market which not only forces Gazprom to align its natural gas agreements with other EU companies, but also constitutes an example for Algerian gas producer Sonatrach which has natural gas agreements with EU companies to follow the same way in order to fulfil the EU competition law requirements.[50]

Due to the massiveness of gas volume subject to the agreement between Gazprom and ENI, which is the first EU company reached the settlement and also the biggest EU customer of Gazprom, importance of the settlement is increased.

According to the settlement;

(1) Destination (territorial sale restriction) clause is deleted in the current agreements;

(2) Parties committed not to put destination clause or any clause which has the same restriction effect as destination clause in the agreements to be concluded in the future between each other and also with different parties;

(3) The consent clause which requires Gazprom to obtain consent of ENI in order to sell natural gas to third parties in Italy was deleted;

(4) Delivery point of the natural gas provided from Gazprom is increased from one to two delivery points in order to diversify ENI's choice;

(5) Apart from above mentioned contractual commitments, ENI also committed to offer remarkable gas volume to the customers outside of Italy such as in Germany and Austria for five years;

(6) ENI committed to increase the capacity in TAG pipeline which transport the Russian gas to Italy through Austria;

(7) ENI also undertook to support the third party access regime on the TAG pipeline via ensuring well capacity management, transparency on the price and capacity availability publication.

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[50] Speech of Competition Commissioner Mario Monti, which will be available at http://europa.eu/rapid/press-release_IP-03-1345_en.htm?locale=en (online on 15.06.2019) para 2.

b. Gazprom - OMV

Commission investigation concerns and also resolution in this matter were similar to the one mentioned above (*Gazprom- ENI*). In this investigation it is found that, according to agreement between Gazprom and OMV which is an Austrian gas and oil company and a door to be opened to Europe for Gazprom, Gazprom prevented OMV to resell the gas purchased from Gazprom to outside of Austria and OMV required Gazprom to offer the first natural gas to OMV before selling the natural gas to other customers in Austria which is so-called "*right to first refusal*"[51].

This agreement is evaluated against the EU competition law as well as the consumer welfare and liberalisation process of the EU natural gas market.

This investigation was then concluded with a settlement where the parties committed to delete the destination clause and right to first refusal condition in the existing agreement and not to put any kind of clause having the same restrictive effect as destination clause in the agreement to be concluded in the future. Same non-contractual commitments are given by OMV. ENI to promote the third party access and increase the capacity on the TAG pipeline.

Both in *Gazprom – ENI* and *Gazprom – OMV* investigation, especially the non-contractual commitments of the parties will play an important role to liberalise the EU natural gas market by promoting third party access and encourage new market entry and prevent "compartmentalization of the market"[52]

It is also said that destination clauses in the upstream natural gas agreements is accepted as hard core restriction which is not capable to obtain exemption individually.[53]

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[51] Ibid, para 4.
[52] Talus, Kim. "*Long- Term Natural Gas Contracts and Antitrust Law in the European Union and the United States*", Journal of World Energy Law and Business, 2011, Vol. 4, No.3, page 282, last paragraph, available at https://academic.oup.com/jwelb/article/4/3/260/980055 (online on 11.06.2019).
[53] Ibid, page 284.

c. E.ON Ruhrgas – GDF Suez

It is evaluated in more details in this section that not only the meetings of undertakings considered as cartel, but also the agreements where they share the market, restrict the competition via market foreclosure which affected the trade between Member States considered as restriction of competition under article 101 of the TFEU.

As it is known from the first gas directive in the EU law, it is required for Member States to open their gas market to competition and allow third parties to have access to the transmission systems. Apart from the EU law perspective, the national law of the undertakings, which are German law and French law were also considered when the judgement was given. Beforehand of first gas directive, according to German law, some agreements between energy suppliers, distributers, authorities are exempt from the competition review and even they have competition restriction effect they could be excluded from the prohibition on the condition that it is notified to German national competition authority in order to get exemption approval.[54]

Demarcation agreements in which the parties share the territories and agree not to sale in other ones' territory are also covered in the exemption list. Since the subject matter of the handled case is demarcation agreement between two leading and largest natural gas suppliers in their national market and the important market players in the EU it could have been accepted in Germany as an exemption. Moreover when French law is reviewed it could be said that monopoly in French gas and electricity market was allowed and the aim of nationalization in the energy market in France also supported the monopoly of GDF Suez in there.[55]

The subject matter of the dispute was the Megal Agreement concluded between E.ON Ruhrgas and GDF Suez on 18 July 1975. According to Megal Agreement, parties had jointly constructed and operated the gas pipelines called Megal which have been used to transport and import the natural gas into Germany and France since 1980.[56] In order to achieve this aim, parties had established the joint companies whose titles start with

[54] Judgement of 29.06.2012, Case T-360/09, E.ON Ruhrgas and E.On v. Commission, page 2, para 6.
[55] Ibid, page 3, para 9,10,11.
[56] Ibid, page 4, para 17, 18.

"*Megal ...*" and one of which was dedicated to finance secure and capital management and operation field of other ones' construction, operation, transportation of the natural gas and the pipelines. These jointly set up companies were notified to the German National Competition Authority in 1976. Besides the aim of jointly construction and operation of the gas pipelines, parties also agreed not to sale in their territories as written down in Direction G Letter that:

"... The Carrying Capacities Contracted or to be Contracted by [GDF] for the transportation of gas shall concern gas which has been or will be purchased by [GDF] and will be delivered to [MEGAL] ... for transit for [GDF] to and destined for consumption in France.

The Carrying Capacities Contracted or to be Contracted by Ruhrgas for the transportation of gas shall concern the transportation for any other transit purposes and the transportation of gas through the pipeline and taken from the pipeline in the Federal Republic of Germany destined for consumption in the Federal Republic of Germany, or purchased by Ruhrgas and destined for transit through the Federal Republic of Germany." [57]

Direction I Letter

"[GDF] undertakes not to deliver or supply directly and indirectly any Gas in connection with the [MEGAL] Agreement to any customer in the Federal Republic of Germany" [58]

Since the parties also signed another agreement on 13 August 2004 and declared that Direction G and Direction I letters are null and void, the validity of these letters does not therefore remain and they were deleted retroactively.

In 2005, E.ON Ruhrgas and GDF Suez concluded another consortium agreement reviewing the operation conditions and capacity allocations of Megal pipelines and

[57] The Direction I Letter signed between E.ON Ruhrgas and GDF Suez on 18 July 1975 is also referred in Judgement of 29.06.2012, Case T-360/09, E.ON Ruhrgas and E.On v. Commission, page 4, para 22.
[58] Ibid, page 4, para 23.

redrafting their contractual relationship based on the Megal pipelines. Pursuant to this new agreement, parties had "*beneficial use agreements*" regarding their capacity share.[59]

Within the scope of abovementioned conduct, the Commission initiated the inspection against E.ON Ruhrgas, GDF Suez and their subsidiaries on 5 May 2006 and this inquiry was concluded with a decision adopted on 8 July 2009. In its decision the Commission stated that Megal Agreement did not allow third parties to penetrate in the market, it limits the market entry as well as provides parties to protect their power in their home market by prohibiting to sale in others' home market that caused restriction on competition which is banned under Article 101 of the TFEU.[60] It is evaluated that the parties had intended to share the market, limit the market entry, had the common manner on the market conduct which made this intention as concreate via signing the Megal Agreement (especially drafting Letter G and Letter I) and expressly restricted the territorial use of Megal pipeline. Moreover, meetings, email correspondences of the parties are also considered as concerted practises. The duration of the agreement and the infringement, as well as the implementation time of the first gas directive in Germany and France are also evaluated. For instance, it is found that for E.ON Ruhrgas the infringement began on 1st January 1980 when the Megal pipeline started to operate, whereas for GDF Suez, start date of infringement was accepted on 10 August 2000 when the first gas directive was transposed in France. Moreover for the end date of infringement was not accepted as the date when the parties declared the invalidity of Letter G and Letter I of Megal Agreement on 13 August 2004 due to the fact that even though the parties cancelled these letters, they continued to territory and volume sharing in practise until 30 September 2005.

After the natural gas market analysis in Germany and France about effect of the Megal Agreement on the trade between Member States, the Commission found there is a restriction on competition which is banned under Article 101 of the TFEU and imposed fines in the amount of 553 million Euro separately on the undertakings in accordance with

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[59] Judgement of 29.06.2012, Case T-360/09, E.ON Ruhrgas and E.On v. Commission, page 5, para 26.
[60] Judgement of 29.06.2012, Case T-360/09, E.ON Ruhrgas and E.On v. Commission, page 5, para 34.

Article 23/2 of Regulation No 1/2003. Cartel founding in the inquiry was also taken in the account when the fine calculated which is seemed as extra %15 amount of the sales.[61]

This Commission decision was appealed by the undertakings in question on the grounds that:

First, there is no infringement which could have been considered under Article 101 of the TFEU since there are "*lawful ancillary restrictions*"[62] allowing restriction that parties taken were objectively necessary, proportionate and directly related to the operation in order to construct and operate the Megal pipelines. [63]

This first plea ground was however rejected by reason of no evidence supporting this plea had been submitted to the Commission and contrary to that, the statement of E.ON Ruhrgas clearly showed that collective construction and joint operation were not necessary in order to have Megal pipeline. It is admitted by E.ON Ruhrgas that it would have constructed the Megal pipeline on its own if GDF Suez have had rejected the collective operation and/or restriction regarding not to sale gas in Germany.[64]

Secondly, it is also alleged that undertakings in question are not rivals and have not been in competition, thus there is no infringement to be evaluated under EC. Regarding this plea, it is restated that Article 101 of the TFEU applies to the contestable market and in order to understand whether the market is open to competition, analysis of the market structure not only in the economic contexts but also in the legal point of view has to be completed. Moreover existing/actual competition and potential competition have to be taken into account when the competition level and conditions in the market are estimated. Potential competition is determined based on the question if the agreement in question had not applied, whether the undertaking would have entered the market and

[61] Ibid, page 7, para 46, 47, 48.
[62] Ibid, page 8, para 60.
[63] More about "ancillary restriction" *Case T-112/99 M6 and Others v Commission [2001] ECR II-2459, para 104* should be checked too. In this case it is accepted that in the event that, it is impossible or very difficult to operate without the restriction, then it could be accepted as objectively necessary restriction. It is also emphasized that even there is an objective necessity, its geographic scope and duration do not exceed what is necessary. Moreover it is mentioned that ancillary restriction is the ones accepted under Article 83/3 of EC where the exception of the prohibition stated under Article 81/1 of EC.
[64] Case T-360/09, E.ON Ruhrgas and E.On v. Commission, page 10, para 71 and 73.

could have competed with the other undertaking.[65] Answer of this question has to show the concreate possibilities under real analysis and evidences in order to accept that there is a potential competition in the market.

In the present case, German gas market and French gas market were analysed. It is found that, before the transposition of first gas directive, GDF Suez have had enjoyed its monopoly in French gas market whereas in German gas market, new market entry is not banned. However incumbents were allowed to put barriers therefore regarding the power of E.ON Ruhrgas in German gas market, it is stated that GDF Suez had not been a potential competitor for E.ON Ruhrgas especially before the liberalisation.[66]

It is evaluated that GDF Suez and E.ON Ruhrgas were the important players in the EU gas supply market and as well as operating in the neighbour countries, there have been high potential competition especially during from 1998 to 2000 when the liberalisation in the EU energy market has begun.

Third plea was about the *G Letter*. Applicants alleged that Direction G Letter does not restrict the competition in the French market.

It is pointed out that Direction G Letter does not explicitly ban E.ON Ruhrgas to sell and/or supply gas in the French market. However it is deduced from the wording of the letter that E.ON Ruhrgas can transport the gas via Megal pipelines only into Germany and also transit through the France to other countries. Therefore it is seemed that E.ON Ruhrgas have had right to use Megal pipelines in France only for the purpose of the transit the gas, not to convey the natural gas in the French market.

The fourth plea was based on the purpose of the agreement. It is stated that the aim of the agreement was not to restrict the competition and the purpose of the letters (specifically Direction G and Direction I letters) was neutral.[67]

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[65] Ibid, page 12, para 86.
[66] Ibid, para 94.
[67] Ibid, page 17, para 138.

This claim was evaluated by referring to the EU case law and it is mentioned as principle that firstly; if the object of the agreement in question is anti-competitive, it is not requisite to examine the effect of the agreement.[68] Secondly, if one of the aims of the agreement is restrictive, other legitimate purposes are not counted.[69] In the concreate case, legitimate purposes would have been the investment in natural gas supply market by constructing the pipelines, however demarcation of the market in favour of the national market of the undertakings was restriction of the competition in the EU. Within this respect the timeline of the liberalisation process was also taken into account. Nevertheless, it is pointed out that even before the transposition of the gas directives, EU law prohibits the restriction on the competition via emphasising the aim of EU in the TFEU and the TEU as establishing the common market where the quantitative restrictions on the import and export as well as the all others measures having equivalent effect are prohibited.[70] Additionally, at the time of the Direction G and I letters were signed, he CJEU have had ruled that separation of the national market from the EU single market is contrary to the purpose of the EU.[71]

The fifth plea was related to effect of the agreement on the trade between Member States. As it is known that in order to apply Article 101 of the TFEU, restriction on competition has to affect the trade between Member States. This criterion has been interpreted in the case law as; (1) if the agreement, decision, concerted practices have potential or actual, indirect or direct influence on the trade[72], (2) if it diverts the trade pattern[73], (3) if it has appreciable, significant effect which will be evaluated by examining it in its legal and economic context[74], it is accepted that there is an effect on the trade between Member States thus the arrangement falls in the scope of Article 101 of the

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[68] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291.
[69] Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173.
[70] Article 2 and Article 3 of TFEU.
[71] Case 192/73 *Van Zuylen* [1974] ECR 731.
[72] Case C-238/05 Asnef-Equifax and Administracion del Estado [2006] ECR I-11125.
[73] Joined cases 209/78 to 215/78 and 218/78 van Landewyck and Others v Commission [1980] ECR 3125.
[74] Judgement of 29.06.2012, Case T-360/09, E.ON Ruhrgas and E.On v. Commission, page 19, para 152.

TFEU. As stated in clause (1) above, it is also sufficient to have only potential influence and there is no need to prove the actual effect on the trade pattern.[75]

Contrary to rejected first four pleas, this plea was upheld. Since the Commission found and stated in its decision that German natural gas market (from 1st January 1980 to 24 April 1998) and French natural gas market (until August 2000) were closed to competition, it could not have been said that during this term the agreement in question restricted the competition, since there was no competitive market.

Sixthly applicant also had objected the amount and calculation method of the fine imposed on them. It is found that the Commission disregarded the infringement duration and average sale in connection with the infringement during this term (approximately 13 months) in France. Although the missing calculation part is related to the French market and for relatively short period, both parties are benefited the reduction of the fine and imposed fine reduced to EUR 320 million.[76]

As a consequence, this case review was a good example of examination of the demarcation agreement in the EU natural gas market as well as the restriction durations gave chance to observe the Commission's point of view on the application the Article 101 of the TFEU before and after the liberalisation.

3. Use of Restriction Clause

Use of restriction clause[77] prevents purchaser to use the natural gas different than the usage aim mentioned in the purchase agreement. For instance, natural gas sold to

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[75] Joined cases C-215/96 and C-216/96 Bagnasco and Others [1999] ECR I-135 which is referred in the Judgement of 29.06.2012, Case T-360/09, E.ON Ruhrgas and E.On v. Commission, page 19, para 153.
[76] Judgement of 29.06.2012, Case T-360/09, E.ON Ruhrgas and E.On v. Commission, page 38, para 303, 304 and 305.
[77] Example of use restriction clause is given by Kim Talus, *Ibid*, page 275, as follows;

"The natural gas supplied by the [company] is intended for the customer's own operational purposes. Passing the gas on to third parties and use of the gas for non-operational purposes of the customer shall require the prior consent of the [company]" or another usage restriction clause sample is;

"Natural gas is only supplied for the customer's own purposes. It can only be passed on to third parties with the written consent of the [company] Consent must be given if there are no outweighing energy supply reasons which contradict a transfer."

electricity company cannot be used or resold for another aim apart from the electricity generation fuel. DONG/ DUC case which will be examined further is about use restriction clause.

4. Profit Splitting Clause

Profit sharing/splitting clause is kind of component to destination clause. It is a mechanism/condition that in the event that purchaser resells the natural gas outside the territory different from the agreed one, it will split the share revenue with the seller.[78]

This clause was also offered in the investigation against Algerian gas producer Sontrach as an alternative to territory restriction clause. However it is not accepted by the Commission on the ground that it has the same and/or similar effect as territory restriction clause.[79]

Profit sharing clause limits the freedom of purchaser to use the natural gas for the purposes other than planned in the agreement and thus selling the outside of the territory seems disadvantage for the purchaser.

5. Oil Price Indexation Clause

EU gas price mentioned in the long term agreement is determined according to market value principle which includes the price of non-gas products too. Contrary to EU gas price determination, in the USA, gas price is determined considering the gas-to-gas competition.[80]

The mind-set behind the oil price indexation is that when the price is determined, customers' switching options should be taken into account. In other words, it is considered that when the price of natural gas increased, whether customer would switch to oil or electricity.

[78] Ibid, page 281.
[79] Ibid, page 284.
[80] Ibid, page 285.

This clause is evaluated as anticompetitive on the grounds that via this clause provider has extra profit and compensates the price differentiation. Additionally it is examined that oil price indexation in the upstream agreements and downstream agreements varies the fact of which causes increase in the price of natural gas to be paid by the final customers. [81]

Therefore oil price indexation clause does not serve for customer welfare and it could not therefore be beneficial to customers but for EU natural gas supply companies only.

6. Take or Pay Clause

Take or pay clause[82] obliges purchaser to assume the price risks, which means even purchaser does not take the natural gas, has to pay for it. This clause with a resale restriction clause empowers the supplier to sell the natural gas second time and make profit out of it.[83]

Take or pay clause is inevitably included in the long term natural gas agreements within the purposes of ensuring (1) investors that they will reap the fruits of their investment, (2) sellers that there will be cash flow in the market and (3) purchaser that supply of natural gas will be reliable and secure.[84] Additionally, natural gas projects require high amount of investment, thus the banks where the investors have account and ask for credit to invest the projects demand from the investors to ensure the banks that the credit given to investor will be returned.[85] Therefore the take or pay clause is added to the

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[81] Ibid, page 286, para 3.

[82] Example of take or pay clause is given by Kim Talus, Ibid, page 275, as follows;

"If the customer does not comply with the minimum purchase obligation of Annex 1, he shall also pay for the volumes which he has not purchased at the mean valid energy price for the relevant contractual period weighted by the monthly volume (take or pay)."

