

The criteria of fair competition in the EU midstream gas market

Effects of its application on EU Member States in Central Europe

Candidate number: 7011

Submission deadline: 15th May 2016

Number of words: 17 936



Table of contents

1 INTRODUCTION	1
1.1 Topic of the thesis.....	1
1.2 Fair competition as a concept	2
1.3 Research question	3
1.4 Structure of the thesis	3
1.5 Players in the EU gas market.....	4
1.6 Methodology and sources	6
2 COMPETITION LAW IN MIDSTREAM GAS MARKET OF THE EU	8
2.1 Applicable EU competition law.....	8
2.1.1 Treaty on the Functioning of the European Union.....	9
2.1.2 The Gas Regulation 1775/2005	16
2.1.3 Third Gas Directive	17
2.2 How fair is competition in the gas market of the EU	19
2.2.1 Competition policy in the EU.....	19
2.2.2 Long term contracts v. trading hubs in competition law perspective.....	31
3 PICTURE OF GAS MARKET IN CENTRAL EUROPE REGARDING LIBERALIZATION AND FAIR COMPETITION	36
3.1 Situation on the Gas Market in Hungary	37
3.2 Level of competition and cross border cooperation in gas market of Czech Republic	37

3.3	Does Poland comply with rules of EU on the internal gas market?	39
3.4	Level of fair competition in the Slovenian gas market	41
3.5	Picture of gas market in Croatia	46
3.6	Conclusion	47
4	HOW TO SUCCESSFULLY ENTER THE EUROPEAN GAS MARKET UNDER THE CONDITION OF ‘FAIR COMPETITION’	48
4.1	Stringent requirements by the Member States	48
4.2	Modernizing way of trading gas	49
5	CONCLUSION	51
6	TABLE OF REFERENCE.....	55
	Books.....	55
	Articles.....	56
	Legislation:	58
	Case law	59
	Web sources:	60

1 Introduction

*Effective competition in the EU is an essential precondition for a competitiveness of European industry.*¹

1.1 Topic of the thesis

Picture of gas market in Europe has in the past years, changed tremendously from a mostly monopolistic, State regulated to a more liberalized market open to various market players. But it has still not achieved a fully liberalized market yet. The CJEU decided already in one of the most important decisions, *Costa v. ENEL*² that the same rules on competition apply in the energy sector as they apply in other sectors.

Especially in the Central Europe that was historically influenced by monopolistic, closed market,³ has the liberalization been developing slowly. The countries are in addition still strongly dependent on the Russian gas.

Because of, on the one hand turbulent situation of the gas market situation because of political reasons, and on the other hand the efforts and reforms of the EU to liberalize the EU gas market, I decided to dedicate the topic of my thesis to midstream gas market in the European Union in a perspective of fair competition.

In order to achieve a fully competitive, liberalized market, it is also important that it is relatively easy for new entrants to enter the gas market. Therefore a chapter of the thesis will look upon how to successfully enter the European gas market regarding fair competition rules in the EU. If the companies are entering the EU market, then they are regulated by the EU legislation. Therefore it is important that when they enter EU market, they consider first on what kind of actions they can impose regarding the relevant rules.

In order to understand what the fair competition actually means and how it is applied, an explanation of how it is defined in the EU legal sources and its interpretation will be given.

¹ Jones et al. EU Energy Law Volume II EU Competition Law and Energy Markets, pp.103 para. 3.1

² Case C-6/64 *Costa v. ENEL* (1964)

³ European Commission Sector Inquiry Gas

One of the steps when assessing the question of fair competition is defining relevant market. As the focus on the definition and interpretation will not be later in the thesis, a short description will be given here its meaning here. When assessing competition, the definition of market is often uncertain⁴ and therefore is important to define the relevant market and to measure market concentration. The two components that are important is the product and geographical market. A short answer to the question what the geographic market analyzed in the thesis is, is market in the Central European Member States, both national and trans-boundary market. On the other side is the answer to what the product market is financial and physical market of natural gas. Defining of the market can be rather lengthy and complicated and will therefore not be included directly in the text of the thesis, but it will be considered indirectly through relevant cases, as i.e. through Commission's inspections in gas sector.

