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The application of EU competition law in the energy sector

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Ευχαριστίες

Η παρούσα διπλωματική εργασία με τίτλο ‘The application of EU competition law in the energy sector’ («Η εφαρμογή του ενωσιακού δικαίου ανταγωνισμού στον τομέα της ενέργειας») εκπονήθηκε στα πλαίσια του Ενιαίου Προγράμματος Μεταπτυχιακών Σπουδών, κατεύθυνση «Δίκαιο της Ευρωπαϊκής Ένωσης» της Νομικής Σχολής Αθηνών, κατά το ακαδημαϊκό έτος 2017 – 2018.

Είμαι ευγνώμων απέναντι σε όλους τους διδάσκοντες του προγράμματος, την Επίκ. Καθηγήτρια κα. Ρεβέκκα – Εμμανουέλα Παπαδοπούλου, τον Επίκ. Καθηγητή κ. Εμμανουήλ Περάκη, τον Καθηγητή κ. Βασίλειο Χριστιανό για την φωτεινή τους παρουσία και την προσφορά τους καθ ’όλη τη διάρκεια τους έτους. Ιδιαιτέρως ευχαριστώ την κα. Παπαδοπούλου για την ταχύτατη και αποτελεσματική συνεργασία της στην προετοιμασία της αίτησής μου για τη διενέργεια πρακτικής άσκησης Erasmus+.

Θα ήθελα να ευχαριστήσω θερμά την επιβλέπουσα της εργασίας μου, Επίκ. Καθηγήτρια κα Μεταξία Κουσκουνά για την εμπιστοσύνη που μου έδειξε και τη βοήθεια της, ιδίως μέσα από γόνιμα σχόλιά πάνω σε θέματα που θεωρούσα δεδομένα. Ιδιαιτέρως ευχαριστώ την Επίκ. Καθηγήτρια κα. Αικατερίνη Ηλιάδου η οποία εν μέσω καλοκαιρινών διακοπών έδωσε ώθηση στην έρευνα μου μέσα από στοχευμένα εναύσματα με ενωσιακή προοπτική. Εξάλλου, στο πλαίσιο του μαθήματός της «Δίκαιο της Ενέργειας» ανέπτυξα ενδιαφέρον για το θέμα που πραγματεύεται η εργασία.

Τέλος, θέλω να ευχαριστήσω θερμά την οικογένεια και τους φίλους μου για την δίχως όρους συμπαράστασή τους σε κάθε μου εγχείρημα. Ένα ιδιαίτερο ευχαριστώ στον Cian ο οποίος επιμελήθηκε γραμματικά και συντακτικά μεγάλο μέρος του κειμένου, κυρίως όμως για την ανεκτίμητη υποστήριξή του καθημερινά. Οποιοδήποτε σφάλμα βαρύνει αποκλειστικά εμένα.

Abbreviations

ACER: Agency for the Cooperation of Energy Regulators

AG: Advocate General

Art./art.: Article

CEF: Connecting Europe Facility

CFREU: Charter of Fundamental Rights of the European Union

CJEU/ECJ/Court: Court of Justice of the European Union/Court of Justice

CMLR: Common Market Law Review

DG: Directory General

EC: European Community

ECN: European Competition Network

ECSC: European Coal and Steel Community

ed: editor

edn: edition

EEAG/Guidelines: Guidelines on State aid for environmental protection and energy

EEC: European Economic Community

EED: Energy Efficiency Directive

ENTSO: European Networks of Transmission System Operators

et al.: et alia

et seq.: et sequens

ETS: EU Emissions Trading System

EU: European Union

EUMR: European Union Merger Regulation

GC: General Court

GW: GigaWatt

ISO: Independent System Operator

ITO: Independent Transmission Operator

LNG: Liquefied Natural Gas

MDI: Market Design Initiative

MS: Member States

NCA(s): National Competition Authorities

NRA(s): National Regulatory Authorities

OJ: Official Journal

PCIs: Projects of Common Interest

PPC: Public Power Company (Other acronyms referring to trade names of undertakings will not be explained)

PSOs: Public Service Obligations

RED: Renewable Energy Directive

REMIT: Regulation on Energy Market Integrity and Transparency

RES: Renewable Energy Sources

ROCs: Regional Operational Centres

SEA: Single European Act

SG(E)I: Services of General (Economic) Interest

SSR: Sector Specific Regulation

TEN-E: Trans-European Energy Networks

TEU: Treaty of the European Union

TFEU: Treaty of the Functioning of the European Union

TPA: Third Party Access

TSO: Transmission System Operator

Introduction

This thesis will discuss the application of the European Union competition rules in the energy sector. More specifically, we will look at how competition law is a tool used, firstly, to create competitive and well-functioning energy markets where they did not exist previously due to deeply rooted monopolistic structures dating back to the aftermath of WWII. In particular, the objective of EU competition rules is not only this, but also to create an internal, integrated EU-wide energy market that will comply with the Union's economic constitution, respond to the unique characteristics of the energy markets and benefit EU citizens. Once markets are 'initiated', but also simultaneously to this process, EU competition law applies in a complementary fashion to the more and more maturing markets, with a view not only to fill in the gaps of the liberalisation process, but also to restore competition restrictions, while taking into account efficiency and public interest considerations. In this sense, we will conclude that EU competition law enforcement is a policy instrument with which the Union seeks to restructure the markets, replace the 'mercantilist', protectionist State regulation with an EU one and, at the end of the day, use it as a means to enforce measures which were not accepted by Member States through the legislative process.

Making clear certain methodological aspects of the study, it should be noted that 'application', is perceived in the sense of public enforcement of EU competition law, and in particular by the EU institutions solely, namely the Commission – first and forward, along with the General Court and the Court of Justice of the EU. The private enforcement of EU competition law, although it does not lack sufficient background in the EU legal order, is only now developing at an EU level. Thus, instances of private action in the energy sector have not been reported, at least in the public forum. However, in Part One of the study, we will take a look at individual action that, in synch with the 1980 – 2000 economic zeitgeist, mobilised the EU institutions in liberalising the energy sector. Enforcement by Member States' authorities, competition or regulatory is not examined. Although this was an intention (or rather ambition) at the very beginning of the research, it later became clear that such an autonomous study was not possible in the given time-frame, and upon the current resources. More precisely, one of our early assumptions about the possible outcome of the study was that since Regulation 1/2003 trusts and assigns responsibilities to the National Competition Authorities, the energy sector would be no exception, and thus, their workload would become heavier. This can be inferred by the study of the proceedings with the Commission included in this thesis, which focus on the more EU-centered cases, especially since 2012-2014. Nevertheless, we

decided that a primary, first hand study of Member State enforcement was not possible, since, for instance, the case publications are not always accessible or not available in English. In contrast, most Commission decisions are public and ample commentary on them exists. To sum up, a case study of the EU institution enforcement is attempted. 'EU competition rules' include primary, Treaty EU law – Articles 101-109 TFEU - along with other provisions, secondary law and soft law issued upon those Treaty legal bases and implementing legislation [103, 106(3), 109 TFEU], only in an introductory fashion and whenever deemed necessary for the case study. Case law is of course not excluded. In the sense of secondary law, we also perceive the EU sector specific regulation for the creation of an internal energy market, since 1992, not to its entirety but after focusing at its competition law elements examined in Part One, 1.3. In this sense, we also look at the Merger Regulation 194/2004. Lastly, the 'energy sector' is conceived in a horizontal view, including different energy sources or 'product markets' without distinction.

The research and drafting of the dissertation at hand started in July 2018 and was concluded on 20 November 2018. It consists of a legal study focusing on the Commission's and the Court's use of their legal powers and excludes informal discussions and negotiations at a political level, although this is sometimes tempting for the politically charged energy sector. We hope that this is limited in the present Introduction and the Conslusions. It is structured in two (2) parts, Part One extending at 52 pages, Part Two at 54, each incorporating introductory remarks, four (4) chapters and a findings section. Finally, at 'Conclusions' we arrive firstly, at certain assumptions on the application of the law and the relationship between 'sectoral' and 'general' rules, secondly, we express thoughts about the current state and future standards for the application of EU competition law in the energy sector. The main inspiration across the study and the look-out for conclusions was a 'law-in-context' analysis, overcoming the technicalities so inherent to the so-called 'energy law', similar to that of Kim Talus in his most important work 'EU Energy Law and Policy: A Critical Account', Oxford University Press, 2013. Other significant sources of inspiration where the excellent accounts on economic regulation by Giorgio Monti.[1]

Part One explores the intricacies of the energy sector that make it unique and render public intervention through regulation necessary. The market mechanism alone cannot alleviate the challenges the sector poses. For this reason, we believe that the term 'de-regulation', describing the liberalisation process is not precise. Public intervention not only exists, but it is more sophisticated

[1] D Chalmers, G Davies, G Monti, *European Union Law Cases & Materials* (2nd edn, Cambridge University Press, 2010) Ch. 24; G Monti, *EC Competition Law* (Cambridge University Press, 2007)

and complex than before, only it is now coming from the EU legal order and not from the State. Competition law enforcement is only another aspect of the role of the State in the newly liberalized energy sector. The application of competition law can be a result of 'negative integration' (Part One, 1.2.). This was the case in the first stages of the opening of the market, through the application of Articles 4(3) TEU and 106 TFEU, by initiative of individuals or the Commission against Member States who breached the competition law provisions of the Treaty. Those actions did not appear in a vacuum, but were instead influenced by the 'neo-liberal' wind blowing in the late 1980s and 1990s when the Single European Act also came into force. As Talus notes,[2] the 1990s were 'a time of economic prosperity with great enthusiasm over the collapse of communism. Energy reforms towards privatisation and liberalisation were taking place in many advanced EU and other 'benchmark' countries (UK, Germany, the Netherlands, Sweden, Finland, Norway, the US, Australia, Canada)' and were proof that *'competitive energy markets would work'*. This led to *'the system of energy monopolies, which served European countries well in the phase of rebuilding their economies after WWII, to lose by the late 1980s its purpose and its political, and moral, legitimacy'.* Consumers came to the realisation that the state monopolies charged higher than were necessary and that the surplus was not used for public purposes due to the *'mutually profitable symbiosis between the state-owned or state-licensed monopolies and the political classes'*. Those ideas were strengthened when it was demonstrated that *'proper and universal energy supply could be provided in more market-based regimes',* as it is currently the case. The European Commission, by initiating the liberalizing process at an EU level by means of the internal energy market directives (1992 and beyond), appears in this narrative as the one institution able to exploit these opportunities and move towards the development of both market forces and a solid political consciousness in Europe. This way Europe's gas and electricity markets were opened to competition, resulting in the abolition of national monopolies and the removal of barriers to cross-border trade. The furthest aim is the creation of an integrated European energy market across Member States, which, in our view, is a work in progress. The content of the EU regulation from a competition law point of view is examined in Chapter 1.3. of Part One. State Aid in the energy sector will be examined after this section, focusing on three current phenomena that give rise to state aid issues, the renewable energy support schemes, capacity mechanisms and services of general economic interest (Chapter 1.4.). The common ground of the above rules is that they address Member States, raising questions as to what extend and how competition law can be applied against the sovereign State.

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[2] K Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2013) 95-96

In Part Two, we turn to the application of the general EU 'core' competition rules, i.e. 101, 102 TFEU and the Merger Control Regulation against private undertakings. After an introduction to the EU competition law mechanism, we attempt a case study of agreements between undertakings under 101 TFEU in Chapter 1.2. This analysis is rather simple, especially in comparison to that of 102 TFEU in Chapter 1.3., which gives rise to serious legal issues, in particular with relevance to the application of the 'essential facilities doctrine', the imposition of structural and behavioural remedies in commitments decisions and the assessment of long term supply contracts. When the Commission deals with them, it seems to derogate from the established case law and practice in other sectors of the economy. It is also evident that the competition law toolkit allows the Commission to enforce policy choices through the administrative 'back door', although the Member States did not concede to them at a political level, in the Parliament and the Council. The case study of Merger Control in Chapter 1.4., which combines elements of both the 101 and 102 TFEU mechanisms, reaches the conclusion that the EU policy in this respect is significantly influenced by strategic and economic policy choices. Generally, it gives out signals of the EU being rather tolerant towards mergers and acquisitions which do not raise very severe anticompetitive concerns but can contribute in the integration of the EU market despite them. The cases examined in all four chapters were selected based on their impact and recurrence in the literature and commentary, dating from the late 1990s to the present date, while the bulk of them were decided in 2003-2012.

Part One

Application of EU Competition Law in the Context of Creating Energy Markets

The Member States at the Stand

Obligations imposed to Member States under EU competition rules

1.1. Introduction: why is public intervention in the energy sector necessary?

In this part we examine the application of EU competition law on the regulation of energy markets by Member States. Enforcement of competition law in this field was slow to emerge.[3] The reason for the belated, and so far relatively cautious, from a certain standpoint,[4] intervention is threefold. First, the European Union's economic policy at the time the Single European Act was adopted, changed, favouring greater liberalisation of the economy[5]. State intervention became inherently suspect. Secondly, intervening and regulating sovereign states is more 'politically sensitive' than regulating private firms; thus the Commission and Union courts had to move with more caution. Thirdly, there is a tension between the Union's aims of competition and liberalisation of certain protected sectors of the economy, on the one hand, and the duties that Member States owe to their citizens, in particular the duty to ensure the availability of certain vital goods and services (e.g. water, telecommunications, energy, postal services), on the other.[6]

In other words, competition policy (and therefore, law), does not exist in isolation. Instead, it is complemented by social, regional, employment, environmental or other policies which may in some cases restrict its scope. In certain industries, such as the provision of healthcare, defense and once, energy, governments may also consider fully or partially shielding the relevant markets from competition.[7] The notion underlying all of the above is that while the market mechanism is generally believed to deliver certain benefits, there is also the possibility of 'market failure' from a social perspective. In those cases, overall welfare is improved by some form of more stringent intervention than a mere supervision of the market mechanisms.[8] Acknowledged by economists factors which cause market failures are externalities, public goods and asymmetric information.[9] Focusing on the

[3] D Chalmers, G Davies, G Monti, *European Union Law Cases & Materials* (2nd edn, Cambridge University Press, 2010) 1107
[4] Ibid
[5] See *infra* Part Two
[6] B Bozeman, *Public-value failure: When efficient markets may not do*, Public Administration Review, March/April 2002, Vol. 62, No. 2, 145-161
[7] Ibid
[8] M Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press, 2013) 23
[9] Ibid, 23-26

energy market, certain characteristics make the public intervention imperative, being, apart from externalities, the natural monopoly nature of the energy industry consisting of a network industry and also general interest considerations.

- Externalities: Externalities arise when the behaviour of an economic agent has implications for other agents that are not reflected in the market system.[10] They can be negative, as the environmental implications the exploration, production, transport and supply of energy carry. In this case, the market agents (producers, consumers) do not account for a cost created[11]. Externalities can be positive too, when market agents do not take advantage of all the benefits created in an industry. One example is network effects. Network effects arise when the value of a product to an individual user increases the more people use the product.[12] Social welfare is achieved when externalities are internalised, them being taken into account at the decision making process. This can be done by means of public, regulatory intervention, as in levying a tax on the firm that reflects the external effect of its output decision, or imposing an obligation to invest. The primary example of such a mechanism in the EU context is the EU Emissions Trading System (ETS).[13] In the energy sector, externalities originate from the industry's economic characteristics as economies of scale.[14] In general, being active in the energy industry requires stable, specialised, high-intensity investment (e.g. in networks for the transportation and distribution of electricity and gas) which in turn asks for long term planning and results in unsure amortisation.[15] In other words, costs already incurred and which cannot be recovered (sunk or post investment costs) can occur, giving rise to the aforementioned failures.[16] Consequently, a clear and predictable legal framework can add to the security needed for the investments to be realised.

- General interest considerations: Energy is a fundamentally vital good, essential for a dignified human existence. Energy is also a factor of economic development and progress to the extent it consists a prerequisite for the production of industrial goods and the offer of services (telecommunications, transport). Of course, the notion of vitality is a dynamic one, reliant on technological development. In addition, the social welfare considerations of energy are not limited to the availability of goods and services, but are relevant to the access to the network which will

[10] Bozeman, (n 6) 2
[11] A Iliadou, *Η Διείσδυση του Δημοσίου Δικαίου στη Ρύθμιση Αγορών Δικτύου* (Nomiki Bibliothiki, 2010) 39
[12] Lorenz, (n 8) 24
[13] Council Directive (EU) 2018/410 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 [2014] OJ L76/3
[14] R Whish, D Bailey, *Competition Law* (7th edn, Oxford University Press, 2012) 83
[15] D M Tilman, *Ownership Unbundling and Related Measures in the EU Energy Sector* (Springer, 2018) 4
[16] Whish, Bailey, (n 14) 716

allow for expansive investment. In this context, art. 22 of the Electricity Directive[17] regulates the network investments at an EU level.[18] Nevertheless, the above considerations do not automatically render energy a public good.[19] Energy is a commercial, rival good, as any other.[20] On this basis lies the dispute as to whether 'energy law' can be regarded as an autonomous discipline.[21] Lastly, the energy industry gives rise to geopolitical and strategic considerations, since the major consuming centres can be situated far away from the necessary resources. The EU is largely dependent for its energy supply from third countries to its eastern and southern fringes, with which energy trade is as a rule volatile, high-risk and, from a governance perspective, problematic.[22] However, surprisingly, the external dimension of EU energy regulatory law started to emerge relatively late, and is still largely absent. The primary example is the accession to the Energy Charter Treaty in 2005 which, according to Talus, barely offers 'a tangible, creative mechanism which goes beyond marginal and moral support to facilitation of trade and investment.'[23]

-Natural monopoly characteristics: According to the economic theory,[24] natural monopoly means a situation in which, infrastructure is not feasibly duplicated, therefore having two or more competing producers would not be viable and so efficiency dictates that a single firm serves the entire market. Where a natural monopoly exists, it is inappropriate to attempt to achieve a level of competition which would destroy the efficiency that this entails.[25] This problem may be exacerbated where the 'natural monopolist' is also required to perform a 'universal service obligation',[26] such as the uninterrupted supply of power to all domestic customers at a reasonable, uniform price; performance of such an obligation may not be profitable in normal market conditions, so the state may confer a statutory monopoly on the undertaking entrusted with the task in question.[27] Two models are largely proposed to tackle those issues: public ownership, or a system of regulation while

[17] Council Directive (EC) 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L 211/55
[18] Iliadou, (n 11) 32
[19] Lorenz, (n 28) 26: *'Public goods are non-rival, the consumption of one additional unit of a good not reduce the availability of the good for consumption by others, and non-exclusive, meaning that once a good is produced, no one can be excluded from benefiting from its availability. Examples include defense, security and public education.'*
[20] Contra R Heffron, *Energy Law: An Introduction* (Springer, 2015) 36
[21] See discussion in K Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2013) 69-71
[22] Ibid 499
[23] Ibid 500
[24] N Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* (Cambridge University Press, 2015) 16-17
[25] Whish, Bailey, (n 14) 83
[26] See *infra* 1.4.
[27] Whish, Bailey, (n 14) 83

leaving the competitive segments of the industry in the private sector.[28] The former describes the situation of the EU energy markets prior to the liberalisation which took place in the 90s, and its lawfulness under EU competition law of 'special or exclusive rights' conferred by the state is one of the more complex issues to be considered to some extent in this thesis.[29] The latter, the way EU energy markets have been operating since competition was introduced to the former state monopolies, leading towards the creation of an *internal* [in the sense of 26(2) TFEU], integrated, EU-wide market.[30]

Prior to the 1980's most utilities were run by national and very often state-owned monopolies. Although not all such industries evolved in the same way, at a certain stage national or regional monopoly supply companies were established and granted either de jure or de facto the exclusive right to sell, import and export, and to construct infrastructure in their particular area.[31] During the late 1980's and early 1990's, the Commission began to challenge the existence of these monopolies and exclusive rights, first in the telecommunications and then in the gas and the electricity sectors, on the grounds that they made the existence of a European market – an internal market – for these goods impossible. Electricity generation was solely in the hands of the monopoly company, usually state-owned. Similarly, the national gas company often benefited from a legal monopoly to import. As a first step, therefore, the freedom to construct and operate competitive generating facilities and to freely import gas needs to be established. Furthermore, this may not be sufficient to create competitive markets due to the continuing strength of the ex-monopoly with its historical very high

[28] Whish, Bailey, (n 14) 566: *'Direct regulation should be a remedy of last resort. Competition authorities should not be price regulators; they should be the guardians of the competitive process. Where markets are oligopolistic and entry is limited, competition authorities should be concerned with the question of whether there are barriers to entry and whether the state itself, for example through restrictive licensing rules, regulation or legislation, is responsible for a lack of competition.'*

[29] See *infra* 1.2.

[30] Market integration has been a fundamental EU energy policy concern since the beginning of the work to establish an internal energy market; for earlier documents on the topic, see, inter alia, the Commission Working Document 'The Internal Energy Market' COM(88) 238 final (2 May 1988) <https://eur-lex.europa.eu/procedure/EN/107212> (accessed 20 November 2018). One of the pillars of the Energy Union is the establishment of an integrated EU electricity market. In legal terms, this internal electricity market can be described as an EU-wide market without frontiers where the free movement of electricity as a commodity is ensured in accordance with the provisions of the Treaty on the Functioning of the European Union (TFEU). A well-functioning internal market in the grid-bound electricity sector requires the opening up for cross-border competition between former national markets, investments in the necessary cross-border transmission infrastructure ('interconnectors') and sufficient utilisation of such interconnectors. An interconnector is defined in Art 2(1) of Council Regulation (EC) 714/2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15 (the 'Electricity Regulation') as a 'a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States'; J Rumpf, H Bjørnebye (2018): *Just how much is enough? EU regulation of capacity and reliability margins on electricity interconnectors*, Journal of Energy & Natural Resources Law, 2

[31] C Jones, 'Introduction' in C Jones (ed), *EU Energy Law: Volume I The Internal Market* (4th edn, Claeys & Casteels 2016) 10

market share, which is only eroded slowly. Thus, further measures may be necessary to limit or reduce the market share of the ex-incumbent by, for example, capacity release schemes.[32] In the absence of a liquid market with a sufficient number of competitors, a number of problems may emerge. In particular, there may be no reliable index of the price of electricity and gas which represents the real fundamentals of supply and demand. This may act as a disincentive to investment in new production plant and infrastructure capacity. It will also undermine the confidence of consumers in the market, especially during periods where prices are increasing. Such circumstances will give rise to pressures for government intervention in the market such as pricing restrictions. Such measures may further damage investment incentives, creating a cycle which could eventually result in the return of total government control of the sector in question.[33] Thus, from a liberal perspective ensuring real and effective competition on wholesale markets is probably the most important 'public service' that needs to result from the Internal Market process.[34] However, in our view, the role of the State is not (and should not be) limited to this. The necessary preconditions for this to happen have been already incorporated in the EU regulatory framework and are discussed here.[35]

Initially, in a process which may be labeled 'negative integration', only individuals and the Commission on their own initiative challenged anti-competitive state regulation, which led to the Court of Justice becoming involved in determining if and how far markets should be liberalised. While this approach may result in some markets being opened, liberalisation of economic sectors is necessarily unsystematic and guided by private interests.[36] Subsequently, the Community gradually began to take legislative steps to liberalise major industries formerly under state control or ownership, in particular the network industries including energy, as part of the Community's single market programme which sees network industries as a catalyst to generate increased competitiveness in the EU economy as a whole ('positive integration').[37] To reflect these developments, Part One is organised in the following manner: In 1.2. we will look at the interpretation of 106 TFEU in conjunction with 4(3) TEU and 37 TFEU so as to examine the lawfulness of the former state monopolies under EU law. We will see that EU law imposes obligations of non-intervention to the state. In 1.3. we will turn to the Union's efforts to positively

[32] Ibid 9
[33] Ibid 10
[34] Ibid 10
[35] See *infra* 1.3.
[36] Chalmers, Davies, Monti, (n 3) 1108
[37] Ibid

regulate the newly opened energy markets by examining the current regulatory framework. 1.4. concerns State Aid. Lastly, under 1.5. we will sum up our findings.[38]

1.2. Negative integration: Primary law obligations imposed to Member States

Given the fact that regulatory legislation has been adopted since 1992, the judgments mentioned below, relevant to the postal services, transport and telecommunications sectors, are now of largely academic and historical interest for the energy sector. However, they are of fundamental importance because it was these judgments, confirming that the Commission did have power to abolish monopoly rights under certain circumstances, that brought the Member States to the negotiating table in the belief that it was better to agree on common rules requiring progressive market opening rather than to leave proceedings with the Commission and CJEU acting as *ad hoc* enforcers of the internal market rules. The latter role of the EU institutions is examined in Part Two, where it is submitted that it might accelerate or even undermine the legislative approach to create a competitive internal energy market.

1.2.1 General obligations: an interpretation of article 4 (3) TEU

Pursuant to Article 4(3) TEU, Member States have a general obligation to cooperate with the European Union to facilitate the objectives of the Treaty on the Functioning of the European Union, one of them being the creation of a competitive internal energy market.[39] In a spate of decisions from the late 1970s to the mid-1980s, the Court of Justice held that on the basis of Article 4(3) TEU, Member States could not maintain in force legislation that allowed an undertaking to infringe EU competition law because such legislation deprived competition law of its 'effet utile'.[40] The approach was first articulated in *GB-INNO-BM*[41] and established with *Vereniging van Vlaamse.*[42] The Court consolidated this approach in *Van Eycke*,[43] which 'codifies the basis upon which state regulation will fall foul of EU competition law': a state measure would be incompatible with Articles 4(3) TEU read together with Articles 101 or 102 TFEU if it 'were to require or favour the adoption of agreements, decisions or concerted practices contrary to [Article 101 TFEU], or to

[38]The provisions of 4(3) TEU and 106-109 TFEU are described as 'quasi-competition' rules by certain scholars: Dunne, (n 24) 23

[39] See *infra* Part Two 1.1.

[40] Chalmers, Davies, Monti, (n 3) 1109: *'It refers to the effectiveness of a rule of law. In this context it indicates that if states could legislate to legitimise anti-competitive behaviour the effectiveness of Articles 101 and 102 TFEU would be lost, as undertakings could merely lobby governments to shield their anti-competitive agreements with legislation preventing the application of EU competition law.'*

[41] Case 13/77 *GB-INNO-BM SA v Association des détaillants en tabac (ATAB)* [1977] ECLI:EU:C:1977:185

[42] Case 311/85 *Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECLI:EU:C:1987:418

[43] Case C-267/86 *Pascal Van Eycke v ASPA NV* [1988] ECLI:EU:C: 1988:427, para 16

reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere' (para 16). However, after the *Meng*[44] judgement, which draws on AG Teasuro's arguments, it was accepted that 4(3) applies only when there is a causal link between the state measure and an infringement by undertakings. However, this rationalisation points to a gap:[45] If anti-competitive state legislation falls outside the Article 4(3) TEU doctrine and is also not covered by the free movement laws, 'then some anti-competitive state action is possible, compromising the Treaty's ambition to create an economy based on market principles.' It seems to be that the Court implied in *Meng* that the state would be able to provide a public interest defence if the court were to find that state law had an anticompetitive effect, this was not yet certain though. The Court's answer to date seems to be that 'while states are unable to give substantive policy reasons why their actions do not infringe competition law, they may avoid the application of competition law if procedures are in place to show that the state is not merely ratifying anti-competitive agreements but is regulating the economy in cooperation with relevant stakeholders and is thus acting in the public interest'.[46] To further strengthen the enforcement of competition law, the Court, in *Fiammiferi*,[47] also held that liability in damages may be available against undertakings which act on the encouragement of state legislation, thereby furthering the Commission's policy of promoting private enforcement of EU competition law. The effect of this judgment is that 'national competition authorities (NCAs) may be encouraged to review anti-competitive state regulation more systematically.'[48] It has been suggested that this could lead to a division of labour whereby the Commission deregulates the economy in sectors of general EU importance (electricity, telecommunications, postal services) while NCAs contribute to liberalisation by prohibiting state measures that affect local economies.[49] In our view, that this is largely the picture today when it comes to ex post enforcement of general competition rules within the European Competition Network,[50] but exactly the reverse when it comes to introducing regulation: While competition law enforcement is becoming more and more decentralised, sectoral regulation is Europeanised.

[44] Case C- 2/91, *Criminal proceedings against Wolf W. Meng* [1993] ECLI:EU:C:1993:885, paras 25, 27, 28, 30
[45] Chalmers, Davies and Monti, (n 3) 1113
[46] Case C-35/96, *Commission of the European Communities v Italian Republic* [1998] ECLI:EU:C:1998:303
[47] Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECLI:EU:C:2003:430
[48] Chalmers, Davies, Monti, (n 3) 1114
[49] Ibid
[50] *Infra*, Part Two, 1.1.

1.2.2. Specific obligations: an interpretation of articles 106 and 37 TFEU

The CJEU, respectful of state sovereignty, not only narrowed the application of the duty in Article 4(3) TEU to cases where state law is causally connected to an agreement in breach of Article 101 or 102 TFEU,[51] but also dictated that the application of EU competition law to anti-competitive state regulation to be carried out under Article 106 TFEU (former art. 86 EC).[52] Article 106(1) is a prohibition addressed to Member States themselves; Article 106(2) provides a limited exception for certain undertakings from the application of the competition rules; Article 106(3) provides the Commission with important powers to ensure compliance with the provisions of Article 106. Article 106 does not state that granting special or exclusive rights or creating public undertakings are unlawful; it is neutral as to their existence.[53] After a long dormant period it has proved to be a formidable provision in the process of liberalising numerous markets in Europe, such as energy related services.[54] According to Whish,[55] 'Article 106(1) is a 'renvoi' provision or a 'reference rule', 'that is to say it does not have an independent application but applies only in conjunction with another Article or other Articles of the Treaties. It follows that Article 106(1) did not need to have been placed in the chapter of the Treaty on competition law; however, the fact that it is there indicates that 'the Treaty's authors were aware of the potential for Member States to distort competition through the legislative and other measures that they adopt. The importance of Article 106(1) in relation to the competition rules is that, in certain circumstances, a Member State can be liable for the abuses that have been, or would be, carried out by undertakings.'[56] In a quartet of

[51] D Chalmers, G Davies and G Monti, (n 3) 1114

[52] 106 TFEU reads: 1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109. 2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union. 3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

[53]Chalmers, Davies, Monti, (n 3) 1115: *'This is consistent with Article 345 TFEU (former art. 295 EC) according to which 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.' This provision was inserted in the original Treaty in 1957 to allow Member States to nationalise industries. However, while the existence of state-granted monopolies is tolerated, the exercise of these rights must not undermine the Treaty's objectives.'*

[54]Case C-463/00, Commission of the European Communities/Kingdom of Spain [2003] ECLI:EU:C:2003:272, para 82: *'[P]aragraph 2 of Article [106 TFEU], read with paragraph (1) thereof, seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or social policy with the [EU's] interest in ensuring compliance with the rules on competition and the preservation of the unity of the [internal] market.'*

[55] R Whish, Bailey, (n 14) 296

[56] Ibid

decisions in 1991,[57] the Court cast the scope of application of Article 106 widely, and the last judgment of the series illustrates the Court's policy.[58] In *RTT*, para. 12, the Court referred to earlier case law, that an abuse is committed where 'an undertaking holding a dominant position on a particular market reserves to itself an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such an undertaking.'[59] The practical consequences of those judgements are that markets previously closed by the protection afforded to the public undertaking are now opened up to competition. The most significant contribution of this case law is that the Court took a more aggressive stance under Article 106 TFEU than it did under Article 4(3) TEU, where an anti-competitive agreement caused or legitimised by national law is necessary for the state to be found in breach of EU law.[60] According to Edward and Hoskins,[61] these decisions suggest that if the state wishes to reserve the provision of a service to a particular undertaking (in order for instance to ensure that all citizens are able to gain access to it), then it has an obligation under EU law to ensure that the service works efficiently, in response to changing market conditions. On the other hand, Edward and Hoskins note that the Court's case law also places a limit on the reach of competition as Article 106(2) allows states to depart from competition norms when necessary to safeguard the provision of a service of general economic interest.[62]

The derogation in Article 106(2) is a more explicit route to avoiding the application of competition law in order to safeguard the provision of services of general economic interest (SGEIs), which is a good reason for a state to intervene, contrary to protectionism to safeguard an industry. States and undertakings may justify the non-application of EU law obligations when the following three criteria are met: first, undertakings (sometimes falling under 37 TFEU) have been entrusted by the state with the operation of an SGEI; secondly, the application of competition law would obstruct the performance of undertakings entrusted with the operation of an SGEI; thirdly, one must also show that the restriction of competition is not contrary to the interests of the Union.[63] This final provision

[57] Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECLI:EU:C:1991:161; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Others v Dimotiki Etairia Pliroforissis* [1991] ECLI:EU:C:1991:254; Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECLI:EU:C:1991:464 and Case C-18/88 Régie des télégraphes et des téléphones (RTT) v GB-Inno-BM SA [1991] ECLI:EU:C:1991:474

[58] Whish, Bailey, (n 14) 302

[59] Ibid

[60] Chalmers, Davies, Monti, (n 3) 1024

[61] D Edward, M Hoskins, *Article 90, Deregulation and EC Law*, [1995] 32 CMLR 157

[62] For analysis on the current case law interpretation of 106(1) see Opinion of AG Jacobs in Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECLI:EU:C:1999:28, paras 388-439 3 where types of cases are discerned

[63] Whish, Bailey, (n 14) 224-225

has yet to receive detailed scrutiny by the Court, although it clearly demands more than proof that the state measures affect trade between Member States.[64] The expression 'services of general economic interest' is not defined in the TFEU.[65] More recently, AG Colomer has suggested that to be of general economic interest a service there should be continuity, universality, and equality, with perhaps transparency and affordability added to this trinity,[66] while the said service is not economically viable in its own right. Obvious examples of such services are the operation of 'utilities', such as the basic postal service[67] and the provision of transportation services.[68] The Commission has issued numerous publications clarifying the application of internal market and competition rules to services of general interest since 2003, already replaced by 'A Quality Framework for Services of General Interest in Europe'.[69] In the context of Directives to liberalise the energy sector, the Union has 'Europeanised' the provision of SGEIs by listing a number of SGEI, thereby imposing on states obligations to provide a common range of SGEIs.[70] This was consolidated by two Treaty provisions, added by the Treaty of Amsterdam, and expanded by the Lisbon Treaty, 14 TFEU[71] and 36 CFREU,[72] which grant the EU legislative powers. However, Protocol No. 26[73] runs contrary to the Union's legislative competence; especially to the possibility

[64] Chalmers, Davies, Monti, (n 3) 1130

[65] See *infra* 1.4.

[66] Opinion of AG Colomer in Case C-265/08, *Federutility and Others v Autorità per l'energia elettrica e il gas* [2010] ECLI:EU:C:2009:640, paras 186, 187, 203

[67] Case C-320/91, *Corbeau* [1993] ECLI:EU:C:1993:198, para 15: *'it cannot be disputed that Regie des Postes is entrusted with a service of general economic interest consisting in its obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member State concerned, at uniform tariffs…'*

[68] Case C-66/88, *Ahmed Saeed* [1989] ECLI:EU:C:1989:140, para 55. However, it is noticeable that, in more recent judgments, the Court of Justice has recognised that the 'protection' of Article 106(2) can extend beyond the conventional utilities. For example, it has been found to even be capable of application to pension schemes: Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECLI:EU:C:1999:430

[69] Communication from the Commission, *A Quality Framework for Services of General Interest in Europe* COM (2011)0900 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2011:0900:FIN> accessed 20 November 2018. For more on SGEI and in particular in the field of State Aid see *infra* 1.4.

[70] Chalmers, Davies, Monti, (n 3) 1130

[71] Article 14 TFEU reads: 'Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.'

[72] Article 36 of the Charter ('Access to services of general economic interest') reads: The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

[73] The provisions of Protocol 26 on SGI read as follows: 'Article 1: The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:— the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;—

that secondary legislation is to be by way of regulations, which would undermine the state's autonomy to design services of general interest.[74] As it will be seen in the following chapters of this part, any secondary law that regulates the matter as well as the case law drawing criteria for the lawful provision of SGEI is rather timid.[75]

Article 106(3) provides that the Commission shall ensure the application of Article 106(1) and (2) and that, where necessary, it shall issue appropriate decisions or directives.[76] According to Whish,[77] it is not possible to use Article 106(3) for the purpose of achieving harmonisation, the legislative base for which is provided by Articles 114 and 115 TFEU. The Commission began to employ it in the 1980s, most notably in the context of the telecommunications sector, and it is now an important part of its armoury.[78] The advantage of Article 106(3) from the Commission's perspective is that it can adopt a decision or directive itself. If the Commission did not have its Article 106(3) powers, it would be able to proceed against measures that off end Article 106(1) only by taking proceedings before the Court of Justice under Article 258 TFEU or by persuading the Council to adopt the measures it favours.[79] Two notable decisions pursuant to 106(3) are the ones of 2008[80] and 2009,[81]

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the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;— a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights. Article 2: The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non- economic services of general interest.'The latter are therefore outside the scope of the rules on competition and State aid, which focus exclusively on undertakings; C Bovis, R Cisotta, AÓ Caoimh, K Pantazatou, W Sautera, E Szyszczak in *State Aid Law of the European Union*, C.H. Hofmann and C Micheau (eds), (Oxford University Press, 2016) 89-90

[74] Chalmers, Davies, Monti, (n 3) 1130

[75] In this light, apart from the Electricity and Gas Directives (see *infra* 1.3.), recitals (8) and (9) of Council Directive (EU) 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243

[76] Of general interest is the Commission Directive (EC) 2006/111 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (Transparency Directive) [2006] OJ L 318/17 (in force)

[77] Whish, Bailey, (n 14) 242

[78] Ibid - see also *infra* 1.3.