[83] Ibid.

[84] Bulama, Bitrus Joseph. "*Take or Pay Obligation In the Natural Gas Contracts : Any Respite for the Buyer?*" available at https://www.academia.edu/11036248/ (online on 27.08.2019)

[85] Moussas, Nicholas. "*Take-or-Pay Clauses in the Natural Gas Sales Contracts and Potential Claims Against Buyers*" available at https://www.lexology.com/library/detail.aspx?g=57bbd39f-9109-4d40-8f4a-16a2c07d1279 (online on 28.08.2019)

long term natural gas agreements in order to give guarantee not only to the investors but also to the banks.

This clause enables parties to formulate the risk sharing and pre-agreed compensation mechanism[86] whereas it puts the purchaser in disadvantaged position.[87] Within the view of the competition rules, it could be said that, take or pay clause is not directly and explicitly against the competition, however it has a potential to prevent competition since the term of the of the natural gas agreements including this clause is very long and generally empowers the dominant position of the undertakings. Therefore the impact of the take or pay clause on the competition has to be assessed case by case with the market analysis.[88]

C. TYPES OF NATURAL GAS AGREEMENTS

1. Horizontal Agreements

When the undertakings, which do business at the same trade level, conclude an agreement, this agreement is called as horizontal type of agreement. Comparing to vertical agreements, horizontal ones have less foreclosure effect on the market as long as the parties of the agreement are not actual or potential competitors to each other and/or do not have intent to collectively boycott the third parties.

On the one hand, horizontal agreements restrict the competition by means of price fixing, market share and/or noncompetition clause in the agreement which prevents other party to reduce the price, change the selling area or be actively in competition. Horizontal agreements may be deemed sometimes as beneficial since giving chance to undertakings to achieve to bring innovation by launching new products which could have not been achieved solely. When there is a consumer welfare, economic benefit effect of

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86 Ibid.

87 Bulama, Bitrus Joseph. "*Take or Pay Obligation In the Natural Gas Contracts : Any Respite for the Buyer?*" available at https://www.academia.edu/11036248/ (online on 27.08.2019)

88 Ibid.

the horizontal agreements, is considered under Article 101/3 of TFEU as efficiency defence.

In order to understand whether the parties are competitors of each other, it should be evaluated from the behaviour of the consumer whether the parties are substitutable or not. Substitutability could be tested with the following questions:

(1) Whether consumers could switch the products which serve for their needs (Changeability criteria);

(2) Whether consumers could change the products immediately or have to wait for long time to do (Immediate effect criteria);

(3) Whether alteration of products causes risks and/or considerable additional costs that consumers have to burden (Additional cost/risk criteria).

When the suppliers actively operate in the same product market as well as in the same geographical area, it is accepted that they are in actual competition.[89]

Potential competition may occur from the possibility of new entrance to the market. Therefore there is no actively operating undertakings to be a competitor, however there is a risk of having one as soon as they tackle the market entrance obstacles and become an alternative for consumers in the market. In order to evaluate an undertaking, which is planning to enter in the market, as potential competitor, planned market entrance period should not take place more than three years. This three years criterion comes from Article 1/1 (n) of the Specialisation Block Exemption Regulation[90].

Under the Specialisation Block Exemption Regulation, agreements have been categorised in three types regarding the prevention density on the competition from low to hard as follows[91];

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[89] Cabau, Emmanuel & Hancher, Leigh & Kjolbye, Lars.& Landes,Valerie.& Salerno, Francesco. & van der Woude, Marc. "*EU Energy Law Volume II EU Competition Law and Energy Markets*" published in 2011 by CLAEYS&CASTEELS, page 163, para 3.45.
[90] Commission Regulation (EU) No 1218/2010, dated 14.12.2010 on the application of Article 101/3 of the TFEU to certain categories of specialisation agreements.
[91] Ibid, page 166, para 3.51.

(1) Agreements have restricting effect;

(2) Agreements have object to limit the competition;

(3) Agreements have hard core restriction clauses which are the subject matter of cartel investigations.

Efficiency defence could be more applicable to the first type of agreement whereas it seemed not possible to apply on an agreement which has hard core restriction.

Exchange of sensitive commercial information is one of the most investigated competition restriction types. One of the energy market related example of this was *French Petrol Station Case* investigated by French Competition Authority[92]. Subject of the case was; owner of the petrol stations located on the French highway had called each other to give their price information for each type of petrol product they have sold, few hours before the price lists were publicly revealed. French Competition Authority had found this as a restrictive behaviour on competition and had fined these petrol stations' operators. This decision was appealed and appellate court gave its reversing decision on the grounds that petrol market is highly concentrated and transparent enough to collect the price information. This case shows the importance given by the Competition Authorities of information exchange in the same market between competitors. In this case although each petrol station operators could have collected the price list by going one station to another one, which means exchanged information was not top secret information, however French Competition Authority found that calling competitors to exchange the information increased the market transparency to the market and negatively affect the competition.

Information exchange impact on the competition depends on the market structure, its transparency, stability, complexity and integration level as well as the importance and sensitivity of the information, frequency of the exchange, etc.[93]

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[92] Case 03-D-17.

[93] Cabau, Emmanuel & Hancher, Leigh & Kjolbye, Lars.& Landes,Valerie.& Salerno, Francesco. & van der Woude, Marc. "*EU Energy Law Volume II EU Competition Law and Energy Markets*" published in 2011 by CLAEYS&CASTEELS, page 170, para 3.57.

Market power, market share, rivals' position are some of the important factors which effect the competition. When two powerful undertakings in the market have concluded an agreement, it shall definitely have foreclosure effect other than strengthening their market power which cause negative impact on consumer welfare. Moreover, rivals' position is also important. In the event that the rivals are strong, an agreement between other undertakings in the market would not be more harmful than the situation of having weak rivals.

Furthermore, countervailing buyer power is also considered as a factor of shaping the competition in the market, especially where the purchasers whose volume commitment and capacity are big and/or the one who resell the product have higher negotiation power than the ordinary purchasers. Therefore negotiation power comes from the parties' market position which also structure the competition in the market.

Buyer power is only considered as competitive restriction when it effects the overall market.[94] Otherwise, due to having more powerful negotiation position and so bargaining strength, powerful buyers may have better conditions in the agreement different from the other purchasers.

Another effects on the agreements is entry barriers such as regulation requirement, resource limitation, prevention to access of infrastructure, etc.

a. Cartels

Competition restriction is obviously seen on hard core restrictive agreements mainly known as cartels. Cartels have direct, immediate, detrimental effect on the competition. Hence cartel investigation is seriously conducted and when the investigation turns to prosecution, parties shall not only be ordered to stop the violation but also pay the tremendous amount of fine which is calculated regarding the turnover of the undertakings.

Since it is desired to have internal energy market which is harmonised and have no entry barriers and restrictions, having cartel agreements especially on geographical

[94] Ibid, page 178, para 3.73.

sale limitation is strictly banned. The mind-set was that when the Member States are forced to abolish restriction in order to have market integration, undertakings a fortiori shall not put restriction on the competition in the market.

As it is previously examined in detail way under the destination clause, cartel case in the energy market is *GDF/EON*[95] where the Commission first time had imposed massive amount of fine on the energy companies. GDF is operated in France and EON is operated in Germany and in 1975 they decided to jointly build a gas pipeline called MEGAL which would have been collectively own and operated by these two undertakings in order to import cross border gas with the condition that GDF would not sell transported gas via MEGAL in Germany and in return E.ON would not sell transported gas via MEGAL in France. Thanks to this pipeline project each undertakings had been enjoyed being monopoly in their country and until the year of 2000, GDF had benefited from being a monopoly to import the natural gas into France and until the year of 1998 when the demarcation agreements accepted as illegal and also liberalisation process in the EU energy market started with the Directive 98/30/EC.[96] E.ON had also taken advantage of territorial market share with GDF as well as other German suppliers. In 2004, parties stated that sales ban in counter party's country condition is null and void, however in practise it is found that they have continued to have non selling restriction until 2005. The Commission imposed fines on each undertaking in the amount of 320 million euro.

This case also shows that after the liberalisation process in the EU energy market, there is no tolerance to market sharing, territorial restrictions, etc. and this kind of infringement is seriously investigated under Article 101 of the TFEU.

French Jet Fuel Case[97] is another cartel example in the EU energy market. In this case it is alleged that four of the jet fuel suppliers which are namely Shell, Total, Chevron and ESSO involved in bid rigging regarding the Air France call for tenders. As

[95] Case COMP/39.401-GDF/E.ON, Commission Decision dated 08.07.2009.
[96] Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1998.204.01.0001.01.ENG&toc=OJ:L:1998:204:TOC (online on 16.06.2019).
[97] French Competition Authority Decision, Case 08-D-2008.

a tenderer, the aim of the Air France was to choose a supplier which gives high quality of goods and/or services with relatively inexpensive price. At the time Air France launched this tender in order to find a jet fuel supplier for its flights from Island of Reunion, these four bidders collectively agreed to give volume bids regarding their market share. Therefore they had forced Air France to conclude agreements with all of them in order to meet their needs and by doing so they prevent the competition in favour of their market position. When this is found by the French Competition Authority, 41 million Euro was imposed on these energy companies as fines.

Cartel investigation procedure has been conducted not only by national competition authorities but also the European Commission and thus every investigation brings different question to be asked. For instance above mentioned GDF/E.ON intervention draws the attention of competition authorities for the question that whether the OPEC (Organisation of Petroleum Exporting Countries) practises such as joint decision on the procurement volume, quota for each member countries of the organisation, etc. are cartel practises or not? However it is accepted that OPEC practises do not meet the requirement of Article 101 of the TFEU, since the members of the organisation do not conclude an agreement.[98]

Cooperation between competitors is generally under investigation which sometimes on the ground of Article 101 of the TFEU and when the cooperation is in the form of joint venture, on the ground of EU Merger Regulation.

b. Joint Selling Agreements

Joint selling is one of the examples of an agreement which could be investigated under Article 101/1 of the TFEU and could benefit from efficiency defence under Article 101/3 of the TFEU. Undertakings may wish to enter the market, but could not overcome the entry barriers solely and thus conclude an agreement to strengthen each other's' position to penetrate the market and/or effectively compete in the market. In the energy sector, joint selling agreement would be a good option for those who do not have access

[98]Cabau, Emmanuel & Hancher, Leigh & Kjolbye, Lars.& Landes,Valerie.& Salerno, Francesco. & van der Woude, Marc. "*EU Energy Law Volume II EU Competition Law and Energy Markets*" published in 2011 by CLAEYS&CASTEELS, page 174.

to energy. Additionally when an undertaking would like to share the costs and risks, joint selling would be a fruitful option not only for undertakings but also customer who would enjoy the variety of goods, innovation, reduced prices by having new market entrants. Although customers would not benefit from all these opportunities, sometimes joint selling would be still good for customers that have no undertakings to serve for them in the territory and by having joint selling option where both undertakings have the burden of the cost and risk then they would like to enter the market which would be advantage for customers. It is also useful to reach more customers via joint selling than solely selling where the undertakings reach limited customers. Moreover joint selling would not be considered as hard core restriction when it is integrated with the real economic activity.[99]

Joint selling case in the energy market is about GFU[100] which is a Norwegian Gas Negotiation Committee and negotiated with purchasers mostly domiciled in the EU in order to conclude gas sale contacts on behalf of Norwegian gas producers. Since GFU acted on behalf of Norwegian gas producers, it eliminated the competition and had a chance to fix the price, decide the volume and other trade conditions.[101] Another competition case in energy market is also from Norway, *Statoil/Hydro* merger which are two largest gas producers in Norway would like to merge and this merger approved by the Commission decision dated 03.05.2007, numbered with Case COMP/M.4545. These two examples show the approach to the competition issues in Norway. On the one hand, agreements concluded by the GFU was found anticompetitive since GFU represented all of the Norwegian gas suppliers and it is found as prevention of the competition. On the other hand, merger of two large Norwegian gas producers was approved. It shows that in the merger procedure it is mostly considered that there would no restrictive effect, however when it is the case of entering into an agreement between undertakings, this draws more attention of the competition authorities than merger.[102]

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[99] Ibid, page 187, para 3.95.
[100] Case C-198/01, CIF,ECR 2003,p.1-8055.
[101]Cabau, Emmanuel & Hancher, Leigh & Kjolbye, Lars.& Landes,Valerie.& Salerno, Francesco. & van der Woude, Marc. "*EU Energy Law Volume II EU Competition Law and Energy Markets*" published in 2011 by CLAEYS&CASTEELS, page 189 footnote 684, "See Commission, Competition Report 2002, p.207; Lindroos/Schnichels/Svane, Liberalisation of European Gas Markets- Commission settles case with Norwegian gas producers, Competition Policy Newsletter 2002 (3) page 51.
[102] Ibid, page 189, footnote 685.

GFU case was concluded with a settlement. This settlement conditions were different from the Commission approach to the hard core restriction which are imposing high amount of fines and cease and desist order. In the GFU settlement, it is committed that;

(1) Permanent members of GFU which also produce large amount of products shall sell the remarkable volume of gas to new customers for around 4 years.

(2) Royal Decree which allows GFU to operate was abolished.

Second condition mentioned above is a sign to understand the mind-set of the Commission by not imposing fines as its general approach. Commission may have been considered that since established the GFU operated under Norwegian Law, undertakings which are members of GFU conducted their transaction by benefiting from GFU conditions having legal basis to do so. Thus punishment for the conduct which is allowed by the law would not have been reasonable and had no legal basis.

This settlement also was evaluated from the perspective of its effectiveness. It is argued that this settlement did not restrict the long term jointly selling agreements which empower the market position of the undertakings, and instead, it just contented with volume commitment to new customers. [103] The aim of this decision would have been evaluated as increasing the market integration and assist the creation of internal gas market.

This remedy was found neither as useful nor competition demand related. Since the long term joint selling agreement is still in force, competition is under the threat.

Settlement procedure and conditions were altered by Regulation 1/2003[104] where the undertaking has to stop its suspicious conduct. This regulation is also more effective

[103] Ibid, page191, para 3.101.

[104] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001 (online on 16.06.2019).

and deterrent since the commitments legally binding and so undertakings can be forced to fulfil their commitments.[105]

When there is a clear cartel case where market sharing, price fixing, product sharing etc. are obvious, the Commission has no tolerance to this kind of grave violation of competition rules and imposes fines.[106] However imposing deterrent fines is not enough, thus the anti-competitive conduct has to be stopped with the order of cease and desist in order to meet the appropriate conclusion.

c. Joint Distribution Agreements

Distribution agreements which the undertaking sells the products of its competitors could be caught by the Commission as anticompetitive. Distribution agreements could be in the form of unilateral, reciprocal, and could be between actual competitors, potential competitors and could have the conditions of territorial restriction, customer restriction and exclusivity clause etc.

(1) Unilateral /Reciprocal

When undertakings which have been competed, sell their respective products due to the distribution agreement condition, this type of agreement assessed as reciprocal; whereas only the one of the supplier has to sell the other ones' which is its competitor's product, this type is termed as unilateral agreement. Within this respect, aim of the competing suppliers has to be evaluated whether they conclude this kind of distribution agreement in order to share the geographical sale, customer sale and/or price fixing, etc. If the purpose of the rival suppliers is clear and obvious to restrict the competition in the market, then the Commission evaluates this harmful conduct under Article 101/1 of the TFEU. Exception to this investigation would be proving that the distribution agreement between the competitors concluded for easing the market entry[107] which is not possible

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[105] Ibid, Article 9.
[106] Case COMP/39.401 – E.ON/GDF.
[107]Cabau, Emmanuel & Hancher, Leigh & Kjolbye, Lars.& Landes,Valerie.& Salerno, Francesco. & van der Woude, Marc. "*EU Energy Law Volume II EU Competition Law and Energy Markets*" published in 2011 by CLAEYS&CASTEELS, page 189 footnote 684, "See Commission, Competition Report 2002, p.207; Lindroos/Schnichels/Svane, Liberalisation of European Gas Markets- Commission settles case with Norwegian gas producers, Competition Policy Newsletter 2002 (3), page 193, para 3.105.

or difficult for one or two of the competitor suppliers without the other one. Additionally if the parties of this kind of distribution agreement could prove that the agreement signed in order to make investment to the market.

In the case of concluding distribution agreement and appointing other supplier which is very powerful in the market to sell other ones' product, the product of the latter would not be sold as many as the former one since as a nature each suppliers would like to sell their own products preferably.

(2) Market Sharing

Market partitioning, which could be in the form of territorial market share and/or customer market share and/or product market share, is accepted as hard core restriction.

Competitor suppliers may agree to divide the market as north, south, west and east and agree to sell only in the one territory. Moreover they may classify the customers as local, industrial, upper class or lower class etc.

For instance in the energy sector, suppliers could be operated in one Member States and distribute to other Member States via its incumbents operate in the relevant Member States. This is less costly way for suppliers than entering into a market on its own in the Member States where it distributes.

When there is a market sharing agreement there must be at least rational business explanations to evaluate the conduct as anticompetitive.

According to Article 2 of the Regulation 1/2003, burden of the proof is on the Authority and/or the plaintiff which claims the market sharing. This article is also align with the basic law principle which is contesting party has to prove its claim. This is especially important when the market shared via concerted practises rather than an explicit agreement. For market sharing there is no need to conclude an agreement, this type of infringement could be seen as the form of concerted practises too. [108] For instance

[108] Commission Decision dated 08.07.2009, Case COMP/39.401-EON/GDF.

without an agreement one competitor do not sell for the customers which is the target customer of other one or do not make sale to the territory where its rivals operate, etc.

d. Joint Production Agreements

Horizontal agreement might be in the form of joint production. Especially in the energy market which requires huge investment in order to enter the market as well as burdening the high amount of cost to proceed in order to provide goods and/or services. Therefore, unless the strengthening of the market power, joint production agreements are considered as cost effective and a tool to increase the capacity of production, etc.

Joint production agreements would be unilateral where the only one producer ceases the production and provides the good from other producer as well as it would be reciprocal where producers agree to cease providing one of their different types of good and purchase them from each other. Reciprocal joint production agreements in the energy market may only be seen in the petroleum industry.[109]

It is the nature of this type of agreement that parties share the capacity, output of their joint production, allocate the duties and responsibilities etc. which would be drawn the competition authorities' and/or Commission' attention. Additionally this type of agreements assist to reach the aim of energy sustainability easily and more effectively. Therefore joint production agreements are likely to be approved since the competition concern is restriction which is not generally occur via this agreements.