1.2 Fair competition as a concept

Competition is defined as *"relationship between a number of undertakings which sell goods or services of the same kind at the same time to an identifiable group of customers."*⁵ Fair competition can be understood in two ways, as an opposite meaning of unfair, or as competition based on efficiency of undertakings.⁶ The EU has been imposing competition according to the latter.

Specifically in the EU, a definition of competition could be concluded from the Articles 3(1)(a) and 101 TFEU, but there is no proper definition offered.⁷ Because competition in the EU is also considered as policy, that determines on how competition is applied in the gas sector. Because the latter is of particular importance as a service of a general economic

⁴ Jones, Sufrin. EU Competition Law. 4th edition., pp. 174, footnote 301

⁵ Definition by Goyder D. in: Cameron. Competition in energy markets: law and regulation in the European Union, pp. 5

⁶ Akman. The Concept of Abuse in EU Competition Law: Law and Economic Approaches. Pp. 79

⁷ Cameron. Competition in energy markets: law and regulation in the European Union, pp. 6

interest, competition policy applies in the gas sector, regarding TFEU.⁸ Additionally apply competition rules, such as Articles 101 and 102 TFEU in the gas sector when gas utilities are acting in a way that may present a prohibition of the Articles.

1.3 Research question

There are two main questions that will be answered in the thesis. The first main and major question is how fair is the competition in the EU midstream gas market both in the EU in general, but especially in the Central European Member States. The question needs to be approached regarding more aspects. One of the aspects is if the gas companies were acting in accordance with EU rules on fair competition, both relevant provisions of TFEU and Gas legislative package.⁹ Furthermore, it is important if all the parties had the same conditions to access the pipelines regarding Third Party Access rules and also if the utilities in different stages of gas market were unbundled.¹⁰ This question is important because new entrants often lack effective access to network (and also to storage and liquid natural gas terminals).¹¹

The second question that a shorter part of the thesis will be dedicated to is how to successfully enter the EU midstream gas market in a sense of fair competition rules of the EU.

1.4 Structure of the thesis

In order to answer the research question on how fair the competition in the midstream gas market in the EU is and how to successfully enter EU gas market, the thesis will be divided into three main topics. Firstly will the focus be on how fair competition in the gas market in Europe is. The focus of the second part will be on the picture of the gas market in some Central European Countries. In the last part the focus will be on how it would be possible to successfully enter European gas market regarding fair competition rules.

⁸ Cameron. Competition in energy markets: law and regulation in the European Union, pp. 6

⁹ Such as Third Gas Directive, Gas Regulation.

¹⁰ TPA and unbundling are regulated by the Third Gas Directive.

¹¹ Dinnage. Joint Activities Among Gas Producers: the Competition Man Cometh. In: Journal of Energy and Natural Resources Law. Volume: 16:3 (1998) pp. 249 – 285

In order to come to a conclusion on what the fair competition in the upstream gas market is, how it works and what kind of actions are permitted, two issues need to be analyzed. Firstly, it is important to analyze how the concept of fair competition is understood in the EU and on the other hand, how fair competition specifically in the gas market is understood. In relation to the latter, a part of the thesis will look upon forms of cooperation and agreements that have occurred between competitors in the gas market. Additionally, a focus will be on analysis of which forms of cooperation are prohibited and are limiting fair competition and which forms are permitted or represent exemption.

This topic needs to be addressed due to the specifics and costs of the gas trade that pushed gas companies to cooperate with each other. Such cooperation can either be in a form that does not distort competition or in a form that does, which happens very often. Therefore it is important to analyze each case separately and consider all the specifics of a case, such as situation in the gas market of a certain Member State, number of actors in that gas market, types of contracts made between actors etc. Specifically in the gas market the abuses have been made either through State Aids or through actions of some of the major gas providers, which have additionally connected with smaller gas market players in the regional markets. Therefore the focus will be on the cases in the area of joint marketing of gas and different types of agreements between energy utilities.

Last but not least topic of the thesis will be focused on analysis of what is contained in the criteria of fair competition, how it has been applied and how it fits to the gas market in Central Europe.

A very interesting issue that drew my attention is how to successfully enter the European gas market as an actor in gas trade in a sense of what kind of cooperation and actions do the companies need to impose in order to be successful in the competition of the gas trade in the EU.