[79] Ibid

[80] Commission Decision Case COMP/38.700, *Greek Lignite* [2008] OJ C93/3 appeal to the GC, Case T-169/08. In the contested decision, the Commission states that the Hellenic Republic adopted State measures which concerned two distinct markets, the first being that for the supply of lignite and the second the wholesale electricity market, which covers the generation and supply of electricity in power stations and the importation of electricity by means of interconnection systems. According to the Commission, the DEI held a dominant position on both those markets, with a share of more than 97% and 85%, respectively. Moreover, there was no prospect of new market entrants being capable of reducing significantly DEI's share of the wholesale electricity market, and imports, which represented 7% of total consumption, did not constitute a genuine competitive restraint on that market. At the moment (2016-2017), DEI holds more than 76% of the wholesale electricity market (para. 59). The Commission notes, lastly, that power stations operating on lignite, which are the least expensive in Greece, are the most used, since they generate 60% of the electricity permitting the supply of the interconnected network. By granting DEI, and maintaining in its favour, quasi-monopolistic lignite exploitation rights, which guaranteed it privileged access to the most attractive fuel in Greece for the purposes of generating electricity, the Hellenic Republic thus created inequality of opportunity between economic operators on the wholesale electricity market and so distorted competition, thereby reinforcing the dominant position of DEI and excluding or hindering any new entrants, despite the liberalisation of the wholesale electricity market.

relevant to the long-running case of Greek interest, 'Greek Lignite' where the Court of Justice set aside the judgement of the General Court and referred the case back.[82] The case focuses on exploration and exploitation rights regarding the Greek lignite reserves.[83] The Greek government had granted these rights to incumbent electricity producer DEI almost exclusively, allowing it to produce electricity at prices significantly below those of its competitors, thus giving it a competitive advantage.[84] The Commission had originally classified this as an infringement of Art. 106 (1) TFEU in conjunction with Art. 102 TFEU. The General Court had then held[85] that it was not sufficient for an infringement that the state measure had caused inequality of opportunity between competitors but that it was necessary to prove that the state measure had directly caused, or else enabled, the undertaking in question to commit abuse. As no specific abuse by DEI had been found, the General Court annulled the Commission decision. The Court of Justice, however, held that the General Court had erred when requiring actual abusive behaviour. Rather, a potential anticompetitive consequence from the state measure is sufficient[86]: 'Such an infringement may thus be established where the State measures at issue affect the structure of the market by creating unequal conditions of competition between companies, by allowing the public undertaking or the undertaking which was granted special or exclusive rights to maintain (for example by hindering new entrants to the market), strengthen or extend its dominant position over another market, thereby restricting competition, without it being necessary to prove the existence of actual abuse.'[87] Since PPC (DEI) and the Hellenic Republic responded to the upheld 2008 and 2009 Commission decision with a 10-year delay and without fully abiding to them, following an unannounced inspection, the Commission came up with reviewed binding remedies in 17 April 2018 which include calls for tender over

[81] Commission Decision Case COMP/38.700, *Greek Lignite* [2009] OJ C243/4 appeal to the GC, Case T-421/09

[82] Case T-421/09, *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* [2016] and Case T-169/08 *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* [2016] which upheld the Commission decision leading to the current developments.

[83] Opinion of AG Wathelet in Case C-553/12P, *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)* [2014] ECLI:EU:C:2013:807 paras. 5, 6: According to the Commission, 590 million tones of lignite reserves still exist in Greece. The Hellenic Republic has allocated to DEI exploration and exploitation rights for lignite in respect of mines the reserves of which amount to about 2200 million tonnes. According to the Commission, this amounts to 91% of total public deposits of lignite for which rights were granted. Lesser amounts have been granted to private parties, whose deposits partially supplying the power stations of DEI. No exploitation rights have yet been allocated in respect of about another 2000 million tonnes of lignite reserves in Greece.

[84]U Scholz, S Purps, *The Application of EU Competition Law in the Energy Sector*, Journal of European Competition Law & Practice, 2013, Vol. 4, No. 1, 63, 68

[85] Case T-421/09 *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* [2012] Case T-169/08 *Dimosia Epicheirisi Ilektrismou AE (DEI) v European Commission* [2012]

[86] Scholz, Purps, (n 84)

[87]Case C-553/12P, *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI)* [2014] ECLI:EU:C:2014:2083

exploitable lignite deposits for which exploitation rights had not yet been granted at all or have been granted to DEI.[88]

Article 37(1) of the Treaty provides that: 'Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States' Article 37(1) goes on to state that it applies to anybody through which a Member State supervises, determines or appreciably influences imports or exports between Member States, and also that it applies to monopolies delegated by the state to others. Article 37(2) obliges Member States not to introduce any new measure contrary to the principles in Article 37(1) or which restricts the scope of the Treaty Articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.[89] Article 37 is designed to prevent state monopolies of a commercial character discriminating against nationals of other Member States, without requiring the abolition of existing monopolies.[90] One way of ensuring that Member States do not discriminate in this way is to alter their public procurement policies, in which area the Council has been active.[91] The currently in force Directive 2014/25/EU[92] 'holds a direct and particularly close link with the principle of competition as a general principle of EU law',[93] same with the general procurement regime.[94] Where the Commission suspects infringement of Article 37 it may take proceedings against the Member State under Article 258 or it could make use of the powers available to it under Article 106(3).[95] In *Commission v Greece*[96] the Court of Justice held that Greece was obliged to terminate exclusive rights to import and sell petroleum derivatives since those rights discriminated against exporters of such products in other Member States and since they upset the normal conditions of competition

[88]European Commission Statement STATEMENT/17/285, 'Antitrust: Commission confirms unannounced inspections in the electricity sector in Greece' [2017] <http://europa.eu/rapid/press-release_STATEMENT-17-285_en.htm> (accessed 20 November 2018); Commission Decision Case AT 38.700 (2018) 2104 final, 'Greek lignite and electricity markets' [2018] <http://ec.europa.eu/competition/antitrust/cases/dec_docs/38700/38700_2053_3.pdf> (accessed 20 November 2018)

[89] Whish, Bailey, (n 14) 245

[90] Ibid

[91] Whish, Bailey, (n 14) 254; In this spirit Council Directive (EU) 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243, recital (7) *'it should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than procurement within the meaning of this Directive'.*

[92] Council Directive (EU) 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243, recital (2)

[93] A S Graelis, *Public Procurement and the EU Competition Rules* (2nd edn, Bloomsbury) Chapter 5

[94] Council Directive (EU) 2014/24 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65

[95] Whish, Bailey, (n 14) 245

[96] Case C-347/88, *Commission v Greece* [1990] ECLI:EU:C:1990:470

between Member States. In *Commission v Netherlands*[97] the Court of Justice found that import and export monopolies for gas and electricity in the Netherlands, Italy and France amounted to an infringement of Article 37(1). However the Court considered that Article 106(2) could be invoked by Member States in proceedings brought under Article 37 to justify such monopolies.[98] Justification was possible, provided that the maintenance of monopoly rights was necessary to enable the undertaking in question to perform the tasks of general economic interest entrusted to it under economically acceptable conditions; it was not necessary to demonstrate that the survival of the undertaking itself would be threatened in the absence of such a monopoly.[99]

1.3. Positive Integration: Secondary law obligations imposed to Member States

1.3.1. Background and development of the regulatory framework for energy

The case law discussed above is in large part the result of businesses seeking to participate in markets sealed off by anti-competitive state measures. Such episodic and indirect pressures to facilitate market access, although they offered great momentum, they cannot create the best conditions for competition in an economic sector, nor will they lead to a harmonised approach across the Union: positive integration measures were required. In the past two decades, the Commission has worked hard to press for EU legislation to open markets in network industries (energy, telecommunications and postal services). Initially, the Commission met national reluctance to agree to such legislation by using its powers of legislation under Article 106(3) TFEU (which allows the Commission to issue Directives, eschewing the traditional law-making channel of Article 114 TFEU). The Commission's legislative initiatives were a challenge to Member States who, fearful of uncontrolled, Commission-led initiatives,[100] were persuaded to negotiate liberalisation within the procedures in Articles 114 and 26 TFEU which left them political space to advance liberalisation while allowing them some scope to safeguard national interests. The drawback, at least from the Commission's perspective, is that while in some economic sectors (notably telecommunications) liberalisation has been successful, political foot-dragging has meant that in other sectors (notably postal services and energy), the degree of market opening has been less pronounced.[101] Occasionally, the Commission has threatened to revert to using Article 106(3) to

[97] Case C-157/94 *Commission v Netherlands* [1997] ECLI:EU:C:1997:499
[98] Whish, Bailey, (n 14) 245
[99] Whish, Bailey, (n 14) 246
[100] Case C-202/88, *French Republic v Commission of the European Communities* [1991], ECLI:EU:C:1991:120
[101] Chalmers, Davies, Monti, (n 3) 1039

liberalise certain economic sectors when Member States try to stall the legislative process.[102] The Treaty of Lisbon introduced an autonomous legal base for energy in Article 194 TFEU, envisaging for an integrated EU energy policy, a complete and functioning internal energy market, more energy efficiency and inclusion of renewable energy, security of supply and an international dimension to the EU energy policy.[103] On this last basis, one novel idea to counteract the dependency of Europe on external energy supplies is the pooling of demand and joint negotiation with foreign energy suppliers as suggested in Commission President Juncker's mission letter to the Energy Union-Vice-President.[104] It will be interesting to see how such a proposal will be aligned with the competition and internal market rules as well as trade law and in which other ways the new Commission will have an impact on European energy policy[105]. Article 194 TFEU is the legal basis for the proposed 'Clean Energy for All Europeans' legislative package, as part of the 'Energy Union' initiative.[106]

European energy markets have undergone a liberalisation process over the last 20 years with the goal of creating a single European energy market. The removal of national monopolies and development of cross-border trade is hoped to lead to lower prices and better services for consumers—a study commissioned by the Commission expects annual net economic benefits of up to 40 billion Euros to be generated from a truly integrated energy market.[107] The first liberalization steps—a third-party access regime and protection mechanisms against discrimination by vertically integrated energy utilities—were taken in the mid to late 1990s.[108] The so-called second energy package in 2003[109] reinforced this process by imposing an obligation on Member States to fully

[102] Commission, press release, IP/01/872 (20.6.2001), 'Commission confirms need to tackle cross-border investment restrictions and energy market distortions' <http://europa.eu/rapid/press-release_IP-01-872_en.htm?locale=en> (accessed 20 November 2018)

[103] I Mourianakis, '*194 ΣΛΕΕ'* in V A Christianos (ed) *'Συνθήκη ΣΕΕ & ΣΛΕΕ, Κατ' άρθρο ερμηνεία'* (Nomiki Bibliothiki, 2012) 706 In para 2, competence is conferred on the European Parliament and the Council to establish the measures necessary to achieve these aims in secondary law.

[104] 'Jean-Claude Juncker, President of the European Commission, 'Mission Letter to Maroš Šefčovič Vice-President for Energy Union' (1 November 2014) <http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/sefcovic_en.pdf> (accessed 20 November 2018)

[105] U Scholz, S Purps, *'The Application of EU Competition Law in the Energy Sector'*, Journal of European Competition Law & Practice, 2015, Vol. 6, No. 3, 200-209

[106] Article 191 of the TFEU on the environment has also been important, constituting the legal basis for acts such as the Renewables Directive; Council Directive (EC) 2009/28 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16

[107] Booz & Company, '*Final Report – Benefits of an Integrated European Energy Market'* prepared for DG Energy, European Commission (20 July 2013) <http://ec.europa.eu/energy/infrastructure/studies/doc/20130902_energy_integration_benefits.pdf> (accessed 20 November 2018)

[108] Council Directive (EC) 1996/92 concerning common rules for the internal market in electricity [1997] OJ L27/20; Council Directive (EC) 1998/30 of 22 June 1998 concerning common rules for the internal market on natural gas [1998] OJ L204/1

[109] Council Directive (EC) 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37; Council Directive (EC) 2003/55 concerning common rules for the internal

open their electricity and gas markets by way of a regulated third-party access regime and far reaching rules on legal, operational, and informational unbundling.[110] Even before those measures were implemented by Member States, in 2005 the Commission launched a sector inquiry into the functioning of the European electricity and gas markets. To address the concerns identified in the sector inquiry, the Commission not only used its powers under the competition rules[111] but also proposed further regulatory and structural measures leading to the third energy package, adopted in July 2009 and entered into force in 2011. To aid and influence this process the Commission published so called 'Interpretative Notes' on certain topics touched upon by the directives, outlining its views on potentially contentious questions arising in the transposition process.[112] Those papers could be considered an attempt to use soft law to support the Commission's positions that could not be agreed upon when the legislative package was passed by the Council.[113] The third energy package introduced stricter rules on unbundling, a better coordination of the operation and development of networks across borders and the introduction of a new European Agency for Cooperation of Energy Regulators (ACER). The following chapter addresses the basic requirements for creating competitive electricity and gas markets in the EU. The focus on the new rules contained in the Third Package currently in force,[114] followed by a discussion of the proposed Winter 2016 package through which the Commission envisages to fundamentally reform the regulatory framework, in order to accommodate the changes in the markets since 2007-2009, when the Third Package was being designed.

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market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57; Council Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity [2003] OJ L176/1; Council Regulation (EC) 1775/2005 on conditions for access to the natural gas transmission networks [2005] OJ L289/1

[110] Scholz, Purps, (n 105)

[111] See *infra* Part Two 1.1.

[112] Commission (EC), Commission Staff Working Paper 'Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas—the Unbundling Regime'; Commission Staff Working Paper 'Interpretative Note on Directive 2009/73/EC concerning common rules for the internal market in natural gas—Third Party Access to Storage Facilities'; Commission Staff Working Paper 'Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas—Retail Markets'; Commission Staff Working Paper 'Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas—the regulatory authorities'

[113] U Scholz, S Purps, '*The Application of EU Competition Law in the Energy Sector', Journal of European Competition Law & Practice*, Volume 1, Issue 1, 1 January 2010, 37–51

[114] Council Directive (EC) 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211/55; Council Directive (EC) 2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211/94; Council Regulation (EC) 713/2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211/1–14; Council Regulation (EC) 714/2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211/15

1.3.2. Competition law elements in the regulatory framework – requirements for competitive energy markets

1.3.2.1. Effective regulation of the transmission and distribution networks through "third party access"

In contrast with the vertically integrated companies who performed every task in a monopolistic fashion, the electricity and gas market consist of four vertically interdependent markets: (1) generation of electricity or import of gas; (2) transmission of electricity through high-voltage grids or of gas through high-pressure pipelines; (3) distribution through lower voltage grids or lower-pressure pipelines, respectively; (4) supply to final customers. Of these markets, competition is possible at the generation and supply ends of the market, provided that generators and suppliers have access to the network. The market was liberalised by giving increasing numbers of consumers the ability to choose suppliers and the provision of access to the network by new generators.[115] This was necessary because the transmission and distribution of electricity and gas in Europe have generally been monopoly activities, and will almost certainly remain so, given the natural monopoly character of the network.[116] Since a second parallel network is not feasible, in order to have any effective competition in the gas and electricity supply and generation markets, the owner of the grid must allow any electricity or gas supplier non-discriminatory access to its grid to supply customers. Only in some countries, notably Germany, the construction of gas transmission pipelines has not always been considered a monopoly activity, and parallel lines or alternative routes exist to a certain extent. For this reason, an option for a negotiated TPA existed in the First Package,[117] while this dropped in the Second Package,[118] for it was observed that new entrants would typically rely on existing infrastructure owned by incumbents to access the market.[119] Also, the introduction of de-coupled entry-exit pricing made notional hubs possible which act as the central marketplace for operators to trade gas.[120] Within a market area covered by the notional hub, all infrastructure must be covered by the same entry-exit contracting and paid for in a single transaction, thus making

[115] G Monti, *EC Competition Law* (Cambridge University Press, 2007) 460
[116] Jones (n 31) - *infra* 1.1.
[117] Council Directive (EC) 1996/92 concerning common rules for the internal market in electricity [1997] OJ L27/20; Council Directive (EC) 1998/30 of 22 June 1998 concerning common rules for the internal market on natural gas [1998] OJ L204/1
[118] Council Directive (EC) 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37; Council Directive (EC) 2003/55 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57; Council Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity [2003] OJ L176/1; Council Regulation (EC) 1775/2005 on conditions for access to the natural gas transmission networks [2005] OJ L289/1
[119] Jones (n 31) 28

competition between networks in a market area much more difficult as pricing and service levels would no longer be a relevant consideration for potential customers.[121] The Third Package Directives[122] maintain the system of regulated access as the minimum requirement for distribution and transmission networks in the gas and electricity networks.[123] Effective regulation of the transmission and distribution networks through TPA might constitute the most vital requirement for the creation of competitive electricity and gas markets for the reasons below:[124]

- Preventing discrimination: Where ownership unbundling does not exist, an incentive to discriminate against competitors for access to the grid remains. The lesser the degree of unbundling, the greater is the possibility to carry out such discrimination. To prevent this, a regulatory authority needs to examine the terms and conditions offered by the network company.[125] Ex-incumbents have the motive, the means and the opportunity to impose various conditions. Obvious discriminatory methods aside, such companies may overtly refuse to give access to networks or charge higher prices to competitors than to their own vertically integrated company for equivalent services, using subtler means. Examples of this include manipulating tariff categories so that while the same tariff s appear to be applied to all parties, in practice, the vertically integrated company's subsidiaries pay cheaper tariffs than its competitors preferential allocation of scarce capacity to the vertically integrated company (e.g., on a 'first-come-first-served' basis). The vertically integrated company will have prior warning and will therefore always be the first applicant; making it difficult for final customers to switch from a vertically integrated supplier, for example, by implementing onerous or expensive procedures, such as an obligation to install a new meter, or to complete time consuming and burdensome administrative procedures; and lastly, manipulating capacity availability so that lines required by competitors are 'congested'. Finally, the existence of vertically integrated companies also gives rise to asymmetry in relation to the provision of commercially

[120] See *infra* Part Two 1.3.
[121] For the evolution of and the impact of antitrust enforcement on this pricing mechanism see also *infra* Part Two 102
[122] Council Directive (EC) 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L 21/55 (Electricity Directive) Council Directive (EC) 2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211/94 (Gas Directive)
[123] Member States retain the choice between regulated and negotiated third party access regarding access to gas storage and gas ancillary services, with the exception of balancing. Derogation from regulated access however was, and still is, possible: main examples are the exemptions according to Article 36 of the Gas Directive and Article 17 of the Electricity Regulation as well as regional derogations according to Article 44 of the electricity Directive and Article 49 of the gas Directive; See Jones (n 31) 28
[124] D M Tilman, *Ownership Unbundling and Related Measures in the EU Energy Sector* (Springer, 2018) 27
[125] Jones (n 31) 92

important information, given the experience of the ex-incumbent in the sector and its close ties with the powers that be.[126]

– Preventing cross-subsidies: A vertically integrated company has a commercial interest in ensuring that its prices for transmission and distribution (a market in which no competition exists) are as high as possible. It is then in a position to reduce margins on its generation and sales activities (thus increasing its competitiveness in the sector where competition does exist) whilst maintaining overall group profitability. A regulatory authority therefore needs to ensure that such cross-subsidies do not take place.

– Preventing excessive pricing: Electricity grids are generally accepted to be not only natural monopolies, but also a perfect monopoly. It is a true essential service - it is the only way of delivering a product which cannot be substituted by another, at least in the short and even medium term. Similar considerations apply with respect to gas, although greater substitutability does exist. Price elasticity of demand for both electricity and gas is low; thus the network operator would have considerable margin to increase prices without the demand for network services reducing to the extent that reduced demand would limit increased profitability. Thus, irrespective of the level of unbundling, it is necessary, given the monopoly nature of the activity, for a regulatory authority to ensure that tariffs are cost-reflective and do not lead to excessive pricing and monopoly profits. Very recently, Hungary was officially referred by the Commission to the CJEU under 258 TFEU for violating the 'Third Energy Packages requirements on network tariffs. The Third Energy Package requires that tariffs applied by network operators for the use of electricity and gas networks are regulated in order to prevent anti-competitive behaviours, and entrusts national regulatory authorities with the task of setting these tariffs or their methodologies. After it assessed the legislative measures adopted by Hungary in the energy field, the Commission found that Hungarian law excludes certain types of costs from the calculation of network electricity and gas tariffs, in violation of the principle of cost-recovery of tariffs provided for in the Electricity and Gas Regulations. In addition, the Commission found that Hungary adopted amendments to its energy legislation which jeopardise the right of market operators to a full judicial review of the national regulator's decisions on network tariffs.'[127]

[126] Art 32(1) of the Electricity Directive. On the significance of the non-discriminatory access to energy networks, see Case C–439/06 *citiworks AG v Flughafen Leipzig/Halle GmbH and Bundesnetzagentur* [2008] ECLI:EU:C:2008:298, paras 37–44.

[127] Commission, press release IP/18/4487 (19 July 2018), 'Infringement - Internal energy market: Commission refers Germany and Hungary to the Court of Justice of the EU for failure to fully comply with the Third Energy Package' <http://europa.eu/rapid/press-release_IP-18-4487_en.htm> (accessed 20 November 2018)

It is observed that in determining the scope of the TPA regime, the CJEU has so far put great emphasis on existing secondary law provisions. It ruled in its *VEMW*[128] judgment that granting preferential network access to certain undertakings discriminated against all other network users and could only be justified on the grounds of exemptions provided for in relevant secondary EU law, meaning, at that point, the First Electricity Directive of 1996. The Court went so far as to rule that the measure in question could not pass the proportionality test under the services of general economic interest exemption in primary law [now Article 106(2) of the TFEU] since it did not qualify for an exemption under the relevant secondary law acts (paras 89, 90). This line of reasoning has been interpreted to the effect that a measure that is in conflict with the energy-specific non-discrimination regime established by secondary law cannot achieve justification under more general provisions of primary law.[129] In its subsequent *citiworks*[130] judgment, the ECJ considered the admissibility of a national measure excluding the electricity network of an airport from the third-party access regime strictly against exemptions provided for in secondary law.[131] However, as it will be seen in Part Two, this approach does not preclude the application of the Treaty competition rules. A breach of the prohibition on discrimination can in principle also qualify as an abuse of this dominant position.[132] This has led to the investigation and sanctioning of breaches of the aforementioned obligations by the Commission under those rules. The case law of the ECJ indicates that derogations from the TPA regime must be assessed on a case-by-case basis, while access refusal must be reasoned.[133] Security of supply is the major consideration that can justify derogations from the regime in the general Electricity and Gas Directives. Specific instruments also exist. Access may be refused where there is: (i) lack of capacity; (ii) a public service obligation imposed by the Member States; and (iii) a 'sudden crisis' under Article 46 for gas, and Article 42 for electricity. In addition, access to the gas transportation network can be refused on the basis of serious economic and financial difficulties with a take-or-pay contract.[134] As far as gas is concerned, the upstream pipeline network is one major exception. The parts of the upstream networks and facilities used for local production operations at the site of a field where the gas is produced constitute an exception to the TPA obligations contained in Article 34.

[128] Case C–17/03 *VEMW, APX & Eneco NV v DTE* [2005] ECLI:EU:C:2005:362, para 48
[129] Rumpf, Bjørnebye (n 30)
[130] *citiworks* (n 126)
[131] Ibid
[132] Rumpf, Bjørnebye (n 30)
[133] *citiworks* (n 126) para 20
[134] See Part Two 1.3.1.

1.3.2.2. Effective separation of the transmission and distribution network business through unbundling requirements

The ex-incumbent electricity and gas companies are typically vertically integrated, meaning that they are active in generation, supply, distribution and transmission of energy.[135] When competition is introduced, the ex-monopolists hold a 100% market share. Thus, any gain in market share by new competitors means a loss in market share by the ex-incumbent. Where the ex-incumbent owns the network, it has a natural incentive to make third party access to it as difficult as possible, by setting various access conditions, designed to favour its own sales efforts, thus preventing loss of market share. The only solution to this problem is to require the effective separation of the network business, both at transmission and distribution level, from generation and supply activities. Different degrees of unbundling can be envisaged, in the following descending order of effectiveness:[136]

– Accounting unbundling: Separate accounts for the transmission/distribution company need to be prepared. Aside from this, the vertically integrated company may operate its various activities as a single business.[137]

– Management unbundling: In addition to accounting unbundling, it may be required that the management of the network business be separate from the management of the remainder of the electricity and gas company.[138]

– Legal unbundling: A separate legal undertaking is created in which all the activities of the network company are carried out. Whilst in theory this may add little to management unbundling (on the assumption that real and effective management separation exists), experience has shown that a legally separate company will tend to act more independently than one in which only management unbundling takes place [139]

– 'ITO' unbundling: Although the network remains under the ownership of the vertically integrated company, it is actually operated by another undertaking that has no connection with the integrated holding company. The vertically integrated company in effect leases the transmission assets to a third undertaking, and acts as a financial investor, relinquishing all operational decisions

[135] According to Art 2(21) of the Electricity Directive, 'a vertically integrated undertaking means an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity'.
[136] Jones (n 31) 10-11, 91 et seq.
[137] Ibid
[138] Ibid
[139] Ibid

to the operator.[140] The inclusion[141] of the ITO as an alternative model was prompted by a joint proposal of eight Member States which sought to maintain existing ownership structures and, at the same time, guarantee the factual independence of the transmission business.[142] Under this alternative model, transmission system operators may remain part of a vertically-integrated energy group, provided that they are equipped with all necessary assets, equipment and staff, have effective decision making rights without being influenced by other parts of the vertically-integrated company, have an independent management and staff and adhere to a compliance programme to prevent discriminatory conduct.[143]

– Ownership unbundling: The vertically integrated company is obliged to sell its network assets so that it is controlled by shareholders not active in the generation, production and sale of electricity or gas.[144] Under the Third Package, Member States may choose between three unbundling regimes which are labeled Full Ownership Unbundling, Independent System Operator (ISO) and Independent Transmission Operator (ITO). The Commission clearly preferred Full Ownership Unbundling[145] as the standard model for guaranteeing the independence of network operators. Any controlling interest in the production of a supply company, or the power to exercise any voting rights or to appoint members of any bodies legally representing the production or supply company, would conflict with having control in the transmission business. As a second option, the new legislative package allows a vertically integrated energy company to retain ownership of the transmission network assets, provided that the operation of the network will be assigned to a third party operator, i.e. the ISO.[146] The ISO must have at its disposal all the requisite financial, technical and human resources to carry out the task of a transmission business and must commit to comply with a ten-year network development plan. It is evident that, under this model, the asset holder loses

[140] Ibid
[141] Electricity Directive 2009/72/EC (hereinafter "Electricity Directive") art. 17–23; Gas Directive 2009/73/EC (hereinafter "Gas Directive") art.17–23
[142] D M Tilman, *Ownership Unbundling and Related Measures in the EU Energy Sector* (Springer, 2018) 24; *'However, another controversial provision of the draft Directives was not included in the Third Package, the 'third country or Gazprom' clause which provided as follows: 'Without prejudice to the international obligations of the Community, transmission systems or transmission system operators shall not be controlled by a person or persons from third countries.' [art. 7a(1) and 8a(1) of the electricity and gas Directives respectively]. 'This would have enabled the EU to ensure that third country undertakings, which are more difficult to control, also complied with and satisfied the applicable unbundling rules. Member States opposed the outright prohibition of foreign investment in transmission network assets. Instead, it was decided to assess third country investors on a case-by-case basis.'* See *infra* Part Two 1.3.
[143] Scholz, Purps, (n 113)
[144] Jones (n 31) 11
[145] Electricity Directive art. 9; Gas Directive art. 9
[146] Ibid art. 13, 14; art. 14, 15 respectively

most of its entrepreneurial rights.[147] The purpose of the above sector- specific rules is to ensure that a given sector is no longer based on a monopoly-like structure. The competition rules alone cannot achieve this to a sufficient level. However, once the sector has undergone structural changes the competition rules alone should, in principle, be sufficient to regulate and control anti-competitive behavioural practices. In the meantime the competition rules serve to support the objectives behind the unbundling rules and can, through the commitments procedure, attain the same result as the ownership unbundling rules.[148] Along with Hungary,[149] Germany was referred to the CJEU under an infringement procedure for 'not ensur[ing] full respect of rules concerning the powers and independence of the national regulatory authority. In particular, the regulator does not enjoy full discretion in the setting of network tariffs and other terms and conditions for access to networks and balancing services, since many elements for setting these tariffs and terms and conditions are to a large extent laid down in detailed regulations adopted by the Federal government. Furthermore, Germany has incorrectly transposed into national law several requirements concerning the (ITO) unbundling model. For example, the rules on the independence of the staff and the management of the ITO do not fully respect these Directives and the definition of vertically integrated undertaking incorrectly excludes activities outside the EU.'[150]

1.3.2.3 The establishment of an independent energy regulator

Whilst competition policy can deal with certain cases of discrimination by dominant companies, its procedures and remedies are inadequate to deal with a network industry where competition for the services in question is completely non-existent or at best very limited – which is why in monopoly network industries, fair access is generally safeguarded by sector specific regulators. The establishment of public authorities, independent from the market player players can be called 're-regulation'.[151] In the case of electricity and gas regulators, they also perform tasks which would go beyond the capacity of competition authorities, such as ex ante approval of terms and conditions, setting or approving tariffs or methodologies, continuous market monitoring and facilitating infrastructure investment.[152] Articles 35(1) of the Electricity Directive and 39(1) of the Gas Directive provide that 'Each Member State shall designate a single national regulatory authority at national level', while the next paras allow MS to designate regulatory authorities at regional level, as

[147] Scholz, Purps, (n 113)
[148] See *infra* Part Two 1.3. for examples
[149] *infra* 1.3.2.1.
[150] Commission press release (n 127)
[151] Monti, (n 115) 468
[152] Jones (n 31) 229

part of the compromise leading to the acceptance of a single regulator at national level (the second package allowed for more than one national regulator). However, since the objective of the Third Package is to create one integrated internal market, not a series of separate national ones, Articles 38 et seq. of the Electricity Directive and 42 et seq. of the Gas Directive, impose a general obligation on regulatory authorities to closely consult and cooperate with each other, especially on issues of cross border relevance.[153] Cooperation requirements stipulated by the Directives must be seen as complementary to the obligation to cooperate within the ACER.[154] The Agency for the Cooperation of Energy Regulators (ACER) was established by Regulation (EC) No 713/2009[155] with the aim to fill a regulatory gap at Union level. The Agency has its seat in Ljubljana, Slovenia and is fully operational since 3 March 2011. Within ACER, national regulators, represented by a Board of Regulators, the Director and Administrative Board and the Commission will cooperate on regulatory issues and tasks assigned to ACER. These include monitoring TSOs and their cooperation. Together with the European Networks of Transmission System Operators (ENTSO)[156] have been active in developing common standards in order to facilitate cross-border energy supplies and network development plans to ensure non-discriminatory, demand-based, and transparent investment into infrastructure.[157] In this respect, The European Ten Year Network Development Plans for Gas, developed by ENTSO-G is accepted by ACER on a biennial basis, under Regulation 715/2009.[158] ACER has few autonomous decision-making powers, limited to the field of technical issues in relation to cross-border energy networks and to cases where national authorities cannot agree or jointly request ACER to act.[159] ACER adopted in 2011 Framework Guidelines[160] still applicable today, giving guidance on how the network codes to be developed by transmission system operators are to look. The topics addressed were electricity grid connections, capacity allocation and congestion management for electricity, capacity allocation mechanisms for gas, gas-balancing, as well as electricity system operation. Subsequent legislation added further tasks, such as the REMIT

[153] Ibid 269
[154] Ibid
[155] Council Regulation (EC) 713/2009 establishing an Agency for the Cooperation of Energy Regulators OJ L 21/1
[156] Council Regulation (EC) 714/2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211/15, art. 5(2); Council Regulation (EC) 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) 1775/2005, OJ L 211/36, art. 5(2)
[157] U Scholz, S Purps, 'The Application of EU Competition Law in the Energy Sector', *Journal of European Competition Law & Practice*, Volume 3, Issue 1, 1 February 2012, Pages 76–87
[158] See <https://www.entsog.eu/publications/tyndp> (accessed 20 November 2018) for the ongoing Plans
[159] Scholz, Purps, (n 113)
[160] Available at <https://acer.europa.eu/en/Electricity/FG_and_network_codes/Pages/default.aspx> (accessed 20 November 2018)

Regulation 1227/2011,[161] the TEN-E Regulation[162] and the Transparency Regulation.[163] The creation of ACER further formalises a process of cooperation between national regulatory authorities that started with the Madrid (gas) and Florence (electricity) Forums, and had led to the Council of European Energy Regulators (CEER)[164] and ERGEG.[165]

It is argued that the duties of NRAs and NCAs overlap often, since both deal primarily with issues of abuse of dominant position, such as excessive prices and refusal to grant access to essential facilities, similar to those we will examine under Part Two 1.3. We shall see in Part Two, that the Commission extends the boundaries of established competition law, using it in a sector specific manner so as to achieve regulatory functions. In this case one might question the need for NRAs. Apart from the practice of the Commission as above being condemned[166] (see *Conclusion),* an NRA has a comparative advantage over competition authorities, based on expertise and resources 'for day-to-day management', primarily in the supervision of remedies[167] and the imposition of fines, according to the EU and national network codes and guidelines. A competition authority intervenes in markets episodically and in an *ad hoc* manner. For those reasons, among others, it can only compliment and fill in the gaps of the sector-specific regulation.

1.3.2.4. High public service standards

The experience of liberalisation in all sectors, including electricity and gas, demonstrates that the introduction of effective competition leads to increased efforts by companies to improve service levels because this is one of the issues on which they compete. However, there are some issues that must be addressed by public authorities when opening markets to competition to ensure that all citizens continue to receive secure supplies of electricity and gas, at reasonable prices, with high service levels. For example, some consumers may live in geographic areas where, from a strict business viewpoint, it would not make sense to connect and/or supply them. Others, notably vulnerable sections of society, may have very low levels of demand or poor payment records, such that a business may question whether it would be profitable to supply them. Other, wider issues, also

[161] Council Regulation (EU) 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency Text with EEA relevance OJ L 326/1; See also infra Part One 1.3.2.5.
[162] Council Regulation (EU) 347/2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 OJ L 115/39
[163] Commission Regulation (EU) 543/2013 on submission and publication of data in electricity markets and amending Annex I to Regulation (EC) No 714/2009 of the European Parliament and of the Council OJ L 163/1
[164] Established in the year 2000, now acting as a preparatory body for ERGEG
[165] European Regulators' Group for Electricity and Gas, the Commission's formal advisory group of energy regulators; established by Commission Decision (EC) 2003/796 on establishing the European Regulators' Group for Electricity and Gas, [2003] OJ L 296/34
[166] See *infra* Conclusion

require attention, for example regarding security of supply and environmental protection. Such matters need to be addressed to take account of the changed market situation. These issues - public policy requirements that will or may not be achieved satisfactorily simply through the operation of a competitive market and therefore require government action - are referred to in the EU as 'public service objectives'.[168] The importance of legitimising public services is so significant that the directives begin by defining universal services before dismantling restrictions of competition. While respectful of national concerns, the EU PSO regime has two features that distinguish it from national public service interventions: an emphasis on consumer interests, and a preference for market solutions.[169] This preference for market delivery is a significant departure from certain national systems where the state's legitimacy is based at least in part on its ability to provide certain services personally. Articles 3 of the Electricity and Gas Directives set out detailed rules for the compensation of the provider undertakings.[170] With this fits the emphasis on consumer rights as a distinctive feature of the European model of public services because it makes the end user a part of the regulatory infrastructure: their choices give suppliers incentives to provide improved services.[171] The role of consumers as not only receivers but participants in the market is highlighted in the 2016 legislative proposals.[172]

1.3.2.5. Enhanced integration under the "Energy Union" banner

Since 2009 the EU's Internal Energy Market has continued to change at an extraordinary rate. Energy policy is one of the priorities of the Juncker Commission.[173] Further regulatory measures have been considered necessary and have been promoted by the Commission and national regulators, now under the banner of the 'Energy Union' of the Juncker Commission.[174] This 'Energy Union' marks another milestone in the development of the regulatory framework of energy markets in the EU. It is prominently represented by the Commission's Vice-President Maroš Šefčovič and

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[167] Monti, (n 115) 469
[168] Jones (n 31) 12-13; See *infra* 1.2.2. and 1.4.2.3.
[169] Monti, (n 115) 494
[170] See 1.4.2.3.
[171] Monti, (n 115) 493
[172] See 1.3.2.5. and 1.4.2.3.
[173] U Scholz, T Vohwinkel, 'The Application of EU Competition Law in the Energy Sector', Survey, Journal of Competition Law & Practice, 2015, 1-16; 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change', Political Guidelines for the next European Commission, Opening Statement in the European Parliament Plenary Session by Jean-Claude Juncker, Candidate for President of the European Commission (15 July 2014) <http://ec.europa.eu/priorities/docs/pg_en. pdf#page=6> (accessed 20 November 2018)
[174] U Scholz, T Vohwinkel, 'The Application of EU Competition Law in the Energy Sector', Survey, Journal of Competition Law & Practice, 2015, 1-16

Commissioner for Climate Action and Energy, Miguel Arias Cañete.[175] The Commission has observed trade within national electricity and gas markets has been gaining pace over recent years. In contrast, pan-European trade in electricity and gas between companies and actively participating end consumers is still to be achieved.[176] It conceded in February 2015 that, on the subject of the changing environment for energy generation and transmission, '(d)espite progress made in recent years, Europe's energy system is still underperforming. The current market design does not lead to sufficient investments, market concentration and weak competition remain an issue and the European energy landscape is still too fragmented'.[177] According to the Commission, the project will consist of five mutually supportive dimensions: (i) energy security, solidarity, and trust; (ii) the internal energy market; (iii) energy efficiency as a contribution to the moderation of energy demand; (iv) decarbonisation of the economy; and (v) research, innovation, and competitiveness.[178] The Commission outlined 15 'action points' in relation to these dimensions. Included among these are: the diversification of gas supply; the modernisation of energy infrastructure, in particular the integration of renewable energies and the security of supply; the creation of a seamless internal energy market; and reaching the EU's climate protection targets, mostly by enhancing energy efficiency and reducing greenhouse gas emissions in both the Emissions Trading System (ETS) and sectors outside the ETS.[179] In all these fields, proposals for new legislation and/or Commission guidance have been announced or have already been introduced. This is the case with two key pieces of regulation.[180] Only a couple years after the Third Package was adopted, and before the Juncker Commission came in office, the Commission seeked to tackle the market manipulation which rose due to the added liquidity of the market,[181] by introducing the REMIT Regulation.[182] The need was evident in the German Electricity Wholesale Market case[183] in which the Commission raised concerns under competition law that E.ON might have abusively withdrawn available generation capacity in order to raise prices on the German electricity wholesale market. REMIT –

[175] Ibid
[176] Communication from the Commission 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (Energy Union Package). Commission, COM (2015) 80 final (25 February 2015) <https://setis.ec.europa.eu/system/files/integrated_set-plan/communication_energy_union_en.pdf> (accessed 20 November 2018)
[177] Energy Union Package, 7 et seq.
[178] Ibid, 4 et seq.
[179] Ibid, 19 et seq.
[180] U Scholz, T Vohwinkel, 'The Application of EU Competition Law in the Energy Sector', Survey, Journal of Competition Law & Practice, Vol. 8 No. 3, 2017, 190-204
[181] Scholz, Purps, (n 157)
[182] Council Regulation (EU) 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency [2011] OJ L 326/1

addressing market participants - applies to the supply and distribution of electricity or natural gas to final customers. REMIT does not cover emissions, coal, and oil trading. REMIT prohibits insider trading (art. 3) and market manipulation (art. 5) and imposes extensive reporting obligations (art 7,8). Enforcement of the prohibitions is left to the national regulatory authorities (Art. 13). Art. 16 contains extensive cooperation rules and gives ACER oversight of the national authorities' enforcement action to ensure consistent application of REMIT. With regard to the modernisation and expansion of existing energy infrastructure, the Parliament and the Council have adopted a new Regulation on Guidelines for trans-European energy infrastructure in 2013 (TEN-E Regulation).[184] Under this regulation, 'Projects of Common Interest' (PCIs) located in priority corridors and areas will receive special funding and benefit from a 'priority statuses' in permission procedures.[185] In November 2015, the European Commission adopted a second list of a further 195 key energy infrastructure projects.[186] According to the Commission, the projects will 'enable the gradual build-up of the Energy Union by integrating the energy markets in Europe, by diversifying the energy sources and transport routes. In addition, the PCI's adopted today will help bring an end to the energy isolation of some Member States. They will also boost the level of renewables on the grid, bringing down carbon emissions'. Under the Connecting Europe Facility (CEF),[187] a key EU funding instrument to promote growth, jobs, and competitiveness, a total of €5.35 billion has been allocated to trans-European energy infrastructure for the period of 2014–2020. A total of €800 million in grants was set aside for PCIs in 2016. In January 2016, Member States agreed on a Commission proposal to invest €217 million in certain key trans-European energy infrastructure projects, mainly in Central and South Eastern Europe. In total, 15 projects were selected following a

[183] German Electricity Wholesale Market (Case COMP/39.388) and German Electricity Balancing Market (Case COMP/39.389) Commission Decisions of 26 November 2008 [2009] OJ C 36/8 briefly discussed in Part Two 1.3.