The Commission has considered the impact, integration concentration, effect on the output level, density of the sensitive information exchange etc. in order to decide whether there is a restriction in the market via joint production agreements which is much closed to be evaluated as merger, but has less integration level than merger conduct.[110]

Besides, this kind of agreement should be specifically evaluated within the scope of market power increase and jointly exercised market power. For this reason, articles in

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[109] Cabau,Emmanuel & Hancher, Leigh & Kjolbye, Lars.& Landes,Valerie.& Salerno, Francesco. & van der Woude, Marc. "*EU Energy Law Volume II EU Competition Law and Energy Markets*" published in 2011 by CLAEYS&CASTEELS, page 202, para 3.124.
[110] Ibid, page 203, para 3.127.

the agreement regarding the allocation of duties, responsibilities, power, rights, benefit of the parties from output, utilization of the facilities where the production taken place, market position of the contracting parties, cooperation level of the parties, decision making structure of the joint production etc. have to be carefully analysed. *German Electricity Wholesale Market*[111] and *EDF/British Energy*[112] were the cases where the Commission analysed the effect of the jointly exercising the market power which might cause the withdrawing of the capacity when the demand is high and thus pose a risk in the market. In another case[113] the Swedish Competition Authority emphasised that exchange of sensitive information and collective decision on the operation cause increased market power via jointly exercising the market power of the parties which run the nuclear plants together.

e. Commercialisation Arrangement

Another type of restriction would arise from a horizontal agreement where the competitors cooperate with each other individually or collectively for logistics, advertising, service and promotion, etc. Common commercialisation arrangement investigated within the scope of competition concern is exchanging or revealing sensitive trade information via the cooperation. Another general type of commercialisation arrangement is commonality of cost which emerges from the sameness of the expense items of the competitors in the market. When the competitors know the cost of the good or services, the price which they decide by themselves would be the same or closest as its rivals' price. Therefore this would be considered as a kind of concerted practises which eliminate the price competition.

For each case it has to be meticulously assessed whether there is an infringement of competition rules, how the infringement effects the market condition, how the competition in the market would be without restrictive arrangement, how restrictive the

[111] Case COMP/ 39.388 – German Electricity Wholesale Market, Commission Decision dated 26.11.2008.
[112] Case COMP/M.5224 – EDF/British Energy, Commission Decision dated 22.12.2008.
[113] 12.09.2008, DNR 500/2008.

arrangement is, etc. For instance, cooperative special offer for gas as a heating fuel would have rare negative effects on competition in the market.[114]

2. Vertical Agreements

Agreements concluded between undertakings operating in the different level of the market share called as vertical agreements. In the energy market, distribution agreements and capacity reservation agreements are the examples of this type of agreement. For instance agreements between a gas buyer and a gas supplier is a vertical agreement since buyer and supplier are at the different level of the market chain.

Duration of the vertical agreements is important as in the horizontal ones, since the duration is one of the indicators of foreclosure effect. For instance short term exclusive distribution agreement would not be considered as a threat on the competition.

a. Exclusive Distribution Agreements

Exclusive distribution agreements aim to decrease the number of distributors, resellers and thus minimise the competition in the market. Exclusivity would be in the forms of territory exclusivity, amount exclusivity, product exclusivity, customer exclusivity, etc. Exclusivity term in the agreement draws the attention when it gives absolute rights in the territory and it is accepted as hard core vertical restrains without market effect analysis. Comparing to other restrains, efficiency defences under Article 101/3 of the TFEU for the vertical restrains is less likely to be acceptable. Exclusive distribution agreements would have been caught by Article 101 of the TFEU with the concerns of foreclosure risk and collusion possibility. Commission Press Release

[114] Cabau, Emmanuel & Hancher, Leigh & Kjolbye, Lars.& Landes,Valerie.& Salerno, Francesco. & van der Woude, Marc. "*EU Energy Law Volume II EU Competition Law and Energy Markets*" published in 2011 by CLAEYS&CASTEELS, page 200, para 3.119.

regarding *Gazprom/ENI*[115], *Gazprom/OMV*[116], *Gazprom/E.ON Ruhrgas*[117] are guides of unofficially settlement type in the event of founding that exclusive distribution agreement is restrictive and caught by Article 101 of the TFEU. In these cases, the party which has "*right of first refusal*" or "*adjustment mechanism*" waive its rights and the Commission had accepted this waiver as a lifter of competition concern.

Wingas/ EDFT[118] case is an example of vertical as well as the horizontal restriction. These two undertakings operating in Germany, one as a wholesaler and the other one as a gas trader, concluded gas supply agreement for a long duration. Pursuant to this agreement, when EDFT sale in the core supply territory of Wingas, the latter has a right to decrease the volumes purchased from EDFT. Moreover EDFT could sell in the Wingas core supply territory area on the condition that EDFT sells only to existing operators such as Ruhrgas, not to new market players. This is a vertical restriction side of the case. Being a long term agreement, creating barriers for new market entrants, inequality arising from the application of the agreement's condition for existing market player and new ones, concern of foreclosure effect of the agreement made necessary to evaluate it with competition law aspects. In addition to previously mentioned reasons, EDFT and Wingas are potential competitors in the gas sale market, especially the liberalised industrial gas sale market. Customers in industrial market demand high volume and tend to work with a supplier for long term, thus having the customers from industrial gas sale market empowers the suppliers.

Wingas/EDFT case is concluded with an alteration of reduction clause in favour of EDFT, which was after the modification of the agreement free to sale gas to

[115] European Commission Press Release Database, 06.10.2003, Brussels, IP/03/1345 "*Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses*" available at http://europa.eu/rapid/press-release_IP-03-1345_en.htm?locale=en (online on 16.06.2019).

[116] European Commission Press Release Database, 17.02.2005, Brussels, IP/05/195 "*Competition: Commission secures improvements to gas supply contracts between OMV and Gazprom*" available at http://europa.eu/rapid/press-release_IP-05-195_en.htm?locale=en (online on 16.06.2019).

[117] European Commission Press Release Database, 10.06.2005, Brussels, IP/05/710 "*Competition: Commission secures changes to gas supply contracts between E.ON Ruhrgas and Gazprom*" available at http://europa.eu/rapid/press-release_IP-05-710_en.htm (online on 16.06.2019).

[118] European Commission Press Release Database, 12.09.2002, Brussels, IP/02/1293 "*Commission clears gas supply contracts between German gas wholesaler WINGAS and EDF-Trading*" available at http://europa.eu/rapid/press-release_IP-02-1293_en.htm (online on 16.06.2019).

wholesalers in core supply territory of Wingas without limitation of existing new players' differentiation.

Another example where the "*adjustment mechanism*" is evaluated as effective restriction as exclusivity clause was *DONG/DUC* case. Suppliers and wholesalers in the Danish market concluded a gas supply agreement which had adjustment mechanism clause gave DONG a right to reduce the volume purchased from its suppliers.

This case is an example of horizontal and vertical restrains in the EU gas market. In this case, the Commission examined the joint marketing in the scope of horizontal restrain as well as the restrictive provision of the gas supply agreements signed between DONG which is a Danish company and the gas producers with regard to vertical restrain.

In Denmark, DUC via its partners which are namely ChevronTexaco, AP Moller/Maersk and Shell produced gas for sale which consist of %90 of the production in the Danish continental.[119] This produced gas was sold to DONG under the terms and conditions of three gas supply agreements which were jointly negotiated by DUC partners, however separately signed by each DUC partners. These gas supply agreements have provisions as follows;

(1) DONG have priority when there is an additional gas volumes;

(2) Resale price of DONG is also formulated;

(3) Adjustment mechanism for gas volume which will work in the event of DUC partners would like to sell into Denmark.

The Commission examined that joint marketing and negotiation reduce the consumer's chance to choose between producers, suppliers etc. and thus are found against Article 101 of the TFEU. Furthermore it is stated that joint marketing conduct does not meet the exception conditions stated under Article 101/3 of the TFEU which mainly are improving the product/service conditions, innovation, serving for consumer welfare etc.

[119] Ibid, page 61.

However DUC partners alleged that joint marketing is within the scope of exemption under Specialisation Block Exemption[120]which under certain circumstances allows joint distribution of goods collectively produced.

This allegation of DUC partners was not accepted by referring the recital 8 of the Specialisation Block Exemption which says "*the undertaking concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply*" however it is stated that joint marketing of natural gas have neither efficiency effect, nor price reduce. Moreover considering natural gas market characteristic, joint marketing would not be the case for operating the gas more efficiently or causing the price decrease.[121]

DUC partners' commitments are (i) to individually renegotiate the prices set under the current agreements when the renewal of price term come; (ii) not to continue joint marketing for rest of the uncontracted gas in Denmark; (iii) selling the 7 billion cubic meters of gas to third parties excluding DONG.

After obtaining above mentioned commitments, the Commission closed the investigation only for the part of joint marketing. For horizontal restriction part, the Commission found that adjustment mechanism clause in the supply agreement concluded between DONG and DUC partners is like "*reduction clause*" examined as restriction in previous case law.[122]

It is claimed that reduction clause is necessary for counterbalance to requisite of buyer (in this case DONG) to take or pay which means even buyer does not take the natural gas it has to pay for defined quantity of it. The Commission considered this clause similar to exclusivity clause which restricts supplier (DUC Partners in this case) to penetrate the downstream market. This issue was concluded by waving the adjustment

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[120] Commission Regulation (EC) No 2658/2000, dated 29.11.2000 on the application of Article 81/3 of the Treaty to categories of specialisation agreements.

[121] Schnichels, Dominik. & Valli, Fabien. "*Vertical and horizontal restraints in the European gas sector-lesson learnt from the DONG/DUC case*", Competition Policy Newsletter, Number 2 – Summer 2003, page 62, available at http://ec.europa.eu/competition/publications/cpn/2003_2_60.pdf (online on 09.06.2019).

[122] European Commission Press Release Database, 12.09.2002, Brussels, IP/02/1293 "*Commission clears gas supply contracts between German gas wholesaler WINGAS and EDF-Trading*" available at http://europa.eu/rapid/press-release_IP-02-1293_en.htm (online on 16.06.2019).

right on the agreement. The Commission practise regarding the reduction clause in *Wingas-EDF Trading*[123] enlightens and leads to find this solution in this case.[124]

Another restrictive clause in the supply agreement was about the condition of volume reporting in order to take advantage of particular price formula. DONG have to report the gas volumes purchased by the certain customer groups to DUC partners for benefiting special price for these groups. This conditional clause was found as hard core restrictive[125] since DONG does not have flexibility to choose its customers without concern of losing the price formula benefit.

This use restriction issue was solved by amending the supply agreement which DONG will be able to sell the gas to whomever and wherever it wants without reporting to the DUC partners.[126]

As a result of this case, it is reemphasised that there is no more tolerance to joint marketing in gas sector especially in the liberalised energy market. This case also shows the importance of evaluating competition case in order to support liberalisation procedure in energy market.[127]

Exclusive distribution agreement is also evaluated as other non-compete agreements with in the aspect of the efficiency defence under Article 101/3 of the TFEU. Security of supply, cost efficiencies and easing the new market entry would be some of the efficiency defence for exclusive distribution agreements. For instance, exclusivity of reselling would be beneficial to improve transportation and distribution system in the

[123] Ibid.

[124] Schnichels, Dominik. & Valli, Fabien."*Vertical and horizontal restraints in the European gas sector-lesson learnt from the DONG/DUC case*", Competition Policy Newsletter, Number 2- Summer 2003, page 62, available at http://ec.europa.eu/competition/publications/cpn/2003_2_60.pdf (online on 09.06.2019).

[125] This use restriction is linked with territory and/or customer partitioning which are banned in accordance with Article 81 of EC (Article 101 of TFEU).

[126] This solution was similar as in the case related to NLNG which is a Nigerian gas company. NLNG had concluded gas supply agreement with European customers and this agreements includes territorial restriction clause that prevent customers to resell the gas outside the member states. This case was also closed after obtaining the commitments of NLNG which are, deleting the territory restriction clause in the existing supply agreement and not to put neither territory nor use restriction clause in the future agreement. Commission Press Release Database, IP/02/1869, dated 12.12.2002, Nigeria LNG.

[127] Schnichels, Dominik. & Valli, Fabien. "*Vertical and horizontal restraints in the European gas sector-lesson learnt from the DONG/DUC case*", Competition Policy Newsletter, Number 2 – Summer 2003, available at http://ec.europa.eu/competition/publications/cpn/2003_2_60.pdf (online on 13.04.2019).

market as well as cost efficiency accordingly. Moreover, especially territorial exclusive distribution right is likely to ease the new market entry. Also, distributors having exclusivity rights tend to invest in equipment, advertisement, personal in order to boost their sale.[128] When distributed good is complex and needed to be explained in order to take the attention of the purchasers, investment in personal who sale and make the goods attractive for purchasers become especially important. In the energy sector, investment in equipment where the gas or petrol stored is most common. These efficiency defences have to be verifiable and/or estimated.

b. Capacity Reservation Agreements

Especially in the energy market, not only the selling, producing or having the resource of the energy is important but also having access for the product transmission is essential. In other words serving way of the product is as crucial as having the product. Therefore capacity reservation is a main tool to use the transmission systems. For instance, in the event that gas producer does not have access to pipelines in which it would like to sale and/or interconnectors of upstream pipelines, then producing the gas would not be profitable even not logical. This is the same in electricity market is where having an access to interconnectors linking network is essential to electricity transmission.

By concluding capacity reservation agreements, parties reserve the capacity and exclude others to use it. This agreement would not be caught by Article 101 of the TFEU and/or evaluated with the competition concerns as long as there is sufficient capacity in the market for all players, otherwise it could be considered as market foreclosure. This foreclosure effect is assessed by checking the market power of the undertakings whether they, through the agreement, increased their market powers in downstream and upstream market. In this assessment, clauses in the agreement regarding exclusive right and long term duration are also taken into consideration. Additionally, when the capacity reservation agreement is concluded between the vertically integrated companies, it will

[128] Cabau, Emmanuel & Hancher, Leigh & Kjolbye, Lars.& Landes,Valerie.& Salerno, Francesco. & van der Woude, Marc. "*EU Energy Law Volume II EU Competition Law and Energy Markets*" published in 2011 by CLAEYS&CASTEELS, page 289, para 3.321.

not be considered as anticompetitive under Article 101 of the TFEU since vertically integrated companies are not interpreted as two different undertakings.[129]

Recently, commitments by the dominant gas undertakings regarding the release of serious percentage of entry capacity are accepted by the Commission such as in *Corus Nederland/Pechiney Nederland.*[130]

D. EXCEPTIONS OF ARTICLE 101 OF TFEU

1. Exception – De Minimis Presumption

De minimis presumption becomes evident after the market analysis carried out and the market shares of the undertaking are known. As a rule, if the cooperation between undertakings composing less than %10 of the market shares, it is accepted as non-hard core restriction on the competition.

2. Exception – Small Competitor Presumption

Besides de minimis presumption, "small competitor rule" is also applicable when there is a cooperation between a big competitor and a small competitor. Market share threshold in de minimis presumption is less than %10, whereas in small competitor presumption market share percentage would not be as important as the de minimis presumption since one of the competitor has very low effect on the market and/or does not have significant resources.

3. Exception – Block Exemption

Block exemption which is also referred as "*safe harbour*"[131] in many literature is an opportunity for those who concluded an agreement which would be investigated under the scope of Article 101/1 of the TFEU. The opportunity comes from block exemption is that if the agreement is one of the types of certain agreements categorised in the block exemption list then the agreement would considered as compatible with EU

[129] Ibid, page 292, para 3.326.
[130] Commission Competition Report 2003, page 202.
[131] Ibid, page 195, para 3.108.

Competition Law without asking whether the Article 101/3 conditions are met. In other words, as long as the agreement falls into one type of agreements categorised under block exemption list, there is no need to prove that agreement meet the conditions specified under Article 101/3. Therefore Block Exemption gives a chance to undertakings and lightens the burden of proof that the agreement has economic benefits and is concluded in favour of customer welfare etc. Another advantage of the block exemption that it is legally valid since the Commission or Competition Authority of the Member States does not withdraw the exemption.

Exceeding the market share threshold does not mean that the agreement is out of scope of the block exemption and need to be evaluated under Article 101 of the TFEU. This indicates that the agreement has to be evaluated individually and specifically. [132]

Joint distribution agreement in the energy market could have less efficiency defence than other markets, since energy requests huge investment in order to enter the market and via joint distribution electricity or gas undertakings which sell homogenous product would allege that this joint distribution allows them to decrease the cost, reach extended areas where all customers can be served and benefit from it, improved or new products are introduced, etc.

Therefore it is not easy for energy companies to prove the economic benefit of the joint distribution. As an example of exception, an electricity company which does not sell green electricity as its own product and so does not operate under this segment, could sell its competitors' green electricity product jointly.[133] In this case joint distribution serves the purpose of environment protection as well as reaching the broader scale of customer.

Especially in the energy market, efficiency for joint distribution is more acceptable when the competitors jointly selling the goods in favour of household consumers rather than the industrial ones. Due to this fact, although earnings from the

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[132] Commission Guidelines on the Application of Article 101/3 para 24.

[133] Cabau, Emmanuel & Hancher, Leigh & Kjolbye, Lars.& Landes,Valerie.& Salerno, Francesco. & van der Woude, Marc. "*EU Energy Law Volume II EU Competition Law and Energy Markets*" published in 2011 by CLAEYS&CASTEELS, page 197, para 3.113.

household consumers do not match the real cost of distribution, competitors prefer this type of consumers to be served and thus meet the consumer welfare condition.

E. APPLICATION OF ARTICLE 101 OF TFEU IN TERMS OF DURATION

Evaluation of the criteria stated under Article 101 depends on the time when the claims of anti-competitiveness arise. The different application of Article 101 of the TFEU was experienced especially when it is compared before and after of the liberalisation of the energy market.

In *E.ON/GDF*[134] case; E.ON and GDF were the investors of the pipeline infrastructure which they planned to operate collectively and it is investigated that they concluded an agreement in order to restrict the sale area of the products transported via this invested pipelines. For instance, GDF restricted E.ON to sell gas transported via this jointly operated pipelines in France and E.ON did the same by restricting GDF not to sell transported gas via the pipelines in Germany. This restrictive agreement was concluded before the liberalisation thus it was legal at the time when it was signed. However after the liberalisation in the energy market, the application of the competition rules in the EU have been more forceful and the competition authorities and the Commission are more sceptical for the restrictive conduct of the undertakings. In this case, the Commission imposed high fines to the undertakings. This E.ON/GDF case is also one of the good examples of the application of the competition rules in terms of the duration. The agreement between the E.ON and GDDF was neither considered within the scope of the Article 101 of the TFEU, nor evaluated with the competition concern beforehand of the liberalisation thus the undertakings thought that they had concluded the agreement on the legal basis. However after the liberalisation, the Commission found this agreement restrictive of the competition and imposed the huge amount of fines.