1.5 Players in the EU gas market

In order to understand better why the fair competition in gas market is important and why the Central European countries are facing problems at achieving a fully liberalized market, it is important to at least have a general picture of the situation of the gas market in the EU.

In gas market in the European Union there are, more or less, seven biggest energy utilities in Europe that operates in most of the EU countries and make it therefore rather difficult for the new entrants to enter the market.

The first of the biggest energy utilities is a German electricity and gas company E.ON Ruhrgas.¹² E.ON is also a majority shareholder in several regional and supra regional German power suppliers,¹³ plays an important role in gas market in seven European countries¹⁴ and also made some major acquisitions with some of the biggest energy utilities.¹⁵

The second is GDF Suez (from April 2015 called ENGIE). ENGIE is present in the entire gas chain,¹⁶ is one of the largest gas companies in Europe and also the largest LNG company in the world.¹⁷ GDF Suez is at most present in France where it has 9.4 million contracts, but it is also active in twelve more European countries.¹⁸

Another big utility is French EDF. It is involved both in electricity and gas market¹⁹ and was 100% state owned until 2005.²⁰ EDF was initially an electricity company, but has decided to get involved in several countries in the gas market through multi-energy offers.²¹

The fourth big utility is a former Italian electricity monopoly ENEL. ENEL is through its organization and cooperation present in different product and geographical markets. It is also involved in the gas sales in Italy.²²

¹² EON Ruhrgas Norge, About us

¹³ Ibid.

¹⁴ EON Ruhrgas Norge, About us, Structure

¹⁵ The most major ones are the following: Powergen (UK), Sydkraft (Sweden), Statkraft (Norway), majority control of Ruhrgas (Germany), MOL (Hungary), Endesa (Spain).

¹⁶ Engie, Information, Gas

¹⁷ Ibid.

¹⁸ ENGIE is active in: France, Belgium, Austria, Greece, Italy, Hungary, Romania, Czech Republic, Germany, the Netherlands, Luxembourg, Spain Portugal and Poland. Data from: <http://www.engie.com/en/group/strategy/our-international-presence/europe/>

¹⁹ [EDF, Information for public](#)

²⁰ Seven case studies of Changing Strategies of Major European Energy Utilities since Market Liberalization

²¹ Ibid.

²² Ibid.

RWE is the fifth largest gas company in Europe²³ and is present in the oil and gas upstream and midstream markets in Europe.²⁴

Gazprom is a very important supplier of gas in Europe with the world's largest transmission system.²⁵ Gazprom is importing gas to Europe by a unified export channel and holds an exclusive right to export gas via gas pipelines from Russia²⁶ and is also very dependent on the exports of its gas to majority of the EU Member States, as that represents 54% of the company's exports. Gazprom is the only Russian importer of gas to the EU.²⁷ Gazprom has also worked on establishing its own pipeline capacity in the EU in a way of purchasing Wingas' shares, the interconnector between the UK and Belgium, and potentially also in the BBL pipeline from the Netherlands to the UK.²⁸

1.6 Methodology and sources

As the research question of the topic is on how fair the competition in the midstream gas market in the EU is, focus will be on two issues. On the one hand, analysis of the rules and regulations of the EU competition rules in general will be made, and on the other hand, the focus will be on the situation of gas market in the EU.

As the research is focused purely on the EU market, legal sources of the EU will be analyzed. The use of both EU primary legislation, such as Articles 101 and 102 of the TFEU and sector specific legislation as secondary legislation in the field of gas market will be made. Besides legislative sources it is also important to use case law, especially the decisions made by the European Court of Justice as the most important interpreter of the EU law and decisions of authorities of Member States. Besides decisions of the ECJ it is also important to look upon the decisions made by the European Commission in the field of gas

²³ RWE, about the company

²⁴ RWE Annual Report 2014

²⁵ Gazprom, About Marketing

²⁶ Ibid.

²⁷ Eni report on natural gas 2015

²⁸ Sartori. The European Commission vs. Gazprom: An Issue of Fair Competition or a Foreign Policy Quarrel?

market in the EU. To support interpretation and analysis will I also refer to legal theorists and use their interpretations in the relevant parts.