[184] Council Regulation (EU) 347/2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 OJ L 115/39

[185] The first list of 'PSCIs' was adopted in 2013.An overview of the status of these projects can be found in Commission (EC) 'Staff working document—Implementation of TEN-E, EEPR and PCI Projects Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Progress towards completing the Internal Energy Market' (13 October 2014) SWD (2014) 314 final <https://ec.europa.eu/energy/sites/ener/files/documents/2014_iem_communication_annex5.pdf> (accessed 20 November 2018)

[186] Commission, press release IP-15-6107 (18 November 2015) 'The European Commission adopts a list of 195 key energy infrastructure projects—known as PCI— which will help deliver Europe's energy and climate objectives and form key building blocks of the EU's Energy Union' <http://europa.eu/rapid/press-release_IP-15-6107_el.htm> (accessed 20 November 2018)

[187] Council Regulation (EU) No 1316/2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010 [2013] OJ L 348/129.

call for proposals under the CEF.[188] When it comes to other goals of the Energy Union, the Commission noted that the 'Clean Energy for All Europeans' 'Winter' legislative proposals,[189] presented exactly two years ago, on 30 November 2016 will cover in particular energy efficiency, renewable energy, the design of the electricity market, security of electricity supply as well as a strategy for connected and automated mobility. The package includes 8 different legislative proposals (each with a linked impact assessment), with political agreement having been reached on four of the eight files, as of November 2018. The first category of measures also known as the market design initiative (MDI) includes a new directive amending and repealing Directive 2009/72,[190] a new regulation on the internal electricity market, amending and repealing Regulation 714/2009[191] as well as a new regulation repealing Regulation 713/2009 on the ACER.[192] The second category of measures aims to better align and integrate climate change goals into this new market design. This category includes a fully revised Renewables Directive 2009/28 (RED)[193] and a fully revised Energy Efficiency Directive 2012/27 (EED),[194] both to enter into force on 1 January 2021. Lastly, the proposal for a new regulation on risk-preparedness in the electricity sector (the Risk Regulation)[195] and a proposed regulation on Governance of the Energy Union (the Governance Regulation),[196] also to enter into force on 1 January 2021, are entirely new measures. Only the

[188] Commission, press release IP/16/94 (19 January 2016) 'Energy: EU invests €217 million in energy infrastructure' <http://europa.eu/rapid/press-release_IP-16-94_en.htm> (accessed 20 November 2018); U Scholz, T Vohwinkel, 'The Application of EU Competition Law in the Energy Sector', Survey, Journal of Competition Law & Practice, Vol. 8 No. 3, 2017, 190-204

[189] Communication from the Commission, 'Clean Energy for All Europeans', COM/2016/0860 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1512481277484&uri=CELEX:52016DC0860> (accessed 20 November 2018)

[190] Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity (recast) (23.2.2017) COM (2016) 864 final/2 2016/0380 (COD) <https://ec.europa.eu/energy/sites/ener/files/documents/1_en_act_part1_v7_864.pdf> (accessed 20 November 2018)

[191] Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity (recast) COM/2016/0861 final - 2016/0379 (COD) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016PC0861> (accessed 20 November 2018)

[192] Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (recast) COM/2016/0863 final - 2016/0378 (COD) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:863:FIN> (accessed 20 November 2018)

[193] Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast) COM/2016/0767 final - 2016/0382 (COD) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2016%3A767%3AFIN> (accessed 20 November 2018)

[194] Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/27/EU on energy efficiency COM/2016/0761 final - 2016/0376 (COD) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0761> (accessed 20 November 2018)

[195] Proposal for a Regulation of the European Parliament and of the Council on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC COM/2016/0862 final - 2016/0377 (COD) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:862:FIN> (accessed 20 November 2018)

[196] Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013

Directive for Buildings[197] has been entered into force, while others, such as the recast Electricity Directive and Regulation, the process is still ongoing. Particularly when it comes to the Proposed Electricity Directive, which is more interesting for this thesis, it is focused on the role customers play in the electricity market, whereas the proposed internal electricity market regulation concerns the wholesale market and grid operation. The proposed directive sets out some general principles that Member States would have to follow, which do not bring something new to the philosophy of the existing framework: 'the EU electricity market should be competitive, customer-centred, flexible and non-discriminatory.[198] Member States should ensure that there are no undue barriers for market entry or market exit of electricity generators or electricity suppliers. Their national legislation should facilitate cross-border electricity flows'.[199] However, the Proposal focuses on consumer or 'prosumer' - in the term coined by the legislator - participation, providing extensive regulation on self-production, distributed or decentralised and flexible generation and storage, which will require the modernisation of the distribution systems (recital 32). Other rules put emphasis on supply and demand response, primarily through the extensive employment of intelligent meters (recitals 33-36, 38) and the fiery promotion of electro-mobility. The above responsibilities for active consumers are accompanied by consumer protection guarantees (recitals 21-31), with particular attention to data protection (recital 38) to be exercised before the national authorities and suppliers of electricity. When it comes to prices, electricity prices should reflect actual, 'real-time' supply and demand.[200] Electricity suppliers should be free to decide the prices at which they sell electricity to customers, with limited possibilities for public price interventions; whenever made, such interventions should target energy-poor or vulnerable customers. In this respect, the Proposal is highly suspicious of non-market based SGEI schemes and invites for social welfare considerations to be addressed with 'targeted social policy measures' and the least possible market intervention.[201]

COM/2016/0759 final/2 - 2016/0375 (COD) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A759%3AREV1> (accessed 20 November 2018)

[197] Council Directive (EU) 2018/844 amending Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency PE/4/2018/REV/1 OJ L156/75

[198] Briefing (4 June 2018), 'EU Legislation in Progress' <:http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595924/EPRS_BRI(2017)595924_EN.pdf> (accessed 20 November 2018)

[199] L Hancher, B M Winters, '*The EU Winter Package Briefing Paper'*, February 2017, Allen & Overy LLP 2017 <http://fsr.eui.eu/wp-content/uploads/The-EU-Winter-Package.pdf> (accessed 20 November 2018)

[200] Elements which are elaborated in Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity (recast) COM/2016/0861 final - 2016/0379 (COD) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016PC0861> (see recital 65 of the Electricity Directive Proposal) (accessed 20 November 2018)

[201] Recital 14: 'Member States should maintain a wide discretion to impose public service obligations on electricity undertakings in pursuing objectives of general economic interest. Member States should ensure that household customers and, where Member States deem it appropriate, small enterprises, enjoy the right to be supplied with

A few additional competencies have been assigned to ACER in those areas where fragmented national decision-making on issues with cross-border relevance would lead to problems or inconsistencies for the internal market. For example, the creation of regional operational centres (ROCs) in the recast Electricity Regulation[202] calls for supra-national monitoring which needs to be performed by ACER, as the ROCs cover several Member States. Similarly, the introduction of an EU-wide coordinated adequacy assessment in the same proposed regulation calls for a regulatory approval of its methodology and calculations that may only be attributed to ACER. While the assignment of new tasks to ACER will require a reinforcement of its staff, the coordinating role of ACER will lead to a lower burden for national authorities, thus freeing up administrative resources at national level.[203] The core elements introduced with the previous Packages remain largely intact (recitals 44 et seq.), proving they are still valuable, especially for the less mature markets. After all, even when they are taken for granted and overshadowed by more sophisticated measures, they will be enforced by means of the general competition rules, as it will be seen in Part Two.

1.4. State Aid in the field of energy

1.4.1 Overview of EU State Aid law with relevance to the energy sector

A free market requires a level playing field where companies compete on the strength of their commercial abilities, not on the strength of their political relations, ability to influence or even capture the regulatory process, and not as a result of direct or indirect financial support from their government.[204] EU State aid control encompasses a competition-policy related reasoning. For example, Article 107(1) of the TFEU is not only part of the chapter on competition law, but also explicitly prohibits State intervention by means of aid, 'which distorts or threatens to distort competition' in the relevant market. Within this concept, only those measures which have the

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electricity of a specified quality at clearly comparable, transparent and competitive prices. Nevertheless, public service obligations in the form of supply price regulation constitute a fundamentally distortive measure that often leads to the accumulation of tariff deficits, limitation of consumer choice, poorer incentives for energy saving and energy efficiency investments, lower standards of service, lower levels of consumer engagement and satisfaction, restriction of competition as well as fewer innovative products and services on the market. Consequently, Member States should apply other policy tools, and in particular targeted social policy measures, to safeguard the affordability of electricity supply to their citizens. Interventions in price setting should only be applied in limited exceptional circumstances. A fully liberalised retail electricity market would stimulate price and non-price competition among existing suppliers and incentivize new market entries therefore improving consumers' choice and satisfaction.'; See also recitals 39-41

[202] Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity (recast) COM/2016/0861 final - 2016/0379 (COD) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016PC0861> (accessed 20 November 2018)

[203] Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity (recast) (23.2.2017) COM(2016) 864 final/2 2016/0380 (COD) <https://ec.europa.eu/energy/sites/ener/files/documents/1_en_act_part1_v7_864.pdf> page 11(accessed 20 November 2018)

'effect' of distorting competition and trade should be targeted. This effects- based approach implicitly favours the use of economic theory to distinguish potentially harmful from less detrimental forms of aid.[205]

According to Talus, even more than antitrust rules, EU rules on state aid had relatively little significance for the energy sector as long as the energy markets were nationally segregated and energy was beyond the reach of EU law. With the opening-up of national energy borders and the development of European energy trade, the energy companies become vulnerable to international competition, and this tends to make the provision of state aid to energy companies themselves seem quite tempting to governments. On the other hand, the pressure for fiscal austerity under the standard rules relating to the Euro currency, in particular in the current debt crisis, together with the waning political and moral legitimacy of state intervention in corporate affairs which have a less pronounced 'national' character, tends to reduce the temptation to intervene surreptitiously, with an inherent opening for corruption, in order to enhance national energy companies' competitive edge.[206] For those reasons, the prominent state aid control cases which will be examined were produced after 2015.

Articles 107 to 109 TFEU regulate the granting of state aid by Member States. Article 107(1) TFEU prohibits 'aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition, by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States.' The grant of new state aid must be notified in advance to the Commission, failing which it will be invalid. Article 107(1) TFEU permits a declaration of incompatibility with the common market, but not a directly applicable prohibition of an aid.[207] Article 107(2) and (3) TFEU provides for exemptions to this strict prohibition to be applied under certain circumstances; Certain types of aid are excluded under Article 107(2), and others may be excluded at the Commission's discretion under Article 107(3). As far as energy is concerned, Article 107(3) is the more significant of the two provisions.[208] Justifications for state aid cannot only be found in Article 107(2) and (3), but also in the overall

[204] K Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2013) 285
[205] R Chari, C H Hofmann, C Micheau 'Motivations for Aid, Why Control It, and Evolution of Aid in the EU' in *State Aid Law of the European Union*, Herwig C.H. Hofmann and C Micheau (eds) (Oxford University Press, 2016) See also their critique on the competition model from a political science perspective, pages 7-8
[206] Talus, (n 204) 287
[207] The prohibition is not directly applicable but the Art 108 procedure is required for an aid to be deemed compatible or not with the internal market. However, 108(3)(c) is directly applicable, introducing the standstill obligation for new - and not for the modifications on existing aid schemes - prior to their notification to the Commission. See case law cited in the Opinion of AG Mengozzi in Case C- 206/06, *Essent Netwerk Noord* [2008] EU:C:2008:33, para 76, footnote 46
[208] Talus, (n 204) 288

derogation in favour of public service functions in Article 106(2)[209], as was affirmed in in *Altmark*[210]. The Article 106(2) undertakings relating to public service functions are covered by Article 107. This means that such undertakings have to notify new grants of state aid, which are invalid unless justified under Article 107(2) and (3) or, with the strict necessity test, under Article 106(2).[211] Article 108 TFEU regulates the procedural aspects of state aid supervision while Article 109 TFEU provides that the Council may make appropriate regulations for the application of Articles 107 and 108 TFEU, including empowering the Commission to issues regulations for the enforcement of the state aid rules. Currently, the procedural provisions are laid down in Article 108 TFEU and complemented by Council Regulation 2015/1589.[212] Considerable discretion in favour of the Commission is involved, particularly under Art. 107(3) while a state aid difference is prominently a Commission - State one. Third parties (i.e. beneficiaries and competitors) are entitled to have their voices heard after the Commission has published a communication on state aid procedure.[213]

A number of cumulative criteria must be fulfilled for a measure to fall under Article 107(1) TFEU. First, there must be intervention by the state or through state resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer a selective advantage on the recipient, which it would not have had under normal market conditions. Fourthly, it must distort or threaten to distort competition.[214] The problematic nature of the definition of 'aid' for the purposes of Article 107(1) TFEU is of particular importance in the energy sector. The Commission has produced a consultation document in the form of a Notice, on the notion of aid in January 2014.[215] Presumably, only this criterion will be examined in more detail while the rest in passing. The effect of the arrangement is, or should be, the decisive factor, not its form.[216] However, as discussed below, the notion of state resources as treated in the leading *PreussenElektra*[217] and subsequent cases seems to undermine this effects-based approach. In examining this criterion, it

[209] Ibid 289; See *infra* 1.2.2.
[210] Case C-280/00, *Altmark*, [2003] EU:C:2003:415.
[211] Case C-387/92, *Banco de Credit* [1994] ECLI:EU:C:1994:100
[212] Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9 which replaces as of 14.10.2015 Council Regulation (EC) 659/1999 [1999] OJ L 83/1, as amended, along with a plethora of implementing and complementary legislation.
[213] G S Karydis, *Παράνομες Κρατικές Ενισχύσεις και Έννομη Προστασία των Ενδιαφερομένων Τρίτων* (C A Vasileios (ed) (Nomiki Bibliothiki, 2013) 62-95
[214] Case C-206/06, *Essent Netwerk Noord and Others* [2008] EU:C:2008:413, para 64
[215] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946 OJ C 262/1
[216] Talus, (n 204) 289; Emphasis added
[217] Case C-379/98, *PreussenElektra* [2001] EU:C:2001:160

must be underlined that the notion of state aid covers more than just direct 'subsidies' and has widened over the years, to include e.g. purchase guarantees in power-purchase contracts.[218] 'Negative state aid' also falls within the category of state aid.[219] If government-controlled companies are involved, typically through the use of tariffs or other contract terms, the Commission uses the 'market investor principle',[220] to distinguish camouflaged state aid from a legitimate commercial reaction to market conditions.[221] According to Talus,[222] the *EDF* case,[223] involving France, offers an illustrative example of strong governmental control over its energy companies and the difficulties in applying the 'market investor' test. In that case, the French state essentially cancelled EDF's debt by using various fiscal concessions. During the relevant timeframe, EDF was fully owned and controlled by the French state. Given its undercapitalization and the need to restructure EDF, the General Court held that the state had acted as any private owner would have done to facilitate restructuring of the company.[224] An important standard in practice is that state aid must involve some transfer of a 'resource' from the government to the beneficiary. However, this seemingly clear standard is far from being so in practice, as the case law demonstrates.[225] The issue has been raised in a line of energy related cases from *PreussenElektra*[226] to *Essent.*[227] This criterion involves two separate and cumulative sub- criteria: the direct or indirect granting of State resources and the imputability of the measure to the State. The Court of Justice held that the distinction between aid granted by a Member State and aid granted through State resources 'is intended to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public and private bodies designated or established by the State'.[228] The initial approach of the Court was to take a broad view of Article 107(1) TFEU and apply it to any measure which conferred an economic advantage on specific undertakings, which is the result of action or conduct attributable to

[218] Commission Decision of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements (notified under document C(2008) 2223) <http://ec.europa.eu/competition/state_aid/cases/201965/201965_827719_388_1.pdf> (accessed 20 November 2018)
[219] 'Negative state aid' means non-imposition of certain charges on companies in comparable situations therefore mitigating the financial burdens of undertakings. See Cases C-128/03 and C-129/03, *AEM SpA and AEM Torino SpA v Autorita per l'energia elettrica e per il gas and others* [2005] ECLI:EU:C:2005:224
[220] Case C-305/89, *Italy v Commission* [1991] ECLI:EU:C:1991:142
[221] The 'private investor test' does not apply to services of general economic interest in the sense of 106(2) TFEU.
[222] Talus, (n 204) 297
[223] Case C-124/10P, *European Commission v Électricité de France (EDF)* [2012] EU:C:2012:318, paras.75-106. Appeal against the Judgment of the General Court (Third Chamber) of 15 December 2009, Case T-156/04
[224] Talus, (n 204) 297
[225] Ibid 290
[226] *PreussenElektra* (n 217) para 58 et seq
[227] *Essent Netwerk Noord* (n 214)
[228] *PreussenElektra* (n 217) para 58

the State.[229] This criterion gave rise to a restrictive interpretation by the Court of Justice in the *PreussenElektra* case,[230] where it held that an obligation imposed by a Member State on private electricity suppliers to purchase electricity from renewable energy sources did not fulfill the condition of direct or indirect transfer of State resources to the undertakings in charge of producing that particular type of electricity. This ruling is problematic since it opens the door to circumventing the State aid rules by creating obligations upon private parties to subsidize the beneficiary without a transfer of State resources.[231] The use of the State to channel the funds determined that this was a form of State aid. According to Talus,[232] the Court, following the approach taken by AG Jacobs, clearly adopted a very narrow interpretation of the concept of 'state resources' in *PreussenElektra*, and excluded the situation in which aid is not provided using state resources but can nevertheless be attributed to state conduct. This formalistic interpretation was undoubtedly beneficial from a renewable energy and environmental point of view. However, from a wider EU law perspective it is rather problematic as the economic effects of the renewable energy support scheme were essentially the same as in a state aid scheme. The formalistic approach of the Court in this case seems unwarranted, in particular if one looks at the effects of the measure, instead of its form.[233]

The *Essent* case can be contrasted to *Preussen*, in which electricity consumers were obliged to pay a surcharge that was transferred to a body controlled by the State, which then distributed the funds to energy producers.[234] In examining the scheme, the Court essentially found that certain amounts under the scheme had their origin in a state resource. This appeared to be so because the charge was imposed by law (para. 66) and the proceeds were administered in accordance with the law (paras 67-

[229] For a discussion of the case law see Opinion of AG Jacobs in Case C-379/98, *PreussenElektra* [2001] ECLI:EU:C:2000:585, para 115 who summarises the question of whether the wording of Article 107(1) TFEU, according to which aid should be granted by a Member State or through State resources should be interpreted as creating two alternative or cumulative conditions. According to E Szyszczak in 'State Aid Law of the European Union', C H Hofmann and C Micheau (eds) (Oxford University Press, 2016) 65 the literal interpretation of the Treaty Article leans in favour of an alternative approach. However, the EU Courts have consistently interpreted the two conditions in a cumulative way as explained in the main text.

[230] The case concerned a feed-in-tariff scheme in which electricity supply companies were obliged to purchase electricity generated from renewable sources in their areas at a fixed price that was considerably higher than that of electricity produced from non-renewable sources. This scheme had been notified to the Commission under Article 108(3) TFEU and was duly approved. It was subsequently modified to include new provisions, such as a hardship clause under which the supplier had the right to receive compensation from the network operator for its additional costs.This right was triggered in 1998 and the local energy supplier duly invoiced PreussenElektra, the operator.

[231] E Szyszczak in 'State Aid Law of the European Union', C H. Hofmann and C Micheau (eds) (Oxford University Press, 2016) 66

[232] Talus, (n 204) 292

[233] Ibid 293

[234] This case concerned a national legislation permitting the levy of a surcharge on the price for electricity transmission in favour of a statutorily-designated company which was required to pay stranded costs under Dutch law. These costs could not be recovered in the new context of liberalized energy markets because they related to pre-liberalization long-term power purchase contracts.

69). Although this was also largely the case in *PreussenElektra*, the Court, following AG Mengozzi, explicitly distinguished[235] the two cases. The Court reasoned that the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any direct or indirect transfer of state resources to undertakings which produced that type of electricity. The difference is subtle.[236] The ECJ set up four criteria which can be used to test whether an aid scheme for renewable energy including private actors constitutes State aid: a) the surcharge has to constitute a 'state resource' (para. 47) b) appointment of a private body by the State to manage State resource (para 74) c) use of the state resources for a means defined by law (para73) d) state control of the actual use of the funds (para. 74). It has been suggested that this case sheds light on the interpretation in *PreussenElektra* though others maintain that the distinction drawn between *PreussenElektra* and *Essent* is not entirely convincing.[237]

1.4.2. Prominent State Aid issues and proceedings relating to energy

The case law on the provision of state aid in the energy sector has grown substantially since the early 1990s and particularly since 2014. Certain state aid issues can be associated with the early liberalisation period and subsequently, not all of them apply to the contemporary more mature markets. Thus, only some of them will be examined here. They can be categorised as coal subsidies,[238] preferential tariffs,[239] compensation for stranded costs, aid given for environmental purposes and services of general economic interest.[240] The former two are largely still applicable today and are examined below.

The bold enforcement of 2014 and beyond is undoubtedly related to the ambitious reform of State Aid law set out by the Commission in 2012, which has three main objectives: 'Foster growth in a strengthened, dynamic and competitive internal market, focus enforcement on cases with the biggest impact on the internal market, streamlined rules and faster decisions'. Responding to the increasingly alarming environmental concerns and strict climate protection targets on the one hand, and the debt crisis on the other, State Aid control 'should more effectively target sustainable growth-enhancing policies while encouraging budgetary consolidation, limiting distortions of competition

[235]For the interpretative technique of distinguishing see V A Christianos, *Μετεξελίξεις της προσφυγής λόγω παραβάσεως στην Ευρωπαϊκή Ένωση* (Nomiki Bibliothiki, 2010)
[236] Talus, (n 204) 294
[237] Ibid
[238] With reference to Council Decision (EU) 2010/787 on State aid to facilitate the closure of uncompetitive coal mines [2010] OJ L 336/24/. For prominent enforcement examples see Talus, (n 204) 298
[239] Ibid 299-303

and keeping the single market open, according to the Commission'. The Commission proposals and follow-ups on State Aid Modernisation 'identify common principles for assessing the compatibility of aid with the internal market, across various guidelines and frameworks and revise, streamline and possibly consolidate State aid guidelines to make them consistent with those common principles'. In that respect, the State Aid Modernization initiative focuses on the review of the 'de minimis Regulation',[241] the General Block Exemption Regulation,[242] and the Council Enabling Regulation[243] with a view to extending the number of aids subject to a simplified control.[244] For those reasons, the Commission's enforcement activities in the field of State aid law have become an increasingly important means of enforcement of European competition law.[245] Among other proceedings, firstly, since 2014, the Commission has initiated or continued with proceedings examining the compliance of Member States' subsidy schemes promoting renewable energies. The 2012 German subsidy scheme has been put in the spotlight. Secondly, the Commission has also assessed the capacity mechanisms installed by Member States to secure their electricity supplies and prevent potential blackouts. These have also been subject to a sector inquiry launched by the Commission in April 2015.[246]

1.4.2.1. Compliance of renewable energy support schemes

In its public consultation on new energy market design, the Commission stressed the importance of integrating the growing share of volatile renewable energies into the market. Indeed, in 2009, the Commission passed the so-called Renewable Energy Directive (RED),[247] which essentially established an overall policy to promote the production of energy from renewable sources in the EU and the cooperation of different countries to jointly meet renewable energy targets. However, the

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[240] Ibid 297

[241] Commission Regulation (EU) 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L 352/1

[242] Commission Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1

[243] Council Regulation (EU) 2015/1588 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid [2015] OJ L 248/1. See also Commission Proposal for a targeted amendment of the Enabling Regulation of 6 June 2018 amending Council Regulation (EU) 2015/1588, COM (2018)398/2

[244] Communication from the Commission, 'EU State Aid Modernisation (SAM)', COM/2012/0209 final [2012] <http://ec.europa.eu/competition/state_aid/modernisation/index_en.html> (accessed 4 November 2011)

[245] Scholz, Vohwinkel, (n 174)

[246] Ibid

[247] Council Directive (EC) 2009/28 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140/16. See also Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast) COM/2016/0767 final - 2016/0382 (COD) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2016%3A767%3AFIN> (accessed 20 November 2018)

promotion of renewable energies was left to the Member States themselves.[248] This led to a situation where numerous Member States, in order to meet their common climate protection targets, implemented subsidy schemes for the promotion of renewable energies, schemes which the Commission has recently examined and criticised under the rules of EU State aid law, the cases discussed below. The same applies to so-called capacity mechanisms subsequently implemented by Member States, which are thought to close perceived gaps in generation capacity and help manage grid congestion. The Commission issued guidance for both forms of subsidies in the form of the revised and supplemented Guidelines on State aid for environmental protection and energy 2014–2020 (EEAG). These have been applicable since 1 July 2014.[249]

Support schemes for provide for electricity from renewable resources to be treated preferentially compared with conventional energy from fossil resources. For example, renewable energies are preferentially off-taken by energy suppliers, can obtain a higher level of remuneration and renewable energy production facilities, be it wind farms, photovoltaic installations, or other generation facilities, and are preferentially connected to electricity grids.[250] In the EEAG, the Commission explicitly addressed—among other types of subsidies—the subsidisation of renewable energies and emphasised that subsidy schemes where the generation capacity per site exceeds 250 MW, and which were not granted on the basis of a competitive bidding process, remain subject to the notification obligation contained in Art. 108(3) TFEU. To comply with State aid rules, Member States must show that the aid contributes to an objective of common interest, there is a need for State intervention, the aid is appropriate, and that there is an incentive effect (para. 30 et seq.). The Commission will consider subsidy schemes to be compatible with the internal market pursuant to Art. 107(3)(c) TFEU, where they lead 'to an increased contribution to the Union environmental or energy objectives without adversely affecting trading conditions to an extent contrary to the common interest' (para. 23). As the Commission expects established renewable energy sources to become grid-competitive by 2020–2030, it has indicated that subsidies shall be phased out digressively over this period (para. 108). In any event, the Commission will only authorise aid schemes for a maximum period of 10 years (para. 121). Further, from 2016, all new aid schemes and measures may consist only of a premium paid in addition to the market price that generators can obtain from selling their electricity directly in the market. From 2017, aid will generally be granted

[248] Scholz, Vohwinkel, (n 174)
[249] Communication from the Commission, Guidelines on State aid for environmental protection and energy 2014–2020 (28 June 2014) [2014] OJ C 200/1 (EEAG)
[250] Scholz, Vohwinkel, (n 174)

through a competitive bidding process on the basis of transparent and non-discriminatory criteria. In such cases, the Commission will presume that aid is proportionate and does not distort competition to an extent contrary to the internal market (para 124 et seq.). Additionally, the EEAG addresses the practice of funding support for renewable energies through charges levied from electricity consumers, either directly or indirectly in the form of surcharges. The Commission recognised that some reductions to the cost of funding may be necessary in order to avoid particularly affected undertakings being put at a significant competitive disadvantage. However, the Commission has stated that this aid should be limited to sectors that are particularly exposed due to their electro-intensity and their dependence on international trade. Therefore, only undertakings that belong to the sectors listed in Annex 3 of the EEAG will benefit from the reductions. In addition, due to the heterogeneity of certain sectors in terms of electro-intensity, the Commission has allowed Member States to include certain non-listed undertakings in their national schemes, provided that the undertakings have a high electro-intensity (i.e. electricity costs amount to at least 20 percent of the gross value added) and belong to a sector with a trade intensity of at least 4 per cent at EU level (para 181 et seq. in conjunction with Annex 4).[251]

A major proceeding that was settled in 2014 was the one initiated by the Commission against Germany a year earlier in relation to aid granted under the German Renewable Energy Act of 2012 (hereinafter the Act).[252] The Commission confirmed that the support given by Germany for renewable energy production was in line with the Commission's 2008 environmental aid guidelines, notably because it was limited to compensating the extra costs of renewable energy production that exceeded the market price for electricity. In particular, the Commission approved major parts of a reduction to a surcharge intended to finance support for renewables that had been granted to certain energy-intensive companies. The surcharge was imposed on electricity suppliers and passed on to end consumers. However, the Commission did require a limited portion of the reductions relating to 2013 and 2014 to be paid back by the beneficiaries, as it found that these reductions exceeded the exemptions from the surcharge permitted under EU State aid rules.[253] The General Court confirmed the Commission's view that the feed-in tariffs and market premiums, which guarantee producers of

[251] Ibid

[252] Commission, press release IP-14-2122 (25 November 2014), 'State aid: commission approves German aid scheme for renewable energy (EEG 2012); orders partial recovery' <http://europa.eu/rapid/press-release_IP-14-2122_en.htm> (accessed 20 November 2018)

[253] The decision did not concern reductions to the surcharge granted through the new 2014 Act for 2015, which had already been notified to the Commission in April 2014 and approved in July 2014 for the period until 31 December 2016: Commission, press release IP/14/867 (23 July 2014), 'State aid: commission approves German renewable energy law EEG 20140 <http://europa.eu/rapid/press-release_IP-14-867_en.htm> (accessed 20 November 2018)

renewable electricity a higher price for the electricity than the market price, constituted State aid, and that the reduction of the EEG surcharge for certain energy-intensive users is only compatible with the internal market if certain conditions are met.[254] The German government has already appealed[255] against this decision in order to obtain a ruling confirming that its national provisions promoting renewable energy use constitute State aid compatible with the market.[256]

Other instruments relevant to the assessment of state aid with an environmental objective are the General Block Exemption Regulation[257] as well as the new Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme.[258] Among others, in 2016, the Commission approved a Greek support scheme.[259] According to the Commission, the scheme was likely to increase the proportion of green electricity and reduce pollution, while limiting any distortions of competition which may be caused by state support. With the exception of one case which is seen under 1.4.2.2.[260] and two ongoing investigations into Romanian restructuring support cases,[261] the Commission's State Aid control activity in 2017-2018 concerned exclusively green support schemes, the majority of them being approved. So far, feed-in tariffs are the most prevalent measure Member States choose to promote renewable energy[262] In general, this means that national authorities may warrant fixed selling prices for the renewable energy produced. Hence, the authorities' challenge is to determine the prices, taking into account the market conditions. The financial crisis and recession intensified this task's difficulties. The CJEU case law since the *PreussenElektra* and *Essent* judgements and the Commission's initiatives in this field demonstrate a predilection towards market-oriented support schemes. These developments make it clear that it is not easy to introduce feed-in tariffs schemes that do not pertain to issues of State aid. This may

[254] Case T-47/15, *Federal Republic of Germany v European Commission* [2016] ECLI:EU:T:2016:281
[255] C-405/16P, *Federal Republic of Germany v European Commission*, unavailable publication
[256] Scholz, Vohwinkel, (n 180)
[257] Commission Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1
[258] Communication from the Commission — Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012 (SWD (2012) 130 final) (SWD(2012) 131 final) OJ C 158/4. Enforcement under the modernised regime has not been reported yet. For enforcement under the prior to 2012 regime see Talus, (n 204) 315-320
[259] Commission, press release IP-16-3707 (16 November 2016) 'State aid: Commission approves Greek support scheme for renewable electricity and cogeneration' <http://europa.eu/rapid/press-release_IP-16-3707_en.htm> (accessed 20 November 2018)
[260] Commission - press release IP/17/903 (7 April 2017) 'State aid: Commission opens in-depth investigation into German plans for electricity capacity reserve' <http://europa.eu/rapid/press-release_IP-17-903_en.htm> (accessed 20 November 2018)
[261] Commission - press release IP/18/3733 (8 May 2018), 'State aid: Commission opens in-depth investigation into restructuring support for Romanian National Uranium Company' <http://europa.eu/rapid/press-release_IP-18-3733_en.htm> (accessed 20 November 2018)

impel the Member States to substitute feed-in tariffs schemes with market-based support schemes, so as to avoid the compatibility assessment. Many MS now opt for premium schemes, which adjust to the market ups and downs, reflect market prices and, consequently, they do not end in overfunding.[263]

1.4.2.2. Compliance of capacity mechanisms

The revised EEAG 2014–2020 also contain guidance regarding the so-called capacity mechanisms. Capacity mechanisms have been implemented by some Member States to close potential gaps in the electricity supply, in case electricity cannot be generated from renewable resources and/or physical congestions in electricity grids prevent the supply of renewable energy past the points of congestion.[264] Under these mechanisms, Member States typically grant support to energy generators for the mere availability of generation capacity.[265] The Commission's position on capacity mechanisms was outlined in its first decision on national capacity mechanisms under the EEAG adopted on 23 July 2014 (UK capacity mechanism).[266] According to the Commission, capacity mechanisms are generally designed to encourage private investment so that expected capacity gaps can be filled. In most cases, capacity schemes offer further remuneration to capacity providers, on top of the profits they receive from electricity sales on the market, in return for those providers maintaining existing capacity. The Commission stressed that, as a general rule, Member States should primarily consider alternatives which do not involve environmentally or economically harmful subsidies, for example the facilitation of demand side management or the increase of interconnection capacity. Only the generators' commitment of capacity to deliver electricity, not the sale of electricity itself, should be remunerated. However, the Commission has conceded that beneficiaries should be able to earn a reasonable rate of return where the provision of capacity is the result of a competitive bidding process. In any case, measures should be taken so that remuneration for availability automatically tends to zero, if a balance between the capacity supplied and capacity demanded is achieved. Any capacity generated with the help of different technologies should also be taken into account. In addition, it is essential that a sufficient

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[262] T Iliopoulos, 'Renewable Energy Regulation: Feed-in Tariff Schemes under Recession Conditions?' European Networks Law & Regulation Quarterly, Volume 4 (2016), Issue 2, 110 - 117

[263] Ibid

[264] Scholz, Vohwinkel, (n 174)

[265] Ibid

[266] Commission, press release IP/14/865 (23 July 2014), 'State aid: commission authorises UK Capacity Market electricity generation scheme' <http://europa.eu/rapid/press-release_IP-14-865_el.htm> (accessed 20 November 2018); ultimately, the Commission concluded that the assessed scheme was in line with EU State aid rules, as it aimed at ensuring the availability of sufficient electricity to cover consumption at peak times without distorting competition in the single market.

number of generators participate in the process so as to ensure a competitive price for the capacity (para. 216 et seq.).[267] In April 2015-November 2016, the Commission carried out its first sector inquiry with regard to capacity mechanisms.[268] It emphasised the need for a 'more harmonised approach', as 28 different capacity mechanisms could be identified.[269] The report contained three main conclusions. First, the Commission emphasised that capacity mechanisms must be accompanied by appropriate market reforms. Although there was overcapacity in European electricity markets, and power shortages were 'extremely rare', the results of the sector inquiry indicated that Member States had concerns as to whether their generation capacity would meet electricity demand. According to the Commission, concerns could be removed by implementing market reforms proposed in the 'Clean Energy for All Europeans Package',[270] 'including the removal of low electricity price caps, enabling the participation of demand response in the market and matching bidding zones to network congestion.'[271] As a general rule, strategic reserves are deployed in emergency situations. They should be held outside the market to minimise distortions to the market's day-to-day functioning. They must be transitional measures, which accompany market reforms and are phased out as soon as the reforms take effect. Moreover, the Commission requires the need for capacity mechanisms to be demonstrated. Again, it referred to the 'Clean Energy for All Europeans Package' and the 'resource adequacy assessment' which it provides for.[272] Finally, capacity mechanisms must be 'fit for purpose' and open to all capacity providers. For long-term adequacy problems, the Commission found a market-wide mechanism likely to be the most appropriate. Temporary adequacy concerns would be better addressed through more transitional measures such as a strategic reserve, as these keep certain capacity outside the electricity market for

[267] Commission decision in Case SA.35980 (2014/N-2) United Kingdom Electricity Market Reform—Capacity Market C(2014) 5083 final, [2014] OJ C/348

[268] Commission, press release IP-16-4021 (30 November 2016) 'State aid: Sector Inquiry report gives guidance on capacity mechanisms' <http://europa.eu/rapid/press-release_IP-16-4021_en.htm> (accessed 20 November 2018) ; Final Report on The Sector Inquiry: <https://ec.europa.eu/energy/sites/ener/files/documents/com2016752.en_.pdf> (accessed 20 November 2018)

[269] L Hancher, A D Hauteclocque, M Sadowska, *Capacity Mechanisms in the EU Energy Market-Law, Policy, and Economics* (Oxford University Press, 2015) 158: 'The application of the EU state aid rules is not an alternative to or substitute for a harmonized approach to dealing with generation adequacy at European level. The EU's role is reactive and even passive: at most it can reject a national capacity mechanism scheme as incompatible state aid, but on the basis of past precedent, it is more likely that the Commission will recommend certain changes or adjustments in order to approve the scheme in question as compatible aid. Furthermore, the Commission considers each national measure individually and on its own merits. It does not compare that measure with the measures adopted in another Member State in order to determine compatibility—state aid control is not even an instrument of indirect harmonization.' Although the revised EEAG contains more far-reaching rules, this is not bound to change.