Application of Article 101 of the TFEU in terms of duration was also the case regarding the analysis of capacity reservation agreements concluded before the adoption of Gas and Electricity Liberalisation Directives in 1996 and 1998. In these cases, the Commission's perspective was in favour of the contracting parties on the grounds of legal

[134] Case COMO/39.401 – GDF/E.ON, Commission Decision dated 08.07.2009.

certainty principle and protection of legitimate expectation of the parties which derive from the current law at the time when they conclude the agreement, thus had accepted these agreements as valid.[135] However the perspective of the CJEU was likely to differentiate from the Commission's one in the preliminary ruling decision in the case of Vereniging voor Energie, Milieu en Water/Amsterdam Power Exchange[136] in which the parties of the long term electricity import agreement have granted privileged access to transmission system by Nederland national electricity transmission system operator. Although the preliminary ruling rejected the Commission reasoning and evaluated this agreement with competition concerns referring to Article 101 of the TFEU, decision at the end was not compatible with it and so legal certainty and legitimate expectation principle were confirmed.

[135] Commission Competition Report 2003, page 202.

[136] Case C-17/03 *Vereniging voor Energie, Milieu en Water and Others* v *Directeur van de Dienst uitvoering en toezicht energie*, EU:C:2005:362.

V. ARTICLE 102 OF TFEU

As a general rule, having a dominant position is not forbidden, whereas abuse of dominant position is prohibited under Article 102 of the TFEU[137]. Holding the dominant position solely as one undertaking or collectively as several undertakings is not important if this dominance is abusive.[138] Additionally size of the undertaking is irrelevant, thus small undertaking can also hold dominant position and has the market power. Therefore market definition is crucial to understand whether the undertaking has dominance or not. Moreover, having a dominant position in the market and abuse it are not sufficient, it is also requested under Article 102 of the TFEU that, abuse of dominant position has to affect the trade between member states.

In order to evaluate whether the undertaking has dominant position, a *two stage test* has to be applied.[139] Firstly market analysis has to be made via controlling the product market, geographic market and temporal markets. Secondly the dominant position of the undertaking has to be evaluated via checking the market share[140], market power of the undertaking and market entry barriers such as legal and politics barriers, technical barriers, economic disadvantages' of the new entrants.

Different than Article 101 of the TFEU, exceptions of the rule are not mentioned under Article 102 of the TFEU. However in practice, it is accepted that if there are

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[137] Article 102 of TFEU (ex Article 82 TEC) is as follows;

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

[138] Lorenz, Moritz. "*An Introduction to EU Competition Law*", Cambridge University Press, 2013, page 190.

[139]Ibid. page 194.

[140] It is accepted in the EU case law that market share above %50 percentage indicates the dominance.

objective reasons to justify the conduct of the dominant undertakings, it is not found as abusive.[141]

Abuse types are categorised as exclusionary abuses which restrict competitors, as exploitative abuses, which get benefit from increased market power. These two types are sub-categorised especially in the energy market as follows: [142] Market partitioning, strategic underinvestment, capacity hoarding, margin squeeze (refusal to grant access), exclusive dealing are considered as exclusionary abuse; while discrimination, market manipulation and excessive pricing are considered as exploitative abuse.

Abusive conducts of dominant position under Article 102 of the TFEU are price fixing, market control, refusal to supply, market sharing, supply sharing, application of dissimilar condition to equivalent transaction, etc. which will be examined in a detailed way by referring related cases in the natural gas market.

A. ESSENTIAL FACILITY DOCTRINE

Essential facility doctrine originally rises from the decisions of the US Supreme Court143 which influenced the EU law. In the EU law, essential facility doctrine expressly referred in the cases especially related to refusal to grant access to infrastructures of the port[144], airport[145], railway[146], trademark[147], telecommunications[148] and gas pipelines[149]

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[141] Lorenz, Moritz. "*An Introduction to EU Competition Law*", Cambridge University Press, 2013, page 221.

[142] Brown, Mayer. "*Abuse of Dominance in Energy Markets*" 4th Eu Energy Law & Policy Master Class Claeys & Casteels, 13 June 2012, page 8.

[143] *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912) and Associated Press v. United States, 326 U.S. 1 (1945).

[144] Commission Decision dated 21.12.1993, IV/34.689-*Sea Containers v. Stena Sealink- Interim* measures. This is the first case the EU Commission applied essential facility doctrine

[145] *London European/Sabena*, Decision 88/589/EEC.

[146] *Night Services*, Decision of the 21September 1994, 94/663/EC.

[147] *Magill TV Guide/ITP, BBC & RTE*, Decision of 21 December 1989.

[148] Case C-79/00 *Telefonica de Espana* [2001] ECR I-10057

[149] Case COMP/39.315-*ENI*, Commission Decision of relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement,

Classical example given for explanation of this doctrine that; access to a port is indispensable in order to be able to provide maritime transport services in a given geographical market. If the owner of the port uses the infrastructure on an exclusive basis in order to secure a monopoly over the market for maritime transport services and refuses to grant access to the port without any objective justification are evaluated under the essential facility doctrine and found abusive and prevention of the competition in the market.[150] Addition to this example, particularly in the cases where the intellectual property right of the dominant undertaking clashes to the competition law, it is found that refusal to grant access to the essential facility on the grounds of having intellectual property rights prevents the innovation, thus against the customer's welfare.[151]

The main purpose of the essential facility doctrine is to prevent dominant undertakings that is also the owner of the infrastructure to use privilege on accession to infrastructure which is essential to enter the market or maintain the business in the market. In the EU case law, it is stated that owner of the infrastructure is under the obligation to treat its competitors without any discriminative manner and/or exclusionary action.[152]

Indispensability criteria is crucial for the assessment of the essential facility. In the natural gas market, having access to natural gas pipelines is indispensable, otherwise undertakings cannot enter the market. Within this regard, essential facility doctrine will be examined in a detailed way via referring the related cases in the EU natural gas market as follows;

1. *ENI* Case

This case is an example of an abuse of dominant position in the natural gas market via restricting the usage and access to essential facility, which was gas pipelines. In this concrete case, conduct of ENI Spa ("ENI"), which has dominant position not only on the gas transport market, but also on the gas supply market (shall collectively referred as "market" in this case) in Italy, was questioned under Article 102 of the TFEU whether

[150] *Port of Rødby*, Decision dated 21.12.1993
[151] Case C-418/01 *IMS Health GmbH & Co.KG vs. NDC Health GmbH & Co.KG*
[152] *B&I/Sealink*, Interim Decision dated 11.06.1992

ENI's purpose is limiting the access or restricting the new entrance when it operates and manages its natural gas pipelines.[153]

It is alleged that ENI may have restricted the competition on the market by refusing to supply gas to third parties which means there is a foreclosure in the market by way of doing (a) capacity hoarding[154], (b) capacity degradation[155] and (c) strategic investment[156].

Being a state controlled Italian company, actively operating in transportation, supply and production chain in the energy market, especially in natural gas market, ENI has enjoyed and got benefit from being an integrated company at different level of the chain. At the production level, ENI not only imports gas from other countries such as Russia, Netherlands, Norway and Algeria via long term agreements, but also produces its own natural gas in Italy and Libya.[157]

At the transportation level, which is ENI's strongest point due to the fact that it has had wide network especially in borders, ENI has cooperated with international companies and thus actively operated on the natural gas transmission system. ENI has actively operated on three international natural gas pipelines which are 1) ENI with OMV, which is an Austrian undertaking have jointly owned and controlled Trans Austria Gasleitung ("**TAG**") GmbH, which operates at Austrian and Slovak border; 2) ENI with E.ON Ruhrgas, which is a German undertaking, have collectively owned and controlled Trans Europa Naturgas Pipeline GmbH & Co. KG ("**TENP**") that operates at German, Belgian and Dutch border as well as at German and Swiss border; 3) ENI with Swissgas AG have together owned and controlled "Transitgas" pipelines, which assists to gas flow

[153] Ibid, page 3, para 2.

[154] Capacity hoarding means, although there is an available capacity on the transport network, undertaking which has dominant position in the market refuses to grant rivals to access the system. Case at hand, capacity allocation, management of ENI and its long term agreements related to capacity usage which give ENI some privileges were analysed.

[155] Capacity degradation happens when access to the capacity is granted in an impractical manner for third parties.

[156] Strategic investment is considered as an abusive action when the undertaking on the dominant position strategically invests or limits its investment on purpose in favour of its dominant position.

[157] Case COMP/39.315-ENI, Commission Decision of relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement, page 4, para 4.

from TENP to Italy over Switzerland.[158] Apart from these three pipelines, ENI indirectly owned and controlled Panigaglia LNG Terminal.[159]

As obviously seen above, thanks to three undertakings ENI jointly own the fact of and controlled, ENI has had a voice in natural gas transmission and transport network which also causes a doubt that ENI may have abused its dominant position.

ENI has capacity rights on TENP in the percentage of %67, on TAG and as well as on Transitgas in the percentage of %85-95.[160] These percentages constitute significant amount of available capacity. Moreover, considering the shareholding agreement and company structure of these pipelines, it would be said that ENI has known substantial information and influenced the decision making regarding these pipelines, its management, its capacity allocation, investment in them, etc.[161]

Within this respect, the Commission investigation proceeding against ENI was initiated on 20 April 2007.

When the Commission evaluated the issue at hand, it divided the relevant product market as sale of gas market which was subdivided to sales to wholesaler and sales to final customers which could be household, industrial, commercial consumers, etc. Gas transport market was also subdivided into high pressure transmission and low pressure transmission network.[162] Distinguishing the sale and transportation of natural gas as different markets was Commission's ongoing practices as previously happened in *Total/Gaz de France*[163] and *E.ON/MOL*[164] cases.

The Commission also states that various routes which assist to bring the gas into Italy are considered as geographic relevant market.[165]

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[158] Case COMP/39.315-ENI, Commission Decision of relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement, page 4, para 5.
[159] Ibid, page 6, para 17, footnote 16.
[160] Ibid, page 7, para 19, 20 and 21.
[161] Ibid, page 7, para 22.
[162] Ibid, page 8, para 23, 24, 25.
[163] COMP/M.3410, Total/Gaz de France, para 15 and 16.
[164] COMP/M.3696, E.ON/MOL, para 97.
[165] Case COMP/39.315-ENI, Commission Decision of relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement, page 8, para 26.

When the Commission evaluated the dominant position of ENI, it had not only taken into account that ENI actively operates and manages the capacity on the natural gas pipelines and LNG terminal since 2000, but also it considered that there will not be a new natural gas pipeline project in the near future which challenges ENI's dominant position.[166] Besides, it is emphasised that ENI also has dominant position on the downstream gas supply market via having long term import and supply agreements. Moreover, ENI can relatively easily import natural gas into Italy as well as it produces natural gas in there, whereas its competitors cannot have the same opportunities and access to infrastructures which depend on the ENI's discretion on the network and capacity availability. This is assessed as bottlenecks for market entrance and increase the competition in the market. Since the share of domestic production and import are higher than %70[167], it is evaluated as market foreclosure.

The Commission stated that natural gas pipelines are essential facility and for market entrance as well as effective competition in the market depend on having the access to these infrastructures. It is also referred to *Bronner case*[168] where the essential facility doctrine was born.[169] According to essential facility doctrine;

(1) Indispensability of product or services has to be checked. Pursuant to Bronner conditions, the access must be indispensable or essential for carrying out the applicants business. In the ENI case, it is evaluated that having access to gas pipelines is indispensable for competitors and for new market entrance in order to conduct the business in Italian natural gas supply market. Moreover it is found that technically, economically and legally it is not easy and/or possible for competitors to own, built, find another solution to maintain the business in the market without having access to the gas pipelines.[170]

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[166] Ibid, page 9, para 32.
[167] AEEG, Annual Report, July 2008, page 120.
[168] Case C-7/97 *Oscar Bronner GmbH Co. KG* v. *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, EU:C:1998:569.
[169] Essential facility doctrine: When the owner of the facility which is essential to enter into market or produce or renovate the products does not allow anyone to use the essential facility or provides the facility to its rivals on the very difficult, uncompetitive conditions and thus prevent the competition in the market. However applying essential facility doctrine with Bronner case outcomes is not easy for natural gas market.
[170] Case COMP/39.315-ENI, Commission Decision of relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement, page 12, para 42.

(2) Purpose and result of refusal to supply has to be evaluated whether there is elimination and/or limitation, restriction on competition in the market which cause a harm on consumer.

(3) Is there any objective justification for refusal? If the undertaking in dominant position refuses to grant third party access to the essential facility without demonstrating any objective justification, then it is accepted as restriction on competition.

With regard to second and third conditions mentioned above, the Commission found that ENI has understated its technically available capacity[171] and refused to propose unused and/or available capacity to third parties despite the serious demand from them either on the short term or long term basis. [172] Regarding the EU case law[173], it is assessed that it is not enough to claim that essential facility can only meet the requirements of the undertaking which owns or controls it, it also objectively justified that undertaking holding the essential facility has not taken all possible measures to prevent competition restriction in the market.[174]

The Commission also mentioned that ENI only considers to invest in existing pipelines under its control or other pipeline projects as long as it serves its needs and strengthens its position. Therefore its investment plans are also considered under the strategic limitation of investment aspect.[175]

Considering the Article 102 of the TFEU requirements, conduct of ENI was also examined in the context of whether it affects the trade between Member States or not. Since ENI has influence on controlling the international natural gas pipelines and import

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[171] Ibid, page 13, para 48.
[172] Case COMP/39.315-ENI, Commission Decision of relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement, page 12, para 46.
[173] *Frankfurt Airport* case (OJ L 55, decision dated 26.02.1994), *Port of Rodby* case (OJ L 15/18, decision dated 21.12.1993), etc.
[174] Case COMP/39.315-ENI, Commission Decision of relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement, page 14, para 56 and footnote 43.
[175] Ibid, page 14, para 55 and 57.

to natural gas into Italy from other Member States, its dominant position which restricts the competition in the market has effect on the trade between Member States.[176]

As a result of this investigation ENI proposed commitments which mainly consist of divesting its shareholdings in the undertakings which controls the natural gas pipelines (TAG, TENP and Transitgas) to independent third party which will be approved by the Commission.[177] Another condition was, during the divestiture period which will be conducted by independent trustee, binding sale and purchase agreements will not be signed.[178]

Commitments of ENI regarding the divesting its shareholdings are as follows:

(1) "Divestment Business Germany"[179] regarding the TENP pipeline system; ENI committed to divest its whole shareholding in its subsidies namely Eni Gas Transport GmbH which has %49 of controlling power in the undertaking controls TENP pipeline system.

(2) "Divestment Business Switzerland"[180] regarding the Transitgas pipeline system; it is committed to divest %46 of its shares in Transitgas AG which operates the Transitgas pipeline system.

(3) "Divestment Business Austria"[181] related to TAG pipeline system; ENI committed to divest %89 of its shares in the undertaking which holds %100 of the capacity rights on TAG pipeline system.

These above mentioned divestment business is not only selling the shares in the related undertakings, but also ensuring to divest contracts, licences, intangible assets and component equipment which are essential to operate the transmission network system.

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[176] Ibid, page 15, para 62.
[177] Ibid, page 16, para 64.
[178] Ibid, para 65.
[179] Ibid, para 67.
[180] Ibid, page 17, para 68.
[181] Ibid, para 69.

Moreover it is also stated that personnel who are necessary for the operation will be divested via the business divestment.[182]

Besides this commitment, ENI has also committed not to conclude new transport contract and not to renew its existing contracts in favour of itself on the related pipeline systems until the end of divestiture period.[183]

After obtaining the commitments of ENI, the Commission started the procedure of notification to interested third parties about the commitments pursuant to Article 27/4 of the EC Regulation No. 1/2003. In general, interested third parties have welcomed the commitments of ENI which are based on structural remedies. Although responses from the interested third parties for the commitments are important, proportionality and necessity of the commitments are still under the discretion of the Commission.[184]

Within this regard, the Commission found that commitments of ENI are sufficient and proportional. Due to the fact that the anticompetitive conduct at hand was related to the dominant position of ENI on the natural gas transportation network, divesting the shareholding in the undertakings which operate and control the pipelines systems will weaken ENI's position and ENI will not be effectively control over the pipelines and it will not be on the position to refuse to grant access, limit the investment, etc.[185]

Additionally, the Commission put criteria for the purchaser of these divestment business which are as follows:[186]

(1) Purchaser has to be independent and not be connected to ENI,

(2) Eliminate the competition concerns, at least not to create a doubt about anti-competitiveness,

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[182] Ibid, para 70.
[183] Ibid, page 25, para 113.
[184] Case C-441/07 P *Commission v. Alrosa Company Ltd.*, EU:C:2010:377.
[185] Case COMP/39.315-ENI, Commission Decision of relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement, page 21, para 89.
[186] Ibid, page 23, para 99.

(3) Purchaser has to be competent, have financial recourses and intention to develop the business.

Afterwards of checking whether the purchaser fulfils the requirements mentioned above, the Commission found that the commitments of ENI are sufficient, proportionate and dismiss the competition concerns as well as the purchaser meets the criteria, thus the Commission adopted the decision which makes the commitments binding and stated that the procedure is brought to an end. This Commission Decision given according to Article 9/1 of Regulation (EC) No.1/2003 does not include the assessment about whether the infringement has stopped or still continued.[187]

2. *Marathon* Case

This is another case in which refusal to access to gas pipelines is the main competition concern that is evaluated by referring the essential facility doctrine.

In order to have a liberalised internal natural gas market, access to gas pipelines is prerequisite.[188] In the event that new entrant does not have access to existing pipelines, the aim of giving a chance and possibility to the customers to switch their suppliers would not be realized. Since refusal to grant an access to pipelines is a bottleneck, the Commission gives special importance to application of the Third Party Access regime.[189] Third party access to pipelines should have been supported on the basis of essential facility doctrine and the non-discrimination principle which arises from the hypothesis that once the undertaking in a dominant position granted access to its pipelines, it has to purpose the same accessibility to the other market players too.[190]

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[187] Ibid, page 26, para 115.

[188] Salas,Mariano Fernandez.& Klotz. Robert.& Moonen, Sophie. Directorate-General Competition, unit B-1, and Dominik Schnıchels, Directorate-General Competition, unit A-4, "*Access to gas pipelines: lessons learnt from the Marathon case*", Competition Policy Newsletter, Number 2, Summer 2004 available at http://ec.europa.eu/competition/publications/cpn/2004_2_41.pdf (online on 03.06.2019).