Additionally, consideration of decisions made by national competition authorities will be made in cases of analysis national markets of Member States. In order to get the picture of the national gas markets, various webpages of relevant authorities and gas companies will be used.

2 Competition law in midstream gas market of the EU

Sale of gas is more limited than sale of other commodities because the specifics of gas make its transportation quite limited. Therefore gas, except of Liquefied Natural Gas, can only be transported through pipelines, construction of which is very costly. Competition policy in the EU is concerned about antitrusts, merger control, state monopolies and state aid.

Another reason why competition in gas market is so important is because the situation in Europe in the gas market was historically rather non-competition friendly. Companies were in a big part state-owned and were obtaining dominant, sometimes even monopolistic positions in the states. As the trade of gas is very specific due to its dependence on the infrastructure and used to be in the hands of Member States regulation, special rules for fair trade of gas had to be made. Therefore, gas market opened up in 2000 and energy sector became a priority for European competition policy.²⁹ First of all, the Articles of the Treaty on the Functioning of the European Union apply to trade of gas. Additionally, there are also sector specific regulations that apply to the trade of gas. To understand what a fair competition in gas market is, one needs to firstly understand the general competition rules in the EU and furthermore sector specific rules on competition in market of gas.

2.1 Applicable EU competition law

The legal sources of the EU competition law appear are defined both on primary level, in the Treaty on Functioning of the European Union, as well as on the secondary level in the Directives and Regulations. Firstly examination of the meaning and content of the relevant legal sources will be given. Furthermore it will be shown how the sources apply to the gas sector. Case law will be referred to when applicable.

²⁹ Commission, Competition Report 2001, p. 27, para. 85-96

2.1.1 Treaty on the Functioning of the European Union

Common rules on competition are written down in the Chapter 1 of the Title VII of the Treaty on the Functioning of the European Union³⁰ (herein after: TFEU). For the purposes of the thesis the important articles regarding EU competition law are 101 and 102 TFEU.

2.1.1.1 Article 101 TFEU

Article 101 TFEU states a list of agreements and decisions that shall be null and void.. Court of Justice of the European Union developed a reach palette of cases³¹ deciding on what is considered as an agreement that is null and void.

The Article 101 reads as follows:

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

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
- (b) limit or control production, markets, technical development, or investment;*
- (c) share markets or sources of supply;*
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

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

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

³⁰ Treaty on the Functioning of the European Union TFEU C 326/49

³¹ Polypropylene case T-1/89, Graphite Electrodes cartel OJ L100/1, PVC OJ L239/3

- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”³²

Article 101 is applicable to restrictive agreements between market actors both in cases of vertical and horizontal agreements.³³ Under 101(1) TFEU an act is considered as a prohibition, the following conditions need to be considered:

1. Whether two or more undertakings are entering into a conduct,
2. Whether this conduct is in a form of an agreement, decision of an association of undertakings or concerted practices,
3. Whether the object of the conduct is prevention, restriction or distortion of competition in the internal market,
4. Whether the restriction on competition has appreciable effect and whether the conduct has an effect on cross-border trade.³⁴

An entity to be interpreted as undertaking needs to fall into one of the categories of actors to which the competition rules apply.³⁵ The term undertaking has been widely interpreted by the CJEU, and, as stated in *Elser v. Macroton*.³⁶ “concept of undertaking encompasses every entity engaged in economic activity, regardless of the legal status of the entity or the way in which it is financed.”

³² TFEU, Article 101.

³³ Jones, Sufrin. EU Competition Law. 4th edition. p.118

³⁴ Rose, Bailey. European Union Law of Competition. 7th edition. pp. 81-82

³⁵ Jones, Sufrin. EU Competition Law. 4th edition., p.124

³⁶ Case C-67/96 Albany International BV v. Stichting Bedrijfspensionenfonds Textielindustrie (1999)

In some cases even Member States can be considered as an undertaking, although, it is a rather complicated decision. But as long as the State is acting as an economic operator, its actions are being ruled by competition law.³⁷