[270] Commission, press release IP/16/4009 (30 November 2016), 'Clean Energy for All Europeans –unlocking Europe's growth potential', <http://europa.eu/rapid/press-release_IP-16-4009_en.htm> (accessed 20 November 2018); see also *infra* 1.3.

[271] Final Report on The Sector Inquiry, 16-17

[272] Ibid

operation only in emergencies.[273] The Commission demands that prices paid for capacity are determined in a competitive process. The inquiry confirmed that prices set through an administrative procedure were not appropriate. Furthermore, the Commission proposed that capacity mechanisms should also be open to providers in other Member States, as this would provide incentives for investment in interconnectors and generation capacity in other Member States, and reduce system costs.[274] Based on these principles, the Commission has opened an in-depth investigation into German plans for electricity capacity reserve which would require German network operators to procure 2 (GW) of capacity that would be held in reserve outside the market for extreme and unforeseen circumstances. The Commission is concerned that the measure could continue to exist even when it will no longer be necessary, that the scheme is not open for demand response operators (i.e. customers ready to cut or reduce their electricity use to help to balance demand with supply), neither for foreign capacity providers. In an interesting note, the Commission believes that Germany 'may not have carried out all possible market reforms that would enable the market to fully ensure security of supply at lowest possible cost and without the need for state intervention. Even if capacity measures are well designed, they cannot replace essential electricity market reforms.'[275]

1.4.2.3. Services of General Economic Interest and State Aid

As briefly examined in 1.4.1., various tests for assessing whether the Member States' measures granting aids were compatible with EU law have been established, developing a framework for the notion of State aid which relies on distinct criteria, including that of State origin of funding, the notion of an undertaking, the concept of an advantage, the concept of selectivity, as well as finally, the concept of distortion of competition and effect on trade between Member States, the interpretation of which concepts has become increasingly policy- specific.[276] The concept of an advantage in State aid has become a specialized legal field in its own right following the various interpretations of the concept of a service of general economic interest (SGEI), whose deep rooted background is intertwined with the liberalisation process in the energy sector. As AG Colomer explains 'in the early days of the welfare state, certain areas of the economy were set apart from the free market philosophy with the aim of reducing the distance between the 'dominated lebensraum

[273] Ibid
[274] Ibid
[275] Commission, press release (n 260)
[276] Bovis, Cisotta, Ó Caoimh, Pantazatou, Sautera, Szyszczak (n 63) 64: *'These criteria have both political and constitutional significance in that they demarcate and balance Member State– EU competence. They also have an economic– constitutional significance in determining the lawfulness of State intervention in the market, not only in the light of the creation and maintenance of a 'social market economy' set out in Article 3 TFEU in the Treaty of Lisbon 2009 framework, but also in the light of global regulation of protectionism.'*

(living space)' and the 'effective lebensraum'. Inspired by ideals which went beyond the strictly economic – enshrined in the time-honoured continental legal concept of service public – state intervention in some sectors was intensified, monopolies were created and regulation was increased. Since the Single European Act, when competition was installed as the new deity on 'the altar of political ideas', public service has become an obstacle to be overcome in the name of a liberalisation on which all hopes were pinned. The creation of an open market is the first step of this policy, but once barriers have been removed there remain certain requirements which the market alone is not able to meet. Hence the origins of public intervention, in the form of 'services of general interest' and 'public service obligations', imposed by the authorities on undertakings in liberalised sectors in order to safeguard public interests which, because they are inalienable, cannot be left to market forces to take care of. It is the great challenge of economic law today to define the limits of this state activity. So far, the question has only arisen in connection with the existence of exclusive rights or the financing of these services and rarely in relation to public service obligations.'[277]

The Treaty, despite its overall free trade orientation, not least in terms of its State aid rules, made space for a degree of state involvement as well. This was set out in what is now Article 106 TFEU, which deals with SGEI as well as special and exclusive rights (legal monopolies). More recently, the SGEI concept has been expanded with an additional Treaty provisions.[278] Apart from the aforementioned Treaty provisions (106, 14 TFEU, Protocol No 26, 36 CFREU) the Almelo case provides insight into the definition of SGEI.[279] The practical significance of all the above provisions is allowing for derogations from the application of competition rules as long as they are strictly interpreted and according to the principle of proportionality. More specifically, the notion of SGEI precludes the application of the state aid rules as long as the Altmark test applies, as explained right below. Those notions are of particular importance in the field of energy: Energy is a fundamentally essential good, crucial for a borderline dignified human existence. Energy is also a factor of economic development and progress to the extent it consists a prerequisite for the production of

[277] Opinion of AG Colomer in Case C-265/08, *Federutility and Others v Autorità per l'energia elettrica e il gas* [2010] ECLI:EU:C:2009:640, paras 1-3; See also ibid, 87

[278] See *infra*, 1.2.2.

[279] Case C-393/92, *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994], ECLI:EU:C:1994:171, paras 48 and 49: *'An undertaking [which] must ensure that throughout the territory in respect of which the concession is granted, all consumers, whether local distributors or end-users, receive uninterrupted supplies of electricity in sufficient quantities to meet demand at any given time, at uniform tariff rates and on terms which may not vary save in accordance with objective criteria applicable to all customers [performs a SGEI]. Restrictions on competition from other economic operators must be allowed in so far as they are necessary in order to enable the undertaking entrusted with such a task of general interest to perform it. In that regard, it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject.'*

industrial goods and the offer of services (telecommunications, transport). However, the energy industry generates environmental hazards which state policies need to take into account. As AG Colomer notes: 'Once the state-owned monopolies in the sector had been eliminated and it was subject to the laws of the market, certain requirements of general interest still remained. With this aim, the Community legislature considered the possibility of imposing public service and universal service obligations, even in the first sectors to be liberalised, such as the postal, transport and telecommunications sectors. The Court of Justice has specifically addressed these derogations, particularly their funding, and has held that the subsidies paid by way of 'compensation' for public service obligations do not constitute State aid if they meet certain conditions.'[280]

The Court takes the view that public service requirements are to be interpreted on a national basis.[281] Where a Member State decides to have recourse to these provisions, the measure must not restrict competition and trade between the Member States more than is necessary in order to fulfill the legitimate general interest objectives.[282] The payment of compensation relating to the accomplishment of a public service obligation is not, in principle, considered to amount to state aid.[283] However, when examining the question of compensation, the Commission applies the state aid test formulated by the Court in the *Altmark*[284] case. This comprises four cumulative conditions which schemes must meet in order not to be ruled illegal:[285] a) the company must be responsible for the implementation of clearly defined public service obligations (PSO); b) the parameters for the cost calculations must be pre-established in an objective and transparent manner; Transparency can be achieved by virtue of constant monitoring on behalf of the State, notwithstanding logistical unbundling.[286] c) the compensation must not exceed what is strictly necessary (yet allowing for a reasonable return); and d) the selection of the company that is subject to the PSO must be made through a public tendering procedure or the compensation level must be calculated by comparing the cost to that which a well-managed and adequately resourced company would incur (again allowing for a reasonable return). The aim is for undertakings other than the historical incumbents to be eligible. When these criteria are met, the measure is not considered to be state aid and do not need to

[280] Opinion of AG Colomer in *Federutility* (n 277) para 44
[281] *citiworks* (n 126) para 59; *Federutility* ibid para 30
[282] *citiworks* (n 126) para 60
[283] Talus (n 204) 311
[284] Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht,* [2003] EU:C:2003:415.
[285] Ibid paras 87-95
[286] See *infra* 1.3.

be notified as such to the Commission. These criteria have been applied in a large number of cases in the energy sector over the last few years.[287]

An early example of a situation falling within the scope of the *Altmark* criteria was the Irish generation capacity scheme.[288] In this case, the Irish TSO had indicated the emergence of a generation capacity gap from 2005 onwards. By 2007, this gap would grow to around 10 percent of the total generation capacity in 2003. To address this potential problem, the Irish Commission for Energy Regulation decided to launch a process aimed at facilitating the entry of significant amounts of new capacity on to the national market. This meant that, under a specific scheme of up to ten years' duration, Capacity and Differences Agreements (CADA) would be granted to generators that would undertake the construction of this new generation capacity. As the CADAs served a security of supply purpose, the Commission examined the scheme under the *Altmark* criteria. It noted that: 'Electricity is a product that is vital for the economy and even for the everyday life of European citizens. Electricity breakdowns have huge, sometimes life threatening, impact. Ensuring that no such breakdown occurs even in peak demand periods and under all weather conditions is therefore clearly necessary for the public interest.' The Commission then went on to take the view that, in line with earlier case law, ensuring security of supply can be considered as a legitimate objective of general economic interest. The assessment then turned to the proportionality question. The Commission considered that, while cross-border interconnectors would in many ways be the preferable option—as they provide for more market-based schemes, allow for the sharing of reserve capacity, etc.—this is not an option in Ireland's case. It also underlined the distinction between 'reserve capacity' and 'normal capacity'. The Commission accepted the scheme as falling within the *Altmark* criteria.[289]

It can be observed from the case law that the notions of SGEI and PSO are relevant, even interchangeable. In general terms, when one speaks of consumer protection at the EU level, the term "public service" or public service obligation" is often used. In fact, the precise meaning of the term "public service" depends on the circumstances in which it is used and, often, the viewpoint of the person using it. In the context of the gas and electricity Directives it has, however, a precise meaning.[290] Given that the new Directives lead to full household market opening, the Commission,

[287] Talus (n 204) 312
[288] Commission case, State aid N 475/2003—Ireland—'Public Service Obligation in respect of new electricity generation capacity for security of supply' OJ 2004 C 34/8
[289] Talus (n 204) 313-314
[290] A Doherty *'Retail market development and public service objectives'* in C Jones (ed), *EU Energy Law: Volume I The Internal Market* (4th edn, Claeys & Casteels 2016) 471

Council and European Parliament considered it necessary to ensure that the Directives contained a number of public service related guarantees. Thus, in the context of the electricity and gas Directives, 'public service' means the guaranteeing, through regulatory standards, measures or requirements, of levels of consumer or environmental protection that might otherwise not be maintained through the simple operation of the market mechanism.[291] This is contained in Article 3 of the currently in force Directive 2009/72/EC[292] and Directive 2009/73/EC.[293] The provision assigns a positive obligation on the States and sets out conditions for state schemes to be admissible under the Directive's framework but does not contain a definition of PSOs.[294] It has been suggested that another secondary law provision can be enlightening in this respect, Article 2(e) of Regulation 1370/2007,[295] which reads as following: 'public service obligation' means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward'. It can be noted that an inverse private investor test lies in the letter of the provision, indicating an obligation and not a free entrepreneurial decision. According to the Court in *Federutility*, 'that condition should be interpreted in the light of that latter provision of the Treaty' (106 TFEU).[296] The case concerned an Italian measure which set as a reference lower gas prices for the supply of natural gas to domestic customers with a view of limiting for them the impact of petroleum price fluctuations on the international markets - all in a context where competition on the wholesale natural gas market was not effective.[297] According to para. 2 of art. 3 of Electricity Directive, the article should be read in conjunction with 106(2) TFEU mentioned above (1.2.2.) as the legal basis

[291] Ibid
[292] Council Directive (EC) 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L 21/55 (Electricity Directive)
[293] Council Directive (EC) 2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211/94
[294] Doherty (n 290) 469-525
[295] Council Regulation (EC) 1370/2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 [2007] OJ L 315/1
[296] Case C-265/08, *Federutility and Others v Autorità per l'energia elettrica e il gas* [2010] ECLI:EU:C:2010:205, para 26
[297] The measure at stake was considered admissible although the Commission is highly suspicious of intervention of this kind, as AG Colomer in the same case, para. 30, states: *'The Commission sees intervention in gas (and electricity) pricing as simultaneously one of the causes and one of the effects of the current lack of competition in the energy sector. On the one hand, the Commission puts 'regulated prices preventing entry from new market players' among the main deficiencies observed in the transposition of the recent directives. On the other, it goes on to say that such shortcomings mean that 'incumbent electricity and gas companies largely maintain their dominant positions', which has 'led many Member States to retain tight control on the electricity and gas prices charged to end-users. Unfortunately this is often a serious constraint on competition.'*

for SGEI, along with the *Altmark* test, which it codifies to a large extent.[298] A question that naturally arises when one reads para. 2 is whether the list of potential PSOs is exclusive or whether - as the wording 'may' could be suggesting - indicative, allowing for 106(2) TFEU to be applied as a filter for other forms of PSOs. The *Anode* judgement offers an argument in favour of the indicative enumeration.[299] It is equally disputed whether 106(2) TFEU could serve in extending the scope of the lex specialis provision of Article 3, para 3 of the Electricity Directive which introduces a universal service obligation only in the field of electricity. The Gas Directive contains no such provision.

However, the discretion in favour of the Member States is not unlimited: procedural and substantive guarantees clarify the *Altmark* criteria in every stage. On a substantive level, according to para. 14 of the Electricity Directive a SGEI scheme would be admissible while 'the development of trade would not be affected to such an extent as would be contrary to the interests of the Community. The interests of the Community include, inter alia, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.'[300] A second limit is the principle of proportionality,[301] as carved out in *Altmark*. On a procedural level, para 15 of art 3 imposes an obligation of informing the Commission. Para. 2(b) of Art. 3 of the Electricity Directive clarifies the 1st Altmark criterion. The wording suggests a general official public instrument which will specify the nature of the PSO,[302] the subject undertakings, any exclusive, special rights - which would amount to an indirect compensation - or the amount of direct compensation by means of public funding[303] along with adjustment clauses, and most importantly, the time limit of the intervention.[304] It is difficult to envisage how exclusive rights or compensation in return for carrying out a public

[298] Art. 3(2) Directive 2009/72/EC: 'Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof [106], Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for electricity undertakings of the Community to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfillment of environmental goals and goals for energy from renewable sources, as referred to in this paragraph, Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.'

[299] Case C-121/15, *Association nationale des opérateurs détaillants en énergie (ANODE) v Premier ministre and Others* [2016] ECLI:EU:C:2016:637, para. 50

[300] *Federutility* (n 281) paras 27, 28

[301] Ibid paras 33-43; Opinion of AG Colomer in *Federutility* (n 277) paras 61-76

[302] Case C-265/08, *Federutility and Others v Autorità per l'energia elettrica e il gas* [2010] ECLI:EU:C:2010:205, paras 44-47

[303] The compensation could be equally funded by levies imposed on the market participants. For the difference between this and public funding see *infra* the discussion on the problematic *PreussenElektra* and *Essent* judgements on the notion of 'aid of state origin' in 1.4.1.

[304] *Federutility* (n 281) para 35

service obligation can be assigned in a non-transparent way unless this is done through a tendering process. Basing on the Altmark judgement, if this is not the case, a clear and difficult to meet, burden of proof would lie on it to demonstrate how the procedure actually chosen was equivalent in terms of non-discrimination.[305] Lastly, transparency is not only achieved for consumers, but also thanks to them. By improving the accuracy and frequency of feedback to consumers the retail energy market should become more active. This will lead to the development of more active distribution networks, which is encouraged in recital 27 of the Electricity Directive 'Member States should encourage the modernisation of distribution networks, such as through the introduction of smart grids, which should be built in a way that encourages decentralised generation and energy efficiency'. Articles 3 (11) electricity and 3 (8) gas, strongly recommend the implementation of Smart Grids as an energy efficiency measure where appropriate. To this end, Annexes I in the third Electricity and Gas Directives facilitate the rollout of intelligent metering systems. An intelligent metering system, more commonly referred to as a "Smart Meter" could be described as an electronic device that can measure the consumption of energy adding more information than a conventional meter and can transmit data using a form of electronic communication.[306] The role of the consumers as active market players is only becoming more significant, carrying benefits, but also risks. The 2016 Proposal for new Electricity and gas Directives focuses on the participating role of domestic and industrial 'strengthens and expands the rights of individual customers and energy communities, giving them the right to engage in demand response, self-production, self-consumption, storage and sale of electricity. The proposal also sets a framework for the market participation of aggregators and local energy communities; introduces an obligation for Member States to monitor and address energy poverty; clarifies the roles and responsibilities of market participants and regulators; and lays out provisions on electro-mobility and energy storage.'[307]

The recast Electricity Directive[308] is bound to include an entire new chapter entitled 'Consumer Empowerment and Protection' (articles 10-29) which includes all of the above policies, along with detailed regulation for intelligent metering systems. The final Report on the Sector Inquiry on

[305] Doherty (n 290) 475; See also Note of DG Energy & Transport on Directives 2003/54/EC And 2003/55/EC on the Internal Market in Electricity and Natural Gas, Public Service Obligations (16.1.2004); Retrieved from <http://www.rae.gr/old/europe/sub4/public_service_obligations_DGTREN.pdf> (accessed 12 November 2018)
[306] Doherty (n 290) 519-520
[307] Briefing (4 June 2018),'EU Legislation in Progress' <:http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595924/EPRS_BRI(2017)595924_EN.pdf> (accessed 20 November 2018)
[308] Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity (recast) (23.2.2017) COM(2016) 864 final/2 2016/0380 (COD) <https://ec.europa.eu/energy/sites/ener/files/documents/1_en_act_part1_v7_864.pdf> (accessed 20 November 2018)

Capacity Mechanisms was published to coincide with the publication of the Winter Package 2016. Article 21 of the recast Electricity Regulation[309] requires that capacity providers located in another Member State shall be able to participate in market-wide capacity mechanisms. In order to realise this objective complex technical rules must be developed in cooperation with the relevant TSOs. It will fall to ENTSO-E to devise and submit various methodologies to ACER.[310]

1.5. Findings on Part One

At the time of the Single European Act the European Union's economic policy shifted, favouring greater liberalisation of the economy in the context of the creation of the internal market. An open and competitive energy market is thought to promote investment, especially cross-border and bring the fairest deal for consumers. State intervention, which was once considered the sacrosanct of development and prosperity for the postwar economies of Europe, became inherently suspect. The intervention of the State in the field of energy is unlike any other. Firstly, as expected, it aimed at alleviating the so called 'market failures', especially the 'externalities' arising from the activities in the risky energy industry of scale. In addition, it seeked to respond to its particular 'natural monopoly' nature. Most importantly, it was designed in a way that carried out the State's duty to provide its citizens with ample, consistent, secure and affordable energy. This kind of State intervention took the form of national and very often state-owned monopolies. During the late 1980's and early 1990's, the Commission and individuals began to challenge the existence of these monopolies and exclusive rights, first in the telecommunications and then in the gas and the electricity sectors, on the ground that they made the existence of a European market – an internal market – for these goods impossible. At an initial stage, the Court of Justice held that on the basis of Article 4(3) TEU, Member States could not maintain in force legislation that allowed an undertaking to infringe EU competition law because such legislation deprived competition law of its 'effet utile'. A little later, it narrowed its approach by scrutinising anti-competitive state regulation under 106 TFEU. The Court took a more aggressive stance under Article 106 TFEU than it did under Article 4(3) TEU, since an anti-competitive agreement caused or legitimised by national law is necessary for the state to be found in breach of EU law. The State can intervene and derogate from the application of EU competition law in order to safeguard the provision of SGEI under 106(2) TFEU. The theory around SGEI is interesting, not only under 106 TFEU but also under State Aid law. The

[309] Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity (recast) COM/2016/0861 final - 2016/0379 (COD) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016PC0861> (accessed 20 November 2018)

system of Articles 106(2), 14 TFEU, 36 CFREU as well as Protocol No. 26 'Europeanises' SGEI and makes way for their gradual harmonisation. However, this has not happened yet, while the existing secondary law and case law remain stringent and timid on the criteria to be met for the provision of those services to escape competition and State aid law. In a more optimistic light, Article 14 introduces an 'upgraded endorsement of social objectives' within the European Union. By introducing 'solidarity' in a field previously reserved to the Member State action, it complementing the Union's economic constitution and even 'galvanises the sense of European citizenship'[311] The provision of 106(3) is one handing significant powers to the Commission, despite the latter showing self-restraint in employing it.

As of today, the key obligations under the regulatory frameworks for electricity and gas are:

- Member States must ensure that new facilities for production, transport, and distribution of energy are licensed on a non-discriminatory basis: i.e. there are no preferential or exclusive rights for the ex-incumbents

- TPA provisions, necessary due to the 'natural monopoly' character of the transportation segment of the electricity and gas markets. The progress in this area led to regulated TPA as the only option, although the progress is not the same in gas.

- Unbundling obligations, necessary to eliminate the inherent conflict of interest 'neutral' network operators might suffer when they also operate as producers, buyers, traders, and distributors of energy. Transmission/network operators are given special responsibility for managing the system, but may start favoring their own business over the demands of their competitors. As Talus puts it, unbundling rules act as a 'Chinese wall' between the transmission and the other, competitive, activities of the transmission operators.[312]

- The directives do not directly impose 'public service' obligations, but encourage Member States to do so, with the 'proviso' that these are verifiable, non-discriminatory, and transparent. The Commission reserves an oversight role to itself.

- The crucial issue of access requires the presence of a regulatory authority to ensure that access is undermined neither in law nor practice by obstructive actions taken by the network operator.

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[310] L. Hancher, B.M. Winters, 'The EU Winter Package Briefing Paper', February 2017, Allen & Overy LLP 2017 <http://fsr.eui.eu/wp-content/uploads/The-EU-Winter-Package.pdf> (accessed 20 November 2018)
[311] H v Eijken, *EU Citizenship & the Constitutionalisation of the European Union* (Europa Law Publishing, 2015) 49-50
[312] Talus (n 204) 176

- ‘Eligible’ customers are finally able to choose their supplier and even have access themselves to the transport networks. This is bound to expand with the legislative reform currently under way.

State Aid control in the field of energy has tightened since 2012, when an extensive modernisation of the framework took place, focusing on two areas: RES support schemes and capacity mechanisms, especially following the Sector Inquiry in the latter field. This is not unrelated to the challenging climate targets of the 2020 Climate & Energy package,[313] which incorporates the Renewable Energy Directive,[314] forcing MS to keep up with fulfilling their national states. In response, the Commission seems to generally allow most notified schemes, especially since MS move towards more flexible, ‘real time’ market-based schemes. Capacity mechanisms have been elevated to EU policy tools, since they are likely to play a central role in the future market design of most Member States. A capacity mechanism design, which is market-based, can affect incentives, and thus competition among firms, both inside and outside of the mechanism.[315] The revised *Guidelines* are bound to provide more clear and concise rules, which could deter MS from employing all sorts of arguments in order to defend national schemes[316], although, in our opinion, this is not visible in the few proceedings issues so far pursuant to the new EEAG.[317] In our view, under those rules, the Commission will have a hard time proving the ‘necessity’ of the measures, not being in proximity to the alleged threat to the security of supply. This might make it focus its assessment on the appropriateness and proportionality of the national measures and the avoidance of negative effects on competition and trade. To conclude, according to Hancher *et al*,[318] in the light of this recent case law it will be a challenge for Member States to set up a capacity mechanism that escapes Article 107(1) TFEU, as in the *PreussenElektra* case. In practice, as confirmed by the recent Commission decision on the German EEG 2012,[319] this would mean that the scheme must entail no public intervention in any form whatsoever by means of management of the private or public entities entrusted to collect a surcharge or levy.

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[313]Communication from the Commission, ’20-20 by 2020 - Europe's climate change opportunity (COM/2008/0030/final) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52008DC0030> (accessed 20 November 2018)

[314] Council Directive (EC) 2009/28 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16

[315] L Hancher, A D Hauteclocque, M Sadowska, *Capacity Mechanisms in the EU Energy Market-Law, Policy, and Economics* (Oxford University Press, 2015) 183

[316] Ibid 177

[317] Commission decision in Case SA.35980 (2014/N-2) United Kingdom Electricity Market Reform—Capacity Market C(2014) 5083 final, [2014] OJ C/348 in which the UK arguments stretch many pages.

[318] Hancher, Hauteclocque, Sadowska, (n 315) 170

[319] Commission, press release IP-14-2122 (25 November 2014), ‘State aid: commission approves German aid scheme for renewable energy (EEG 2012); orders partial recovery’ <http://europa.eu/rapid/press-release_IP-14-2122_en.htm> (accessed 20 November 2018); See 1.4.2.1.

Part Two

Application of General EU Competition Law on Regulated Energy Markets

Undertakings at the Stand

Obligations imposed on Undertakings under EU Competition Rules

1.1. General introduction to substantive and procedural EU competition law and fundamental concepts relating to the energy sector

This section of the thesis contains a survey of the major and primarily concurrent cases of EU competition law provisions being applied in the aspects of energy markets, which are - as seen in Part One- open to competition, i.e. the production and provision of energy. The survey focuses at the enforcement at an EU level, by the EU institutions. If the principal function of the core competition or 'antitrust' rules (101, 102 TFEU) can be summed up in a single sentence, it is 'to *regulate* the behaviour of firms in the market'. Firms that infringe these rules may be fined by the Commission, indicating that competition law is designed principally to *deter* anti-competitive conduct, being enforced *ex post,* after the anti-competitive behaviour has been demonstrated and detected. These two Treaty provisions are discussed in chapters 1.2. and 1.3. Competition law monitors mergers to prevent those that restrict competition when it is feared that the merger gives the newly formed entity too much power (1.4.). Under 1.5. we will attempt a categorisation of the Commission's practices and observe the function of the general competition rules in the economically regulated market of energy. For axiomatic purposes we will start with - an arguably extensive - general introduction to the structure of EU competition law, after a look at its economics, politics and aims.

When the EEC Treaty was negotiated the 'culture of competition' had yet to emerge in most States, who traditionally favoured cartel arrangements, state intervention and the promotion of national champions (France constitutes a famous example). Thus, when provisions were first introduced to curb restrictive practices in the coal and steel sector (by Articles 65 and 66 of the ECSC Treaty), these were 'an innovation for the Member States.'[320] Originally the purpose of introducing competition law into the EC Treaty was to complement the internal market rules by preventing businesses from partitioning the internal market and by encouraging competition across borders.[321] However, today the need for EU competition law as a means of securing economic welfare is not

[320] D Chalmers, G Davies and G Monti, *European Union Law Cases & Materials* (2nd edn, Cambridge University Press, 2010) 909

[321] N Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* (Cambridge University Press, 2015) 21

only widely accepted, but deemed as a 'constitutional foundation' of the EU architecture.[322] Therefore, the rules are enforced robustly, in all sectors of the European economy, including energy already. The foundational character of EU competition rules explains the considerable debate regarding the functions of competition law. Today, the majority view is that competition law should be enforced against behaviours harmful to consumers. Against this, there are two alternative views. One is that competition law should not be concerned with an outcome (efficiency) but with maintaining the competitive process. Another alternative view is that competition law can be enforced to attain a wider set of economic and non-economic ambitions; for example, it may be enforced to promote national industries, to safeguard employment, or to protect the environment.[323] It is our opinion that the application of competition law in the field of energy tends to take into account non-economic considerations to a greater extent compared to that in other productive sectors. An extensive analysis of the background and arguments of each point of view, originating in the US antitrust doctrine, has no place in this thesis.[324] Only the influence the competing approaches have exercised on EU competition policy is of interest, and briefly discussed right below.

In its early years, EU competition law was influenced by German scholarship and German officials played a key role in the development of competition law. Underpinning the German approach to competition was a unique economic philosophy: ordoliberalism or the 'Freiburg School'. This school of thought was in turn inspired by voices in US antitrust scholarly which preached that total commitment to economic values is unnecessary, and that wider political interests may justifiably affect competition law decisions. Under this theory, concern about economic power should lead a competition authority to intervene even if this would not result in the most efficient outcome. After all, the dark memories of IG Farben - the huge German conglomerate which gathered abusive economic dominance and supported the Third Reich's war effort financially, materially and spiritually, threatening the peace and freedom of entire societies in all of Europe[325] - were still fresh. They demanded to be translated into a robust economic doctrine, capable of preventing the reappearance of another atrocious entity.[326] This view still has supporters and inspires modern economic policy and *governance*, mainly in Germany, albeit taking into account social

[322] Chalmers, Davies, Monti, (n 320) and C Jones '*Foundations of competition policy in the EU and USA'* in H Ulrich (ed), *The Evolution of European Competition Law Whose Regulation, Which Competition?* (Edward Elgar Publishing, 2006) 21

[323]Dunne, (n 321) 21 et seq

[324] For a detailed account see C Jones (n 322) 17-37

[325] For the full account, see the excellent book by J Diarmuid, *Hell's cartel: IG Farben and the making of Hitler's war machine* (Metropolitan Books, 2008)

considerations. However, when it comes to competition law enforcement, the Commission is now committed to using an economic approach.[327]

In the late 1980s that EU competition policy took shape. This happened as a result of certain factors. First, the neoliberal economic policies championed by Reagan in the United States and Thatcher in the United Kingdom began to affect governments and industries across Europe (energy being one of them), Secondly, 1983 marked the collapse of the Keynesian economic policies which had been adopted in France. This collapse led to some convergence between national governments that economic policy-making had to focus on 'supply-side' measures which stimulated competition and trade. Market integration did both, and therefore fitted this new consensus. From the early 1980s onwards, major industrialist lobbied aggressively across Europe, arguing for the completion of the common market as a means of promoting European competitiveness. Finally, direct elections had also produced a more aggressive European Parliament which proposed a fully federal Europe with common foreign, macro-economic and trade policies and a developed system of central institutions. These developments all pressed towards further European integration, but were fragmented and uncoordinated. The final piece in the jigsaw fell into place with the appointment of a new Commission in late 1984, headed by the charismatic former French Finance Minister, Jacques Delors. Delors, presented the White Paper on Completion of the Internal Market to the Heads of Government at Milan[328]. Despite the unanimity rule prevailing in the Council, the Single European

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[326] H B Hansen, A Wigger, *The Politics of European Competition Regulation: A critical political economy perspective* (Routledge, 2011) 31 et seq.

[327] C Joerges, F Rödl, 'Social Market Economy' as Europe's Social Model?', EUI Working Paper LAW No. 2004/8, EUI <http://cadmus.eui.eu/bitstream/handle/1814/2823/law04-8.pdf>; For a general account of contemporary relevance see B Thomas, V Frieder (eds), *The birth of austerity: German ordoliberalism and contemporary neoliberalism*, (Rowman & Littlefield, 2017). Current practice seems to favour a more economic approach according to which external, sometimes social considerations take the form of *allocative (or static) efficiencies*. The goal is not perfect but *effective, workable* competition. This is reflected in Articles 101(3), 107 (2) (3) TFEU and Article 2 of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/ 1. To the extent it is necessary for the analysis; it will be discussed further below. Those who support 'old-fashioned' ordoliberalism have three major concerns: first, the absence of any debate at EU level about the choice to abandon the model of competition based on safeguarding the competitive process and favouring an economic approach; secondly, that an economic approach may lead to reduced enforcement, especially against the most powerful firms, while harming smaller players; and thirdly, that an economic approach focuses on allocative efficiency (i.e. measuring the direct impact on consumers today) at the expense of promoting *dynamic efficiency* in the long run. Nevertheless, the latter are not entirely ignored. See for example Joined Cases C-501/06 P, C-513/06P, C-515/06, C-519/06P *GlaxoSmithKline Services Unlimited v Commission and others* [2009] EU:C:2009:610, para 109 where the Court of Justice confirmed that dynamic efficiencies may be pleaded under Article 101(3) TFEU as in Chalmers, Davies, Monti, (n 320) 917-918. Those nuances are evidence of an advanced and sophisticated competition law system. See G Ghidini 'Comment: A short note on the generation of efficiencies in the context of the 'constitutional' principles of European competition law' in H Ullrich (n 322) 357-362

[328] Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985), COM/85/0310 FINAL <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:1985:0310:FIN> (accessed 12 October 2018). The paper was a clever piece of work, suggesting that 279 measures were necessary to realise the

Act (SEA) was eventually signed in 1986.[329] SEA constitutionalised the concept of the single or internal market through Article 14 (2) of the Treaty.[330] The economic liberalisation called for by the Single European Act necessitated a stronger role for competition law to ensure that the transformation from a mixed economy to a free market occurred smoothly. Two policies animate EU competition law – market integration and the development of healthy European industry – which are said to complement competition policy.[331] The Commission's competition policy does not operate in a vacuum. It has to take account of its repercussions in other areas of Commission policy, such as industrial policy, regional policy, social policy and the environment. But this is not a one-way process. Competition policy also makes its own contribution to the formulation and implementation of policy in those areas'.[332] This wind of liberalisation blowing in the 1980s could not but shake the network industries: telecommunications, postal services, transport and of course, energy. As a result, the Commission's internal energy market proposals and enforcement practice should be viewed in the overall context of its ongoing internal market programme.

A turning point for the Commission's enforcement activities has been the 2007 Sector Inquiry[333]. Only two years after the so called Second legislative package was introduced[334] and a short while before the introduction of the Lisbon Treaty, the Commission launched sector inquiries into the functioning of the European electricity and gas markets, investigating potential shortcomings of the

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internal market. Member States were not, therefore, committing themselves to an open-ended set of obligations, but to a finite and limited project. The project was also cast as largely a technical mission rather than having broader panoramas of greater integration. This technicality characterized the internal energy market reforms of the 1990s (see *infra* Part One)

[329] Chalmers, Davies, Monti, (n 320) 918

[330] J B Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, (Hart Publishing, 2002) 67-68. *'Despite their relation, it is important to distinguish the concept coined by the Court [see Judgment of the Court of 9 February 1982, Polydor Limited and RSO Records Inc. v Harlequin, Case 270/80, EU:C:1982:43]—based on a constitutional value enshrined in primary law—from the political aim of achieving the internal market announced in the Single European Act, and materialised in secondary legislation. The latter has not yet been completely achieved and it has received repeated attention from both the Commission and Council. The former is the mandatory legal frameworks in which the political aim to create an internal market and all other Community and State policies have to operate. In this sense, the economic distinction between negative and positive integration, which has been adopted by many lawyers, can be translated as a distinction between constitutional and statutory law.'*

[331] Communication from the Commission – A Pro-active Competition Policy for a Competitive Europe, COM/2004/0293final especially ch. 2 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2004:0293:FIN> (accessed 13 October 2018) and Completing The Internal Market: White Paper From The Commission To The European Council (Milan, 28-29 June 1985), COM/85/0310 FINAL (no. 9)

[332]Karel van Miert,'The Competition Policy of the New Commission', EGKartellrechtsforum der Studienvereinigung Kartellrecht Brussels 11/5/1995 (speech). Retrieved in letter from D Chalmers, G Davies and G Monti, *European Union Law Cases & Materials* (2nd edn, Cambridge University Press, 2010) 919; See *infra* Conclusions

[333] E Wäktare, K Kovács, A Gee,'The Energy Sector Inquiry: conclusions and way forward', Directorate-General for Competition, unit B-1, Competition Policy Newsletter (Antitrust), Number 1 - Spring 2007, pages 55-59. <http://ec.europa.eu/competition/publications/cpn/2007_1_55.pdf> (accessed 6 September 2018)

liberalisation process. After 18 months of investigation, the Commission published the final report on the sector inquiry on 10 January 2007 which identified the following deficiencies:[335]

- At the wholesale level in particular, market concentration was found to be high. The electricity market was characterized by a significant level of concentration in generation allowing power generators to exercise market power by raising prices. Wholesale gas trade was regarded by the Commission as developing slowly with incumbents remaining dominant in their traditional markets. An insufficient level of unbundling between network operation on the one side and supply and/or generation activities on the other side resulted in vertical foreclosure preventing potential competitors from entering the market and threatening security of supply.
- Insufficient cross-border capacities and different market designs constituted an obstacle to further market integration. Existing network capacities were found to be largely controlled by incumbent companies which supposedly had only slight incentives to expand their network capacity for the benefit of their competitors.
- Market entry of new competitors was further hampered by information asymmetry between incumbents and market entrants.
- The lack of efficient and transparent price formation was regarded as the key reason why the opening of the energy market had failed to result in benefits for consumers.
- Long contract durations, the lack of competitive offers from non-incumbent suppliers and restrictive practices in relation to the operation of supply contracts had resulted in the foreclosure of downstream markets.
- As regards balancing markets, existing balancing regimes were often found to favour incumbents and create obstacles for newcomers. Whereas markets for balancing and reserve energy in the electricity sector were deemed to be highly concentrated, which allowed power generators to exercise market power, the balancing areas in the gas sector were regarded as too small and complex, thus discouraging new suppliers to enter the market.