[189] Third Party Access regime so-called TPA was introduced by The European Gas Directive of 1998, which mainly supports allowing third parties to access the existing gas pipelines.

[190] Salas,Mariano Fernandez.& Klotz,Robert. & Moonen, Sophie. Directorate-General Competition, unit B-1, and Dominik Schnıchels, Directorate-General Competition, unit A-4, "Access to gas pipelines: lessons learnt from the Marathon case", Competition Policy Newsletter, Number 2, Summer 2004 available at http://ec.europa.eu/competition/publications/cpn/2004_2_41.pdf (online on 03.06.2019), page 41 ,footnote 4.

Marathon, which is a Norwegian gas producer and a subsidiary of US oil demanded to access to gas pipelines of five EU gas companies, which are Ruhrgas, BEB, Thyssengas from Germany and Gasunie from Holland and Gaz de France from France. However these undertakings refused to grant Marathon access to their pipelines on the ground that they prefer purchasing gas from Marathon. Since Marathon received negative response to its request, it accepted to sell the gas to these companies according to their gas supply agreements. After a few years, Marathon terminated these gas supply agreements and also requested to have access to their gas pipelines. This repeated demand was also refused by claiming that termination is not valid. Thus Marathon proceeded to provide gas to these EU gas companies but lodged a complaint to the Commission. Marathon alleged that there is an infringement of Article 102 of the TFEU based upon these EU gas companies have abused their dominant positions by refusing to grant access to their pipelines without any objective justifiable reasons. Addition to that they have collectively acted and refused, so there is a collusion leads to a cartel which is strictly prohibited under Article 101 of the TFEU.

Apart from the complaint to the Commission, two of the EU gas companies and Marathon have involved in arbitration proceeding where Marathon claimed damages. This arbitration proceeding was concluded with a settlement, thus Marathon withdrew its complaint.

Another feature of this case that, even Marathon which was the complainant to the Commission settled with the European energy companies and informed it to the Commission, the Commission proceeded to investigate the issue at hand on behalf of the EU interest. This also shows that liberalisation in the EU energy market is the dedicated aim of the Commission and it would like to effectively render this aim in the EU. This case is also referred as an excellent example of positive effect of concluding the issue regarding the competition law via a settlement on EU liberalisation.[191]

The purposes of the Commission by proceeding the investigation would have been preventing the abusive conduct regardless of the questioned undertakings' wishes

[191] Ibid, page 41, section 2 ("The Marathon case), para 4.

and settlement which could also lead to collusion. Furthermore, for the sake of creating a liberalised internal energy market, criteria for third party access to gas pipelines has to be established to ensure that all EU energy companies have fulfilled and considered these when they conduct businesses.

Within this regard, related EU gas companies have given their commitments to the Commission, which has closely worked with the national competition and energy regulation authorities, in order to ensure the variety of the market player for the benefit of the customers and open the market to the competition.[192] Since the companies are from different EU member states, the application and the result of the commitments are divergent in their national market. Furthermore, by obtaining the commitments, in this case it is urged to effectively apply the third party access regime in the natural gas market.[193] Marathon case is concluded company by company in question after they gave their commitments at different times. Looking at the commitments of the companies as glance;

Thyssengas, which is a joint venture company owned by both Shell, is a British-Dutch company and RWE, a Germany company committed[194] to improve accessibility of its pipeline network system. In order to eliminate the imbalancing cost and differences between real and nominated delivery on the system, Thyssengas offered free online balancing services and compensation chance such as extra gas delivery. New principle "use it or lose it" was introduced and according to this principle no one can hold the capacity for its own wishes, they have to use it. By committing this principle, it aims at preventing arbitrary and so abusive conduct and refusal to grant access and supply without any objective reason. Thyssengas also undertook to publish its available capacity and tariffs on its web page in a transparent manner as well as making easier for shippers to reach the information. It is also committed to draft checklist which shows the objective

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[192] European Commission Press Release Database, "*Commission settles Marathon case with Gaz de France and Ruhrgas*", IP/04/573, Brussels, 30 April 2004, available at http://europa.eu/rapid/press-release_IP-04-573_en.htm?locale=en (online on 03.06.2019).

[193] Speech of Mr. Mario Monti who was the Commissioner in charge of competition will be found as reference in the Commission Press Release referred at above footnote.

[194] European Commission Press Release Database, "*Commission settles Marathon case with Thyssengas*", IP/01/1641, Brussels, 23 November 2001, available at http://europa.eu/rapid/press-release_IP-01-1641_en.htm (online on 03.06.2019).

refusal reasons applied to all access request as well as the standard contracts. One of the Thyssengas commitments allows capacity holders to trade its capacity rights which has effect on the secondary market (transportation).

Gasunie, Dutch gas company, have committed in the same way of Thyssengas and undertook to improve its third party access regime to its pipelines.[195]

BEB which is a joint venture German gas company owned by ExxonMobil and Shell, was also one of the undertakings that refused to grant Marathon access to its gas pipelines at the northern part of Germany. During the Commission investigation BEB submitted its commitments[196] which are mostly similar as the ones of Thyssengas such as introducing new capacity management system, use it or lose it principle, transparency on the available capacity and tariff via putting related information on its webpage, online balancing services, etc.

Commitments of GDF Suez were decreasing the number of controlled exit/entry points (balancing zones) on the transport system which was 7 at the time and promised to be decreased to 4 zones in a year and to 2 zones in 5 years which will happen via implementation of an investment plan in order to reduce the congestion on the pipeline network and ensure new market players not to make expense for all the balancing zones and burden the cost of only 2 zones. Addition to this commitment, Gaz de France offered conversion of high calorific value gas (H gas) into low calorific value gas (L gas) to operators on the non-discriminatory and transparent basis which will support L gas users in French gas market and increased the accessibility. Gaz de France also had committed to boost to competition in southern France, where there is nearly no competition, via gas release programme.[197]

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[195] European Commission Press Release Database,"*Application of competition rules to the gas sector*", Brussels, 29 July 2003, Marathon/Gasunie (IP/03/547 of 16 April 2003) available at http://europa.eu/rapid/press-release_MEMO-03-159_en.htm?locale=en (online on 03.06.2019).

[196] European Commission Press Release Database, "*Commission Settles Marathon Case with German Gas Company BEB*", IP/03/1129, Brussels, 29 July 2003, available at http://europa.eu/rapid/press-release_IP-03-1129_en.htm (online on 03.06.2019).

[197] For more details about the application of the programme please check https://www.cre.fr/en (online on 03.06.2019).

As GDF Suez commitment, Ruhrgas also undertook to reduce the balancing/tariff zones. Furthermore, before the commitments, there was a strict regime about booking the gas which had to be booked together with the entry and exit point as well as through out between these points. However Ruhrgas committed to abolish this system and allows customers to separately book the transport capacity without forcing them to book the capacity between entry and exit points. Ruhrgas offered free online balancing services to its transport customers who withdraw and inject the gas on Ruhrgas network.

Like Thyssengas, Ruhrgas committed to introduce "use it or lose it" principle and applied it on its gas supply agreements. By applying this principle, no capacity holders including Ruhrgas and its subsidies will hold the unused capacity and prevent the others to use it.

By obtaining the commitments by Gaz de France from France and Ruhrgas from Germany, the Commission concluded the investigation. As a consequence, it would be stated that common things in the commitments related to the cases referred to essential facility doctrine are ; transparency on the tariffs and capacity booking system, elimination the imbalancing risk via introducing online balancing services, alteration of transportation system by introducing enter/exit point system which does not take into account the cost of the transmission between entry and exit point, all conducts such as congestion management, allocation of the capacity have to be in a non-discriminatory manner. It would also be said from the Commission's point of view that in general, long term capacity booking and/or supply, transport contract and as well as the unreasonable refusal are not acceptable.

B. REFUSAL TO SUPPLY

As a rule of law every party has a freedom to choose its counter party to conclude an agreement. Its exception regarding the competition law especially Art.102 of the TFEU is that if there is a dominant incumbent in the market it cannot refuse to conclude contract in order to protect its dominant position or impose discriminatory conditions to prevent its competitors to be active in the market.

In the energy market refusal to supply is more connected with refusal to invest.[198] For instance, if there is a vertically integrated company, which works at supply, distribution and transportation lines, is not willing to invest new transportation system, its competitors will also get benefit from it and empower their competitiveness.

In the energy market, vertical merger of EDP/ENI/GDP was evaluated under the risk of potential refusal to supply case, since these companies are dominant in the Portuguese gas and electricity supply market and after the merger they would refuse to supply its competitors or impose unequal terms on them.

Having access to infrastructure such as pipelines is highly important and also essential to compete in the energy market. Therefore if there is a refusal to access these infrastructure or when the company refuses to give customers data who would like to switch its operator there is an abusive of dominant position.

1. *RWE AG* Case

In the German gas transmission market, RWE was dominant thus the Commission had competition concerns regarding the possibility of market foreclosure by preventing competitors to have access of RWE's network which is considered as *essential facility.*

Speciality of gas transmission network is, due to its high pressure characteristic, enables to distribute gas to long distance wholesalers and then via local distribution networks gas is transported to end customers. Therefore having an access to the main transmission network may be seen as the first step in order to reach end-customers.

The Commission investigated whether RWE has kept the transportation capacity on the critical part of its grid for itself. It is understood that RWE has reserved roughly all its transportation capacity for itself for a long term. Long term capacity booking of RWE, restricted its current and also potential competitors in the downstream gas

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[198] Cabau,Emmanuel & Hancher, Leigh & Kjolbye, Lars.& Landes,Valerie.& Salerno, Francesco. & van der Woude, Marc. "*EU Energy Law Volume II EU Competition Law and Energy Markets*" published in 2011 by CLAEYS&CASTEELS, Page 341 para 3.463.

distribution market which have been rejected to have access to the transmission network. It is alleged that RWE has understated its transportation capacity by showing it to third parties as insufficient and used the capacity for its own needs which lead to exclusion of its competitors.

In addition to refusal to supply allegation in the RWE case, margin squeeze was also evaluated. Margin squeeze is the case when the vertically integrated undertaking which has dominant position in the upstream market charges the price for a service or a product in the downstream market and this charged price is not reachable even by the powerful and effective competitors in the market. In the RWE case, transmission tariff of RWE was analysed whether it charges logical price based on the real cost or artificial price which is significantly higher than the real cost. It is claimed that RWE intentionally set high prices in its transmission tariff in order to squeeze its competitors out of the market. This kind of conduct has effect on the market and it even most likely to unable its equally effective competitors to compete under these conditions. In addition to setting a tariff in favour of its needs, RWE excluded itself from penalty clause regarding the balancing services. Generally, when the forecasted transport volumes does not match the actual volumes, network operators charge penalty in order to eliminate the risk. In the RWE case, as a network operator RWE charged penalty for third parties whereas it did not charge penalty when its forecasted and actual volume are not matched. It is analysed whether the risk of paying high amount of penalty regarding the balancing services for third parties had deterrent effect on downstream market.

After examining RWE conduct in terms of refusal to supply and margin squeeze effect in the market, it is concluded by RWE's commitment to restructure its transmission network by offering to sell it to independent purchaser. This commitment was accepted by the Commission on the condition that, sale of RWE's transmission network will be held under the trustee supervision and purchaser is subject to approval of the Commission. It is also ensured that new purchaser will not discriminate its customers.

This remedy was questioned with regard to proportionality. Offering this remedy during the negotiation of 3rd Energy Package leads to liberalisation in energy

market had also influence.[199] This case was a good exemplification of competition issues in the energy market especially in terms of its context and as well as its timing happened at the same time of 3rd Energy Package was negotiated.

Before the RWE case which is an example of vertical foreclosure in the natural gas market, structural remedy was offered in the *E.ON/Electricity Wholesale case*[200] too. In the RWE case, it is observed that RWE potentially abused its dominant position by using the transmission network system only in favour of itself and by benefiting from being a vertically integrated company squeezing the margin which is detriment to the competition in downstream market and so negatively effects the consumer welfare. Within this respect this voluntarily offered commitment of RWE seemed a good solution which would be used as a tool to remove competition concerns. Comparing to other behavioural commitments such as not to engage in anticompetitive practises is not as effective as quitting the conduct.

2. *ENDESA – NATURAL GAS* Case

Long term agreements were under investigation by the Commission. For instance, a gas supply agreement was concluded between Gas Natural which is in a dominant position in the Spanish gas supply market and Endesa which is not only a market leader in electricity production but also a user of significant amount of gas. This long term gas agreement was found problematic on the grounds that duration is very long, there is a reselling prohibition clause, exclusive purchasing clause which covers almost all gas requirements of Endesa. Since Endesa is one of the largest gas users in Spain and within the above mentioned reasons, Commission considered that this agreement has market foreclosure effect which could also be accepted as an obstacle of energy market liberalisation process in the EU. Founding parties then altered the conditions of the agreement in order to meet the Commission requirements by not only limiting the

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[199] Kock, Oliver. & Nagy,Karoly. & Pucinskaite-Kubik, Ingrida. & Tretton, Wlater. *"The RWE gas foreclosure case: Another energy network divestiture to address foreclosure concerns"*, Competition Policy Newsletter Number 2- 2009, page 34.
[200] *E.ON Electricity / Wholesale*, COMP/B-1/39.388 and 39.389.

agreement duration to 12 years, but also limiting the Endure's gas supply requirement from %100 to %75 and giving Endesa reselling rights.

3. *DISTRIGAS* Case

Proceeding against Distrigas was opened concerning its gas supply agreement with industrial customers in 2004. Although proceeding was initiated regarding the industrial customers, the 2005 market research was conducted broadly to include gas supply agreements concluded between Distrigas and industrial customers, resellers, electricity producers in Belgium.

After the preliminary assessment of the Commission, it is confirmed that Distrigas has a dominant position in Belgium on the market of gas supply especially to large customers. As it is known that having a dominant position is allowed however abusing this dominant position is restricted under Article 102 of the TFEU. Commission's concern regarding the abuse of dominant position was especially raised to the point that long term gas supply agreement does not give a chance to customers to change their suppliers or even think about switching opportunities thus it is evaluated that gas supply agreement of Distrigas, whose market share is very high for more than five years, has foreclosure effect.

When the market inquiry had been conducted, it is also considered that Distrigas is not only an ordinary gas supplier, but also its group company structure strengthens its dominant position via having a vertical integrated group companies being operated in more than one market such as electricity generator, electricity reseller, gas reseller markets. In a more detailed way of saying that Distrigas is a gas supplier company under the Suez group umbrella which includes Electrabel Customer Solutions N.V. which is a reseller company of electricity and gas and Electrabel which is an electricity generator and supplier company run by gas fired system. These two group companies operate in different markets in which Distrigas would supply gas as a main source for their group companies' activities and group companies are also considered as large customers for Distrigas. Thus this could cause entry barrier for new comers which do not have a chance

to reach large customers as well as the local and relatively small customers somehow linked with Suez group.

Apart from company structure evaluation, Gaz De France/Suez merger[201] was expected during this market assessment and its potential effect was also considered.

Beside the advantage of being a part of Suez group, pursuant to a directive[202], Distrigas had exclusivity to gas storage and gas transportation in Belgium which enables it to reach a variety of customers, control the entry points/bottlenecks of the network as well as increase its effectiveness in the gas supply market. Moreover Distrigas has gas supply activity in more than one member states like Netherlands, France and Germany. These are evaluated as the elements of abusive action.

Gas supply agreement of Distrigas withdrew the competition concerns with regard to being on long term basis and also having volume commitments[203] which tied customers to Distrigas. Annual contractual and also annual minimum quantity requirement in the gas supply agreement force customers to purchase specific amount of gas from Distrigas.

Beforehand of Statement of Objection drafted by the Commission, Distrigas removed the resale and use restrictions in its agreements, thus the Commission did not refer to this issue in its objection.[204]

Within this respect, Distrigas submitted its commitments to the Commission as follows:

(1) Distrigas ensures minimum percentage of gas volumes (%65-70 depends on each or all calendar years calculation) which is given back to the market. These

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[201] COMP/M.4180 Gaz de France/Suez, Commission Decision dated 14.11.2006.
[202] Directive 98/30/EC of the European Parliament (OJ L 204,21.7.1998).
[203] This case is an example of *"volumes vis-a-vis the total volume sold by the supplier"* as referred in Kim Talus, *"Long- Term Natural Gas Contracts and Antitrust Law in the European Union and the United States"*, Journal of World Energy Law and Business, 2011, Vol. 4, No.3, page 271, para 1, available at *https://academic.oup.com/jwelb/article/4/3/260/980055* (online on 11.06.2019).
[204] Case COMP/B-1/37966 – Distrigas, Commission Decision of 11.120.2007 relating to a proceeding pursuant to Article 82 of the EC Treaty, page 6, para 17.

commitments related to market effect of Distrigas dominance assist to competing suppliers to increase their chance to be effective in the market.

(2) Agreement term is limited to maximum five years. However not all the agreements' duration is automatically limited, only the new ones concluded with electricity producers and/or industrial users are limited to maximum five years. Besides, with regard to existing agreements whose duration is five or more than five years, it is given to counter party to terminate the agreement unilaterally and without compensation.

Limiting the agreement duration gives chance to customer to rethink about which seller they may choose, how the gas price may vary and in which favourable conditions serves for customer welfare. By limiting the agreement duration the Commission aims at increase the competitiveness in the market without waiting the expiration date of the long term agreement.

(3) Over two years, gas supply contracts will not be concluded with resellers.

(4) In addition to the duration clause limitation as per para (2) above, destination, resale, use, tacit renewal clauses are removed from existing gas supply agreements and also to be ensured not to be included in the new ones.

These commitments of Distrigas will be applicable for four years and on the condition that Distrigas has had market share more than %40 and/or had at least %20 more market share than its closest contestant. It is also mentioned about applicability of the commitments that in the event of Gas de France / Suez merger, purchaser will be responsible of fulfilling these commitments too. Moreover, expected sales by the purchaser in Belgium will be also included in the commitments with the exception of one year transitional period.

Above mentioned commitments of Distrigas were subject to interested third party responses in accordance with the EC Regulation No 1/2003. Afterwards of submitting the commitments of Distrigas to the Commission, pursuant to Article 27/4 of EC Regulation No 1/2003 responses to the commitments from related third parties are

received. Some of the responses which could be found interesting to keep the current anti-competitive conduct of Distrigas were as follows:

(1) Customers who would like to conclude long term agreement should have considered. For instance customer who invests in recent production capacity and/or whose significant percentage of production cost consisted of gas would like to keep concluding long term agreements in order to receive the outcomes of their investment.

(2) Two years duration limit for gas supply agreement to reseller may also have restriction domino effect on the relationship of reseller and its customers.

The Commission were of the opinion that duration limitation is proper in order to eliminate the risk of customer tying and give a chance to other market players to contest. Additionally, the Commission referred that since Distrigas has a dominant position, it is likely to tie %20-30 of total market if there is no limitation and this could therefore be anticompetitive.[205]

Distrigas's commitments were evaluated as a whole and overall proposed remedies found sufficient. Therefore Distrigas intervention is concluded with a settlement without leading to a case. The Commission procedure was thus brought to an end.

4. *GAZ DE FRANCE* Case

GDF Suez SA and its subsidiaries and controlled companies, especially GRTgaz SA, Elengy SA *(collectively referred as "GDF Suez")* were subject to a Commission procedure by the Commission decision dated 16th May of 2008 on the grounds of their alleged anticompetitive conduct on gas import and gas supply market in France.

Preliminary assessment was given on 22nd June 2009 and it is found that GDF Suez has a dominant position not only on the gas supply market, but also on gas import market in the balancing zones of its subsidiary GRTgaz transport network.[206]

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[205] Ibid, page 10, para 35.

[206] Case COMP/39.316 – Gaz de France, Commission Decision dated 03.12.2009 relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement, page 2, para 2.

GDF Suez dominance has foreclosure effect on the downstream gas supply market since, via its subsidiary GRTgaz, GDF Suez has privileges on balancing zones of transport network which restrict the competition and cause entry barriers for other market players. Moreover long term access to gas import capacity also strengthens its dominance in the market. GDF Suez determines the reception capacity as well as the allocation procedure of the long term capacity at Fos Cavaou LNG terminal, in southern France and limitation of import capacity investment at Montoir de Bretagne LNG terminal, in northern France.

Generally in the energy market and specifically in the gas market, having access to transportation network and storage facilities are crucial to maintain the operation. With the above mentioned respect, it could be said that comparing to its rivals, GDF Suez has had access to all kind of necessity elements to operate via its subsidiaries and have benefited from its subsidiaries' position which gives more powers to GDF Suez. Thus having vertical integrated group company structure in which subsidiaries operate on the subdivided market, strengthens the dominance of the main company on another market.

Considering the operation field and company history of the GDF Suez, this company is one of the biggest electricity and natural gas suppliers in the world. Especially in France, most of the customers' gas requirements are met by GDF Suez. Main feature of its subsidiary GRTgaz is that GRTgaz not only owns but also operates the transportation network of the gas and it is able to reach most of the customers in all around France.

Besides, via its other subsidiaries called Elengy which makes GDF Suez indirectly active in LNG terminals and Storengy which makes GDF Suez indirectly active in natural gas storage market in France, GDF Suez dominance has foreclosure effect on the market. Therefore GDF Suez has had access to main points, entries and interconnections in the transportation network and gas pipelines and as well as the gas import capacity at the LNG terminals.

Within this regard, preliminary assessment of the Commission was sent to GDF Suez and its related subsidiaries. In its market inquiry, the Commission had distinguished

the gas supply market and gas infrastructure market as it did previously in Total/GDF[207] procedure.[208] Moreover, these two markets are subdivided, such as supply market is branched to wholesale supply and retail supply regarding the customer profiles and size. Supply market may also be analysed in a detailed way via dividing the products supplied by transmission network or distribution network as well as dividing the customers on the grounds of their consumption habits and needs as household or industrial consumers. Furthermore types of gas such as high calorific, low calorific, etc. would be another parameter to analyse the gas supply market.

About the gas infrastructure market, it is considered that import capacity of gas via LNG terminals and gas pipelines are possible and thus firm capacity and interruptible capacity are distinguished.[209]

After this market inquiry, it is found that GDF Suez has dominance on the gas supply and import market and its dominant position restricts the market entry, limits the access to storage facilities of other market players, causes bottlenecks in capacity usage, etc. It is emphasized that vertically integrated company structure is the main reason of the market foreclosure effect of GDF Suez which ensures its foreseeable future via long term contract and capacity reservation agreements concluded with its subsidiaries and customers.

It is also evaluated that having access to infrastructure and import capacity, which GDF Suez has, are essential in order to supply the gas in balancing zones of GRTgaz network. Moreover it is not legally, financially and technically possible to create new infrastructure or network capacity alone and compete with those GDF Suez has. Within this respect "essential facility doctrine"[210] arising from Oscar Bronner Case[211] is

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[207] COMP/M.3410 *Total/Gaz de France*.

[208] Commission Decision dated 03.12.2009 relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement, Case COMP/39.316 – *Gaz de France*, page 4, para 11.

[209] Ibid, page 5, para 14.

[210] Bronner conditions (essential facility doctrine) are *(i) the refusal of access to a facility must be likely to prevent any competition at all on the applicants market; (ii) the access must be indispensable or essential for carrying out the applicants business; and (iii) the access must be denied without any objective justification.* In the energy market, high voltage electricity grids and gas transport networks are usually considered as essential facility.

[211] Case C-7/97 *Oscar Bronner* [1998] ECR I-7791.

referred. Due to the fact that rebuilding the facility, infrastructure, pipelines, network, terminals that GDF Suez has, it is highly impossible and difficult thus other market players cannot compete effectively and also some of them cannot enter the market by reason of these obstacles.

As in general capacity reservation, facility utilization started with historical reasons such as state aid, privileged rights and there is no transparent procedure or allocation for utilization of the facilities. Therefore GDF Suez enjoyed its dominant position and has used the facilities more than other third parties in favour of itself. Pursuant to preliminary assessment of the Commission, third party shippers' demands are not satisfied in France due to the refusal to supply in the form of lack of available capacity and as well as restriction on investment in import capacity. GDF Suez reserved the significant proportion of the available capacity and also did it for a very long period. Thus, third party shippers would not have been able to access to capacity which prevents them to compete on the downstream gas supply market.

Moreover, anti-competitive conduct of GDF Suez via Fos Cavaou LNG terminal by refusal to supply and conditional supply as well as via Montoir de Bretagne LNG terminal by limiting the strategical investment in extra capacity. It is analysed that GDF Suez had not conducted transparent, open, non-discriminatory procedure in order to allocate the capacity and reserved the capacity for long term for own its needs and this is evaluated as refusal to supply. Third parties had only access to Fos Cavaou LNG terminal for long term capacity on the condition to provide nonfinancial strategic assets.[212]

Moreover, GDF Suez also prevented the competition via refusal to investment in the construction of the Fos Cavaou LNG terminal when it was built. Although GDF Suez could have increased the capacity of the terminal by financial supports of their party shippers, it did not take the risk of third party access to facility and would like to be sole decision maker on the utilization of the facility and so reservation of the capacity.

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[212] Case COMP/39.316 – *Gaz de France*, Commission Decision dated 03.12.2009 relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement, page 8, para 32.

Additionally, it is evaluated in the preliminary assessment of the Commission that GDF Suez had booked the capacity of Fos Cavaou LNG Terminal more than its needs and on the condition of providing critical assets, GDF Suez shared this pre booked capacity with third party shippers. This also shows that there is no fair, transparent, non-discriminatory procedure for booking the capacity.

Furthermore, conduct of GDF Suez at Montoir de Bretagne LNG terminal was separately and additionally evaluated.

Above mentioned findings were interpreted as an abuse of dominant position by GDF Suez through refusal to supply of essential input.[213]

5. *GAZPROM* Case

Gazprom which is the Russian energy company operates at the production, exploration, refining, transportation and marketing of natural gas[214] and thus known as energy giant, holds the highest percentage of the natural gas reserves in the world as well as it is the sole permitted undertaking that can export the natural gas from Russia via pipelines.[215]

Gazprom supplies natural gas to Europe and it has dominant position on the wholesale supply upstream natural gas market in Poland, Bulgaria, Hungary, Czech Republic, Estonia, Latvia, Lithuania and Slovakia (hereinafter these EU member states shall jointly referred as "Central and Eastern Member States") .[216] Generally in the each Central and Eastern Member States there is a domestic incumbent wholesaler which conclude natural gas agreement with Gazprom.[217] In each Central and Eastern Member States, Gazprom has highest market shares higher than %50 percentage and almost close to %100 percentage in most of the countries.[218] Within this regard, Gazprom is a vital and

[213] Ibid, page 9, para 36 and para 40.
[214] Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe, Commission Decision dated 24.05.2018 para 6.
[215] Ibid, para 7.
[216] Ibid, para 2.
[217] Ibid, para 32.
[218] For more details about the market share percentage see: Ibid, para 34.

very important trade partner for Central and Eastern Member States whose natural gas consumer may not be served without supply of Gazprom in the short and mid-term.[219]

Considering the dominant position of Gazprom which assessed as market entry barriers, The Commission initiated investigation against Gazprom on the grounds that Gazprom abuses its dominant position in the Central and Eastern Member States by having natural gas agreements with these Central and Eastern Member States which includes territorial restriction includes export bans and destination clauses[220], thus these restrictions cause higher natural gas prices. It is alleged that the natural gas prices charged to these Central and Eastern Member States by Gazprom are dramatically higher than the benchmark prices as well as cost of the Gazprom.[221] [222] Within this regard it is also claimed that Gazprom prevents free flow of gas and gas supply diversification via these restriction clauses. It is also found abusive that Gazprom conditionally supplies natural gas to Bulgaria and Poland and asked these countries to invest in pipeline projects supported by Gazprom and/or demanding them to accept Gazprom's control over the pipeline.[223][224]

In the gas supply agreement concluded with Gazprom and Bulgaria, re-export of gas is banned. [225] Restrictive clauses in the gas supply agreement signed with Bulgaria maintained even this country became an EU Member States. Moreover in many gas supply agreements, Gazprom has privileged and superior position to decide the amount of the natural gas annually supplied as well as the delivery point. During the gas crisis in 2009, Gazprom refused to alter the delivery point of the natural gas without justifiable

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[219] Ibid, para 34.
[220] In some gas supply agreement it is explicitly states that resale of gas outside the country is prohibited whereas in other gas supply agreement it is formulated as purchaser can use the natural gas only in the country.
[221] Stern, Jonathan & Yafimava, Katja "*The EU Competition Investigation of Gazprom's Sales in Central and Eastern Europe : a detailed analysis of the commitments and way forward*", The Oxford Institute for Energy Studies, Oies Paper NG 121, July 2017, page 3, available at https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/07/The-EU-Competition-investigation-of-Gazproms-sales-in-central-and-eastern-Europe-a-detailed-analysis-of-the-commitments-and-the-way-forward-NG-121.pdf (online on 24.08.2019)
[222] It if found by the Commission Decision dated 25.07.2001 in the case COMP/C-1/36.915 *Deutsche Post AG – Interception of cross border mail* that charged price higher than %25 of the estimated cost is unfair.
[223] Ibıd.
[224] Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe, Commission Decision dated 24.05.2018, para 3.
[225] Ibid, para 58.

reasons such as congestion or capacity absence and by doing so prevented the gas import into Poland as well as the other wholesaler which intend to bring natural gas to another gas market.[226] It is assumed that Gazprom strategically follows this preventive attitude and unfair pricing policy in order to ensure that Russian gas would not compete with itself.[227]

In order to meet the Commission's competition concern, Gazprom submitted its commitments which are mainly similar as the other dominant undertakings' commitments examined previously. Gazprom committed to remove territorial restriction clause in the agreements and not to reintroduce this kind of restrictive clause in the future. Agreements concluded with Bulgaria is specifically amended in terms of natural gas allocation system and interconnection possibility with other Member States is given to Bulgaria. Infrastructure isolation of Bulgaria and Baltic States from the other Member States, Gazprom keeps its dominance there. In order to eliminate the claimed abuse of dominant position, Gazprom committed to give option to Central and Eastern Member States to change delivery points of natural gas to Bulgaria or Baltic States. This gas swapping operation is committed on condition that customers cannot arrange themselves to transport gas to Bulgaria or Baltic States and Gazprom can give this transportation service and allowed to charge service fee. Considering the Commission's unfair pricing concern, Gazprom committed to introduce price revision clause which the both of the contractual parties can ask to revise the price on the basis of the economic change in the market.

The Commission found commitments of Gazprom proportional and effective to remove the competition concerns and the investigation brought to an end.

Gazprom case is a distinctive example of how politics and economy affects the legal issues. The purpose of the Commission is initiating investigation in order to remove the competition concerns and ensure the competitive market and to reach this aim, the Commission either imposing tremendous amount of fine on the dominant undertakings which happened to American company Microsoft or accepts very serious commitments including restructuring of business that happened to French company GDF, Italian

[226] Ibid, para59.
[227] Ibid.

company ENI and German Company RWE AG. However in *Gazprom* case, the Commission did not impose fine on Gazprom and accepted the commitments which do not radically change the way of doing business of Gazprom. Since Russia is one of the main natural gas source of the EU, amicable way of settlement is chosen to bring the investigation to an end.

C. INPUT FORECLOSURE

Within this section *Greek Lignite*[228] case which is not only an example of input foreclosure since competitors of the undertaking in question did not have access to the lignite input in order to produce electricity, it is also an example of application of Article 106 of the TFEU where the EU competition rules embodied in the public undertaking aspect will be examined.

In that case, Public Power Corporation S.A. ("**PPC**") had been granted exclusive rights to extract lignite by the Hellenic Republic and thus the Commission decided by its decision dated March 5, 2008 that there is an infringement of Article 106 of the TFEU and by its decision dated August 4, 2009 the Commission took measures to prevent this infringement. PPC appealed these two decisions.

The Hellenic Republic had granted privilege to PPC by giving exclusive rights to exploit lignite in Greece which strengthened the dominant position of PPC in the Greek wholesale electricity market and thus caused a barrier for newcomers to enter the market as well as inequality among the other market players who also needed to have access to lignite in order to produce electricity. Within this respect, it is found that the Hellenic Republic infringed Article 106/1 by not fulfilling the requirements embodied under Article102 and had been notified to prevent this anti-competitive behaviour. By its decision, the Commission asked to the Hellenic Republic to apply some measures on lignite exploitation of PPC such as allowing other competitors to reach sufficient lignite and access to electricity generation based on lignite, giving an opportunity to the

[228] Case AT.38700 – Greek lignite and electricity markets, Antitrust procedure, Article 106/3 of TFEU, date: 17/04/2018, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38700/38700_2053_3.pdf (online on 03.06.2019).

competitors to constrain PPC to use lignite resources as effectively as PPC especially during the off peak time which ensures competitors to create equivalent generation portfolios and provides them generation source flexibility. Since this case is about lignite reservation in Greece and privileged rights on lignite exploitation, the Commission also referred to the EU environmental policies and requirement to being aligned with this CO2 emissions policy when applying the measures stated in its decision and gives a chance to the Hellenic Republic to propose new commitments accordingly.

After the 2008 decision of the Commission, commitments of the Hellenic Republic were made binding by the Commission decision August 4, 2009 thus Hellenic Republic had to grant lignite exploitation rights to the foundations different than PPC via tender procedure in Drama, Elassona, Vegora and Vevi the fact of which means competitors of PPC have right to extract approximately %40 of total lignite reserves in Greece.

On December 15, 2016 the CJEU upheld these Commission decisions by confirming that PPC has dominant position due to the exclusive rights granted by the Hellenic Republic and its competitors cannot access sufficient amount of lignite reserves which prevents them to effectively compete with PPC in the wholesale electricity market in Greece which means there is a created abusive dominant position by the Hellenic Republic. The CJEU also approves the proportionality and adequacy of the solutions which give competitors of PPC to have access at least %40 of the total exploitable lignite reserves.

The Hellenic Republic has not been fulfilled these measures and since the EU energy policy has been altered to more alternative green energy sources, adopted measures regarding the usage of lignite capacity do not comply with the new energy policy.

Since the Hellenic Republic is given opportunity to propose new commitments in order to align with the EU energy policy, it gave its first proposal on December 1st, 2017.

By selling the %40 of its coal fired capacity, PPC whose %51 shares are owned by the Greek state implements the CJEU ruling. It increases the competitiveness which leads the decrease of electricity prices and serves for consumer welfare.

D. TYING-BUNDLING

Abuse of dominant position by tying and bundling which means in order to sell one product putting condition to buy another product from the same company has not been found in the EU energy market yet. It is assumed that since the energy incumbents operate generally in one energy market it seems technically not possible to tie customer to buy for instance electricity on condition to buy gas from the same incumbent. Moreover comparing the other markets, there is no variety of sub-product in energy market to tie its selling on condition. In the energy market service is more imported than the products, incumbent may rather tie the customer via having services for transmission, distribution, storage etc.

Incumbents in the energy market are tended to avoid breaching the competition rules as the Commission interventions conclude with fulfilled commitments and do not lead to a case which would end with high amount of fines. Therefore it would be said that energy incumbents are aware of the outcomes of breaching Articles 101 and 102 of the TFEU.

E. APPLICATION OF ARTICLE 102 OF TFEU IN TERMS OF DURATION

As previously analysed the application of Article 101 of the TFEU in terms of duration, it is similar for Article 102 of the TFEU too. Altered perspective of the Commission, liberalisation procedure in the energy market, effectiveness of application of the Articles, changed market structure and players are some of the factors this variance of the application of the rules. For example, before the liberalisation in the energy market in 1978, the Commission had decided in the case *BP vs. Commission*[229] that application of cutting down policy to the irregular customers by reasoning the poverty while proceeding to provide to regular customers is not an abuse of dominant position.

[229] Case 77/77, *Commission vs. BP*, judgement dated 29.06.1978.

VI. APPLICATION OF MERGER CONTROL TO NATURAL GAS MARKET

One of the pillars of EU competition law is the merger control which is embodied separately under EU Merger Regulation 139/2004.[230] Comparing to Articles 101 and 102 of the TFEU, which are practices in the form of merger control is created as an "*ex ante control*"[231] that means competition concerns are previously considered and tried to be avoided and designed to punish "*ex post control*"[232] of anticompetitive conduct.

Regarding the fact that merger control is preventive, the future and potential impact on the market competitiveness of the concentration is predicted.