[334] Council Directive (EC) 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37; Council Directive (EC) 2003/55 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57

[335] U Scholz, S Purps, 'The Application of EU Competition Law in the Energy Sector', *Journal of European Competition Law & Practice*, Volume 1, Issue 1, 1 January 2010, 37–51

The proposal of new legislation was one of the consequences of the findings of the sector inquiry. Additionally, as the Commission stated in the annex to the final report of the inquiry[336] and as Commission officials repeatedly pointed out later, the Commission intended to use 'the full gamut of competition enforcement tools at [its] disposal to pursue *individual cases* that could significantly improve the level of competition in the market.[337]' Prior to the publishing of the final report of the sector inquiry, the Commission initiated individual investigations against several incumbent undertakings in the energy sector, especially in Germany, France, Belgium, and Italy[338]. Regardless, proceedings initiated after the inquiry was carried out. This point in time generally marks the Commission seeming increasingly self-confident and active in enforcing competition rules in the energy sector. Competition and the creation of an internal market are closely interrelated.[339] The enforcement practice of EU competition law shows that it is particularly sensitive to practices which run counter to the goal of market integration. The importance of the internal market in the sense of Article 26 TFEU was emphasised by the CJEU in the *Eco Swiss* case.[340] Alongside the fundamental freedoms the competition rules are another set of Treaty provisions crucial for the creation of an internal market. While the fundamental freedoms aim at preventing Member States from interfering with the market mechanism, the competition rules also contain provisions for private undertakings.[341]

When it comes to the 'competitive benchmark' underlying EU competition law, the objective of EU competition law is the protection and promotion of 'effective competition'. For example, the EU Merger Regulation (EUMR)[342] states in Article 2(3) that '[a] concentration which would

[336] Communication from the Commission Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report) {SEC(2006) 1724}, COM/2006/0851 final <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006DC0851> (accessed 11 September 2018)

[337] P Lowe, 'Can EU competition policy create competition in the energy sector?' (speech), The Beesley Lectures, London 6 Nov. 2008). <http://ec.europa.eu/competition/speeches/text/sp2008_09_en.pdf> (accessed 11 September 2018). Emphasis added.

[338] Scholz, Purps, (n 335)

[339] Case 26/76, *Metro SB- Großmärkte GmbH & Co. KG v Commission* [1977] ECLI:EU:C:1977:167, para. 20: *'The requirement contained in Articles 3 and 85 of the EEC Treaty that competition shall not be distorted implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market. In accordance with this requirement the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors.'*

[340] Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECLI:EU:C:1999:269, para. 36:*'According to Article 3(g) of the Treaty, Article 85 of the Treaty [Article 101 TFEU] constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market'.*

[341] M Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press, 2013) 27-29

[342] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/ 1

significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market'. While no universal definition of effective competition exists,[343] it can be traced back to the concept of 'workable competition' first developed by J. M. Clark in 1940.[344] Based on this concept, the degree of competition that can realistically be achieved in a given market will depend on the features of the industry at hand. Relevant criteria include the level of product differentiation, the number and size-distribution of firms, the character and means of market information, the underlying cost structure and the degree of flexibility of capacity, i.e. the significance of barriers to entry. Maybe the lack of a definition comes in handy, allowing for an *ad hoc* approach, innate to competition law enforcement. As the CJEU has stated 'the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors.'[345]

Article 3 TFEU provides that the EU has exclusive competence in establishing the competition rules necessary for the functioning of the internal market. The provisions of primary EU legislation relating to competition law are set out in Title VII, Chapter 1 TFEU. Section 1 (comprising Articles 101–106 TFEU) deals with competition rules that apply to undertakings. Section 2 (comprising Articles 107–109 TFEU) governs the measures necessary to prevent anticompetitive State aid. Article 101 TFEU, Article 102 TFEU and merger control are often referred to as the 'three pillars' of EU competition law. Merger control was introduced at EU level only in 1992, i.e. about three decades after Articles 101 and 102 TFEU entered into force, by means of a regulation. The regulation requires compulsory notification to the Commission by the parties of concentrations which exceed certain turnover thresholds.

[343] From an economics perspective, effective competition cannot reasonably be equated with the absence of any market power, i.e. the ability of firms to influence market prices and set prices at a level above costs. In fact, even oligopolistic market outcomes, in which prices often remain above marginal and average costs, can reflect the result of fierce competition between firms. This has also been acknowledged in the Merger Control Regulation, Art. 2(25): *'[m]any oligopolistic markets exhibit a healthy degree of competition'.* According to M Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press, 2013) 21-22, 'economics can provide the necessary tools to assess the likely welfare implications of certain firm behaviour (e.g. certain pricing strategies like tying and bundling or certain types of rebates employed by a dominant undertaking). Economics can also help to assess whether the change in market structure due to a planned merger or State aid measures is likely to lead to anticompetitive effects.'

[344] J M Clark, '*Toward a Concept of Workable Competition*', American Economic Review, 30 (1940), 241. Clark was one of the first economists to argue that *'perfect competition was not an appropriate benchmark for competition policy because 'perfect competition' does not and cannot exist and has presumably never existed'*. Instead, Clark proposed several criteria to assess what degree of competition could be achieved in a given market (see main text). Clark's paper sparked lots of discussion among economists and even today there is no consensus on what workable or effective competition really means. However, there is general agreement that the factors Clark listed in his original paper can be informative of the degree of competition that can reasonably be expected in a given market.

As a means to give effect to the principles of Articles 101 and 102 TFEU, there also exists a volume of secondary legislation. Regulations are either Council regulations or Commission regulations. Article 103(1) TFEU empowers the Council to adopt regulations in the area of competition law on a proposal from the Commission and after consulting the European Parliament. Council regulations govern in particular the procedure in competition cases, the sanctions to be imposed for violations of the competition rules and the relationship between EU and national competition law. Article 105(3) TFEU is the legal basis for regulations adopted by the Commission. These regulations define categories of agreements that benefit from an exemption from the prohibition laid down in Article 101(1) TFEU under Article 101(3) TFEU (so-called 'block exemption regulations').[346] The procedural rules applicable to the enforcement of EU competition law are also laid down in a regulation. They are accompanied by an implementing regulation addressing certain procedural issues in greater detail.[347] The Commission has also adopted a regulation on settlement procedures in cartel cases.[348] When it comes to directives, apart from those in the area of State aid and unfair competition law, 2014 saw the adoption of the first directive in the area, the one introducing common EU-wide procedural provisions for the private enforcement of the competition rules.[349] Pursuant to Article 103(2)(c) TFEU, the EU has the power to adopt special procedural competition rules to regulate specific branches of the economy. This competence, however, was never used for energy. Despite the existence of statutory secondary law, case law retains its key role in clarifying the restrictions and liabilities in the energy sector under the EU competition regime.[350] Lastly, decisions, binding acts in individual cases, are the typical instrument used by the Commission to enforce the EU competition rules. A decision will declare certain behaviour of an undertaking

[345]Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECLI:EU:C:1973:22, para. 24.

[346] Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices, OJ L 102/1; Commission Regulation (EU) 1217/2010 on the application of Art. 101(3) TFEU to certain categories of research and development agreements, OJ L 335/36; Commission Regulation (EU) No. 1218/2010 on the application of Art. 101(3) TFEU to certain categories of specialisation agreements, OJ L 335/43; Commission Regulation (EU) 461/2010 on the application of Art. 101(3) TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 129/52; Commission Regulation (EC) 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123/11. This type of regulation contributes to increasing legal certainty with regard to the availability of an exemption under Article 101(3) TFEU.

[347] Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1 (hereinafter Regulation '1/2003) and Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123/18

[348] Commission Regulation (EC) No. 622/2008 of 30 June 2008 amending Regulation (EC) No. 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ No. L 171/3

[349] Council Directive (EU) 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1

[350] K Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press, 2013) 244

incompatible with the competition rules and impose a fine or it will order the addressee to stop such behaviour. In merger cases the Commission may adopt a decision on the compatibility of the notified transaction with the internal market.[351] Other binding acts issued by the Commission throughout the investigation and *stricto sensu* enforcement process will be briefly defined and discussed when they arise at the examination of each example of application of the law in the chapters below. The competition provisions are broadly drafted and employ elusive language. Therefore, soft law is of particular importance for EU competition law. The Commission's various[352] defining regulations, guidelines, and communications are more than valuable in guiding undertakings.[353] Although Article 288(5) TFEU states that soft law does not have any binding force, it still may have an effect on the application of the EU competition rules by national competition authorities and courts. Not only do national competition authorities or courts have to observe communications of EU institutions when they apply EU competition law, but the CJEU in the *Grimaldi* case held that although recommendations formally are not binding according to Article 288(5) TFEU they still have to be taken into consideration by national courts when interpreting national law adopted in implementation of Union law.[354] This reasoning is valid *a fortiori* in the area of competition law where national competition authorities and courts have not just to interpret national law adopted in implementation of Union law but Union law itself.[355]

The interpretation of primary competition law does not end at the EU level. Following its decision in landmark *Costa v ENEL*[356] the ECJ further addressed the issue of the relationship between EU and national competition law in *Walt Wilhelm.*[357] In this case it was clarified that, in the event of a conflict, EU competition law would take precedence over national competition law. Article 3(2) of Regulation 1/2003 specifically stipulates the above judgment. Furthermore, the Member States are

[351] Lorenz, (n 341) 32

[352] There is no numerus clausus of the types of soft law adopted by the Commission. For an analysis of administrative rule-making in the competition law area see Hofmann, 'Negotiated and Non-negotiated Administrative Rule-Making: The Example of EC Competition Policy', CMLR, 43 (2006), 153. See for example Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ No. C 298/17 (hereinafter: Leniency Notice); Commission Consolidated Jurisdictional Notice under Council Regulation (EC) 139/2004 on the control of concentrations between undertakings, OJ C 95/1; Commission Notice on the definition of the relevant market for purposes of Community competition law, OJ C 372/5; Commission Guidelines on Vertical Restraints, OJ C 130/1; Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C 11/1; Commission Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ C 101/2.

[353] Talus, (n 350) 244

[354] Case C-322/88, *Salvatore Grimaldi v Fonds des maladies professionelles* [1989] ECLI:EU:C:1989:646, para. 18. With regard to soft law in the area of social policy, the judgement confirmed the binding effect of a recommendation of the Commission on the courts of the Member State.

[355] Lorenz, (n 341) 33-34

[356] Case 6-64, *Flaminio Costa v E.N.E.L* [1964] ECLI: EU:C:1964:66.

barred from applying diverging national law to anticompetitive agreements which are capable of having *an effect on trade* between Member States and are thus subject to EU competition law. Member States are, however, permitted to impose stricter rules in relation to unilateral restrictions of competition even if they fall into the ambit of EU competition law. Another two exceptions is provided for in Article 3(3) Regulation 1/2003. The first aims at national provisions that pursue predominantly an objective different from that of protecting competition on the market. For example, a law prohibiting unfair trading practices may be applied by national authorities and courts, be they unilateral or contractual, even if this leads to the prohibition of conduct that would be permissible under the EU competition rules. The second allows for concentrations that do not exceed the EUMR thresholds are subject to review by national competition authorities.[358]

Decisions made by national competition authorities and in the national courts of Member States lend greater credibility and understanding than would otherwise be the case, as do court decisions from non-EU states which employ similar antitrust and competition regimes. EU competition law is directly applicable and can be directly invoked in national courts[359] (and with private enforcement and decentralization, this occurs more frequently than before), and obligations or allowances under national competition law must stay within the EU framework of Articles 101 and 102 TFEU, and thus, reflect it. For the latter reason, it should be assumed that definitive decisions and clarifications made by national authorities are compatible with EU law. These should therefore be taken more consciously into consideration when interpreting the competition provisions.[360]

This brings us to the matter of international applicability of EU competition law. EU competition law is applicable to all restraints of competition which have an effect within the EU, such as, for example, anticompetitive agreements concluded in a third country but relating to competition in the EU market. This principle is usually referred to as 'effects doctrine' and - when it comes to the EU jurisdiction - it was established with the *Woodpulp* case[361]. There is no harmonised international system for competition law enforcement, which may lead to diverging results in different

[357] Case 14-68, *Walt Wilhelm and others v Bundeskartellamt* [1969] ECLI:EU:C:1969:4.
[358] Lorenz, (n 341) 43-45
[359] Case C-453/99, *Courage Ltd v Bernard Crehan* [2001] ECLI:EU:C:2001:465, paras. 26, 27 and Joined Cases C-295/04 to 298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECLI:EU:C:2006:46, paras. 60-64.
[360] Talus, (n 350) 245
[361] Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85 to C-129/85, *Ahlström Osakeyhtiö and Others v Commission (Woodpulp)* [1988] ECLI:EU:C:1994:12, para. 13 et seq. EU competition law strikes at any agreement which has an actual or potential effect on trade between Member States and which causes the actual distortion of competition or has the potential to do so as its object or its effect *('appreciable effect on the market')*.

jurisdictions.[362] Taking *Woodpulp* a step further, the focus on an appreciable effect on the internal energy market for antitrust considerations could also mean that EU energy undertakings and even non-EU energy undertakings engaging in anticompetitive conduct outside the EU can be subject to the Commission's competition law enforcement efforts under the effects doctrine.[363] The EU's dependence on energy imports complicates the extra-territorial application of EU competition laws. As the ongoing *Gazprom* case might suggests, in some cases political decision-making and the role played by security of supply considerations allow or not for the law to be applied.[364] Last but not least, not only the experiences in other countries and regions can offer guidance on the application of EU competition law in the energy sector. Although the energy industries have their own special features which limit the extent to which competition policies used in other sectors can be applied to them, it is not enough to consider only cases focusing on the conduct of specific energy industries.[365] Various cases from other fields have set precedents for the regulation of similar issues in the field of energy, as it was seen in Part One, 1.2. i.e. telecommunications, postal services and transport industries.

As it is known and deducted from the above, EU competition law is enforced both by EU and national institutions. The Commission is the main enforcement body of EU competition law at EU level, investigating individual cases and adopting decisions binding on the parties. National competition authorities are also entitled to apply EU competition law. Articles 5 and 6 of Regulation 1/2003 empower the competition authorities of the Member States and the courts[366] to directly apply Articles 101 and 102 TFEU. This decentralised approach is primarily intended to reduce the Commission's workload. It gives the Commission the possibility to concentrate on more interesting, important, complex and high-profile cases. This was one of the underlying ideas when Regulation 1/2003 was enacted: it was no longer necessary for the Commission to handle every single case. The resources of the Commission are limited and it needs to identify those areas where it can add value to the actions of other domestic authorities by applying primary competition law. It is our view that this is evident in the field of energy whereas the more we approach the present day, the less cases the Commission handles, to the privilege of the national authorities. However, those cases are more

[362] Lorenz, (n 341) 39-42; A system of comity and mutual recognition, is increasingly practised, but still in its infancy. The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998, providing for the '*resolution of disputes between participating states, and - in the case of investments - between investors and host states'*. See more at <https://energycharter.org/> (accessed 17 October 2018)
[363] Talus, (n 350) 284
[364] Ibid 285
[365] Ibid 246

politically sensitive and bear a wider range compared to the cases assumed by the NCAs and courts. A primary example is the ongoing *Gazprom* case. Unfortunately, in the present thesis, due to lack of time and sufficient credible resources, national cases which did not occupy the EU institutions will not be examined but coincidentally.

This requires a coordination mechanism in order to avoid diverging decisions of EU and national institutions.[367] This is envisaged in Chapter IV of Regulation 1/2003. National competition authorities will inform the Commission before they take any formal investigative measure in relation to an alleged violation of the EU competition rules. If the Commission commences a procedure, national competition authorities automatically lose competence to review the same set of facts under EU competition law. National courts may not hand down a judgment that runs counter to a Commission decision. To this end, national courts and the Commission inform each other about pending procedures. A court may have to stay a procedure until the Commission has adopted a decision. The Commission has also the right to submit written observations to the courts of Member States in proceedings under EU competition law.[368] The plurality of national enforcement bodies also requires coordination between the authorities and courts of Member States. To this end the European Competition Network has been established.[369] Within this network national competition authorities cooperate by informing each other of new cases and envisaged enforcement decisions, coordinating investigations, where necessary, and exchanging evidence and other information.[370] As a general rule, a case will be allocated to the enforcement body that is best placed for the respective investigation. This is usually the authority in the Member State in which the case to be assessed has the strongest impact.[371]

The matter of the 'well placed' competition authority is important in the application of EU competition law to the energy sector. Usually a single authority can deal with agreements or

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[366] For an overview see Commission's national courts cases database <http://ec.europa.eu/competition/elojade/antitrust/nationalcourts>

[367] Before Regulation 1/2003 entered into force on 1 May 2004, the relationship between enforcement by the Commission and national authorities and courts was governed by the *principle of sincere cooperation* [today Art. 4(3) TEU] and the case law of the EU courts. In the Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECLI:EU:C:2000:689, paras.45–60 the CJEU had ruled that national enforcement action may never run counter to EU enforcement action. These principles have been incorporated into Regulation 1/2003, Art. 16(2)

[368] Art. 15 Regulation 1/2003

[369] Preamble para. 15 Regulation 1/2003. The basic foundations of the functioning of the ECN are laid out in Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4. 2004/43; On the case allocation mechanism under this Notice see Brammer, 'Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation', Common Market Law Review, 42 (2005), 1383; See also Joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities <http://ec.europa.eu/competition/ecn/joint_statement_en.pdf> (accessed 16 October 2018).

[370] Art. 12 Regulation 1/2003

practices that substantially affect competition mainly within its territory. Single action may also be appropriate where the action of a single competition authority is sufficient to bring the entire infringement to an end although several competition authorities are well placed for an investigation.[372] This can be traced in the heavy workload of most NCAs in the 28[373] Member States[374] which is in turn explained by the predominantly fragmented energy market comprised of segregated national markets few underdeveloped interconnection. There are also instances of parallel action of two or three competition authorities where an agreement or practice has substantial effects on competition mainly in their respective territories. This may be the case where a market-sharing cartel allocates one Member State to a first cartel member located in that Member State and another Member State to another cartel member that is located in that second Member State.[375] As it will be seen below, market sharing agreements are very common in the field of energy.

The Commission is considered to be well placed if an agreement or practice has effects on competition in more than three Member States. Moreover, the Commission is well placed if the Union interest requires the adoption of a Commission decision to develop EU competition policy when a new competition issue arises or to ensure effective enforcement.[376] Truly so, in the energy sector, the Commission assumes cases of EU-wide impact which are bound to set a precedent. What is more, the Commission attempts to administratively enforce points of its competition policy agenda that were not accepted through the legislative process. With the growing number of interconnections under the trans-European Energy Networks projects,[377] and with the linking-up of the last isolated Member States, the Commission will have EU-level jurisdiction—provided of course that the interconnection capacity is important enough to have an effect.[378] According to Talus[379], the more the internal energy market integrates, the more difficult it will be or a Member State to establish exclusive jurisdiction in any given case. In fact, even in earlier situations, the Commission and Court have been keen to establish jurisdiction and to avoid the scenario in which

[371] Lorenz, (n 341) 57-58
[372] Ibid 58
[373] At the time of writing. At 11pm on Friday 29 March 2019, the UK will officially cease to be a member of the EU, although a transition period will remain in place until the end of 2020.
[374] For extensive annual surveys see instead of others U Scholz, S Purps, T Vohwinkel, 'The Application of EC Competition Law in the Energy Sector', *Journal of European Competition Law & Practice*, 2010-2017 (as of 25 October 2018).
[375] Lorenz, (n 341) 58
[376] Ibid
[377] A policy strategy of the Commission, DG Energy aiming at linking the energy infrastructure of EU countries. See <https://ec.europa.eu/energy/en/topics/infrastructure/trans-european-networks-energy> (accessed 21 September 2018). See *infra* Part One 1.3.2.5.
[378] Talus, (n 350) 252
[379] Ibid 250

national authorities might potentially take a more lenient approach towards their national energy companies. In the German *Jahrhundertvertrag* decision[380] the Commission found that a rather small volume of trade in the area in question did not prevent it from claiming jurisdiction. In November 2009 refusing the referral,[381] thought it was it was 'the better placed authority as certain cross border issues arose, especially regarding market coupling and market interconnectors, and that it had a good understanding of the Belgian energy markets from recent cases.'[382] On one occasion, however, the Commission reflected on jurisdiction, when it investigated a notified oral agreement between companies participating in the development of the Britannia gas field in the UK. The agreement concerned a decision between the participating companies to appoint a single sales negotiator on behalf of them all, but it concluded that there was no jurisdiction for it to investigate further because there was no interconnection between the UK and mainland Europe at that time.[383] Generally speaking, however, the Commission is keen to encourage decentralized enforcement of EU competition rules under Regulation 1/2003. It has also started to give guidance as to the application of competition rules by Member State authorities.[384] Today, the energy sector can largely rely on various energy-sector-specific cases and explanations coming from the Commission[385] or even the national competition law authorities. The 2007 Sector Inquiry clearly provided the ammunition and resulted in the increasingly intrusive application of EU competition law in the energy sector. There is an abundance of case law by the Commission and the CJEU that provides a sophisticated and elaborate pattern of behaviour to be taken into account by undertakings and Member State authorities, some of which will be examined below.

Prior to proceeding, one last overarching substantive issue regarding the application of the competition rules should be dealt with in an introductory manner: the definition of the relevant

[380] Commission Decision of 22 December 1992 relating to a proceeding under Article 85 of the Treaty and Article 65 of the ECSC Treaty (IV/33.151 - ' Jahrhundertvertrag') (IV/33.997 - VIK-GVSt), OJ L 50/14
[381] Commission, Decision M.5549 EDF/Segebel of 12 November 2009 [2010] OJ C 57/9
[382] U Scholz, S Purps, 'The Application of EU Competition Law in the Energy Sector', *Journal of European Competition Law & Practice*, 2011, Vol. 2, No. 62-77
[383] Commission Decision of 30 April 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.473 - Scottish Nuclear, Nuclear Energy Agreement), OJ L 178/31
[384] Notice on the application of the competition rules to access agreements in the telecommunication sector, OJ C 265/15. This notice can be applied *mutatis mutandis* to the energy sector for guidance. While doing this, the significance of interconnectors for EU energy markets must however be kept in mind.
[385] The best example here in undoubtedly the Commission Decision of 11.10.2007 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP/B-1/37966 Distrigaz). This case can be considered as the 'guidance in an appropriate form on the compliance of downstream bilateral long-term supply agreements with EU competition law'. that was promised by the Commission in the Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/55/EC concerning common rules for the internal market in natural gas, SEC(2007)1179–1180, (COM(2007)529), 19.9.2007, s. 5.5 (already Directive 2009/73/EU): *'to reduce uncertainty on the market, the*

market. Identification of the market(s) in which a given transaction or behaviour may have effects – the relevant market(s) – is a necessary precondition for the assessment of any concentration or anticompetitive behaviour. Both a production and a geographical dimension must be taken into account both. The Commission has provided guidance in the form of a notice as to how it applies these concepts.[386] The underlying principle it applies is that undertakings are subject to three main sources of competitive restraints (demand substitutability, supply substitutability, and potential competition) and that demand side substitutability is the principal analytical tool for establishing the relevant market.[387] However, according to Talus,[388] supply side substitutability plays a more important role in the field of energy. This might apply to the former monopolistic markets in which the end-side was passive and technically unable to choose between the competing suppliers. However, the more active demand side takes ground which will lead to more elaborate demand substitutability considerations. Those changes are taken into account by the winter 2016 legislative proposals for the gas and electricity markets.[389]

According to Sandberg and Davies,[390] when it comes to product market definition, liberalisation has fundamentally changed the structure and functioning of the industry, at production, transport, and supply levels. From a situation where the supply and transport of electricity and gas were in the hands of the same or few companies benefiting from network and distribution monopolies, EU rules have substituted market opening, unbundling of supply and transport and third party access. With independent companies being active in energy supply, a distinction between transport and supply activities, or eligible and non-eligible customers,[391] has to be drawn. The development of energy trading also raises the issue of the distinction between supply and trading activities, and, within

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Commission will, in the coming months, provide guidance in an appropriate form on the compliance of downstream bilateral long-term supply agreements with EC competition law.' See *infra* Part Two 1.3.2.

[386] Commission Notice on the definition of relevant market for the purposes of Community competition law ('Relevant Market Notice'). OJ C 372/5

[387] An undertaking cannot be considered to be able to act independently from competitive constraints if its customers are in a position to switch easily to substitute products or to suppliers located elsewhere. The main economic test applied in this respect is *'whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5% to 10%) but permanent relative price increase in the products and areas being considered'* (Notice para. 17). Where the hypothetical price increase would be unprofitable because significant substitution would result in a loss of sales, the substitutes and areas concerned are included in the relevant market.

[388] Talus, (n 350) 248

[389] See *infra* Part One 1.3.2.5.

[390] L Sandberg, L Davies in C Jones (ed), *EU Energy Law: EU Competition Law and Energy Markets* (Claeys & Casteels, 2016) 7

[391] Ibid, footnote 6: '*An eligible customer is one that is free to choose its supplier. Under EU law, as from July 2007, all customers should be eligible. However, under the legal framework of some Member States, such as France, Spain and Portugal, there are regulated eligible customers, i.e. customers that are eligible to switch but remain under the pre-market opening regulated framework until they opt to join the free market.'*

trading, between physical and financial trading, or between trading on a bilateral basis or on developing energy exchanges. Finally, completely new activities are emerging, such as balancing and network services, or grid management and operation.[392] This developing economic and market reality arising from market opening should be reflected in market definitions.[393]

The same challenge has to be faced at geographic level. Because transmission and distribution activities were until recently subject to national and local monopolies in Europe, the relevant geographic market for electricity and gas supply was logically no wider than national or even local in scope. As a result of market opening and third party access, it is now possible for foreign suppliers to enter national and local markets and supply eligible customers. A number of Community initiatives are also bringing about increasingly converging national regulatory frameworks. Arguably, these changes will lead to the development of wider than national markets within the EU, and possibly, in the longer term, to a single EU market.[394] However, for the Commission, the relevant geographic markets for the supply of gas and electricity remain at present largely national in scope within EU Member States, and the more recent decisions strongly suggest that this is not likely to change in the near future. In January 2007, the Commission's Final Report on the Sector Inquiry unequivocally concluded that 'at the wholesale level, gas and electricity markets remain national in scope'[395]. This question whether, or how quickly, national markets have evolved or will evolve into wider regional ones is a key issue for competition policy in the energy sector, as former national incumbents will almost always have dominant positions on nationally defined markets.

The Commission's Notice on the definition of the relevant market makes clear that, especially in relation to merger control where the purpose of the competition analysis is essentially prospective - an assessment of a future position for the venture - the Commission must take into account ongoing evolutions arising from EC market integration in 'a situation where national markets have been artificially isolated from each other because of the existence of legislative barriers that have now been removed' (para 32). As a consequence, the Commission shall be cautious in situations where

[392] On the basis that only the production, transport and transmission of energy can be open to free competition. See *infra* Part One, 1.3.2.
[393] Sandberg et al, (n 390) 7
[394] Ibid
[395] Communication from the Commission Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report) {SEC(2006) 1724}, COM/2006/0851 final <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006DC0851> para 14. The Commission also stated that cross-border sales do not currently impose any significant competitive constraint. Incumbents rarely enter other national markets as competitors. Insufficient or unavailable cross-border capacity and different market designs hamper market integration (para 21)

'companies (…) enjoy high market shares in their domestic markets just because of the weight of the past' (para. 29).[396] In the following section, an attempt at clarifying the Commission's approach to market definition in the energy sector will be taken aboard for each case individually.[397] The examination focuses on some central and current issues relating to the enforcement of competition law in energy: access to facilities, long-term energy agreements, destination clauses, market sharing, price fixing, joint selling. Similarly, the treatment of merger control cases is limited to the most important cases and to areas that are most crucial from an energy perspective.

1.2. The Application of 101 TFEU

Article 101(1) TFEU prohibits all restrictive agreements between independent market operators acting either at the same level of the economy (horizontal agreements), often as actual or potential competitors, or at different levels (vertical agreements), mostly as producer and distributor. It also precludes 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. The Article itself provides a non-exhaustive list of examples of agreements which fall within this provision. These include: (i) price fixing; (ii) limiting or controlling production, markets, technical development, or investment; (iii) sharing markets or sources of supply; (iv) applying dissimilar conditions to equivalent transactions with other trading parties; and (v) making the conclusion of contracts subject to acceptance by the other parties of supplementary and unconnected obligations. Types of agreements under (i), (ii) and (iii) are more relevant to the application of the law in the energy sector and will be examined below in separate paragraphs. Article 101(2) TFEU provides that any agreement or decision in breach of Article 101(1) TFEU shall be automatically void. Under Article 101(3) TFEU, Article 101(1) TFEU may be declared inapplicable when the agreements concerned fulfill a number of specified requirements. This is designed to allow those agreements which are prima facie anti-competitive, but which on balance benefit consumer welfare when the restrictions of competition and the efficiencies created by the agreement are weighed against each other.[398]

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[396] See also para. 50: *'Barriers and switching costs associated to divert orders to companies located in other areas. The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market have to be identified before it is concluded that the relevant geographic market in such a case is national'.*

[397] For an extensive vertical study on the market definition in the electricity and gas markets see Sandberg et al, (n 390) 11-137

[398] Lorenz, (n 341) 30

EU competition law draws a distinction between cooperative and concentrative joint ventures—the latter fall within the ambit of the EU Merger Regulation[399] and will be discussed in 1.4. Cooperative and non-full-function joint ventures are governed exclusively by Article 101 together with other horizontal restraints. Horizontal restraints involve agreements or collusion between and among competing entities.[400] Compared to overall numbers, there have not been many cases under Article 101 TFEU in the energy sector. Accordingly, no particularly interesting or complex legal problems have arisen, in contrast to the application of Article 102 TFEU (1.3.). As (or perhaps if) monopolies gradually disappear, the significance of Article 101 TFEU is likely to increase, since it is through agreements and concerted action that competition can be obstructed in the now slowly emerging and more and more transparent oligopolistic markets.[401] Most of the concern regarding antitrust enforcement under Article 101 - since the liberalisation of the industry - is related to horizontal restraints and namely joint selling, price fixing and market sharing. All the reported cases both before the 2007 Sector Inquiry and after it revolve around price fixing and market-sharing. Recent cases, particularly those after 2013, seem to exclusively concern market partitioning, a *hardcore* infringement (along with price fixing), something that could be considered alarming, both for the nature of competition in the energy sector and for the homogeneity of the internal market.

In addition to agreements between competitors to fix prices and allocate territories or customers, examples of other types of horizontal agreements include those relating to the exchange of certain information or to product standardisation, practices which do not in themselves amount to violation of antitrust law, but they may make it easier for competitors to reach a tacit or explicit agreement on pricing or output.[402] For instance, the coordination of prices may also be achieved by means of agreements for the exchange of information about prices or similar matters. In this regard, at the first years of the liberalisation, the Commission objected to the original form of a joint venture between Shell and Exxon[403] on the ground that it could have encouraged the exchange of market information between them. The decision declared inapplicable for a 10-year period the agreements between a French affiliate of the Exxon Group and a French affiliate of the Shell Group relating to the supply of feedstock and to establishing, financing, constructing, managing and operating a production joint venture named 'Compagnie Industrielle des Polyéthylènes de Normandie' ('Cipen'). Bearing in mind

[399] V Landes in Jones (n 390) 446-450
[400] Commission notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. OJ C 66/1
[401] K Talus, (n 350) 254
[402] Ibid 256

the central role of the 'independence of business operators with respect to their business decisions which must not be subject to reciprocal influence' (para. 54), 'the flow of information between Exxon and Shell allowed by the joint venture structure is the basis on which each partner can plan its polyethylene production and adapt it to the choices of the other partner' (para. 63), constitutes an anticompetitive coordination, regardless of not every decision concerning the new production facility to be taken jointly (para. 77). According to Talus, the number on participants in the market appears to be critical. Where the market is not oligopolistic, the Commission seems prepared to accept exchanges of individual and confidential information concerning sales volumes and market shares.[404] Apart from the yielded efficiency gains, evidenced by reduced production costs, the use of new technology and increases in production capacity,[405] environmental gains were another part of the reason for exemption. The case is an example of the Commission taking into account non-economic considerations in the assessment of Art. 101(3).[406]

1.2.1. Joint selling and long term supply contracts

A form of collusion generally not tolerated by the Commission's competition policy is joint selling, the most common form of which in the energy sector is for the sale of gas from joint production.[407] Although the Commission has stated[408] that an exemption is available if there are compelling reasons to justify it, all lines of argumentation put forward in favour of joint selling of energy have usually been unsuccessful. In the Corrib Gas Field case[409], the production joint venture of Statoil, Enterprise Energy Ireland, and Marathon applied for an exemption for the joint marketing of gas produced at the field for the first five years of production. They argued that this measure was necessary to balance the countervailing purchasing power of the incumbent, state-owned Irish energy company, 'Bord Gais Eireann' and the Electricity Supply Board. After the Commission

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[403] Commission Decision of 18 May 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/33.640 - Exxon/Shell), OJ L 144/20

[404] Talus, (n 350) 256

[405] G Monti, *EC Competition Law* (Cambridge University Press, 2007) 91-92

[406] See *infra* Conclusion

[407] Talus, (n 350) 257

[408] Commission Decision of 16/05/2012 declaring a concentration to be compatible with the common market (Case No COMP/M.6477 - BP / CHEVRON / ENI / SONANGOL / TOTAL / JV) according to Council Regulation (EC) No 139/2004 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012M6477> (accessed 20 November 2018)

[409] Commission, press release, IP/01/578, (20.04.2001) 'Enterprise Oil, Statoil and Marathon to market Irish Corrib gas separately' <http://europa.eu/rapid/press-release_IP-01-578_en.htm?locale=el> (accessed 22 October 2018). Commenting on the case, the then European Competition Commissioner Mario Monti said: "The European Commission welcomes the decision of the Corrib partners to market their gas individually as it will lead to a wider range of gas suppliers in Ireland. This will bring about a more competitive supply structure, urgently needed to render liberalisation

raised concerns and started an examination, the Corrib partners refrained from implementing the joint marketing arrangement and withdrew their application for an exemption. Here, two factors appeared to have given rise to doubts about the economic benefits required under European competition law. The first of these was the fact that the field would be Ireland's only domestic gas field following the exhaustion of the existing gas field at Kinsale. The second was that the ongoing process of liberalization would increase the number of eligible customers and that the Irish customer base for its power market was particularly likely to continue its rapid growth, thus offering potential sales outlets for gas suppliers. Arguably, the relative market strength of the partners, especially Statoil, influenced the decision.[410] On another occasion, the Commission warned Norwegian gas producers that the joint sale of Norwegian gas through the Gas Negotiation Committee infringed Article 81(1) of the EC Treaty (now 101(1) TFEU) and, respectively, Article 53(1) of the EEA Agreement.[411] The Committee (GFU) comprised Statoil and Norsk Hydro and negotiated gas sale contracts with buyers on behalf of all other natural gas producers in Norway. The Commission believed this negotiation to amount to the fixing of sale prices, volumes, and all other trading conditions. The GFU had entered into a large number of long-term supply agreements with European gas operators which had prolonged the adverse effects of joint selling schemes for several years and led to significant rigidity and lack of liquidity in the European gas market. In this type of case the Commission commonly uses a statement of objection,[412] which is a legal step in proceedings under Article 101 TFEU. It does not prejudice the outcome of the investigation, since the companies involved have the right to reply to the Commission's objections, have access to the file, and to request a formal hearing. Nevertheless, where a Member State supports restrictive measures taken by its national energy companies, this often leads to an immediate discontinuation of

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of the Irish gas market a success for consumers. This case also *confirms the Commission's general policy not to tolerate joint selling, unless compelling reasons are provided as a justification*." (Emphasis added).

[410] Talus, (n 350) 258

[411] Commission, press release, IP/02/1084 (17.07.2002), 'Commission successfully settles GFU case with Norwegian gas producers' <http://europa.eu/rapid/press-release_IP-02-1084_en.htm?locale=FR> (accessed 25 October 2018). Commenting on the case, the then European Competition Commissioner Mario Monti said: "We now need to ensure that gas sold by Norwegian gas producers individually can be transported into Europe and thus reach the European gas consumers. The Commission will pursue any violations of internal market rules and competition rules regarding access of Norwegian gas to European pipelines with vigour. We urge national authorities to do the same." (Emphasis added).