According to general rules of law, merger could be in two types[233] which are: (1) two or more undertakings combine in one separate company established as a new legal entity by these combined undertakings and (2) one undertakings absorbed by the other undertaking, thus first one is deregistered at the trade registry, whereas the latter one continues to operate.[234]

Moreover, not all merger transactions are subject to control under the EU Merger Regulation; only the ones which are identified as a "*concentration*"[235] and having a "*Community dimension*"[236] that is decided by doing turnover test in accordance with

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[230] Council Regulation (EC) No. 139/2004, dated 20.01.2004 on the control of concentrations between undertakings. Besides this EU Merger Regulation, Implementing Regulation 804/2004 (OJ No. L 133, dated 30.04.2004), Guidelines on the assessment of horizontal mergers (OJ No. C 31, dated 05.02.2004) and as well as of the non-horizontal mergers (OJ No. C 265, dated 18.10.2008), jurisdictional notice (OJ No. C 95, dated 16.04.2008) have leaded the merger control.
[231] Lorenz, Moritz. "*An Introduction to EU Competition Law*", Cambridge University Press, 2013, page 242.
[232] Ibid.
[233] Ibid, page 245.
[234] COMP/M.2208 Chevron/Texaco, available at http://ec.europa.eu/competition/mergers/cases/decisions/m2208_en.pdf (online on 18.06.2019).
[235] EU Merger Regulation, para 20 which states as follows; "*It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market...*"
[236] EU Merger Regulation, Article 1/II and 1/III which state as follows; Article 1/II "*A concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.*" *Article 1/III "A concentration that does not meet the thresholds laid down in*

Article 1 of the EU Merger Regulation. Therefore the EU merger control prevails the national merger control when these two conditions are matched.[237]

When a proposed merger transaction is reviewed, the substantive test is applied in order to see whether the transaction creates obstacles for effective competition. Within this context three types of market definition are made: (1) relevant product market[238], (2) relevant geographical market[239] and (3) relevant temporal market[240].

Afterwards of market definition, the EU Commission checks the market shares as well as the level of the concentration. Combined market share that is more than %40 may be accepted as the creation and/or strengthening the dominant position in the market.[241]

Furthermore, the effect of the proposed merger is evaluated. For instance, an undertaking creates pressure in order to increase the competitiveness in the market on another undertaking which would like to acquire the first one, then this non-coordinated effect is also taken into account.[242]

Beside above mentioned merit part of the merger control under the EU Merger Regulation, there are procedural rules which are basically summarised as: (a) before the implementation of the merger, parties have to notify the EU Commission and obtain the clearance for the proposed transaction; (b) The European Commission has to review the

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paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

[237] Moritz Lorenz, "*An Introduction to EU Competition Law*", Cambridge University Press, 2013, page 261.

[238] Substitutable products from the customers' point of view are accepted in the same relevant market. Substitutability of the product was checked with the demand side and as well as the supply side. If the supplier can easily swap producing one product to another one, it is accepted as a single market.

[239] Geographic market definition is made considering the product prices, customer tendency and preferences, legal requirements, transportation cost etc. of the territories.

[240] In the event that the product is available only for temporarily and for limited time. Sports ticket is given as an example of a product which is available for limited period.

[241] Lorenz, Moritz. "*An Introduction to EU Competition Law*", Cambridge University Press, 2013, page 292.

[242] Ibid, page 292.

merger notification within a certain period of time specified under the EU Merger Regulation, otherwise when the limited time expires without any decision of the European Commission, it is deemed that merger clearance is granted.[243]

Additionally, the Commission decision regarding the proposed merger is subject to judicial review which may be demanded by the related parties as well as the actual and/or potential competitors of the parties.[244]

A. *E.ON – MOL* MERGER[245]

According to Article 4 of Merger Regulation (EC No 139/2004, dated 20 January 2004) E.ON Ruhrgas International AG ("E.ON") which is a German energy producer and supplier especially operating in the natural gas and electricity market, has notified to the Commission on 2 June 2005 that it would like to acquire two of the subsidies active in the natural gas business of Hungarian natural gas and petroleum company of MOL Hungarian Oil and Gas Company Rt. ("MOL") whose %12 of shares owned by the Hungarian government.

MOL has carried on business at the various energy markets via its subsidiaries such as MOL E&P which is active in natural gas production, MOL Storage which operates in natural gas storage market, MOL Transmission at the transmission market and MOL WMT as its title abbreviation stands for wholesale, marketing and trading of natural gas, etc. Concentration in question was subject to acquisition by E.ON. to (a) MOL WMT that supplies gas to regional natural gas distributors, power plants as well as the industrial customers in Hungary and (b) MOL Storage that is only active in the natural gas storage service business via its five storage facilities.[246] Although MOL E&P was not subject to acquisition, E.ON would have indirect control over it via the long term supply contract for gas which is produced by MOL E&P.[247] With the intention of acquiring MOL WMT

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[243] Ibid, page 299.
[244] Ibid, page 307.
[245] Case No COMP/M.3696 E.ON/MOL, Regulation (EC) No 139/2004 Merger Procedure Article 8/2, Date: 21.12.2005 declaring a concentration to be compatible with the common market and EEA Agreement.
[246] Case No COMP/M.3696 E.ON/MOL, Regulation (EC) No 139/2004 Merger Procedure Article 8/2, Date: 21.12.2005 declaring a concentration to be compatible with the common market and EEA Agreement, page 3, para 5.
[247] Ibid, page 4, para 9.

and MOL Storage, E.ON is also acquiring half of the shares in Panrusgaz which is jointly owned by Gazprom and MOL as well as only serves for its shareholders rather than third parties. Due to the fact that Panrusgaz has no business relation with third parties and thus non function joint venture, it is not assessed as part of the concentration.[248] However, it is stated that competition concern within the scope of reaching the resources from abroad, which means in the present case natural gas supply from Russia via Gazprom, has to be taken into account.[249]

As seen above, not only the real addressed transaction but also its direct and indirect effect, actual and potential impact have to be considered.

Afterwards obtaining the notification regarding the permission demand of acquisition, the Commission initiated the proceeding pursuant to Article 6/1/(c) of the Merger Regulation.

The Commission inquired the relevant market, the effect of the merger, etc. with the competition concerns and preliminarily found that this merger would have negative impact on the competition not only in the natural gas retail and wholesale market in Hungary, but also in the electricity market, whose production also depends on natural gas. The main fact of this competition concerned finds that MOL has dominant position in Hungary at the gas storage and wholesale market which empowers the E.ON dominant position in the electricity and natural gas retail market in the event of merger.[250]

In Hungary, %48 of energy demand has been satisfied by natural gas.[251] Comparing to natural gas demand in other Member States, dependency on natural gas in Hungary is relatively higher.[252] In the inquiry it is also taken into account that gas demand as well as the gas fired electricity generation demand is getting increased in Hungary. Moreover Hungary does not satisfy the natural gas demand only by the domestic

[248] Ibid, page 4, para 10.
[249] Ibid, page 4, para 11.
[250] European Commission Press Release Database, IP/05/1658, Brussels, 21.12.2005, "*Mergers: Commission approves acquisition by E.ON of MOL's gas business, subject to conditions*" available at http://europa.eu/rapid/press-release_IP-05-1658_en.htm (online on 04.06.2019).
[251] Case No COMP/M.3696 E.ON/MOL, page 6, para 28.
[252] For instance natural gas consist of %40 percentage in Netherland and of %39 percentage in the UK in total energy consumption. Ibid, page 6, footnote 6.

production, it is also a gas import country in which %80 of consumed natural gas in Hungary was imported.[253]

Hungary is neither close to European gas producers such as Dutch, Norwegian gas nor Middle East, Caspian and Algerian gas.[254] Almost all imported gas into Hungary comes from Russia (Gazprom) and also there is no LNG terminal near to Hungary. Since it has a limited option or only one choice for imported gas resource which is Russian gas, alternative way is too far and costly and the new pipeline project (Nabucco)[255] which will create an option for gas resource is expected to be active in Hungary after 2011, it is estimated that this market is not open to competition.[256]

Furthermore, via market analysis it is found that, due to the current long term contract between MOL WMT and Gazprom which does not intend to export more gas to Hungary on the grounds that its supply already meets the gas needs of Hungary and it would not like to sell the gas to another trader at cheaper price[257], it is not easy for new market entrants to access to Russian gas.[258]

Examination regarding the entry/exit point in the Hungarian natural gas market, it is found that there are only two entry points where the natural gas come from Ukraine and Austria and one exit point in which the natural gas taken off to Serbia. The capacity of these entry/exit points were substantially booked by MOL WMT and there will not be new pipelines project[259] in the near future.

Moreover the fact that there are only two entry/exit points in the country and not all the gas companies have access to both of them creates another competition concern. In the event that one of the entry/exit points cannot work properly or not at all (for instance due to the weather conditions or other force majeure), the supplier which only has access

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[253] Case No COMP/M.3696 E.ON/MOL, page 8, para 32.
[254] Ibid, page 69, para 322.
[255] Details about Nabucco Pipeline and its effect on Hungarian natural gas market will be found in Case No COMP/M.3696 E.ON/MOL, page 112 -113 para from 523 to 532.
[256] Ibid, page 69, para 322, 323.
[257] Ibid, page 72, para 334.
[258] Ibid, page 71, para 333.
[259] Nabucco Project which brings the gas from Middle East and Caspian to Europe passing through to Turkey and crossing Austria, Romania, Bulgaria and Hungary will be expected to complete at least in 2011.

to this point faces trouble to supply and deliver of the gas to its customers and may also have to pay penalty and lose its customers' reliability.[260]

It is examined that currently MOL WMT has dominant position on the gas produce market in Hungary via domestic and imported gas and its acquisition by E.ON will increase this dominance. Different than MOL, E.ON is also active at the retail supply market of the gas.[261] Because of being a vertically integrated company, E.ON is likely to be a threat on the competition as it may strengthen its dominance which will have market foreclosure effect via this planned acquisition. [262] It is also evaluated within the perspective of acquiring MOL Storage that, after the acquisition E.ON may use its vertically integrated structure which enables it to be active at other gas markets as a privilege and conduct the gas storage business in a discriminative way in favour of its affiliates.[263]

It is also emphasised that having access to natural gas storage facility is important to proceed the supply and be active at retail market without influence of fluctuation of customers' demand and seasonal obstacles.[264]

The Commission also considered that during the investigation, neither Hungarian nor the EU energy market was liberalised properly. There are also some obstacles for market entry such as licence requirement by Hungarian Energy Office.[265] Moreover, according to Hungarian law, acquisition regarding the licenced undertaking is also subject to approval of Hungarian Energy Office which may refuse the transaction on the grounds that after the acquisition there will be energy supply problem, negative effect on sustainability and/or energy security, acquirer does not fulfil the requirement of obtaining the licences under Hungarian law.[266]

[260] Case No COMP/M.3696 E.ON/MOL, page 84, para 391.
[261] Ibid, page 87, para 399.
[262] Ibid, page 87, para 400.
[263] Ibid, page 106, para 487.
[264] Ibid, page 105, para 477.
[265] Ibid, page 16, para 63.
[266] Ibid, page 21, para 84.

In the concreate case, Hungarian Energy Office has resolved that concentration between MOL and E.ON, which will be approved on condition to fulfil the following eight criteria:[267] E.ON is requested to ensure that

(1) Acquisition does not affect the competence, capability, qualifications, which is required by the Hungarian law in order to be able to operate as natural gas company, of the undertakings planned to be acquired; otherwise MOL Storage will have to amend and affirm its qualifications granted by the Hungarian Mining Office.

(2) Regulated access to MOL Storage will be applicable for all system users and business terms of this company will be altered accordingly until 31 May 2006.

(3) Gas storage development plan starts from the year of 2005 to 2009 which is accepted by the Hungarian Energy Office to be implemented by E.ON and MOL Storage. Addition to that it is asked to be declared before 31 May 2006 that E.ON commits to fulfil the obligations presented in the upcoming development directive to be issued by the Hungarian Energy Office.

(4) Scope of public utility wholesaler' customer shall not be extended.

(5) E.ON gets the approval and guarantee of execution of a programme from public utility wholesaler in order to ensure the safety, security and sustainability of gas resources and supply in Hungary.

(6) Exact organizational alterations in MOL Storage and MOL WMT has to be submitted to Hungarian Energy Office which would like to see the independence control of the undertakings.

(7) Before 31 May 2006, trade and public utility wholesale activity of MOL WMT legally and organizationally to be unbundled.

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[267] Ibid, page 22, para 86.

(8) Hungarian Energy Office also requested to be informed about the Commission decision regarding the planned acquisition and asked to E.ON to submit the decision in 30 days after receiving it.

Beside the assessment of natural gas market and its dynamics, relevant electricity market and effects of the planned acquisition on it were also considered.[268] Supply and demand in transmission, distribution, generation, import and export options, capacities, allocation, liberalisation process in the electricity, customers' profile, national and EU regulatory framework were evaluated in a detailed way.

It is ascertained that beforehand of planned acquisition though MOL WMT effectively supplies natural gas to big power plants and has dominant position on this market, it does not actively operate in the electricity market. However E.ON is not only active in electricity market as general, it also has already dominant position in the Hungarian electricity retail market.[269] Therefore from the Commission's point of view, it is evaluated that after the acquisition new entity will raise the costs of gas fired power plants as well as set more favourable conditions to its subsidiaries when it sell electricity production.[270] Moreover it would lead to control the wholesale electricity prices as well as the control of electricity generation capacity.[271]

Shareholding structure of E.ON and its subsidies which enable it to operate in the different levels (retail, supply, wholesale, production, etc.) of the market effectively and also raise its dominance, its remarkable investment in Hungarian electricity market since 1995, ownership of electricity generation companies, having control over the electricity supply and trading companies in neighbouring countries assist and empower E.ON current dominant position in the sector.[272] Therefore this proposed acquisition is considered as an increase of the competition concern in the Hungarian electricity market too.

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[268] Ibid, starts from page 34, para 142.
[269] Ibid, page 116, para 553.
[270] Ibid, para 554.
[271] Ibid, para 556.
[272] Ibid, page 117, para 560.

Thereafter, the Commission stated that retail of gas and electricity as well as the electricity production depends on direct access to gas which is essential for these activities.[273]

Regarding the above mentioned reasons, the Commission evaluated that the planned acquisition will raise the competition concerns such as market foreclosure and obstacles for new entry under Article 2 of the Merger Regulation.[274]

Afterwards of these competition concerns raised by the Commission, E.ON submitted its commitments which are reviewed and later finalised during the procedure and generally as follows:

(1) *"Ownership unbundling"*[275]

According to the agreement to be concluded between MOL and E.ON for the acquisition of MOL Storage and MOL WMT, it is stated that MOL will have a right to keep minority shares which correspond to %25 +1 of total shares in these companies and it will request E.ON to purchase these shares in 5 years which is so called put option. Apart from put option which MOL requires to E.ON, it will also have an option to sale these minority shares in 6 months after the transaction to third parties to be approved by the Commission. In addition to these sale option, there is an acquisition restriction for MOL that as long as E.ON holds the majority of the shares, MOL will not acquire minority stakes of MOL Storage and MOL WMT for 10 years;[276]

(2) It is granted that MOL may request E.ON to buy a %25+1 or a %75 -1 share interest in MOL Transmission and it is called "*Put option*" regarding MOL Transmission;[277]

(3)"*Gas Release Programme*" whose implementation was undertaken by E.ON will take places via internet auction and for 8 years in Hungary on condition that affiliates

[273] Ibid, page 60, para 280.
[274] Ibid, page 99, para 453.
[275] Ibid, page 155, para 735.
[276] Ibid, page 155, para 736.
[277] Ibid, page 155, para 738.

of E.ON will not participate to this auction directly or indirectly.[278] This programme and its implementation will be supervised by a Monitoring Trustee as well as the Hungarian Energy Office;[279]

(4) "Contract release" commitment is about to contract assignment. Supply contract concluded between MOL E&P and MOL WMT will be partially assigned to third parties for the end of the supply contract term which is till 2016.[280] After the assignment of the contract is effective, the third party will have the rights and obligation of MOL WMT embodied under the supply contract.

When the Commission evaluated these contract and gas release programmes, it also analysed the previous practise of these proposed programmes in different member states.[281] Duration of the programme, committed volumes, price and other terms and conditions are also checked in terms of whether they are competitive, effective, appropriate and satisfies the needs.

(5)Wholesalers and end users are ensured to have access to the gas storage at regulated terms and prices via contract and/or gas release programme mentioned above.[282]

After obtaining the commitments, the Commission has given its decision under condition which the parties have to fulfil their commitments according to Article 8/2 of the Merger Regulation. Pursuant to this, when the conditions are not satisfied, the approval decision for the proposed merger will no longer be valid.[283]

B. *EDP/ENI/GDP* MERGER[284]

EDP (Energias de Portugal SA) and ENI (Eni Portugal Investment S.p.A) would like to acquire collective control over GDP (Gas de Portugal SGPS S.A) by purchasing

[278] Ibid, page 156, para 741.
[279] Ibid, page 156, para 745.
[280] Ibid, page 157, para 749.
[281] Ibid, page 160, para 773.
[282] Ibid, page 157, para 755.
[283] European Commission Press Release Database, IP/05/1658, Brussels, 21.12.2005, "*Mergers: Commission approves acquisition by E.ON of MOL's gas business, subject to conditions*" available at http://europa.eu/rapid/press-release_IP-05-1658_en.htm (online on 04.06.2019).
[284] Case No COMP/M.3440 ENI/EDP/GDP, Regulation (EEC) No 4064/89 Merger Procedure, Article 8/3 Date: 09.12.2004 available at

its shares. Since this planned transaction falls within the scope of Article 3/1/ (b) of Merger Regulation, parties notified to Commission on 9 July 2004 in accordance with Article 4 of Merger Regulation.

Comparing to the acquirer of the proposed transaction, on the one hand, EDP is a largest Portuguese electricity company active in the different chain level at the market such as supply, generation, distribution of electricity.[285] On the other hand ENI is an Italian company which is also active at all steps of distribution and supply of energy.[286]

GDP which was intended to be acquired is a Portuguese gas company indirectly co-owned by Portuguese state and ENI.[287] It also has dominant position on the Portuguese natural gas market and exclusive rights ensured by the national authorities to GDP and its group companies.[288]

After the notification, the Commission deeply inquired the proposed concentration, its real and potential effect on the current and foreseeable market[289], market position of the related parties, and then stated that this planned concentration will highly increase the competition concerns in the market and strengthen the parties' dominance.[290]

Moreover it is emphasised that as an energy company having ability to offer electricity and gas at the same time ("*dual offers*")[291] is accepted as a competitive advantage. It is also shown in the market practise that electricity customers tend to choose the same energy company for purchasing gas. In England and Spain, when the electricity

http://ec.europa.eu/competition/mergers/cases/decisions/m3440_20041209_610_en.pdf (Online on 05.06.2019).

[285] Ibid, page 3, para 5.

[286] Ibid, page 3, para 6.

[287] Ibid, page 3, para 7.

[288] Ibid, page 99, para 474.

[289] Ibid, page 6, para 16, footnote 13. According the case law, it must considered not only the current market but also the *foreseen degree of opening thereof. Case COMP/M.26.84 – EnBW/EDP/Cajastur/Hidrocantabrico: OJ C 114, 15.05.2002, page 23.*

[290] Ibid, page 2, para 3.