[412] Lorenz, (n 341) 298; The written Statement of Objections is a document in which the Commission outlines in detail reasons for which it has serious doubts as to the compatibility of the concentration with the internal market. It is addressed in writing to the notifying parties and gives them an opportunity to be heard before a final decision is adopted. The SO may be amended after receipt of the parties' observations.204 However, pursuant to Article 18(3) EUMR the Commission can base its final decision only on objections on which the parties have been able to submit their observations. Otherwise the decision may be annulled by the General Court since it violates the right to be heard.

such support, as in the case of Norway's GFU[413] —a case which ultimately resulted in Statoil and Norsk Hydro giving commitments to market their gas individually.[414]

While joint selling agreements are typically concluded between players operating on the same level, the last case brings us to long-term supply contracts, which can be scrutinized against both 101 and 102 TFEU if they are part of a strategy qualified as abuse of market power,[415] as in the *Almelo* case.[416] Abuse of market power will in most cases exist in either a refusal to deal or in agreements with other market participants to close the market from competitors. It could also exist in much less visible methods (e.g. conditions favourable to owners and affiliates, early notices or easy access to information on availability; design of capacity contracting and auctions in ways that in effect, favour the owner-operators).[417] In *Almelo*, an exclusive electricity supply contract prevented a Dutch municipality from purchasing cheaper electricity from abroad. Court and Commission considered this agreement a contravention against Article 101. The final resolution – relegated to the Dutch court – hinged on justifiability under Article 106(2), with the Commission's view that the public service function of the Dutch electricity company would not be imperiled by a relaxation of the exclusive supply contract. Long-term contracts in the electricity (and gas) industry are generally concluded in the context of 'BOT' (build, own, operate, transfer) contracts; similarly, take-or-pay long-term power purchase contracts serve as a frequently necessary method to assure investment and financing in the context of privatisation purchase or new investment for power plants. The Commission would often use the review following notification to suggest terms which are consistent with the technical and economic requirements of the project and the Member States' and the EU's security of supply, but also competition objectives.[418] For example, in the *Electricidade de Portugal/Pego* case, the Commission suggested to reduce the term of such contracts to what is considered a legitimate duration for both financing and investment – e.g. 15 in lieu of 28 years.[419] If a standard can be deducted from those early cases, it would be that long-term contracts are much

[413]Commission, press release, IP/02/1084 (17.07.2002), 'Commission successfully settles GFU case with Norwegian gas producers' <http://europa.eu/rapid/press-release_IP-02-1084_en.htm?locale=FR> (accessed 25 October 2018).
[414]Commission, press release, IP/02/1084 (17.07.2002), 'Commission successfully settles GFU case with Norwegian gas producers' <http://europa.eu/rapid/press-release_IP-02-1084_en.htm?locale=FR> (accessed 25 October 2018).
[415] K Talus, T Walde, 'Electricity Interconnectors: A Serious Challenge for EC Competition Law', Competition and Regulation in Network Industries, Volume 1 (2006), No. 3, 355-390
[416] Case C-393/92, *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994], ECLI:EU:C:1994:171
[417] Talus, Walde, (n 415)
[418] Ibid
[419] Notice pursuant to Article 19 (3) of Council Regulation No 17 concerning a request for negative clearance or exemption pursuant to Article 85 (3) of the EEC Treaty — Case No IV/34.598 — Electricidade de Portugal/Pego project, OJ C 26/3–5; K Talus, T Walde, 'Electricity Interconnectors: A Serious Challenge for EC Competition Law', Competition and Regulation in Network Industries, Volume 1 (2006), No. 3, 355-390

more problematic if they are part of a monopoly's defensive strategy 'to erect walls around its markets' than if they are part of a new entrant's offensive requirements to enhance the competitiveness of the market, when they can be excused under 101(3) TFEU.[420] *Electricidade de Portugal/Pego* was followed by more cases which established the 15-year standard duration.[421] According to Talus, the Commission's methodology is not transparent and therefore arbitrary.[422] The policy became clearer in the *Distrigaz*[423] case which is examined in the next chapter. This reasoning reflected on the Commission practice relating to the exemption periods granted under Article 101(3) TFEU. Even the Commission has openly admitted that the early case law under Article 101(3), TFEU was 'not always transparent or in line with the underlying economics of the situation at hand.'[424] The Commission has indicated that it followed a policy that exemptions would be granted for ten years[425] or for the duration of the agreement if it was less than ten years. The ambivalent nature of the exception can be explained, according to Talus, by 'the high upfront investment costs involved.'[426]

1.2.2. Price fixing and market sharing

Price is the clearest and most transparent medium of competition, and price fixing elements are present in both horizontal and vertical agreements.[427] In the energy sector, the pricing question, for natural gas in particular, is somewhat more complicated than in many other sectors.[428] This is evident in a rather recent inspection.[429] In May 2013 the Commission carried out unannounced inspections at the premises of several companies active in and providing services to the crude oil, refined oil products and biofuel sectors (BP, Shell, and Statoil). The Commission has concerns that the companies may have colluded in reporting distorted prices to Platts[430], a Price Reporting Agency

[420] Talus, Walde, (n 415)
[421] Commission Decision REN/Turbogas, OJ C 118/7, 1996; Commission Decision of 30 April 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.473 - Scottish Nuclear, Nuclear Energy Agreement), OJ L 17/31
[422] Talus, (n 350) 266
[423] Summary of Commission Decision of 11 October 2007 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP/B-1/37.966 — Distrigaz) [2008] OJ C 9/8
[424] Talus, (n 350) 267
[425] Commission Decision of 18 May 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/33.640 - Exxon/Shell), OJ L 144/20, para 84 (see above under 101 TFEU)
[426] Commission Decision REN/Turbogas, OJ C 118/7, 1996; Commission Decision of 30 April 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.473 - Scottish Nuclear, Nuclear Energy Agreement), OJ L 17/31, para 143; Talus, (n 350) 267
[427] Jones (n 390)
[428] Talus, (n 350) 255
[429] U Scholz, T Vohwinkel, 'The Application of EU Competition Law in the Energy Sector', Survey, Journal of Competition Law & Practice, 2015, 1-16
[430] S&P Global Platts is the leading independent provider of information, benchmark prices and analytics for the energy and commodities markets. See <https://www.spglobal.com/platts/en.> (accessed 20 November 2018)

to manipulate the published prices for a number of oil and biofuel products. Besides the suspicion of this market manipulation, the undertakings under investigation may also have prevented others from participating in the price assessment process. The suspected practices may reach back to 2002.[431] The Commission continued since with its investigations into the biofuel sector and, in March 2015, conducted further inspections in Spain and other Member States.[432] For the time being no further proceedings against the undertakings have been unleashed.

Market-sharing agreements are widely used in the energy sector. Destination clauses and usage restrictions have traditionally been used in many natural gas contracts, and although there is now ample case law on the topic, these clauses continue to be used.[433] The decision that first illustrated the Commission's policy on hardcore cartels is the 2009 *GDF/E.ON* case, which is the first case in which the Commission has imposed very substantial fines of 553 million euros each on energy companies E.ON Ruhrgas and GDF Suez,[434] alleging an infringement of Art. 101 EU. The Commission found Ruhrgas and GDF to have agreed on a market sharing agreement in 1975 on the occasion of the construction of the Megal pipeline. This pipeline constitutes a backbone for transporting Russian gas to Western Europe including Germany and France. Supposedly, Ruhrgas and GDF agreed not to sell gas transported via said pipeline into each other's home market. Whereas at the time of concluding the agreement, the practice was in line with applicable legal provisions, the Commission accuses E.ON Ruhrgas and GDF of upholding their market sharing agreement until at least 30 September 2005.[435] An agreement between E.ON Ruhrgas and GDF of August 2004, in which the undertakings 'confirmed' that the market sharing agreement had never been enforced and become meaningless, was found by the Commission to have had no effect on the parties actual behaviour.[436] Interestingly, two months after this agreement of August 2004, the Commission reprimanded ENI, ENEL, and GDF for similar contracts in which ENI and ENEL had agreed with

[431] Commission, MEMO/13/435 (14 May 2013) 'Antitrust: Commission confirms unannounced inspections in oil and biofuels sectors'.<http://europa.eu/rapid/press-release_MEMO-13-435_en.htm> (accessed 20 November 2018)

[432] Commission, MEMO/14/581 (9 October 2014) 'Antitrust: Commission Confirms Unannounced Inspections in Oil and Biofuels Sectors'; <http://europa.eu/rapid/press-release_MEMO-14-581_en.htm> Commission, MEMO/15/4821 (21 April 2015) 'Antitrust: Commission confirms unannounced inspections in oil and biofuels sectors' <http://europa.eu/rapid/press-release_MEMO-15-4821_en.htm> (accessed 20 November 2018)

[433] Talus, (n 350) 255

[434] Case COMP/39.401 - E.ON/GDF, see also Commission press release IP/09/1099 (8.7.2009) 'Antitrust: Commission fines E.ON and GDF Suez €553 million each for market-sharing in French and German gas markets' <http://europa.eu/rapid/press-release_IP-09-1099_en.htm> (accessed 20 November 2018)

[435] Commission press release IP/09/1099 (8.7.2009) 'Antitrust: Commission fines E.ON and GDF Suez €553 million each for market-sharing in French and German gas markets' http://europa.eu/rapid/press-release_IP-09-1099_en.htm (accessed 20 November 2018)

[436] U Scholz, S Purps, 'The Application of EU Competition Law in the Energy Sector', *Journal of European Competition Law & Practice*, Volume 1, Issue 1, 1 January 2010, 37–51

GDF to use gas transported through France for them by GDF not on the French but only on the Italian market.[437] No fines were issued, as '[a]mong other factors, [the Commission] has borne in mind that this stage of the liberalisation process, which ended with the entry into force of the Second Gas Directive in August 2004, has involved a profound change in the commercial practices of the operators present on the market.'[438]. However the examined case concerned a market-sharing arrangement in which the companies involved agreed not to sell gas using the Megal pipeline, which the companies jointly constructed in 1975, to each other's home markets. This arrangement was maintained even after the abolition of the companies' legal or contractual monopolies and the liberalization of the EU natural gas markets.[439] While the parties to the contract declared that they regarded the agreement as void, obviously confirming that both companies understood that the arrangement violated EU competition rules, they continued to abide by this arrangement until September 2005.[440] Much like destination clauses, these types of arrangements violate both competition and the internal market objectives of EU competition law.[441] The fines have subsequently been lowered from over €500 to €320 million for each company by the EU general court.[442] The General Court granted the largest reduction in a Commission fine ever, as it found there was not enough evidence for the full duration of the supposed infringement of partitioning the German and French gas markets, in particular for the last year of the infringement concerning the French market, as assumed by the Commission. The General Court also held that the Commission case ENI/ENEL/GDF[443]—which E.ON Ruhrgas and GDF Suez had referred to claiming equal treatment—was not comparable, as it concerned vertical rather than horizontal market partitioning agreements in transit and gas supply agreements.[444] This differentiation appears to be a rather formalistic approach given the GC's finding that Ruhrgas and GDF could have agreed on a vertical transit agreement on a pipeline constructed by Ruhrgas alone rather than jointly constructing a pipeline to transport Russian gas through Germany to France.[445] The effect of the respective agreements was the same and basically covered the same period of time which, due to the

[437] Case COMP/38.662 - ENI/ENEL/GDF, Commission decisions of 26 October 2004
[438] Commission, press release, IP/04/1310 (26 October 2004) 'Commission confirms that territorial restriction clauses in the gas sector restrict competition' <http://europa.eu/rapid/press-release_IP-04-1310_en.htm> (accessed 20 November 2018)
[439] Scholz, Purps, (n 436)
[440] Ibid
[441] Jones (n 390) 168
[442] Cases T-360/09 E.ON Ruhrgas AG and E.ON AG v Commission and T- 370/09 GDF Suez SA v Commission [2012] ECLI:EU:T:2012:332 and ECLI:EU:T:2012:333
[443] ENI/ENEL/GDF (Case COMP/38.662) Commission decisions of 26 October 2004
[444] Case T-360/09 E.ON Ruhrgas AG and E.ON AG v Commission [2012] ECLI:EU:T:2012:332, para 266
[445] Ibid para 73 et seq.

liberalisation process, 'involved a profound change in the commercial practices of the operators present on the market.'[446] Yet in the case the Commission happened to investigate first no fine was issued and in the other a fine into the hundreds of millions was imposed. The Commission's decisions illustrate its tough stance on market sharing and other hardcore restrictions and the risks associated with maintaining agreements that were legal prior to liberalisation but subsequently became subject to Article 101 post-liberalisation. If such agreements are not clearly and unequivocally brought to an end there is a clear risk that in light of surrounding circumstances they are considered to have been maintained.[447]

Destination clauses or territorial restrictions, often included to long-term supply contracts,[448] constitute vertical restraints which can amount both as 101 and 102 TFEU infringements especially in the field of gas supply.[449] As these clauses restrict the freedom of the buyer to resell the purchased gas volumes and create artificial barriers to markets, they serve to compartmentalise the market and thus, they are seen as among the most damaging and anti-competitive provisions used in energy contracts, and have the effect of undermining the creation of a pan-European energy market.[450] The roots of these territorial restriction clauses lie in the 'historical segmentation, both horizontal and vertical, of the EU energy markets. Large producers sold gas to national incumbents, which limited their sale to the area where they controlled the pipelines. By limiting the buyer's freedom to resell the gas outside a certain area these clauses enable the supplier to charge different customers different prices at the same delivery point.'[451] The primary example of a commitment decision on this end is the *Gazprom/ENI* case of 2003.[452] The parties undertook 'contractual' commitments, aimed at lifting the market sharing arrangement, namely to:[453] a) to delete the territorial sales restrictions from all of their existing gas supply contracts. The amended contracts provide for two delivery points for Russian gas, as opposed to one only in the past. ENI is free to take the gas to any destination of its choice from these two delivery points; b) to refrain from introducing the contested

[446] Commission, press release, IP/04/1310 (26 October 2004) 'Commission confirms that territorial restriction clauses in the gas sector restrict competition' <http://europa.eu/rapid/press-release_IP-04-1310_en.htm> (accessed 20 November 2018)
[447] Jones (n 390) 168
[448] See *infra* 1.2.1.
[449] To be examined under 1.3. Part Two 1.3.3.
[450] Talus (n 350) 270
[451] Ibid 269
[452] Commission, press release IP/03/1345 (6 October 2003), 'Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses', <http://europa.eu/rapid/press-release_IP-03-1345_en.pdf> (accessed 20 November 2018)
[453] Commission, press release IP/03/1345 (6 October 2003), 'Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses', <http://europa.eu/rapid/press-release_IP-03-1345_en.pdf> (accessed 20 November 2018)

clauses in new gas supply agreements. To this extent ENI committed not to accept such clauses or any provision with similar effects (e.g. use restrictions and profit splitting mechanisms) in all its future purchase agreements, be they for pipeline gas or gas in liquefied form (LNG). Gazprom had already agreed last year not to introduce the clauses in future contracts with European importers. c) To delete a provision that obliges Gazprom to obtain ENI's consent when selling gas to other customers in Italy, even if ENI claims that it never relied on this provision. The companies already implemented the amendment allowing Gazprom to sell to ENI's competitors in Italy. In addition to these contractual issues, ENI also agreed to offer significant gas volumes to customers located outside Italy over a period of five years and to promote an increase of the capacity in its majority-controlled Trans Austria Gasleitung (TAG) pipeline, which runs through Austria and is used to transport all Russian gas destined for the Italian market. Finally, ENI offered to promote an improved third party access regime (TPA regime) facilitating the use of the TAG as a transit pipeline.[454] According to Talus, the last three, 'non-contractual' clauses are not linked to the market sharing effect of the problematic clauses, but seek to generally improve the competition situation in the Italian gas market, on the occasion of the negotiations for the above conditions. We will add that they also aim at 'filling the gaps' of the sector-specific regulation, which was at a more initial stage at that point, under the First Package. It seems that the Commission is willing to enforce the regulation objectives by means of administrative procedures under the competition regime, instead of the long-running infringement procedure under 258 TFEU.

A more recent case concerns power exchanges EPEX Spot and Nordpool Spot. The investigation into them started in February 2012 and was settled in March 2014, the Commission imposing fines. The undertakings had announced the creation of a joint venture to provide a common IT-infrastructure and harmonise their existing systems. However, the Commission seems to have taken offence at the company's' plans to 'be in charge of their respective customers' and suspected a 'cartel in the form of geographic market sharing'.[455] The Commission fined the operators of the two largest power exchanges in Europe. The fine was set at 9% of annual turnover for both undertakings,

[454] Commission, press release IP/03/1345 (6 October 2003), 'Commission reaches breakthrough with Gazprom And ENI on territorial restriction clauses' <http://europa.eu/rapid/press-release_IP-03-1345_en.pdf> (accessed 20 November 2018): 'This commitment includes amongst others the introduction of one-month transport contracts, an effective congestion management system, the introduction of a secondary market and the regular publication on the Internet of the available capacity. The new TPA regime will be inspired by the Guidelines for Good Practice developed by the European Commission, European Regulators and European gas industry ('Madrid Forum')'

[455] J Almunia, SPEECH/12/172, Copenhagen, 8 March 2012 'Competition policy for innovation and growth: Keeping markets open and efficient' <http://europa.eu/rapid/press-release_SPEECH-12-172_en.doc> (accessed 20 November 2018)

after applying the 10% turnover cap and granting a 10% discount for settling.[456] The Commission held that the two operators had agreed to divide markets, with European countries to the north of Poland (including Poland) falling into Nordpool's area and countries to the south into that of EPEX. The infringement, which lasted less than a year, had started in the context of a cooperation between Nordpool and EPEX in which the undertakings had tried to set out a joint approach regarding the technical systems to be used for cross-border electricity trade and suitable for the developing Internal Energy Market. The Commission found the exchange operators to have strayed from this legitimate cooperation purpose to discussing which of them would submit offers in tender procedures, which would acquire certain activities of competitors and which would provide technical know-how to interested third parties.[457] The decision highlights the need to have rules and procedures in place to prevent discussions exceeding the legitimate scope of cooperation with competitors.[458]

1.3. The Application of 102 TFEU

Due to the industry's structure, Article 102 TFEU has played the more important part in the Commission's focus on the energy sector and still produces the larger number of cases.[459] Compared to the overall 102 TFEU case law, the intricacies of the energy sector give rise to more characteristic of state-sponsored monopolies, such as using cross-subsidization from monopoly rent to extend the monopoly to cognate areas, preventing a competitor from offering supply and services using both market power and political or regulatory power, combining state-delegated regulatory authority over a market with commercial operations in the market, and refusing to deal on reasonable terms with a competitor dependent on an 'essential facility' held by the monopoly.[460] One main focus of the European Commission has been to remedy abuses of market dominance under Art. 102 TFEU via exclusionary or exploitative conduct, thereby addressing the findings in the sector inquiry alleging high market concentration and vertical foreclosure of energy markets. Investigated potential breaches of Art. 102 TFEU include supposed long-term market foreclosure via long-term downstream supply contracts, the limitation of transport capacities via the infrastructure necessary to transport energy[461] as well as destination clauses.

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[456] Power Exchanges (Case AT/39.952) Commission Decision of 5 March 2014 [2014] OJ C 334/5
[457] Commission, press release IP/14/215 (5.3.2014) 'Antitrust: Commission fines two power exchanges € 5.9 million in cartel settlement' <http://europa.eu/rapid/press-release_IP-14-215_el.htm> (accessed 20 November 2018)
[458] Scholz, Vohwinkel, (n 429)
[459] Scholz, Purps, (n 436)
[460] Talus, (n 350) 259-260
[461] Scholz, Purps, (n 436)

1.3.1. Market foreclosure via restriction of access to transportation networks: access to essential facilities and services

The extent to which an undertaking holding a dominant position can refuse to deal with or supply a competitor is one of the most relevant issues for the energy industries to arise under Article 102. The US-based doctrine of mandatory access to an essential facility is of particular significance in this regard.[462] In essence, it obliges a competitor that controls a service, facility, or intellectual property right to provide access to other competitors on non-discriminatory terms. This obligation requires that the use of the facility is essential for doing business and that replication of it is legally or commercially impractical, and is further subject to objective justification for denial of access.

The essential facilities doctrine has been regularly applied by the Commission in cases relating to seaports, railways, and other physical infrastructures (natural monopolies).[463] The Commission tends to stretch the "essential facilities" concept beyond the purely non-duplicable infrastructure,[464] as in the *GVG/FS* cross-border railway case[465] where it applied the test to other assets at stake (e.g. trains, staff, drivers etc.). To counter the ever-widening scope of the essential facilities doctrine, the Court interfered with this trend in *Bronner*.[466] However, this has had very little impact, as the subsequent case law shows. In fact, the Commission's interpretation has been accused of being rather controversially expansive, as it will be explained further on. The essential facilities doctrine finds its regulatory homologue in the third party access obligation (TPA). One might have thought that the question of whether and in what cases access has to be granted to energy networks would have lost much of its relevance with the introduction of third party access in both the electricity and gas markets, but this is certainly not the case. In fact, use of Article 102 TFEU has become a significant tool to force improvements in terms of access, transparency, and even capacity extensions.[467]

Three major Commission proceedings reflect this: On 18 March 2009, the Commission declared binding the proposed commitments upon *RWE* under Art. 9 Reg. 1/2003 so that German RWE transmission system operator lifts the artificial obstacles for other gas companies to access its gas transport network. RWE understated the capacity of its network and set its transmission tariffs at an artificially high level in order to squeeze competitors' margins. In the light of these concerns RWE

[462] R O'Donoghue, A Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing, 2006) 12
[463] Commission Decision of 21 December 1993, Port of Rødby, OJ L 55/52; Commission Decision of 21 December 1993, Sea Containers/Stena Sealink, OJ L 15, 711/8; Commission Decision of 11 June
[464] Talus, (n 350) 260-261
[465] Commission Decision of 27 August 2003, GVG/FS, OJ L 11/2
[466] Case C-7/97, *Oscar Bronner v Mediaprint*, [1998]ECLI:EU:C:1998:569
[467] Talus, (n 350) 261

committed itself to sell its gas transmission network to a suitable purchaser.[468] Another commitment Decision imposing massive structural remedies in the energy sector was issued on 26 November 2008,[469] against E.ON. The Commission voiced concerns that *E.ON*, as RWE, had withheld available and profitable generation capacity from the German electricity wholesale market, thus raising prices above competitive levels. The Commission's further allegation was that E.ON TSO had favoured its own generation affiliate. Lastly, In June 2009, *GDF Suez*[470] was accused of abusing its dominant market position in the gas sector by foreclosing competitors from gas import capacity in France. The alleged foreclosure was found to result from *strategic underinvestment* (limiting investments in the development of LNG-Terminals) and, mainly, long-term capacity reservations for most of France's gas import capacity.[471] Those proceedings take as common ground the belief that new entrants into gas markets require access to gas import infrastructure, such as pipelines and liquefied natural gas terminals. Insufficient access to infrastructure limits their ability to acquire customers, no matter how competitive their offers may be. Preventing new entrants from gaining access to infrastructure therefore, hinders the development of competition in energy markets.[472] In both the E.ON and GDF Suez cases, the Commission held that the long-term booking of a large part of the entry capacities giving access to a certain market can constitute an abuse under Art. 102 TFEU irrespective of whether the undertaking concerned needs these bookings to fulfill (long-term) import or supply agreements with third parties. It is argued[473] that this view contravenes established case law, regulatory provisions and basic principles of competition law.[474]

When it comes to the case law, bearing in mind the definition of 'abuse' within 102 TFEU,[475] it appears that the long-term booking of a large part of the entry capacities of a market does not

[468] Commission Case COMP/39.402 'RWE gas foreclosure' Commission Decision of 18 March 2009 [2009] OJ C133/8, para 30 <http://ec.europa.eu/competition/antitrust/cases/decisions/39402/en.pdf. (accessed 8 October 2009)

[469] German electricity wholesale market (Case COMP 30.388) and German electricity balancing market (Case 39.389) Commission decision of 26 November 2008 [2009] OJ C36/8;

[470] Commission Case COMP 39.316 'GDF foreclosure' 'Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/39.316—Gaz de France (gas market foreclosure)' [2009] OJ C156/14

[471] Commission, press release, IP/09/1097 (8 July 2009) 'Antitrust: Commission market tests commitments by GDF Suez to boost competition in French gas market' <http://europa.eu/rapid/press-release_IP-09-1097_en.htm?locale=en> (accessed 20 November 2018)

[472] Commission, press release, IP/09/1872 (3 December 2009) 'Antitrust: Commission accepts commitments by GDF Suez to boost competition in French gas market' <http://europa.eu/rapid/press-release_IP-09-1872_en.htm> (accessed 20 November 2018)

[473] Scholz, Purps, (n 382)

[474] See also ENI foreclosure (Case COMP 39.315); Commission, press release, IP/10/1197 (29 September 2010) 'Antitrust / ENI case: Commission opens up access to Italy's natural gas market' <http://europa.eu/rapid/press-release_IP-10-1197_en.htm?locale=en> (accessed 20 November 2018)

[475] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECLI:EU:C:1979:36, paras 38-39: 'The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very

constitute an actual, but a *potential* foreclosure. Also, long-term contracts are considered *normal*[476] competitive behaviour, since they are widely used within the gas sector. Long-term capacity contracts usually correspond with long-term import contracts which play an important role in ensuring a secure energy supply for Europe.[477] The availability of capacities is ensured by the nondiscriminatory third party access (TPA) and usage rules laid down in the relevant regulatory provisions. This brings us to the regulatory framework: The regulatory provisions do not expressly touch the topic of long-term bookings, their admissibility or scope. Attempts by the Commission or the European Parliament to limit those contracts failed.[478] Consequently, competition law measures aimed at limiting or modifying such booking contravene the legislatory silence. Directive 2009/73 does not provide for any other changes in the legal situation, yet suggests - leaving it in the national legislators' discretion - that where granting access jeopardises or prevents the due and proper fulfillment of import contracts the Member States are even authorized to repeal provisions regarding access to the system in their entirety.[479] Under art. 4(3) of the EU Treaty, measures that are within the national legislators' discretion on principle must not be circumvented by an excessive application of competition competences by the Commission.[480] Lastly, the booking of long-term capacities by the dominant incumbent cannot be qualified as an infringement of Art. 102 TFEU under the so called essential facilities doctrine either, according to the CJEU case law. Relying on the tangible vs intangible infrastructure division (the import capacity being a tangible one),[481] in in *Magill*[482] and *IMS Health*,[483] the Court required *extraordinary circumstances* - the access to be completely indispensable so as to hold a refusal to access to intangible infrastructure abusive. In the already mentioned *Bronner* case, the only one case in which the CJEU commented on access to physical infrastructures under Art. 102 TFEU, the Court ruled that 'if' (para. 41) the *Magill* case law is applicable in this case, the 'exceptional circumstances' exist only when an undertaking with the

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presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'

[476] Scholz, Purps, (n 382); *A contrario* Commission, Case IV/33.344 British Midland v Aer Lingus [1992] OJ L 96/34, paras 25, 30 concerning access to physical infrastructure in the air transport industry.

[477] Scholz, Purps, (n 382); Recitals 25, 31 Directive (EC) 2003/55 (Second Package Gas Directive)

[478] Scholz, Purps, (n 382); COM (2001)125-2 ' Proposal for a Directive of the European Parliament and of the Council amending Directives 96/92/EC and 98/30/EC concerning common rules for the internal market in electricity and natural gas' It is conferred that such a provision was not included in the second Legislative Package.

[479] Scholz, Purps, (n 382); Art. 48 Directive 2009/73/EC

[480] Ibid

[481] Ibid

[482] Joined cases C-241/91 P and C-242/91, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECLI:EU:C:1995:98

[483] Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG.* [2004] ECLI:EU:C:2004:257

size and output of the dominant incumbent could not construct an alternative infrastructure on economically viable terms (para. 45), which is hardly the case for generated capacity.[484] One last argument can be derived from the established interpretation of 102 TFEU, according to which, in the case of limited capacity, the owner of the infrastructure facility does not have to limit its own operations.[485] In the case of gas transmission grids, capacities are limited. Therefore, granting of access to a fully booked infrastructure necessarily leads to a redistribution of the physically available capacities unfavourable to the owner of the facility, who cannot continue to use it to the extent necessary to allow the performance of the existing import contracts.[486] Following two similar proceedings against the Swedish[487] (with market integration concerns) and Czech[488] incumbents in 2010, it seems that such legal issues have not occupied the Commission since. As it will be seen, its focus has turned to *territorial restrictions* which make up the bulk of public competition enforcement at the moment.

Another, more generic issue, arising from the above infrastructure foreclosure cases is the scope of the essential facilities doctrine under 102 TFEU. Whereas it was common ground that preventing competitors from having access to infrastructure necessary for competing in upstream or

[484] Especially taking into account the existence of 'use it or lose it' provisions, which free up unused capacity for third parties. See more in Scholz, Purps, (n 382)

[485] O'Donoghue et al (n 462) 250; Whish, Bailey, *Competition Law* (7th edn, Oxford University Press, 2012) 697

[486] Scholz, Purps, (n 382)

[487] Svenska Kraftnat (Case COMP 39.351) Commission Decision of 14 April 2010 [2010] OJ C 142/28:
The Swedish electricity TSO, Svenska Kraftnat (SvK) had divided the Swedish transmission system into at least two separate bidding zones to manage congestion in its transmission system without limiting trading capacity on interconnectors and to invest in a new transmission line, thereby favouring consumers in Sweden over consumers in neighbouring EU and EEA Member States by reserving domestically produced electricity for domestic consumption. The alleged practice was found to contradict the Commission's objective of establishing an integrated European electricity market. SvK argued that the export restraints were necessary to alleviate internal congestion in its electricity distribution network. The case demonstrates an inherent conflict of the Commission's incentives to open network-bound markets to competition and the factual circumstances existing in European energy markets. Most networks were developed to cover the need for a vertically integrated utility within a given supply area. Naturally, in the past these networks did not expand over national borders, except for relatively few interconnectors. Thus the practice of SvK to alleviate internal congestion by limiting interconnector capacity may be regarded as essential to safeguard the functioning of its transportation system and as a consequence, to maintain security of supply. In this particular case, however, the Commission claimed to have information on alternative means of managing these congestion problems which would not favour consumers in Sweden over consumers in neighbouring EU and EEA Member States. U Scholz, S Purps, 'The Application of EU Competition Law in the Energy Sector', *Journal of European Competition Law & Practice*, 2011, Vol. 2, No. 62-77

[488] CEZ (Case COMP/39.727) Commission Decision of 10 April 2013 [2013] OJ C251/4: Commitment decision against the Czech Republic's largest energy producer. The Commission was concerned that CEZ Group had hoarded capacity in the transmission network, thereby disincentivising third parties from making new investments in electricity generation and thus preventing their entry into the market for the generation and wholesale supply of electricity in the Czech Republic. To address the Commission's concerns CEZ offered to divest coal or lignite fired generation capacity in the range of around 800–1,000 MW, which would immediately give a third party a significant presence on the Czech electricity market. (around 6 percent of total generation capacity); Commission, press release IP/12/320 (10 April 2013) 'Antitrust: Commission accepts commitments from CEZ concerning the Czech electricity market and makes them legally binding' <http://europa.eu/rapid/press-release_IP-13-320_en.htm> (accessed 20 November 2018)

downstream markets may be qualified as an infringement of Art. 102 TFEU,[489] the recent enforcement practice suggests that the Commission has somewhat moved away from the principles developed under the concept of 'essential facilities'[490] by basing its accusations of market foreclosure on 'strategic underinvestment'. So far, the Commission has only prohibited dominant firms from refusing to supply, not obliging them to invest in capacity enhancements of its infrastructure.[491] The Commission states in its Guidance that 'the disincentive to invest inherently connected to obligations to supply would not be considered in cases in which owners of essential facilities had benefited from special rights or state financing when developing the essential facility or where the obligation to supply has been imposed by regulatory measures.'[492] However, in the above cases *GDF Suez* and *ENI* the Commission demanded that an undertaking not only grant access to existing infrastructure but 'provide additional financial resources for expansion to adapt a given infrastructure to the actual demands.'[493] Following this route would mean that competition law is employed by the authorities 'to take entrepreneurial decisions with long-term effects', *ex ante.* While only the investors themselves are best positioned to do this, it is desirable that sector specific legislation sets certain standards for investments into infrastructure assets. After all regulatory incentives could be brought in line with other regulatory demands and procedures more easily, by the specialised national authorities. In addition, a regulatory approach would provide a level of predictability and legal certainty more likely to foster investment than an ex post review under Art.102 TFEU.[494] This approach is also debatable in the light of 345 TFEU. An obligation to allow the non discriminatory use of existing access as a remedy under 102 TFEU does not breach 345 TFEU,[495] but an obligation in the name of 'strategic underinvestment' 'limit(s) the property owner's negative freedom not to invest [...] Such a step cannot be taken by executive action but needs legislative approval.'[496] Finally, Scholz and Purps spot an interesting paradox:[497] this expansion of the essential facilities doctrine disincentivises the culprit's competitors to invest on their own and attack its dominant position, making them 'lazy' and subject to the owner's discretion

[489] Scholz, Purps, (n 436)
[490] O'Donoghue et al (n 462) 450
[491] Whish, Bailey, *Competition Law* (7th edn, Oxford University Press, 2012) 697 et seq
[492] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7
[493] Scholz, Purps, (n 436)
[494] Ibid
[495] Whish, Bailey, (n 491) 212
[496] Scholz, Purps, (n 436)
[497] Ibid

to expand the infrastructure at stake, while the its dominant position becomes stronger and permanent.

1.3.2. Long term supply contracts or customer foreclosure

Early Commission practice on long-term supply contracts offered a poor model on which to base future practice: the case law which it generated lacked transparency and was neither easy to understand nor of general applicability.[498] However, this initial confusion and uncertainty has been significantly reduced in more recent case law. As we saw under 101 TFEU (1.2.1), the Commission generally exempted from scrutiny an agreement duration of less than 15 years. For downstream contracts, which are 'politically much easier to address than upstream contracts,'[499] guidance has with *Distrigaz*.[500] The structure of EU gas supply must be first considered here. Authorities and competitors had been preaching that 'competitive markets can in theory deliver the necessary investments' and long-term supply clauses disincentivize them, realising in return, security of supply. However, this does not mean that it will happen in the real-world European markets.[501] In addition to the market failures, the reasons for the shortcomings are that 'the payoff for the security of supply infrastructure is quite speculative, very poorly understood and non-quantifiable'[502] therefore one cannot entirely rely on the markets to provide for security of supply.

The *Distrigaz* case was the leading case that made visible the Commission's practice as to the compatibility of long-term contracts with competition law.[503] The Decision was issued after the 2007 sector inquiry had been published but investigations predated the sector inquiry. In a preliminary assessment in 2005[504] and a subsequent statement of objections in 2006,[505] the Commission voiced concerns that Distrigaz was foreclosing the downstream gas markets in Belgium via long-term supply contracts concluded with a large number of customers who mostly sourced all their gas from Distrigaz. As the total demand of these customers was withheld from the market only a small share of the total market was open to competition, thereby preventing competitors from entering the market. To remedy the Commission's concerns, Distrigaz offered commitments

[498] Talus, (n 350) 264
[499] Ibid 267
[500] Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/37966 — Distrigaz OJ C 77/ 48
[501] Talus, (n 350) 268
[502] Ibid
[503] Distrigaz (Case COMP/37.966) Commission Decision of 11 October 2007 [2007] OJ C9/5 <http://ec.europa.eu/competition/antitrust/cases/dec_docs/37966/37966_639_1.pdf> (accessed 20 November 2018)
[504] Ibid, para 4

pursuant to Art. 9 Reg. 1/2003 limiting the number of long-term contracts it was allowed to conclude.[506] In its Decision, the Commission identified five elements to be considered when determining whether long-term contracts are to be considered illegal under competition rules. These are:[507] the market position of the supplier, the share of the customer's demand tied under the contracts, the duration of the contracts, the overall share of the market covered by contracts containing such ties, efficiencies.

The Commission took the preliminary view that Distrigaz held a dominant position in the Belgian market for the sale of high calorific gas (H-Gas) to large customers.[508] In this context, the Commission stressed Distrigaz' market share; existing barriers to entry (e.g. congestion on the entry points into the Belgian gas transport network, the lack of liquidity of the Zeebrugge hub, and the balancing regime on the transport network), and Distrigaz' affiliation with the vertically integrated Suez Group.[509] With regard to the share of the customer's demand under the contracts held by Distrigaz, the Commission reached the preliminary conclusion that in most cases Distrigaz covered the total demand of its customers.[510] As to the duration of the contracts, the Commission found in its preliminary assessment that about 60 per cent of Distrigaz' contracts ran for at least a year and more than 30 percent of its contracts ran for over three years.[511] Consequently, about 35–45 per cent of the market was tied to Distrigaz for more than a year.[512] On the other hand, the Commission acknowledged that long-term contracts may be justified if they generate efficiencies that outweigh their negative effects. Under the commitment decision, gas supplies to new gas fired electricity generation facilities exceeding 10 MW shall not be subject to limitations, since long-term supply agreements facilitate or may even be indispensable for efficiency enhancing investments being made. In essence, the approval follows previous Commission Decisions[513] and the Commission Guidelines on Vertical Restraints,[514] recognising the potential need for long-term agreements in the context of major investments. It is observed that the Commission in *GDF Suez* (examined in the

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[505] Commission, MEMO/06/197 (16 May 2006) 'Competition: Commission confirms sending Statement of Objections to Distrigaz concerning Belgian gas supply market' <http://europa.eu/rapid/press-release_MEMO-06-197_en.pdf> (accessed 20 November 2018)

[506] Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/37966 — Distrigaz OJ C 77/ 48

[507] Scholz, Purps, (n 436)

[508] Ibid

[509] Distrigaz decision paras 13–16

[510] Ibid 19–20

[511] Ibid 21–22

[512] Ibid 23

[513] Commission Decision of 30 April 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.473 - Scottish Nuclear, Nuclear Energy Agreement), OJ L 17/31

[514] Guidelines on Vertical Restraints [2010] OJ C 130/1

previous subchapter 13.1.), which concerns long-term *transportation* contracts, applied the *Distrigaz* test, although it refers to long-term *supply* contracts, therefore a completely different segment of the vertically integrated gas market. Transportation contracts, contrary to supply ones are subject to SSP, since they are part of the natural monopoly. Pursuant to the Second, and then Third Packages, national regulators are preoccupied with the compliance of those contracts are with the strict rules on network access including use-it-or-lose-it-provisions and congestion procedures that have furthered the development of competition.[515] The current legislation does not touch upon the admissible term of transportation contracts, nor their duration, although this could have been agreed upon at a preparatory stage, something that would require the consent and support of the MS at a political level. However, the Commission decided to push forward using its enforcement powers under 101[516] and 102 TFEU. This is strictly legal, since the GC ruled that general competition law and SSR can be applied in parallel,[517] its ruling upheld by the CJEU,[518] it might not though be *legitimate* as a regulatory approach might have been more suitable.[519]

Alternatively, even if the *Distrigaz* test is to applied to transportation (otherwise capacity) contracts, certain structural differences of them are to be taken into account primarily during the 101(3) TFEU evaluation.[520] Similarly to the destination clauses (which will be examined under 1.3.3. below), long-term capacity contracts are also complementary to long-term gas import agreements, thereby contributing to security of energy supply across EU Member States. The Commission has expressly admitted this in soft law documents.[521] In addition, the Gas Directive provides that 'economic difficulties in connection with take-or-pay-provision[522] in import contracts can be a justification for denying network access to third parties.' (art. 48).

[515] Scholz, Purps, (n 436)
[516] See Part One 1.2.1
[517] Case T-271/03, *Deutsche Telekom AG v European Commission* [2008] ECLI:EU:T:2008:101, para 269: 'the application of EC competition law is not precluded if the relevant behaviour is in line with national regulation which implements European directives'
[518] Case C-280/08P, *Deutsche Telekom AG v European Commission* [2010] ECLI:EU:C:2010:603, para 92 *'The same applies to the appellant's claim that the purpose of RegTP's regulation is to open the relevant markets up to competition. It is common ground that that regulation did not in any way deny the appellant the possibility of adjusting its retail prices for end-user access services or, therefore, of engaging in autonomous conduct that is subject to Article 82 EC, since the competition rules laid down by the EC Treaty supplement in that regard, by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation of the telecommunications markets.'*
[519] Scholz, Purps, (n 436)
[520] Scholz, Purps, (n 436)
[521] 'Commission Staff working document: Accompanying document to the Proposal for a Regulation of the European Parliament and of the council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC in security of gas supply' COM(2009) 363, 16 July 2009 SEC(2009) 978 final, 27–28. See also *infra* Part One 1.3.1.
[522] i.e. that the buyer has to pay a certain amount even if he does not off-take certain minimum quantities of gas

1.3.3. Territorial restrictions: renewed interest in the name of the "Energy Union"

As it was seen under the examination of 101 TFEU (1.2.1), historically, destination clauses originate from the fact that European energy markets were divided up into horizontal — and vertical — segments, which hindered competition and integration. In the gas sector, producers did not sell gas directly to final customers (disregarding certain exceptions), while the wholesaling importers limited their sales activities to specific geographical areas,[523] namely those in which they owned and operated pipelines. The Commission, with its enforcement action, intends to transform that traditional structure into a competitive one.

Commissioner in charge of competition policy, Margrethe Vestager, said: "*Territorial restrictions that divide energy markets along national lines prevent us from achieving a true European Energy Union. Today's decision will end these restrictions in Bulgaria and make the Bulgarian wholesale electricity market more open and transparent*."[524] An investigation of the Commission against Bulgaria's BEH came to an end in 2016. The Commission had concluded that the majority of BEH's wholesale electricity supply contracts contained territorial restrictions amounting to an abuse of its dominant position. In its assessment, the Commission had considered that BEH held a dominant position on the basis of the absence of any significant competitive pressure and the percentage of supply of electricity at freely negotiated prices accounted for by sales by BEH's subsidiaries. BEH offered commitments to meet these concerns. In particular, BEH agreed to set up a power exchange in Bulgaria with the assistance of an independent third party and to offer at least stipulated volumes of electricity on the day-ahead market of the exchange.[525] In a separate investigation, the Commission is investigating whether BEH, its gas supply subsidiary Bulgargaz and its gas infrastructure subsidiary Bulgartransgaz might be preventing competitors from accessing key gas infrastructures in Bulgaria, in breach of EU antitrust rules. The Commission opened formal proceedings in July 2013[526] and sent a Statement of Objections in March 2015.[527]

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[523] H Nyssens, C Cultrera, D Schnichels, '*The territorial restrictions case in the gas sector: a state of play'* DG Competition, Number 1 — Spring 2004, p. 48-51 <http://ec.europa.eu/competition/publications/cpn/2004_1_48.pdf> (accessed 20 November 2018)

[524] http://europa.eu/rapid/press-release_IP-15-6289_en.htm

[525] Commission, press release IP-5-6289 (10 December 2015) 'Antitrust: Commission accepts commitments by Bulgarian Energy Holding to open up Bulgarian wholesale electricity market' <http://europa.eu/rapid/pressrelease_ IP-15-6289_en.htm> (accessed 20 November 2018)

[526] Commission, press release IP/13/656 (5 July 2013) 'Antitrust: Commission opens proceedings against Bulgarian Energy Holding and its subsidiaries Bulgargaz and Bulgartransgaz' <http://europa.eu/rapid/press-release_IP-13-656_en.htm> (accessed 20 November 2018)

[527] Commission, press release IP/15/4651 (23 March 2015) 'Antitrust: Commission sends Statement of Objections to Bulgarian Energy Holding and subsidiaries for suspected abuse of dominance on Bulgarian natural gas markets' <http://europa.eu/rapid/press-release_IP-15-4651_en.htm> (accessed 20 November 2018)

In March 2014, the Commission fined the operator of Romania's power exchange, OPCOM, for a discriminatory abuse of its dominant position. OPCOM was found to have required undertakings wishing to trade electricity on its platform to be established in Romania and have a Romanian VAT number. In the Commission's view, this led to higher costs for foreign traders compared to their Romanian competitors, inhibiting the further development of the single market.[528] Much more recently, the European Commission has opened a formal investigation to assess whether Romania's gas transmission system operator Transgaz, the sole operator of the natural gas transmission system in Romania, has been hindering gas exports from Romania to other EU Member States. Natural gas can be transported over long distances via networks of high pressure pipelines. Gas transmission networks are operated by a transmission system operator and are generally interconnected. Therefore a transmission system operator, like Transgaz, also manages interconnections with other networks. The Commission's antitrust investigation will focus on indications that Transgaz has devised a strategy to restrict gas exports from Romania to other Member States. This strategy - akin to this of Gazprom - may have been implemented in several ways including through the use of: interconnector transmission fees, underinvestment or delays in the building of relevant infrastructure, and un-founded technical arguments as a pretext to prevent or justify delays in exports.[529]

Undoubtedly, Gazprom is by far the most high profile case in this realm. In 24 May 2018 the European Commission adopted a decision imposing on Gazprom a set of obligations that address the Commission's competition concerns.[530] This case has been more than a bureaucratic administrative procedure. The Commission has insisted that it is just applying its competition rules as in any other case.[531] While this may be the case on an administrative level, the enforcement activities do fit in with the political goals of the Commission regarding the creation of the Single Energy Market, security, and diversification of supply. Against this background, it will be very interesting to see

[528] Commission, press release IP/13/486 (30 May 2013) 'Antitrust: Commission sends Statement of Objections to Romanian Power Exchange OPCOM' <http://europa.eu/rapid/press-release_IP-13-486_en.htm> (accessed 20 November 2018)

[529] Commission, press release (1 June 2017) IP/17/1501 'Antitrust: Commission opens investigation into gas export restrictions from Romania' <http://europa.eu/rapid/press-release_IP-17-1501_en.htm> (accessed 20 November 2018)

[530] Commission, press release IP/18/3921 (24 May 2018) 'Antitrust: Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets' <http://europa.eu/rapid/press-release_IP-18-3921_en.htm> (accessed 20 November 2018)

[531] J Almunia, Speech/12/620, Washington, 19 September 2012, 'Perspective from the European Commission: Competition as a tool for sustainable recovery': *'My overall focus in the present context is to introduce more competition to energy markets—notably in Central and Eastern Europe—and to support the Commission's objective of completing the Single Energy Market.'* <http://europa.eu/rapid/press-release_SPEECH-12-620_en.htm> (accessed 20 November 2018)

how this conflict between the EU und one of its largest suppliers of energy has played out.[532] On 4 September 2012 the Competition Directorate (DG COMP) of the European Commission, having carried out unannounced inspections ('dawn raids') at the premises of several companies in ten EU Member States one year earlier, opened formal proceedings against Gazprom. It stated that Gazprom may have:[533] (a) divided gas markets by hindering the free flow of gas across member states; a central part of the EU's strategy to ensure security of supply is to make the gas infrastructure in Europe more flexible and allow gas flows in different directions. While such bi-directional gas flows are possible, for example between the Netherlands and the UK or between Germany and Belgium, the pipelines in central and Eastern Europe in general only allow for gas to flow from Russia to the west. However, enabling a bi-directional flow for emergency situations would also mean allowing a diversification of supply under normal circumstances. This would threaten Gazprom's market position as the main and in many cases the sole, supplier to customers in central and Eastern Europe. The Commission has been taking active steps in ensuring the *free flow of gas,* presumably overcoming boundaries.[534] (b) prevented the diversification of the supply of gas; Another aspect of security of supply, which is especially important as the internal production of gas in the EU is declining.[535] (c) Imposed unfair prices on its customers by linking the price of gas to oil prices.[536] This claim, focusing on the once well established business practice of linking gas prices in long-

[532] Commission, press release (n 530): Commissioner in charge of competition policy, Margrethe Vestager, said: *"All companies doing business in Europe have to respect European rules on competition, no matter where they are from. Today's decision removes obstacles created by Gazprom, which stand in the way of the free flow of gas in Central and Eastern Europe. But more than that – our decision provides a tailor-made rulebook for Gazprom's future conduct. It obliges Gazprom to take positive steps to further integrate gas markets in the region and to help realise a true internal market for energy in Europe and it gives Gazprom customers in Central and Eastern Europe an effective tool to make sure the price they pay is competitive. As always, this case is not about the flag of the company – it is about achieving the outcome that best serves European consumers and businesses. And the case doesn't stop with today's decision – rather it is the enforcement of the Gazprom obligations that starts today."*

[533] J Stern, K Yafimava, '*The EU Competition investigation of Gazprom's sales in central and eastern Europe: a detailed analysis of the commitments and the way forward'* The Oxford Institute for Energy Studies, OIES PAPER: NG 121, July 2017 <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> (accessed 20 November 2018)

[534] U Scholz, S Purps, 'The Application of EU Competition Law in the Energy Sector', Journal of European Competition Law & Practice, 2013, Vol. 4, No. 1, 63-82: In 2010, the Commission already took an active part in individual negotiations between Gazprom and the Polish incumbent gas company PGNiG and put pressure on the Polish government to allow third-party access and bi-directional flows on the Yamal Pipeline (in which Gazprom holds a share), as Gazprom was pushing for long-term exclusivity for transport capacity and gas supply into Poland; U Scholz, S Purps, 'The Application of EU Competition Law in the Energy Sector', *Journal of European Competition Law & Practice*, 2011, Vol. 2, No. 62-77: Is this use of negotiating power in the area of gas supply contracts to force the often vertically integrated incumbent gas companies in central and eastern Europe to refrain from investing in bi-directional pipeline capacity and allowing third-party access within acceptable boundaries?

[535]Scholz, Purps, (n 534)

[536] Commission, Press release IP/12/937 (4 September 2012) 'Antitrust: Commission opens proceedings against Gazprom' <http://europa.eu/rapid/press-release_IP-12-937_en.htm> (accessed 20 November 2018)

term supply contracts to oil prices, does not appear to be a classical infringement case.[537] In the 2007 Sector Inquiry, the Commission had stated that a '[m]ore effective and transparent price formation is needed in order to deliver the full advantages of market opening to consumers. Gas import contracts use price indices that are linked to oil derivatives and prices have, therefore, closely followed developments in oil markets. This linkage results in wholesale prices that fail to react to changes in the supply and demand for gas'[538] According to Scholz and Purps, who provide a comprehensive analysis in their survey,[539] this was not always the case. This was different when the long-term contracts were concluded, namely the era prior to the market liberalisation. Compared to coal and oil, natural gas is a relatively new fuel in large parts of Europe. The major development of sources and transport infrastructure started in the 60s, when gas producing countries (Netherlands, UK, Russia, Algeria, and Norway) faced significant investment for exploration and the construction of production facilities and transport infrastructure. At the same time, free markets for the trade of gas did not exist, as in most countries the whole supply chain was state-owned. Fully integrated suppliers delivered gas more or less exclusively via their own networks and did not compete with each other (other than by occasional pipe-to-pipe competition). Accordingly, a pricing method had to be found to ensure both the growth of a customer basis for the new fuel—natural gas—as well as a return on investment for the producers. The Dutch government came up with the method of linking oil prices to gas and most of the gas imported into continental Europe was subject to contracts based on the aforementioned principles[540] from the 1960s until at least the end of the 2000s. Today, market conditions have changed; prices are now set by gas-to-gas competition. Long-term contracts have lost market shares to procurement at hubs,[541] and new long-term contracts do not usually contain pure oil-links any more but rather a number of references, including to the hub prices. In today's environment, therefore, the adherence to historic price levels through the oil links in long-term contracts could be qualified as 'recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators'.[542] This

[537] Scholz, Purps, (n 534)
[538] Communication from the Commission Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report) {SEC(2006) 1724}, COM/2006/0851 final <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006DC0851> p. 9
[539] Scholz, Purps, (n 534)
[540] For a comprehensive analysis see *ibid*
[541] Institute of Energy for South-East Europe (IENE) 'IENE Completes Pioneering Study on Natural Gas Pricing Hub for SE Europe' <http://www.iene.eu/iene-completes-pioneering-study-on-natural-gas-pricing-hub-for-se-europe-p2348.html> (accessed 20 November 2018): Gas hubs are virtual or physical locations where buyers and sellers of gas can meet and exchange gas volumes. In other words, gas hubs are marketplaces for natural gas.
[542] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECLI:EU:C:1979:36, para 91

is largely the case in western and Eastern Europe, but not as much in eastern and even more, southeastern, where no such hubs exist. Regardless, according to the Commission's statement of objections, the strength of Gazprom's dominant position varied on each of the objections (which confirmed the above findings), being strongest in respect of territorial restrictions (under a) and, arguably, weakest in respect of unfair pricing policy (under c).[543] This dominance was calculated upon a) The distinct relevant product market for the *upstream* supply of gas, including its development and production;[544] b) The geographic market of each national one, since market conditions in different destination countries are still so different that the relevant geographic market would have to be defined on a country-by-country basis. For the time being, this approach seems convincing. Only if future technical, commercial, and regulatory developments lead to gas being freely transportable throughout the EU could one assume a single EU-wide market as envisaged by the Commission.[545] In line with Article 9 of Regulation 1/2003, in December 2016 Gazprom submitted its proposal for commitments which were rendered binding this year.[546] The commitments address all substantiated DG COMP concerns in respect of territorial restrictions, prices, and infrastructure. Commentators in 2017 expected a positive response to them during the market test – something that happened - and subsequently, the closure of the case with a settlement.[547] However, they did not rule out that some member states, specifically Poland, might attempt to derail such a settlement.[548] This was realised this year, Poland appealing to the CJEU against the said May 2018 decision. This development might mean that the case will drag on for several more years.[549]

[543] Commission, press release IP/15/4828 (22 April 2015) 'Antitrust: Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets' <http://europa.eu/rapid/press-release_IP-15-4828_en.htm> (accessed 20 November 2018);

[544] See Statoil/Hydro (Case COMP/M. 4545) Commission Decision of 3 May 2007, para. 9. The Commission in the past considered a range of distinct relevant product markets in the gas and oil value chain, including exploration, supply, transport, and storage of gas at the upstream level as well as trading and retail supply at the downstream level: Scholz, Purps, (n 534)

[545] Scholz, Purps, (n 534)

[546] Commission, press release IP/18/3921 (24 May 2018) 'Antitrust: Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets' <http://europa.eu/rapid/press-release_IP-18-3921_en.htm> (accessed 20 November 2018)

[547] Stern, Yafimava, (n 533)

[548] Ibid

[549] Euraktiv, 'Poland attacks EU's Gazprom deal in court' (17 October 2018) <https://www.euractiv.com/section/energy/news/poland-attacks-eus-gazprom-deal-in-court/> (accessed 20 November 2018)

1.4. Merger Control in the energy sector

1.4.1. The structure of EU merger control

Merger control is the third pillar of EU competition law, with the Commission playing the central role in the control of concentrations, deciding whether a merger notified in advance by the interested parties may be implemented, its judgment subject to judicial review by the General Court and the CJEU. The control is designed as *ex ante* control which 'shall primarily prevent merging undertakings from reinforcing or establishing a dominant position enabling them to exercise market power that could be harmful for the process of undisturbed competition.'[550] Since merger control is of a preventive nature its implementation may be solely based on predicting the future effects on competition in the relevant market resulting from the intended concentration. This approach requires a comparison between the potential 'post-merger' situation and the market situation were the merger not to be consummated.[551] Apart from goals related to competition policy, merger control may also pursue some public interest goals defined at the political level. In the past, States have implemented merger control as a tool of industrial policy, so as to block or support business projects, attempt to create national champions or to block takeovers of the existing, often at least partially State-owned, national dominant undertakings by foreign competitors or other investors.[552] For example, France supported a takeover of Suez (a formerly state-owned water and power company) by GD to avoid a possible takeover of Suez by the Italian electricity firm, ENEL.[553] Conversely, the Italian government enacted a law forbidding takeovers of privatised Italian electricity and gas industries by state-owned firms to prevent a takeover from the French state-owned firms,[554] and the Spanish government has taken steps, currently being challenged by the Commission, to prevent E.ON, a German energy company, from taking over Endesa, a Spanish energy firm.[555]

In essence the EU system of merger control is as follows: akin to State Aid schemes, mergers that have a Community dimension must be pre-notified to the Commission on behalf of the parties. Whether or not a merger has a Community dimension is determined by reference to the turnover of the undertakings concerned in a transaction (Articles 1 and 3 EUMR). Where a merger has a

[550] Lorenz, (n 341) 242
[551] Ibid 243
[552] Ibid
[553] Monti, (n 405) 305-306
[554] Case C-174/04 *Commission v. Italy*, [2006] ECLI:EU:C:2005:350; See para. 2 of AG Kokott's opinion [2006] ECLI:EU:C:2005:138, noting the Italian state's concerns about a takeover by French firms
[555] Commission, press release, IP/06/569 (3 May 2006) 'The Spanish law empowers the Spanish energy regulator to block mergers in these sectors' <http://europa.eu/rapid/press-release_IP-06-569_en.htm?locale=en> (accessed 20 November 2018)

Community dimension the Commission has sole jurisdiction in relation to it: this is the principle of 'one- stop merger control'.[556] From the moment a transaction is notified, the Commission generally has a total of 25 working days to decide whether to grant approval (Phase I) or to start an in-depth investigation (Phase II). Once the Commission has established its jurisdiction it has 'wide-ranging powers' under the EUMR, including the power to prohibit a merger in its entirety, although this is a rare occurrence as we shall see. However, and this, along with the *ex ante* application, is another similarity with 102 TFEU, there have been numerous occasions on which the Commission has authorised a merger only after the parties had offered commitments to remedy its competition concerns, which later become legally binding upon them.[557] EU merger control is governed by the EU Merger Regulation 139/2004 (EUMR).[558] The non-binding notices and guidelines[559] issued by the Commission summarise its approach and understanding of the EUMR. The Guidelines declare that horizontal mergers which involve the loss of direct competition in a market are more likely to cause concern than vertical ones.[560] They offer several factors to be taken into account in decisions. For horizontal mergers, they suggest the importance of market shares and degrees of concentration.[561] They highlight the role of barriers to entry legal, technical or due to the established position of firms.[562] The Guidelines offer a number of specific factors to be examined including whether: Merging firms have high market shares or are close competitors; Customers have limited possibilities of switching supplier; Competitors would be unlikely to increase supply if prices rise, especially due to capacity constraints; the merged entity would be able to hinder expansion by competitors. They also underline the significance of whether the merger would remove an important competitive force (including a recent entrant supplier expected to exert significant competitive pressure in the future), especially when the market is concentrated. Those factors strongly apply to the energy sector, especially during the first steps of the liberalisation process, in the cases of former

[556] Whish, Bailey, 7th (n 451) 829: *'However there are some circumstances in which the Commission might allow jurisdiction (wholly or in part) over a merger having a Community dimension to be ceded to one or more Member States; and in certain situations it is obliged to do this. There are also some circumstances in which Member States may transfer jurisdiction to the Commission over mergers that do not have a Community dimension.'*
[557] Ibid 830
[558] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), [2004] OJ L 24/ 1
[559] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] OJ C 31/5 (hereinafter: Horizontal Merger Guidelines); Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2008] OJ C 265/6 (hereinafter: Non-horizontal Guidelines); Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, [2008] OJ C 95/1 (hereinafter: Jurisdictional Notice)
[560] Non-horizontal Guidelines, para 11
[561] Horizontal Merger Guidelines, para 17
[562] Ibid, para 71

'national champion' suppliers, and of mergers with 'horizontal' elements as in the examples above, where the firms are actual or potential direct competitors.[563] Subsequently, it is no surprise that some of the larger merger cases the Commission has dealt with have come from the energy sector.

Nowadays, and in the context of the EU energy markets, there are many, more sophisticated reasons why mergers and acquisitions (M&A) have taken place in the electricity and gas sectors in recent years.[564] Firstly, a concentration may take place with the objective of creating a European or regional company active in more than one Member State and, indeed, the creation of cross-border suppliers is an underlying objective of the internal market.[565] There are less legitimate reasons though. For example, a conglomerate can act as an entry barrier for incumbents active in other MS in this sense: a dominant player in one State will acquire a small undertaking in a neighboring State, subsequently lowering prices in its market. This way the incumbent in the latter State is 'disciplined' and will not attempt similar actions, fearing retaliation. This way, incumbents across the EU have an interest in not competing with each other, creating a non-competitive oligopoly, something dangerous, given the inherent character of the newly opened energy markets and their national still, limits.[566] Jones[567] identifies 3 different types of M&A in the energy sector: Horizontal M&A between companies operating in the same product markets; Vertical mergers and acquisitions between companies operating at different levels within the same sector (e.g. a merger between an electricity generator/seller and a transmission/distribution company); And conglomerate mergers and acquisitions: where an electricity company merges with a gas company. Lastly, given the specific nature of gas and electricity markets, their inherent tendency to evolve towards oligopolistic structures makes the question of 'oligopolistic dominance' relevant.

1.4.2. Management of horizontal M&A: hints of a tolerant Commission policy

Taking into account the two main reasons M&A take place in the EU energy sector, we can explain why there have been relatively few mergers examined by the Commission within the same product market or sector and within the same national market, involving the ex-incumbent or incumbents. Most concentrations involving such companies have been cross-border acquisition,[568] and for this reason such M&A will largely be examined here. However, when a horizontal M&A is national in

[563] M Thatcher, *'European Commission merger control: combining competition and the creation of larger European firms'* (2014) European Journal of Political Research, 53 (3). pp. 443-464. <http://eprints.lse.ac.uk/54743/> DOI: 10.1111/1475-6765.12040
[564] Jones (390) 475
[565] Ibid; Thatcher, (n 563)
[566] Jones (n 390) 476
[567] Jones (n 390) 478

scope, the Commission is highly suspicious of it. In the cases where companies holding significant market shares of national relevant geographic markets have merged, clear competition issues were systematically identified.[569] This strict line was taken in *Exxon/Mobil* case.[570] Exxon owned significant interests in dominant firm on the Dutch gas market, as well as shares in two German gas companies which formed part of an oligopolistic dominant market structure. Thus, prior to the merger, Exxon enjoyed a sole dominant position in the Netherlands and a 'joint dominant position' in Germany. The acquisition of Mobil would strengthen these positions, as owned relatively small assets in both those companies. The Commission raised objections, but permitted the merger to proceed on the basis of remedies, in this case the divestiture of the gas business in question.[571]

It seems that the Commission carefully examines the state of the market of both the acquiring and the acquired company in order to conclude whether the transaction has anti-competitive effects. Largely, the Commission considers a horizontal M&A anticompetitive when the acquiring company has a dominant position in its 'own' geographical market.[572] In this approach, the Commission has added a 'de-minimis test'.[573] A 'de-minimis situation' occurs either because the acquired company is so small that it would not have a significant effect in competition terms or because the markets of the acquirer and target company are not sufficiently close in geographic terms to permit the threat of potential competition that is being eliminated to be considered to be sufficiently immediate.[574] One example of the "de-minimis" approach can be found in the *Enel/Slovenske Elektrarne* case (2005).[575] ENEL planned to acquire the principle producer and supplier of electricity in Slovakia, with 83% of national generation capacity, main supplier to the three regional electricity distribution companies and supplier to four larger industrial customers. However, because ENEL was not active either in Slovakia, or in any neighbouring country, the operation was cleared during the first phase.[576]

In the horizontal cases below, the Commission used competition law is a strategic industrial policy tool, in two ways: to set out its legislative intentions and anticipates the liberalisation of markets or

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[568] Ibid 493
[569] Ibid
[570] Commission Case No IV/M.1383 Exxon/Mobil of 29 September 1999 <http://ec.europa.eu/competition/mergers/cases/decisions/m1383_en.pdf> (accessed 20 November 2018)
[571] Jones (n 390) 497
[572] Ibid 503
[573] Ibid 514
[574] Ibid 511
[575]Case No COMP/M.3665 - ENEL / SLOVENSKE ELEKTRARNE of 26 April 2005 <http://ec.europa.eu/competition/mergers/cases/decisions/m3665_20050426_20310_en.pdf> (accessed 20 November 2018)

to supplement or correct SSR. In particular, the Commission devised extensive remedies in order to accelerate the liberalisation process the period right before the Sector Inquiry. In *VEBA/VIAG* the merger would have led to a dominant duopoly in the market for electricity via the interconnected grid in Germany. The parties agreed a range of structural remedies, which prevented the market being monopolised by two firms (the merged entity and RWE/VEW). However, in addition the merged entity also agreed to release some capacity on its electricity grid to facilitate exports of electricity from Scandinavia (where prices are low) into Germany.[577] The latter remedy seemed unnecessary to remove the competition problems caused by the merger, but is helpful in achieving the Community's wider objective of creating a single market for electricity, by facilitating cross-border trade, especially as interconnection capacity is scarce and limits cross-border trade.[578] In *EnBW/EDP/Cajastur/Hidrocantabrico*[579] the Commission considered the acquisition of Hidrocantabrico (a firm active in the supply of electricity in Spain) by a consortium composed of EnBW(active in the supply of electricity in Germany), EDP (the Portuguese electricity operator) and Cajastur (a bank). EnBW was jointly controlled by Electricite de France (EDF), the French electricity giant.[580] The Commission's sole concern was caused by EDF's connection with one of the acquiring firms. The Commission noted that the Spanish market for the generation and wholesale supply of electricity was a duopoly – Endesa and Iberola – and they enjoyed a position of collective dominance. The only potential competitor was EDF, which could transmit its electricity into Spain. However, after the merger EDF would lose the incentive to compete on the Spanish market because it would harm Hidrocantabrico's profits, which EDF had an interest in after the merger. The effect would be to strengthen the duopoly of Endesa and Iberola. The first point to note in this assessment is that while the merger strengthens the collectively dominant position of Endesa and Iberola, they are not parties to the merger.[581] The Commission's justification for applying the ECMR in this case is that it is similar to a merger that creates collective dominance, where the anticipated lessening of competition arises through tacit collusion among all firms, even those who are not party to the merger.[582] In an oligopoly the merged entity is one of the parties which is

[576] Jones (n 390) 514
[577] Case M.1673 VEBA/VIAG [2001] OJ L118/1 para. 247
[578] Monti, (n 405) 475
[579] Case M.2684 EnBW/EDP/Cajastur/Hidrocantabrico, 19 March 2002 <http://ec.europa.eu/competition/mergers/cases/decisions/m2684_en.pdf> (accessed 20 November 2018) paras. 57 and 58
[580] Commission, press release, IP/02/438 (19 March 2002) 'Commission clears with conditions joint control of Hidrocantábrico by EnBW, EDP and Cajastur' <http://europa.eu/rapid/press-release_IP-02-438_el.htm> (accessed 20 November 2018)
[581] Monti, (n 405) 475
[582] Case M.2684 EnBW/EDP/Cajastur/Hidrocantabrico, 19 March 2002, paras 311 et seq.

collectively dominant.[583] In this case, the merger strengthened the collective dominance of parties which did not participate to the merger. The Commission cleared the merger on the condition that additional interconnection capacity between France and Spain be built, thereby facilitating the emergence of a single market.[584] With increased interconnection, another electricity supplier (other than EDF) would be able to penetrate the Spanish market and modify the collective dominance of the duopoly.[585] According to Monti, in both cases the remedies go beyond that which is necessary to remove the anti-competitive effects caused by the merger. More generally, they turn the Commission into an industry regulator which uses its powers to improve the way markets work, however in a fragmented, *ad hoc* basis. A Commission policy in the electricity mergers can be detected, and will be elaborated further below. Mergers are used to accelerate the liberalisation of the market and the creation of the single market. This might seem paradoxical, because even today, central Europe is dominated by French, German and Italian firms, as a result of the Commision tolerating a number of M&A in the sector.

1.4.3. Management of vertical M&A and M&A across different sectors: hints of a stricter approach by the Commission

As with respect to horizontal mergers, vertical concentrations can be distinguished between those taking place between companies active on the same relevant geographic market and between those on neighbouring or more distant markets.[586] According to Jones[587] only with respect to the first category of vertical merger has the Commission shown any tendency to oppose concentrations, as in the case of horizontal M&A of this geographical scope, especially if they involve ex-incumbents which hold a sole or oligopolistic dominant position, since they are interpreted as a shift back to protectionism and policies supporting the creation of national champions.[588] This was the case for mergers as *Gaz de France/Suez*[589] and *Gas Natural/Endesa,* discussed in 1.4.1. briefly.[590] The

[583] Monti, (n 405) 476
[584] Commission, press release, IP/02/438 (19 March 2002) 'Commission clears with conditions joint control of Hidrocantábrico by EnBW, EDP and Cajastur' <http://europa.eu/rapid/press-release_IP-02-438_el.htm> (accessed 20 November 2018)
[585] Monti, (n 405) 476
[586] Jones (n 390) 513
[587] Ibid 518
[588] S Verde, *'Everybody merges with somebody—The wave of M&As in the energy industry and the EU merger policy'* Volume 36, Issue 3, March 2008, Pages 1125-1133 <https://doi.org/10.1016/j.enpol.2007.11.023> Available at <https://www.sciencedirect.com/science/article/pii/S0301421507005307?via%3Dihub> (accessed 20 November 2018)
[589] Commission, press release IP/06/1558 (14 November 2006) 'Mergers: Commission approves merger of Gaz de France and Suez, subject to conditions' < http://europa.eu/rapid/press-release_IP-06-1558_en.htm> (accessed 20 November 2018)
[590] Commission Case No COMP/M.3986 – Gas Natural/Endesa of 25 November 2005 <http://ec.europa.eu/competition/mergers/cases/decisions/m3986_15_2.pdf> (accessed 20 November 2018)

striking feature of these operations is the direct and active intervention of the State in order to facilitate the success of the deal, by issuing *ad-hoc* regulations, or by issuing legal dispositions able to frustrate the bid launched by foreign competitors. Of course, this behaviour is in contradiction with the original Treaty and the principle of free movement of capital,[591] and not surprisingly the European Commission opened several investigations on Spanish interventions to sustain Gaz de France's and Gas Natural's deals. However, recently, in September 2016, the Commission cleared the acquisition of another vertical acquisition, that of Vattenfall Europe Generation and Vattenfall Europe Mining by EPH and PPF Investments, which had been notified to the Commission in August 2016.[592] The Commission assessed the impact on competition in the markets for the excavation and supply of lignite, the supply of pulverised lignite in Germany, and generation and wholesale supply of electricity and could not detect any adverse effects on the market for the excavation and supply of lignite as the parties operated in different German regions. Concerning a potential ability to foreclose access to generation and wholesale supply of electricity, the Commission came to the conclusion that 'the merged entity would have neither the ability nor the incentive to deny customers access to supplies'.[593] It appears that the EU merger policy allows for competition only criteria. It is our view that efficiencies are taken into account to a lesser extent in EU Merger Control, compared to their importance in the other competition law pillars. That is, despite the fact that the energy sector raises far more social and industrial policy considerations that other sectors.