[291] Ibid, page 5, para 15.

companies penetrated the gas market by offering "dual offer", they have been successful.[292]

As having dominant position is not restrictive unless it is abused, it is emphasised for the dual offers in the same way. Dual offers do not directly mean impede on the competition.[293] However via dual offer, energy companies gain leverage on their competitors. This commercial advantage (customer information, fidelity, former contract basis, technical support, etc.) as well as the strategic significance of distribution net were emphasized by Spanish regulator, CNE as follows: *"all crucial information about the customers (address, consumption, etc.) ..... regular contacts with customers......In gas, the distribution company has contacts in particular through the technical inspections which are made for new installations (i.e. new clients) and then regularly during the lifetime of the installation. In electricity, only distributors are allowed to make these inspections even if the customer switched to the liberalised market with a competing supplier.... "*[294]

Cost saving effect of dual offer was also mentioned with an example of using common call centres for both electricity and gas customers.[295]

In this case it is also referred to the neighbour country's effect and/or the activity of the companies in question at the neighbouring market. It would be the reason of considering the effect on neighbour that is Spain, as well as insufficient interconnections with it[296] due to the regulatory barriers between these two countries,[297] it has only one option to reach the European energy hub. It is also found that prices are not equal either in Portugal and Spain and both countries have congestion problems.[298]

When the natural gas market is specifically examined in the inquiry it is stated that, natural gas came to Portugal after 1997 when the Maghreb-Europe pipeline which

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[292] Ibid, page 116, para 573.
[293] Ibid, page 94, para 453.
[294] Ibid, page 118, para 584, footnote 401 which is agreed meeting minutes dated 07.09.2004 with CNE, the Spanish regulator.
[295] Ibid, page 119, para 591.
[296] Ibid, page 16, para 79.
[297] Ibid, page 28, para 122.
[298] Ibid, page 33, para 140.

transport to natural gas from Algeria to Portuguese –Spanish border was constructed.[299] This pipeline was collectively operated by Spanish transmission system operator Enagas and Transgas, which is one of the subsidiaries of GDP. These two undertakings not only held the transportation rights on the entry point of the pipeline to Portugal, but also they have long term capacity reservation agreements.[300] Allocation of the capacity of the pipeline was demonstrated as a table[301] in the Commission decision as follows:

TABLE -1	in m3/h	In bcm/year	%of total
Enagas booked (only for transit to Galicia, NW Spain)	[…]*	[…]*	[10-20]* %
Transgas booked	[…]*	[…]*	[80-90]* %
Available for either party	[…]*	[…]*	[0-10]* %

This table is copied from the Commission decision in order to show the foreclosure effect and dominance of the parties in question. The table also shows that beside the clear and direct allocation of the capacity for each party, it gives opportunity to the parties to increase their capacity allocation by saying that "available for either party" which means the rest of the capacity still will be allocated either to Enagas or Transgas.

Beside the control over the natural gas pipeline, Transgas owns and operates and therefore holds the whole capacity rights of the LNG Terminal in Sines.[302] Natural gas transportation network was also under the control of Transgas and planned to be transferred to REN (Rede Electrica Nacional S.A.) which is spun off from EDP.[303]

[299] Ibid, page 43, para 190.
[300] Ibid, page 43, para 191.
[301] Ibid, page 43, para 192.
[302] Ibid, page 44, para 194.
[303] Ibid, page 4, para 8.

In addition to holding the transport, natural gas pipelines, LNG Terminal, Transgas also constructed underground storage facility in Portugal.[304] These all show that Transgas is vertically integrated and actively operating in the natural gas market in Portugal. Furthermore, it is stated that GDP will prevent the access of its rivals and/or third parties to the storage facility via asserting technical problems.[305]

Within the respect of liberalisation procedure, Portugal was subject to creating common energy market via Second Gas Directive (2003/55/EC) and it was not included in the first one (Directive 98/30/EC) as an emerging market.[306]

Supply market was also subdivided as supply for (i) power producers, (ii) local producers, (iii) big industrial customers, (iv) small industrial customers, household customers and commercial ones.[307] In the energy market analysis of the Commission, customer demands, variety of customer and its profile in terms of consume patterns, volume needs, seasonal fluctuations, switching of their supply possibilities and conditions are also taken into account.

As a result; the Commission assessed that EDP would increase its dominant position on the wholesale electricity market in Portugal if the proposed concentration had been allowed.[308] Regarding the foreseeable future when the expected imports from Spain happened, EDP would still have the dominance on this market unavoidably[309] since the interconnection levels would not be sufficient in the near future[310].

Moreover, by eliminating its important potential competitor which is GDP via proposed concentration, EDP would strengthen its dominance in the Portuguese wholesale electricity market and this is called "horizontal effect" of the planned

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[304] Ibid, page 44, para 197.
[305] Ibid, page 85, para 403.
[306] Ibid, page 46, para 202.
[307] Ibid, page 47, para 206.
[308] Ibid, page 64, para 280.
[309] Ibid, page 73, para 333.
[310] Ibid, page 73, para 332.

merger.[311] This finding is coming from the strong incentives of the GDP to penetrate the wholesale electricity market in Portugal beforehand of the planned merger.[312]

"Non-horizontal effect"[313] of the proposed merger was mentioned as strengthening the dominant position of EDP on the ground that EDP would have increased its resources to produce electricity. Since the natural gas is commonly used as input to produce electricity in Europe, this planned concentration would give chance to EDP to use the natural gas resources of GDP. Due to not only having access to natural gas resources but also its position, EDP will know the cost of its rivals for using the natural gas as an input for producing electricity.[314] Beside the cost information, EDP will have access to daily basis gas nomination of one of its rivals and thus will be able to know its trade pattern and thus take action accordingly.[315] This is also considered as a competition restriction within the respect of future competitors which will not intend to penetrate the market where their information is known by the dominant market player.[316] Having access to these information is evaluated as market foreclosure risk by the Commission.[317]

Furthermore, Commission also found that even after the liberalisation of the natural gas market in Portugal where the competition rules and natural gas directives would be properly applied and adopted, GDP will still have a tool to abuse its dominance via refusal to supply as well as not granting access to LNG terminal and international pipeline which it owns and/or has control over.[318] Since the real and future natural gas market and the electricity market in Portugal will be badly affected and this will impede the competition in the market, the Commission concluded that proposed merger will definitely strengthen the dominant position of EDP which has the control of access to all supply, transport, storage and generation source in the Portuguese electricity wholesale

[311] Ibid, page 73, para 335.
[312] Ibid. This is also confirmed and supported by the letter of respondents and parties in question to the Commission as well as the market analysis, page 74, footnote 257 and 258.
[313] Ibid, page 77, para 365.
[314] Ibid, page 78, para 368.
[315] Ibid, page 78, para 369.
[316] Ibid, page, 79, para 373.
[317] Ibid, page 80, para 378.
[318] Ibid, page 81, para 381.

market which will cause market foreclosure and impede the competition within the scope of Article 2/3 of the Merger Regulation.[319]

It is also stated that being a dominant market player in Portugal since the beginning, GDP have had many advantages[320] such as (i) know-how and undeniable market experience at every level of Portuguese gas market, (ii) large customer portfolio, (iii) increase the recognisability as well as reliability of its brand, (iv) reliable customers whose needs and demands are well known and easily satisfied by GDP via its subsidiaries operating at each level of the market chain.

These advantages of the dominant market player not only affect the companies which would like to penetrate the market, but also in the point of view of the customers who will not tend to switch off its suppliers due to their habits which create reliability and fidelity between the GDP and them for long years.[321] Also, when it is checked, switching rate in the Member States is very rare and in general large customers would not tend to change their suppliers.[322]

Moreover, customers generally link with one energy brand with for almost all energy sources therefore EDP which has dominance and famousness in electricity market will easily use this as an advantage into natural gas market. Apart from the customer choice and tendency of getting the different energy product and services from the same company/brand which has already constituted fidelity, it is also said that customer base and distribution channel are similar and/or almost the same.[323]

The Commission also stated that via proposed merger, EDP will strengthen its dominance not only on the Portugal electricity wholesale market, but also on the Portugal natural gas market.[324] Thus it concluded that this proposed merger will impede the competition in the market.

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[319] Ibid, page 86, para 410 and page 90, para 429.
[320] Ibid, page 100, para 481.
[321] Ibid, page 102, para 489.
[322] Ibid.
[323] Ibid, page 116, para 570 and footnote 389.
[324] Ibid, page 105, para 501.

Commitments of the parties in a nutshell explained as follows were not found satisfying:

(1) Sale of LNG terminal with its ancillary equipment and workers to REN.[325]

(2) Sale of underground storage facility with its ancillary equipment and workers to REN.[326]

(3) Release the unused capacity at the entry point in Camo Maior in favour of REN.[327]

(4) GDP or any undertakings controlled by each parties will not book further transportation capacity at the entry point in Camo Maior.[328]

(5) GDP or any undertakings controlled by each parties will not book further transportation capacity on the Extremadura pipeline.[329]

(6) In order to eliminate the concern of having access to all information about both electricity and gas customers and market, it is offered by ENI that operational management of the electricity business will not take part in the executive management of the natural gas business.[330]

(7) For large industrial customers, it is offered to renew its supply contact on yearly basis in order to adaptation of liberalisation process in the market.[331]

(8) Dual offer to retail customers as well as the large industrial customers in Portugal will not be made until the natural gas market is liberalised.[332]

(9) Participation of EDP in REN which is currently %30 will reduce to %5.[333]

(10) In order to increase the market players in the electricity market in Portugal, it is offered by EDP to lease the capacity of production to third parties.[334]

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[325] Ibid, page 123, para 611.
[326] Ibid, page 124, para 615.
[327] Ibid, para 619.
[328] Ibid, page 125, para 620.
[329] Ibid, page 126, para 625.
[330] Ibid, page 126, para 628.
[331] Ibid, page 126, para 629.
[332] Ibid, page 127, para 634.
[333] Ibid, page 127, para 636.
[334] Ibid, page 128, para 639.

C. *TOTAL/GDF*[335]

On 20.08.2004, Total notified the Commission that it would like to purchase the some gas assets located at Central and Southwest of France from GDF. Several of these assets were also co-owned by Total and GDF. By separating the location of the assets it would generally be categorized as assets in Southwest of France are; (a) natural gas storage facilities called Pyrenees-Atlantiques at Izaute, (b) various natural gas transmission pipelines and (c) company titled Gaz du Sud Ouest ("GSO").

Assets in Central of France are nontangible and about customer portfolio, serving system to customers etc. of a company titled Compagnie Française du Methane ("CFM").

According to the acquisition plan, it would intend to unwind cross shareholding of Total-GDF in CFM and GSO.[336]

Gas asset of Total which operates in French gas and oil market in France were mainly acquired from Elf Aquitaine. The company to be acquired is active in Southwest France at the supply and transmission of gas market.

This proposed transaction raised the competition concern in the eye of the Commission which evaluated the situation as strengthening the position of Total in the natural gas market. It is stated that via acquiring the assets mentioned above and controlling over GSO, Total will increase its position on the gas supply, transmission and storage market. Considering the characteristic of the region where the natural gas storage and transmission infrastructures are limited, this proposed transaction will increase competition concern on the ground of preventing third party access to infrastructures.[337] Thus conditional clearance to Total's purchase is given by the European Commission.

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[335] European Commission Press Release Database, IP/04/1200, Brussels, 11.10.2004, "*Commission gives conditional clearance to Total's purchase from GDF of several gas assets in South-West and Central France*" available at http://europa.eu/rapid/press-release_IP-04-1200_en.htm (Online on 05.06.2019).
[336] Ibid, para 5.
[337] Ibid, para 6.

In order to eliminate the Commission's concern, Total committed to implement efficient, equal and fair access policy to its natural gas storage facilities and transmission network in the Southwest. This commitment based on the fact that in the event of switching the supplier, necessary storage and transmission capacity will be transferred to new supplier.[338]

As seen analysed merger proposals above that the Commission gives specifically more importance to the concentration in the natural gas market due to the fact that there are only few market players which generally have integrated company structure and dominant position in the natural gas market. In the event of merger of these dominant market players, the natural gas market will be more monopolised. Integrated company structure of the natural gas companies which allows them to operate at the different market chain level where there are also less competitors, makes the merger proposal in the market more complex and raise the competition concerns. Unless the natural gas market is fully liberalised, the merger proposals mostly will be rejected in order to have more market players as competitors in the market.

[338] Ibid, para 8.

VII. CONCLUSION

This thesis examined the application of EU competition rules to the EU natural gas market. Within this respect, history and development of the EU energy market and its liberalisation process were evaluated in order to understand the market requirements and dynamics and readiness for competition. After that, characteristics of the EU natural gas market were analysed by referring to the types of agreements concluded between natural gas undertakings which could operate at the upstream and/or downstream market and could be integrated undertakings which operate at the both level of the market chain. Within this respect, natural gas agreements are classified as horizontal and vertical agreements on the basis of market chain level. Clauses in the natural gas agreements which are found as restrictive of competition are analysed by referring to the related cases and their outcomes.

Since the specific scope of this thesis is the natural gas agreements and their effects on competition, merger agreements under the proposed concentration are also evaluated on the grounds of EU Merger Regulation.

It could be said that, natural gas is an important source for the EU Member States and has influence on the power balance among them. Moreover, regarding the fact that the EU was originally established as the Coal and Steel Community, energy is one of the main elements for unification. It is also explicitly stated in the TFEU that in order to create the internal market, liberalisation in the energy market is essential. On that ground for creating the internal energy market, the TFEU established the aims as security of supply, effective functioning of the energy market, promoting efficiency of energy resources and services. Since the EU depends on imported natural gas, security of supply is essential in order to ensure consumers from all around the Member States of the EU that the natural gas flow will continue sufficiently and on time in accordance with their demands on the basis of low price and equal treatment. Therefore application of the EU competition rules is vital for liberalisation and realizing these aims.

At the beginning when the first liberalisation directives regarding the electricity and gas market were introduced, the European Commission had tolerant approach and

waited for the Member States to align their market with the request of EU competition rules and transpose these directives to their national legal systems/laws. Since the energy was a national issue for the Member States which regulates their energy rules in accordance with their legal, economic and political needs, the European Commission chose directive rather than regulation as a tool to set the internal energy market rules in order to give the Member States flexibility to determine their own way of adaptation of the directives and smoothly transfer the energy issue from national level to the EU level. During the liberalisation process, the European Commission observed the market patterns and made market inquiry in order to see the obstacles and requirements of the market. Within the next step, the European Commission had stricter approach to the anti-competitive conduct of the Member States and intervened the conducts whenever required even by imposing fines sometimes.

General purpose of the competition rules is to ensure the consumer welfare by reducing the prices and increasing the quality of goods and services and opportunities of the consumer. However it was not easy to directly apply the EU competition rules in the EU natural gas market which is structured with national character and monopoly. For that reason it took time to liberalise the EU natural gas market. Liberalisation package which consists of gas directives and market inquiry of the European Commission have paved the way for liberalisation. Additionally the hands on approach of the European Commission played an important role to shape the market and increase the competitiveness in the market.

Main problems preventing the competition in the natural gas market are long term agreements, refusal to supply, refusal to grant an access to third parties, market and territory sharing and reselling restriction clause. Since, natural gas supply and services require infrastructures and facilities which are to be constructed with high investment, it has been accepted that investors may conclude long term agreements in order to secure their investment and outcome. However long term agreements were found as restriction on competition under Article 101/I of the TFEU and asked to be shortened. Regarding the refusal to supply and refusal to grant third party access, as other bottlenecks, it was claimed that the owner of the infrastructure and/or facility has a right to allocate the

availability on the network in favour of itself since by bringing the network to the market, it has privilege and thus can control the market. However it is found abusive of dominant position and breach of Article 102 of the TFEU. In most of the cases, undertakings in the dominant positions are demanded to commit to release specific amount of natural gas to market, delete the anti-competitive clauses in the agreement and have transparent price formula as well as the transparent information about network allocation.

As seen from the undertakings' commitments submitted to the European Commission, the application of the EU competition rules and liberalisation process in the EU natural gas market have moved forward and still are to be developed in a dynamic way. Therefore it is important and essential to evaluate the application of EU competition rules to the EU natural gas market. As being different from the other EU markets, natural gas market is more influenced by political, economic, environmental parameters and legal developments. Since having the natural gas resource gives the political power to the countries, they are not willing to lose it in order to eliminate the competition concerns and they try to overcome competition problems submitting as less commitments as possible and keep their dominance. The effect of the politics could also be observed especially in the Commission's intervention initiated against Russian Gazprom which submitted less strict commitments to the Commission comparing to the other EU companies. Considering the effect of the politics, the liberalisation process of the natural gas market has slowed down.

On the other hand natural gas stays as an inevitable needs of the consumers and a strategic power of the Member States. Moreover the characteristics of being a national issue before the liberalisation process makes the natural gas market as an interesting field of example to examine the application of competition rules and observe the development process of the liberalisation in the market.

As a result of the examination it is found that, the EU depends on imported natural gas which is the common problem of the Member States. As being the common problem in the entire territory of the EU, it makes easy the unification under the energy liberalisation packages. Infrastructure is another key element for the natural gas market. Undertakings which own infrastructure and or privileged access to the infrastructure

become dominant market players which easily lead to the monopolisation and increased unfair prices for the natural gas. Therefore having access to the infrastructure is provided and so guaranteed through the application of the competition rules. In the examined cases and the Commission interventions, it is asked to the undertakings in question to grant an access to the gas pipelines and gas storage facilities and make transparent of the usage capacity and price formula of the infrastructures. As observed; transparency, equality and variety of the customers' option came to the natural gas market via the application of the competition rules. On the one hand monopoly in the market have been decreased, on the other hand market players have been increased as a parallel development of easing the market entry for others. The application of EU competition rules to the natural gas market have also been an assist to standardization of the market and opening it to innovation.

Liberalisation in the natural gas market has eliminated the monopolies which were generally state-owned companies and has been beneficial for the consumer welfare in terms of increased innovation and decreased prices. Application of the EU competition rules to the EU natural gas market assisted the EU in order to reach the internal market aim which under the energy market subdivided as security of supply, energy efficiency and increased interconnection. This application not only served for the consumer welfare and reduce the natural gas price, but also supported natural gas undertakings to bring innovation as well as better goods and services. It also brings the legal unification of the EU in which the Member States apply the same competition rules to the similar issues.

As a consequence, it could be said that application of the EU competition rules to the EU natural gas market is a milestone for both EU energy market liberalisation within the economic and political perspective and the improvement of the application of the EU competition rules in a specific area as legal perspective.

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