According to Jones,[594] there have been systematically reported cases which concerned efforts by a wholesale importer/generator to acquire regional or local distribution companies. The business reason behind such acquisitions might be that the overwhelming majority of customers – with the exception of large industrial customers – have traditionally been obliged to purchase from their local distributor, especially in the field of gas. A similar argument can be made with respect to

[591] Despite the fact that the Court of Justice had recognized the possibility of Member States invoking security reasons against divestiture of strategic assets in the Case C-503/99 *Commission vs. Belgium* [2002] ECLI:EU:C:2002:328 concerning two Belgian Royal decrees allowing the Belgian Ministry for energy to hold a golden share in Distrigaz and to impede management decisions or assets sales able to put into danger the security of national natural gas supplies. According to the ECJ the measure adopted by Belgium was proportionate to the risk and damage resulting from a shortness of natural gas supply; M Thatcher, 'European Commission merger control: combining competition and the creation of larger European firms' (2014) European Journal of Political Research, 53 (3). pp. 443-464. <http://eprints.lse.ac.uk/54743/> DOI: 10.1111/1475-6765.12040

[592] U Scholz, T Vohwinkel, 'The Application of EU Competition Law in the Energy Sector', Survey, Journal of Competition Law & Practice, Vol. 8 No. 3, 2017, 190-204

[593] Commission, press release IP-16-3161 (22 September 2016) 'Mergers: Commission clears acquisition of Vattenfall Europe Generation and Vattenfall Europe Mining by EPH and PPF Investments' <http://europa. eu/rapid/press-release_IP-16-3161_en.htm> (accessed 20 November 2018)

[594] Jones (n 390) 515-516

transmission. However, this question is rarely likely to arise.[595] Transmission grids in the EU are either already part of a vertically integrated company (and therefore not for sale) or have been subject to ownership unbundling requirements, most commonly assigned to a certified under the Third Package and supervised subsidy company. Nevertheless, a recently opened case concerned an in-depth investigation to assess whether the proposed acquisition of the Greek gas transmission system operator DESFA by the State Oil Company of Azerbaijan Republic (SOCAR), is in line with the EU Merger Regulation. SOCAR's activities include the production of natural gas and the upstream wholesale sale of gas in Greece in the context of the Southern Gas Corridor. DESFA owns and operates Greek's sole high-pressure gas transmission and Greece's only LNG terminal and mainly transports gas through its network. The Commission has concerns that the transaction may reduce competition on the upstream wholesale supply market for natural gas in Greece because it could allow the merged entity to hinder SOCAR's competitors in accessing the Greek gas transmission network. The Commission aims to ensure that the sale of DESFA, part of the Greek government privatisation programme with a view to modernise and liberalise the energy markets, does not result in competitive harm and ultimately higher gas prices for consumers in Greece.[596]

We will now turn to conglomerates across the electricity and gas sectors. According to Jones,[597] a dominant company has legitimate business reasons to acquire a company active in a different sector, say gas, since the venture would allow it to diversify, eliminate potential competitors and render it more powerful in future negotiations. In the mildest case, when two non-dominant firms merge in markets characterised by effective competition, the Commission is unlikely to raise objections. A possible exception to this may occur if the gas company in question is not dominant regarding sales, but owns essential infrastructure such as storage/import capacity,[598] or where rival electricity companies have long-term purchase contracts with the gas company in question. Where a merger takes place between a dominant firm and a non-dominant one, a reinforcement of that existing dominance will take place.[599] However, where real rivals exist to the acquired company, this reinforcement of dominance or impediment to effective competition is likely to be limited. After all, this way a dominant firm to prepare for regional or European-wide competition. The Commission

[595] Jones (n 390) 517

[596] Commission, press release, IP/14/1442 (5 November 2014) 'Mergers: Commission opens in-depth investigation into proposed acquisition of Greek gas transmission system operator DESFA by SOCAR' <http://europa.eu/rapid/press-release_IP-14-1442_en.htm> (accessed 20 November 2018)

[597] Jones, (n 390) 527-528

[598] Case No COMP/M.3868-DONG/Elsam/Energie E2 (14 March 2006 <http://ec.europa.eu/competition/mergers/cases/decisions/m3868_20060314_20600_en.pdf> (accessed 20 November 2018)

always seeks for this factor in its substantive judgments.[600] In contrast, a merger between two dominant firms is more than evidently anticompetitive.[601] Yet, only one reported case derogates. In *Tractebel/Distrigaz*,[602] Tractebel sought to acquire sole control of Distrigaz. Until then, Tractebel probably had joint control over Distrigaz, together with the Belgian State. Tractebel was (and remains) a subsidiary of Suez, the owner of Electrabel. There is no doubt that at the time of the merger both Electrabel and Distrigaz were dominant on the Belgian electricity and gas market respectively.[603] However, the decision – which approves the merger – simply notes that the companies are active in separate product markets and concludes that no significant reinforcement of dominance results. Although it appears that the passage from joint to sole control (rather than from no influence to sole control) was an important factor in reaching this conclusion, the argumentation in the decision is rather limited. It is submitted that this decision should not be viewed as a reliable precedent regarding the Commission's future approach.[604]

1.4.4. Assessment: M&A control as an accelerator for the creation of a single energy market

The above attempt to seek out patterns in the Commission's behaviour almost exclusively refers to the boom in merger cases reported in 2003-2006. Since then, contrary to the application of 102 TFEU and State Aid, merger cases arise somewhat sporadically and seem to focus in the oil, nuclear and fuels sectors. Due to this, it can be claimed that a concrete merger control policy has not formulated yet for the energy sector. Some authors in the Anglo-Saxon literature discern two policies in general EU merger control: a 'merger constraining policy' (sometimes called neo-liberal, although this term should be avoided due to its various connotations), the other 'integrationist'.[605] The 'merger constraining' policy would mean that 'the Commission is suspicious of mergers that risk increasing the market power of firms, especially if those firms already have such power. Hence the Commission would use its legal powers 'vigorously' against such mergers, including ones that create larger European firms.[606] On the other hand, an 'integrationist policy' involves greater acceptance of mergers that increase the market power of firms if they also enhance European

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[599] Jones, (n 390) 527
[600] Ibid 529-530
[601] Non-opposition to a notified concentration (Case COMP/M.1803 — Electrabel/Epon) OJ C 101/13
[602] Case M.493 of 1.09.1994 (Tractebel/Distrigaz) (February 2001)
<http://ec.europa.eu/competition/mergers/cases/decisions/m493_fr.pdf> (accessed 20 November 2018)
[603] Jones, (n 390) 531
[604] Ibid 533
[605] M Thatcher, *'European Commission merger control: combining competition and the creation of larger European firms'* (2014) European Journal of Political Research, 53 (3). pp. 443-464. <http://eprints.lse.ac.uk/54743/> DOI: 10.1111/1475-6765.12040
[606] Ibid

integration. It would expect limited use of Commission powers to investigate, condition or prohibit mergers, especially cross-border ones that deepen integration. Neither policy is absolute, a merger constraining policy would not mean that every merger is investigated or prohibited nor would an integrationist policy expect all mergers to be approved unconditionally.[607] As implied in the introduction, the Commission tends to clear energy mergers, leading someone to believe that the 'integrationist' view prevails. However, key features of the energy sector include high shares of domestic markets held by former 'national champion' firms, entry barriers (legal, economic and political), and a limited number of actual or potential competitors.[608] On the other hand, we also see that the Commission has unconditionally approved several acquisitions by 'national champions' of overseas firms who were actual or potential competitors in their domestic market and/or in other EU markets.[609] For instance, it unconditionally approved several mergers by incumbents with overseas suppliers who were potential future competitors- for instance, between the Portuguese electricity incumbent EDP and a Spanish electricity generator,[610] or the vertically-integrated french incumbent EDF buying UK electricity companies.[611] These firms were likely candidates for the desired creation of a 'pan-European' energy market since they are well-situated to operate abroad and compete with important third country rivals.[612] At the same time, the bell tolls for them as they fulfil the criteria the 2004 and 2008 Guidelines warn about. Nevertheless, the Commission is much less tolerant when it comes to domestic mergers, as seen above, with such cases usually ending up in Phase II (investigation) or even, commitments. Many resulted in the elimination of an actual or likely potential competitor in the national champion's home market, which according to the Commission Guidelines is likely to pose problems for approval. Thus for instance, in energy, conditional approval was given for mergers by French gas incumbent Gaz de France with Suez, and the German firms VEBA and VIAG.[613] However, there was only one total prohibition, the most stringent measure under the EUMR.[614] When it comes to the criteria used, as it can detected from the oldest

[607] Ibid
[608] Ibid
[609] Ibid
[610] Commission Case M.3448 - EDP-Hidroelectrica del Cantabrico (9 September 2004) <http://ec.europa.eu/competition/mergers/cases/decisions/m3448_en.pdf> (accessed 20 November 2018)
[611] Commission cases 'London Electricity' Case M.1346 (27 January 1999) <http://ec.europa.eu/competition/mergers/cases/decisions/m1346_19990127_240_en.pdf> (accessed 20 November 2018); 'South West Electricity Board' Case M.1606 (19 July 1999) <http://ec.europa.eu/competition/mergers/cases/decisions/m1606_en.pdf> (accessed 20 November 2018) 'Seeboard' Case M.2890 (25 July 2002) <http://ec.europa.eu/competition/mergers/cases/decisions/m2890_en.pdf> (accessed 20 November 2018)
[612] Verde, (n 588)
[613] See above 1.4.2.
[614] Thatcher, (n 605)

and latest Commission Press Releases and decisions, it primarily looks for the resulting market shares. Because the 'relevant markets' are often still defined as national, cross-border mergers often have limited effects on market shares. Secondly, it observes whether there are adequate rivals left in the relevant market. Loss of an existing or potential competitor to a dominant supplier is the most frequent reason the Commission gives for not giving unconditional approval and requiring conditions (commitments) instead. Commitments often open domestic markets to greater competition. In the field of energy, they are primarily 'structural', such as divestiture of assets or reduction of restrictions on new competition, notably involving access to network infrastructure. Incumbent firms sell off capacity which can allow entry by new suppliers.[615] Hence the Commission has been able to both approve the mergers and also use the conditions to further open national markets to competition, thereby complementing Commission policies of ending national monopolies, and also offering opportunities for overseas entry and hence greater European integration.[616] Indeed, the Commission and merging firms have been able to cooperate in agreeing conditions that further integration, as suggested by the integrationist view, al while solely applying strictly legal competition criteria laid down in the EUMR substantive law. It can be questioned whether the Commission follows this 'integrationist' view because so far, the majority of the mergers have been about European companies and not third country ones. A glance at the enforcement practice since 2012 reveals that this cannot be concluded without caveats. It approved the acquisition of German and Dutch gas supply and storage joint ventures by Gazprom,[617] withdrew an investigation in the acquisition of DESFA by Azeri Socar, as seen above, cleared the acquisition of TNK-BP by Rosneft,[618] cleared the Angolan liquefied natural gas joint venture by BP, Chevron, ENI, Sonangol and Total,[619] approved acquisition of electrical components and connectors manufacturer Thomas & Betts (US) by ABB (Swiss),[620] and lastly, also clears acquisition of joint

[615] Such as the auctioning of gas capacity in the Dong/ Elsam/ Energie E2 Case, or part of the sale of some of Suez's businesses in France and Belgium in the GDF/Suez case, both seen above. See also Case M.1673 VEBA/VIAG [2001] OJ L118/1 as above.

[616] Thatcher, (n 605)

[617] Commission, press release IP/13/1207 (4 December 2013) 'Mergers: Commission approves acquisition of German and Dutch gas supply and storage joint ventures by Gazprom' <http://europa.eu/rapid/press-release_IP-13-1207_en.htm> (accessed 20 November 2018)

[618] Commission, press release, IP/12/214 (8 March 2013) 'Mergers: Commission clears acquisition of TNK-BP by Rosneft' <http://europa.eu/rapid/press-release_IP-13-214_en.htm> (accessed 20 November 2018)

[619] Commission, press release, IP/12/487 (16 May 2012) 'Mergers: Commission clears Angolan liquefied natural gas joint venture by BP, Chevron, Eni, Sonangol and Total' <http://europa.eu/rapid/press-release_IP-12-487_en.htm?locale=en> (accessed 20 November 2018)

[620] Commission, press release, IP/12/47 3(11 May 2012) 'Mergers: Commission approves acquisition of electrical components and connectors manufacturer Thomas & Betts by ABB' <http://europa.eu/rapid/press-release_IP-12-473_en.htm?locale=en> (accessed 20 November 2018)

control of Maxam by US based, Advent.[621] Not a single investigative, let alone prohibitive decision was issued. To confirm the above observations, the situation since 2012 and at the same time period is not different for mergers involving EU based and EU active companies. To sum up, 'far from following a policy of constraining mergers through vigorous use of its extensive legal powers, the Commission has both applied competition criteria and allowed large European firms to expand through mergers.'[622]

1.5. Findings on Part Two

The energy Sector Inquiry initiated by the Commission in 2007 was significant because it defined and made more coherent, the application of EU competition law to the energy markets.[623] It also informed the Commission of the existing challenges in the industry and enabled conscious and strategic application of EU competition law to the energy sector, and still constitutes a valuable source of knowledge about the shortcomings of the sector. The mounting of the Inquiry itself demonstrates the Commission's increased willingness to intensify the application of competition rules, as opposed to sector specific regulation. In fact, the Commission enforcement practice so far - at least in the non-exhaustive manner in which it is presented here - seems to respond to the main groups findings of the Sector Inquiry.

One could distinguish three periods of enforcement of competition rules against undertakings in the energy sector.[624] In the first phase, generally from the late 1990s up to 2005, the Commission mainly focused on markets sharing agreements, with destination clauses and other territorial restrictions, and long-term supply contracts producing foreclosure effects, both in the application of 101 and 102 TFEU. It seemed that there were 'hardcore' problems which needed to be tackled for the markets to have room to mature. In the second phase, largely until 2013, the Commission dealt with more complex issues. Following the RWE[625] and E.ON[626] cases,[627] EU antitrust enforcement was increasingly concerned with more technical issues, equally addressed in sector-specific regulation, in particular infringements linked to national networks, cross-border infrastructure, and price

[621] Commission, press release, IP/12/100 (7 February 2012) 'Mergers: Commission clears acquisition of joint control of Maxam by Advent and a group of individuals' <http://europa.eu/rapid/press-release_IP-12-100_en.htm> (accessed 20 November 2018)
[622] Thatcher, (n 605)
[623] Talus, (n 350) 84
[624] L Hancher, A D Hauteclocque, M Sadowska, *Capacity Mechanisms in the EU Energy Market-Law, Policy, and Economics* (Oxford University Press, 2015) 184
[625] Commission Case COMP/39.402 'RWE gas foreclosure' Commission Decision of 18 March 2009 [2009] OJ C133/8
[626] German electricity wholesale market (Case COMP 30.388) and German electricity balancing market (Case 39.389) Commission decision of 26 November 2008 [2009] OJ C36/8
[627] *Infra* 1.3.1.

manipulation on the wholesale and balancing markets. Both the Sector Inquiry and the regulatory measures stipulated in the Third Package acknowledge that the access to electricity and gas networks on transparent and non-discriminatory conditions is indispensable for entering the downstream energy supply markets and, as a consequence, to open up European electricity and gas markets.[628]

Interestingly, these complex cases were settled by means of 'regulatory-like' remedies. In the *RWE* foreclosure case the Commission was opposed to a case of discriminatory access to the network for competitors. The remedies introduced aimed at substituting the inefficient TPA regime in the German gas transmission system. In the major similar, subsequent cases, the Commission went a step further to demand that dominant companies examine demand more effectively.[629] As explained under 1.3., the Commission's approach in this group of cases goes far beyond the established case law on the 'essential facilities doctrine.' In the *E.ON*[630] and *GDF*[631] foreclosure cases, the Commission stated that a dominant essential facility holder is under the obligation to take 'all possible measures' to remove the constraints imposed by lack of capacity, be it releasing capacity it was using for itself by limiting the duration and volume of its own bookings or expanding its capacities. Instead of limiting the application to access refusals, which was the traditional scope of the doctrine under 102 TFEU, the Commission has gone much further by demanding capacity expansions or the construction of new capacity,[632] i.e. specific obligations for investment in intense infrastructure which will facilitate the access of new-coming players to the facility, under the concept of 'strategic underinvestment'. While the traditional application of the essential facility doctrine has been limited to requiring access, the Commission's practice in the energy sector includes investment in critical sections of the supply chain. In this respect, the essential facilities doctrine is employed to engineer new and - potentially - more efficient market structures which could not be achieved through sector-specific regulation. However, the creation of administratively-designed markets effectively means that the regulator is making certain assumptions as to the most effective design for natural gas markets.[633] In examining this approach to the 'essential facilities' doctrine, we concluded that it is debatable under EU law. We can deduce, firstly, that transportation capacity plays a central role for the creation and maintenance of a functional natural gas market.

[628] Scholz, Purps, (n 436)
[629] ENI foreclosure (Case COMP 39.315) 2010
[630] German electricity wholesale market (Case COMP 30.388) and German electricity balancing market (Case 39.389) Commission decision of 26 November 2008 [2009] OJ C36/8
[631] Commission Case COMP 39.316 'GDF foreclosure' (2009)
[632] Talus, (n 350) 262

This is also illustrated in the detailed, technical sector specific rules on TPA principle, which is of utmost importance in the energy legislation as confirmed by the Court in *citiworks*[634] and constitutes the backbone of the Union's effort to create competitive energy markets. We also notice that the Commission is eager to create the necessary pre-conditions for such a competitive gas market structure to emerge, since gas markets have been lagging behind electricity ones, despite the similar EU regulation. However, the spirit of the SSR might be different: as we saw under Part One, 1.3.2.1., Article 46 of the Gas Directive rules that lack of necessary capacity as a potentially valid reason for a network operator to refuse third party access. In addition, access to the gas transportation network can be refused on the basis of serious economic and financial difficulties with a take-or-pay contract (Art. 12).

In the *Swedish Interconnectors* case,[635] the Commission went as far as classifying congestion shifting by the Swedish TSO as an abuse of a dominant position, and required the TSO to split the market into price zones, thereby changing the whole market design. By the third phase, the intensity of EU antitrust enforcement has lessened considerably due, in part, to the greater involvement of the national competition authorities (NCAs).[636] The Commission and NCAs coordinate within the European Competition Network. The Commission now tends to focus on the most complex issues with a significant EU impact, such as power exchanges,[637] and more 'politically charged' cases, such as the only very recently settled *Gazprom* case,[638] which, as the other cases of this category currently examined by the Commission, focus on territorial restrictions.

We also notice the prevalence of commitment decisions, particularly in relation to the proceedings under Art. 102 TFEU. Those decisions can serve in curing suspected infringements, avoiding lengthy judicial proceedings that can harm the undertaking's reputation on the market. For this reason, firms often prefer them. On the other hand, there is the risk that the Commission will use its bargaining power to reach goals which are beyond its mandate to enforce EU competition law.[639] A

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[633] Scholz, Purps, (n 436)
[634] Case C–439/06 *citiworks AG v Flughafen Leipzig/Halle GmbH and Bundesnetzagentur* [2008] ECLI:EU:C:2008
[635] Svenska Kraftnat (Case COMP 39.351) Commission Decision of 14 April 2010 [2010] OJ C 142/28
[636] Scholz, Purps, (n 534) and subsequent annual publications
[637] Power Exchanges (Case AT/39.952) Commission Decision of 5 March 2014 [2014] OJ C 334/5; see 1.2.2.
[638] Commission, press release IP/18/3921 (24 May 2018) 'Antitrust: Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets' <http://europa.eu/rapid/press-release_IP-18-3921_en.htm> (accessed 20 November 2018)
[639] Scholz, Purps, (n 436)

clear example could be derived from the *Gazprom/ENI* 2003[640] agreement case, discussed under 1.2.2. The Commission had imposed 'non contractual' commitments which were not relevant to the market sharing effect of the agreement, but rather to the state of the Italian market at that time.

In the field of mergers, we notice that the Commission is much 'stricter' towards horizontal mergers, compared to vertical M&A. It is also more tolerant of cross-border transactions, horizontal or vertical, which might have a positive effect in the creation of a 'pan-European market,' even if it concerns very dominant undertakings, known as 'national champions.' M&A is very rarely blocked, the Commission preferring commitment decisions. In its assessment, it primarily looks for the resulting market shares. Because the 'relevant markets' are often still defined as national, cross-border mergers often have limited effects on market shares. Secondly, it observes whether there are adequate rivals left in the relevant market. The loss of an existing or potential competitor to a dominant supplier is the most frequent reason the Commission gives for not giving its unconditional approval.

[640] Commission, press release IP/03/1345 (6 October 2003), 'Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses', <http://europa.eu/rapid/press-release_IP-03-1345_en.pdf> (accessed 20 November 2018)

Conclusion

In Part One, we saw that from the 1980s and onwards, states have been relinquishing control in a number of economic sectors that had been under their ownership since at least the post-war era, including energy, stifled by a shift in the perception of the State and its role, towards a 'market-oriented approach to the delivery of public goods and services.' The State is no longer a providing one, but a 'regulatory one'. The energy sector was thus firstly *privatised,* then *liberalised (*or *de-regulated),* new entrants were allowed in the competitive segments of the industry: generation of electricity, import of gas, supply and sale of both. The segments linked to the network constitute a natural monopoly. All those segments, especially the monopolistic ones, including the former holder of exclusive monopoly rights are severely *(re)regulated* by independent bodies such as the national authorities, which carry out regulatory tasks in the public interest.[641] Those developments were largely thanks to the Court providing a legal basis to challenge anticompetitive state regulation, which allowed the Commission and Council to legislate to open markets to competition. The Court's case law contributes to the construction of markets by facilitating positive integration, offering incentive justification for legislation which authorises competitors to enter the market, or by achieving negative integration rulings that declare the denial of market access by national laws unlawful. We will not judge whether this policy choice was correct; it now seems generally accepted that 'liberalisation was the appropriate way forward for the energy sector.'

Embracing a free-market model in the energy sector does not mean that the public authorities - be it Member States or the EU - abstain entirely from market intervention. The opposite is true: The unique characteristics of the energy industries call for both 'economic regulation', which responds to the monopolistic tendencies of the industry, and for 'social regulation', which seeks to alleviate the security of supply, environmental and consumer protection concerns. The EU sector-specific economic regulation does both, applied in parallel and often overlapping in substance with competition law,[642] as in the case of TPA and unbundling obligations for the vertically integrated incumbent firms. The EU regulatory framework, through which the EU intervenes in the operation of the market so as to remedy market failures or defects, grows in volume and complexity, leaving less room for the application of primary law, and in particular competition rules. From an institutional perspective, the Commission on a 'federal' level enforces competition law, imposing a

[641] G Monti, *EC Competition Law* (Cambridge University Press, 2007) 446
[642] N Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* (Cambridge University Press, 2015) 14, 34

series of competition-focused proscriptions on the behaviour of market actors[643] while taking into account the specific characteristics of the energy sector and the regulatory goals. Simultaneously, EU sector specific regulation, by means of directives, regulations, network codes, and a variety of soft law instruments, intervenes directly into the market to address competition problems. In our view, this system does not eliminate the public intervention from the energy market, as in the mantra 'more market, less state', but essentially replaces the State regulation and intervention with an EU one. Both the former State intervention and the current EU one accumulate the same characteristics: i) the central role of the public authority; (ii) the coercive or directive nature of regulation (iii) its positive nature, placing specific obligations on regulated parties, rather than merely proscribing certain conduct; (iv) the sector-specific nature of regulatory rules; and (v) the use of regulation to correct markets in difficulty, meaning deliberate intervention in and derogation from the free market.[644] It has been argued that the detailed, complex and far reaching EU regulation, particularly when it comes to TPA and unbundling, might contravene 345 TFEU or that 114 TFEU is not the correct legal basis for such measures. However, the Court has repeatedly stated that the European legislator has broad discretionary power in situations which require the evaluation of a complex economic situation.

Regardless, Member States still retain discretion and autonomy to a considerable extent. We probably cannot make a *prima facie* case for public policy considerations to constitute a comprehensive system of derogations from the competition law principles when art. 101(3) TFEU is applied, or in State Aid control. However, one should notice that such issues arise more often and in a more compelling manner in the energy sector, albeit they are still considered without a clear and consistent methodology by the Commission. By public interest considerations we refer to mostly non-economic values, such as consumer welfare or 'technical or economic progress, as in the wording of 101(3), environmental concerns, security of supply, industrial policy, public health. The Commission has set out the following vision of the relationship between competition law and other EU policies: 'This link between Community objectives and competition policy is a two-way process. It is inconceivable that competition policy could be applied without reference to the priorities fixed by the Community. But it is also important to realise how an effective competition policy will help to attain these goals.'[645] In this perspective, the relationship between competition

[643] Ibid 14
[644] Ibid 40
[645] Twenty first Report on Competition Policy Twenty-first Report on Competition Policy (1991) p. 13, retrieved from G Monti, *EC Competition Law* (Cambridge University Press, 2007) 90

law and other Union objectives is reciprocal: on the one hand, competition helps achieve other Community goals, while on the other, competition policy can be applied by direct reference to other Community goals.[646] Even if in certain occasions the commitment to a purely efficiency-based interpretation prevails,[647] the Treaty itself compels the infusion of certain public policy considerations through the inclusion in the Treaty of 'cross-sectional' or 'horizontal' clauses, such as 14 TFEU.[648] Generally though, MS have managed to retain their freedom at determining such worries, primarily by means of the public service obligation (PSO) regime, as examined in various chapters. The Union has provided a variety of responses to accommodate public services and competition. Accordingly, there are instances where an exemption from competition law obligations is granted, provided public services are offered in an efficient manner [by applying Article 106(2) EU] by defining public service obligations as a matter of Community law, and then assuming that competitive markets are the best way to ensure citizens' rights.[649] This last approach permeates the sector specific legislation regarding PSOs. Competitive markets provide the best means for delivering public services and consumers are well placed to attack deficient public service delivery by choosing among other providers. The trend in EU legislation is to apply non-market solutions only when the market fails to protect the general interest.[650] Other derogations produce less of an impact, such as the exception of small companies from unbundling (Art. 26 in both Directives) and the exception for 'emerging and isolated markets' (Art 49). Those exceptions are bound to disappear from the framework when the Clean Energy Package[651] will be adopted. The exception for new infrastructure (Article 17 of the Electricity Regulation 714/2009 and Article 36 of the Gas Directive), however, is inspired by the everlasting considerations of security of supply and the internal market. State intervention is generally regarded as a threat to the single energy market, especially because of the diversity of state aid rules to the energy sector, which is considered responsible for the taxes, levies, and regulated costs already make up more than 60 per cent of the final electricity bill for consumers in half of the Member States.[652] The Clean Energy for All Europeans package is particularly hostile against them. The new legislation will also force MS to

[646] Monti, (n 641) 90
[647] See Part Two 1.1.
[648] Articles 7-17 TFEU
[649] Monti (n 641) 495
[650] Ibid 494
[651] Communication from the Commission, 'Clean Energy for All Europeans', COM/2016/0860 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1512481277484&uri=CELEX:52016DC0860> (accessed 20 November 2018)
[652] Commission, Staff Working Document (2012) 368 final, Part 2, Figure 33; U Scholz, S Purps, 'The Application of EU Competition Law in the Energy Sector' Journal of European Competition Law & Practice, Volume 5, Issue 2, 1 February 2014, Pages 100–112

open their renewable energy support and capacity schemes to those of other MS. Stimulating increased cross-border participation in national support schemes is controversial – taxpayers may be reluctant to fund projects in another Member State, while convincing Member States to rely on surplus capacity availability in neighbouring Member States who may also in turn face shortages may prove difficult.[653] In any case, we believe that Member State decision-making and action should not be dismissed, even at a time when government action of any kind is inherently suspect: the EU and Member State levels 'need each other to construct the internal market as a problem-solving institution that is responsive even to purely local problems and policy objectives and that is a coping mechanism for protecting normative commitments in the face of broader socio-economic transformations.'[654]

In the introduction to Part Two, we generally assumed that the enforcement of EU competition law is based on an economic approach, focused in the creation of an internal market as defined in EU law, applying strict legal and economic criteria. However, the view that competition law does not exist in isolation, is very much proved in the Commission's practice in the field of energy. It accelerated and became coherent following the 2007-2009 Sector Inquiry at a critical time for the Union, when the *Treaty Establishing a Constitution for Europe* failed and the Lisbon Treaty was being prepared. Since then, we argue that it is applied often in a way that not only complements and fills-in the gaps of the specific energy legislation, but aims to 'remedy supposed shortcomings in the process of liberalisation of energy markets by means of competition law, even if legislative steps would be more adequate measures.'[655] In this process, it takes into account energy-specific considerations such as the creation and enhancement of the internal energy market (the permanent goal since the liberalisation commenced), security of supply, public and universal service issues, environmental concerns, tackling the dependence of the EU to suppliers from the third-countries, lack of investment in vital infrastructure, the natural monopoly characteristics of certain segments of the market and finally, the increased tendencies for market failures and oligopolistic dominance,

[653] L Hancher, B M Winters, '*The EU Winter Package Briefing Paper'*, February 2017, Allen & Overy LLP 2017 <http://fsr.eui.eu/wp-content/uploads/The-EU-Winter-Package.pdf> (accessed 20 November 2018): *'Article 5 new RED introduces the mandatory opening of national support schemes to RES installations located in other Member States even if this is only on a gradual basis. At least 10% of newly supported capacity must be opened up annually between 2021 and 2025, and at least 15% for the period 2026 to 2030. It is up to the individual Member State to decide on the mechanics of opening its schemes up to cross-border participation. The allocation of RES benefiting from different national contributions shall be the subject of a co-operation agreement on the cross-border disbursement of funding.'*

[654] Y Svetiev 'The EU's Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?' European Law Journal, Vol. 22, No. 5, September 2016, 659–680

[655] U Scholz, S Purps, 'The Application of EU Competition Law in the Energy Sector', *Journal of European Competition Law & Practice*, Volume 1, Issue 1, 1 January 2010, 37–51, 51

particularly in the field of M&A, to name some.[656] All those objectives, summarised as 'competitiveness, security of supply, and sustainability'[657] do not always 'pull in the same direction.'[658]

For instance, we observed, primarily under the examination of the application of 102 TFEU and merger control, that the commitment decisions constitute the majority of the Commission's decisions, exceeding the number of fines. This procedure allows the Commission to negotiate liberalization outcomes directly with the incumbent, without going through national regulatory authorities and Member States.[659] Those decisions impose structural or behavioural remedies to the undertakings concerned, subsequently affecting the market structure and design. There is a general concern that the Commission may use the tool of Art. 9 Reg. 1/2003[660] to impose commitments that go beyond remedies which could have been imposed under Art. 7 Reg. 1/2003,[661] before and without a formal finding of infringement. Those remedies may 'not just designed to remedy a specific infringement of EU competition rules but rather to restructure markets according to its own competition goals and regulatory strategies. Competition law enforcement would thus be the backup solution for legislative measures which can only be put in effect after lengthy and often

[656] Adrien De Hauteclocque, Market Building through Antitrust: Long-term Contract Regulation in EU Electricity Markets (Cheltenham: Edward Elgar, 2013) 2: 'Economic analysis suggests that antitrust enforcement is complex and requires a careful consideration of the market context in which the practices examined occur. This is even more complicated when short- and long-term efficiency criteria conflict, such as entry and investment, or when efficiency criteria must be weighed with non-economic goals, a likely occurrence in both cases in decentralized electricity markets'

[657] Communication from the Commission Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report) {SEC (2006) 1724}, COM/2006/0851 final <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006DC0851> p. 9

[658] W Sauter, 'Coherence in EU Competition Law' (Oxford University Press, 2016) 236

[659] L Hancher, A D Hauteclocque, M Sadowska, *Capacity Mechanisms in the EU Energy Market-Law, Policy, and Economics* (Oxford University Press, 2015) 184

[660] Article 9 ('Commitments') of Regulation 1/2003 reads: 1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission. 2. The Commission may, upon request or on its own initiative, reopen the proceedings: (a) where there has been a material change in any of the facts on which the decision was based; (b) where the undertakings concerned act contrary to their commitments; or (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

[661] Article 7 ('Finding and termination of infringement') reads: 1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past. 2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

controversial political debate.'[662] Issues regarding the procedural rights of the parties are raised, since the conditions are voluntarily suggested by the parties and made binding by the Commission. In this case, it is unlikely that disproportionate decisions will be judicially reviewed. The GC had held in *Alrosa*[663] that the Commission is obliged to 'observe fundamental due process requirements in the commitment Decision procedure.' Unfortunately, the CJEU overturned[664] the judgement, something that might be alarming for the future practice. It is also worth noticing that in the early years of enforcement, the Commission used competition law to achieve ownership full ownership unbundling of electricity and gas networks/pipelines in Germany, Austria, and Switzerland, in the cases discussed under 1.3.1. of Part Two, 'after failing to gain political support for this idea.'[665] In any case, the role of the Commission in the promotion of competition in the liberalized energy markets has evolved over time, increasingly resorted to 'quasi-regulatory' measures. Sometimes its tendencies lack transparency and raise legitimacy and suitability questions. To generalize, the application of competition law has supported the enforcement of the objectives of sector- specific energy regulation and allowed for much deeper regulation of the field than sector- specific regulation alone could have achieved.

In the context of the Commission currently focusing on territorial restrictions and the linkage of gas prices to those of oil as potential infringements of 102 TFEU, the action against territorial restrictions in the *Gazprom* case[666] allows for some interesting observations. It is undoubtedly inspired by the Union's strategy to ensure security of supply[667] by allowing, free, bi-directional flow of gas between Russia and the West and diversifying the EU's sources of gas, as the Commissioner noted. Both goals are hostile to Gazprom's dominant position in almost all national MS markets. In addition, aiming at shifting price negotiations to the benefit of European buyers, it attacks Gazprom's fixation with the 'old-fashioned' pricing methods of oil indexation, despite the existence of price hubs. The transition to a hub-based pricing mechanism is considered by many as a key to

[662] Scholz, Purps, (n 655)
[663] Case T-170/06 *Commission of the European Communities v Alrosa Company Ltd*. [2007] ECLI:EU:T:2007:220
[664] Ibid
[665] German Electricity Wholesale Market (Case COMP/39.388) and German Electricity Balancing Market (Case COMP/39.389) Commission Decision of 26 November 2008 [2009] OJ C 36/8; RWE gas foreclosure (Case COMP/39.402) Commission Decision of 18 March 2009 [2009] OJ C 133/10; ENI (Case COMP/39.315) Commission Decision of 28 September 2010 [2010] OJ C 352/8; U Scholz, S Purps, 'The Application of EU Competition Law in the Energy Sector', Journal of European Competition Law & Practice, 2013, Vol. 4, No. 1, 63-82
[666] Commission, press release IP/18/3921 (24 May 2018) 'Antitrust: Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets' <http://europa.eu/rapid/press-release_IP-18-3921_en.htm> (accessed 20 November 2018)
[667] Council Regulation (EU) 994/2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC [2010] OJ L295/1, recital 7

EU's energy dependence problem[668] and contributes in basing prices on supply and demand dynamics for gas, rather than for oil, making the market more flexible and liquid. The commitment of the Commission to attack this pricing method might also explain its interest in energy marketplaces, as in the *Nordpool* case, since power exchanges can also serve as hubs for the negotiation of gas prices, facilitating the transition envisaged by the Union for a more market-based pricing of gas, away from 'historical' problematic clauses in long-term agreements, which do not reflect the current state of the market. Eastern and southeastern Europe has been lagging behind in creating hubs, facilitating the Gazprom invasion. According to IENE,[669] the region is now starting to warm up to the prospect of a liquid market where long-term contracts and 'spot' or short-term trading, which is linked to the use of hubs, are combined. The Hellenic Energy Exchange is expected to play an important part in this effort, incorporating gas hubs in Thessaloniki and Athens.

Although the Commission reassures us that the *Gazprom* case is purely administrative, one cannot but notice that the alleged abuses fitted nicely with the Union's political agenda. However, effective competition in Central and Eastern European gas markets does not only depend on the enforcement of EU competition rules but also on investment in gas supply diversification, well-targeted European and national energy legislation and their proper implementation. This is why it is a key priority of the Commission to build a European Energy Union, as discussed in Part One. It seems that the Gazprom case, as well as the other similar investigations of the 'third period' are not a secondary one, but 'the main weapon to frogmarch companies into line with the broader political agenda', in our case, the Juncker Commission Energy Union.[670] The further unfolding of the Gazprom saga promises to provide for interesting discussions at the European level. Similar concerns are addressed in the newly opened investigation against Qatar Petroleum.[671] Although the Commission's application of EU law in the energy field is efficient and targeted, it raises some concerns. Can energy markets created via administrative processes be efficient in the long term? Does the Commission's Directorate- General for competition have the necessary expertise to create functioning energy markets?[672]

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[668] Institute of Energy for South-East Europe (IENE) 'IENE Completes Pioneering Study on Natural Gas Pricing Hub for SE Europe' <http://www.iene.eu/iene-completes-pioneering-study-on-natural-gas-pricing-hub-for-se-europe-p2348.html> (accessed 20 November 2018)

[669] Ibid

[670] Politico, 'The Myth of EU's apolitical competition rule book' <https://www.politico.eu/article/competitive-edge-the-myth-of-the-eu-apolitical-competition-rule-book/> (accessed 20 November 2018)

[671] Commission, press release IP/18/4239 (21 June 2018) 'Antitrust: Commission opens investigation into restrictions to the free flow of gas sold by Qatar Petroleum in Europe' <http://europa.eu/rapid/press-release_IP-18-4239_en.htm> (accessed 20 November 2018)

[672] K Talus, *Introduction to EU Energy Law* (Oxford University Press, 2016) 84

EU antitrust laws apply to all aspects of the energy sector, as confirmed by the CJEU in the 1964 *Costa v Enel* case.[673] General competition law is Treaty, primary law. This means that, in the hierarchy of norms, it will prevail over secondary legislation, such as the internal electricity and gas market Directives adopted by the Council and the European Parliament in the energy field. Although complemented by other secondary law instruments, those directives require MS to install regulatory authorities that shall, inter alia, be responsible for ensuring effective competition in the energy markets through a system of *ex ante* control, articles 101 et seq. will continue to apply alongside the sector specific measures taken by these regulators. 'In other words, a refusal to give access to a certain infrastructure or the application of non-authorized tariffs may not only be an issue under national rules for the implementation of the two Directives, but also under Article 102 TFEU.' as we saw in Part Two 1.3.1. This was confirmed in *Deutsche Telekom:*[674] although the EU electricity and gas market is regulated through SSR, the general EC competition law can be applied to this market as well. The general competition laws are applied to the energy sector in a complementary fashion. Sector specific regulation will, to a certain extent, condition the application of general EU competition law, but the competence to apply EU competition law into the electricity market rests with the Commission.[675] The energy regulation and the competition rules are relevant and contain similar assessments, although this does not make them merge: They remain autonomous instruments, enforced by separate bodies. However, there is an institutional and substantive overlap between the competition authorities (NCAs and the Commission) and national regulators. The Commission has exploited this, applying the competition rules with derogations from the established principles and case law, especially in the application of 102 TFEU and M&A control. For example, it has amplified the essential-facilities doctrine, changed the perceptions around long-term transportation clauses and attacked destination clauses. Imposing a duty not only to cooperate with competitors, but to even invest in infrastructure that will facilitate their access will certainly promote the EU strategy for an internal energy market, diversification and energy security. This is laudable, but goes beyond what competition law is designed for, which is to deter firms from acting lawfully, being applied *ex post.* Instead, it emulates regulatory law, predicting the firm's behaviour and applying the competition rules taking into account the SSR and even specialising those rules.

[673] Case 6-64, *Flaminio Costa κατά Ente Nationale per l'Energia Elettrica* [1964] ECLI:EU:C:1964:66
[674] Case C-280/08P, *Deutsche Telekom AG v European Commission* [2010] ECLI:EU:C:2010:603
[675] Kim Talus and Thomas Wälde, 'Electricity Interconnectors: A Serious Challenge for EC Competition Law', Competition and Regulation in Network Industries, Volume 1 (2006), No. 3, 355-390

To sum up, the application of competition law in a regulatory fashion in the EU energy markets might be explained by 'the relative failure to establish a centralised and uniform agenda in regulated markets. Also, institutional developments may have paved the way for regulatory antitrust.' This is because truly market-based policies and Europeanised policies and a harmonised regulatory environment cannot be created and conserved only by means of institutional reforms at national level i.e. creation of independent authorities. ACER coordinates the national energy regulators and promotes the completion of the European energy market, having an advisory role, but it can also issue binding individual decisions, if national regulators request it or national regulators fail to reach an agreement concerning cross-border infrastructure matters. However, it is not an actual EU regulator, but only assists the NRAs in their duties. Nevertheless, it is expected that creating a competitive energy market with many players is regarded by Member States as a considerable political risk. This is because competition shrinks actual or potential political control over the energy sector, while conventional energy lobbies' power plays a role as well. This, among other factors, can explain why full liberalisation and the creation of an internal energy market was not realised in 2014. As envisaged, neither has it been achieved to date. A cure to this might be the 'competition-law-isation' of the EU regulation, in contrast with the 'regulation-isation' EU competition law is undergoing. A feature of this could be the Commission's 'ability to establish a direct contact with regulates with as little as possible intermediation from Member States' structures,'[676] but not in their absence; the decentralised enforcement could be executed in a 'network fashion', akin to that of the European Competition Network. This might already be happening through ACER, but not in such a structured and coherent manner or pursuant to specific rules as Regulation 1/2003. The further development of private competition law enforcement could also be helpful in this regard. In other words, 'having a more integrated approach of competition policy to leverage the complementarities between sector regulation, in particular ACER, and the antitrust powers of the Commission appears as the best way to support the transition towards a truly integrated single market for electricity in the European Union.'[677]

[676] F M Salerno, 'The Competition Law-ization of Enforcement: The Way Forward for Making the Energy Market Work?' EUI-WP RSCAS 2008/07 <http://cadmus.eui.eu/bitstream/handle/1814/8108/RSCAS_2008_07.pdf?sequence=1> (accessed 20 November 2018)
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