After it has been recognized that there are two or more utilities, in order to prove that there was violation of 101(1) TFEU, it needs to be proved that there existed an agreement, decision of association of undertakings or concerted practice.³⁸ For agreements and decisions to be interpreted as such they do not need to be formal or complete in order to be considered as prohibited.³⁹

As seen from the wording of the Article, actions can also be in a form of concerted practice. In order to understand actions as concerted practices, the following conditions need to be fulfilled:

- two or more undertakings need to perform together,
- undertakings need to act on the market related to the concerted practices and
- there exists a relationship of the cause and effect between the concentration and conduct on the market.⁴⁰

The form in which the utilities are cooperating with each other is not that important. In the *Polypropylene case* the Court stated that the reason that the Article 101 TFEU (ex 81 EC) distinguishes between the three types of actions is just so that as many forms of cooperation would fall within the meaning of the Article.⁴¹

Although the entities and their actions need to, as decided in *British Plasterboard v. Commission*⁴² it is not necessary that a violation of the Article 101 results from one action, but it can also result from a series of acts or from continuous conduct.

³⁷ Case C-205/03 P-FENIN v. Commission, Opinion of AG Maduro, para 26

³⁸ Case T-41/96 Bayer v. Commission, para 174

³⁹ Rose, *Bailey European Union Law of Competition*. 7th edition. pp.100-103; also: case T-41/96 Bayer v. Commission

⁴⁰ Case C-49/92P Commission v Anic Partecipazioni (Polypropylene), para 118

⁴¹ Case C-49/92P Commission v Anic Partecipazioni (Polypropylene), para. 112

⁴² Case T-53/03 British Plasterboard v. Commission

In the gas sector, the Commission has been looking upon the actions of gas utilities that might have represented horizontal restrictions, vertical restrictions or merger controls.⁴³ The Commission has made three rounds of investigations where it was deciding upon the Article 101.

The first of the three is horizontal restrictions, which are understood as arrangements between actual or potential competitors acting at the same market level and that have as their object or effect the prevention, restriction or distortion of competition.⁴⁴ In order to consider an arrangement as a horizontal restriction, there needs to be involvement of competitors in the arrangement and the latter needs to appreciably restrict competition.⁴⁵ Another type of agreements in the gas sector that might be considered as horizontal restrictions is cooperation agreements, within which scope fall joint selling of gas,⁴⁶ its distribution and market partitioning.⁴⁷ One exception is the so called *de minimis* rule, that allows the companies, whose aggregate market does not exceed 10% to form a sort of arrangements,⁴⁸ unless companies form cartels and hard core restraints, that are considered as the most serious violations of the Article 101 TFEU.⁴⁹

The second of the arrangements that might distort competition is vertical agreements that appear between providers and buyers of, in our case, gas. Vertical restraints that are arranged by energy providers and buyers can represent a violation of Art 101 TFEU when they affect the cross-border trade and do not have sufficient benefits that would outweigh competitive defense of it.⁵⁰ Vertical restraints in the gas market can be found as a part of transport, service or other contracts and this is so because many energy providers are vertically integrated firms that are operating at more levels within the chain of supply of gas and

⁴³ Jones. EU Energy Law Vol. II EU Competition Law and Energy Markets, pp. 108

⁴⁴ Jones, Sufrin Brenda. EU Competition Law. 4th edition pp. 142-143 Jones.

⁴⁵ Jones. EU Energy Law Vol. II EU Competition Law and Energy Markets, pp.113

⁴⁶ One example is Corrib case, described latter down in this Chapter

⁴⁷ Jones. EU Energy Law Vol. II EU Competition Law and Energy Markets, pp. 124-135

⁴⁸ Commission, De minimis notice, OJ C 368/13, para. 7a

⁴⁹ Commission, De minimis notice, OJ C 368/13, para. 11

⁵⁰ Commission, Vertical restraints guidelines, para. 5, 23, Appendix 4

have therefore possibility to preserve their commercial interests at more levels.⁵¹ One of the most common forms of vertical restraints is market partitioning by territory. One of the examples is GDF/ENI/ENEL case that will be described further down in the thesis.

Commission has therefore investigated several cases where it suspected violation of the Article 101 TFEU. While deciding, it was leaning on its interpretations, interpretations by the CJEU and wording of the Article. It has shown that it will treat the trade of gas in the meaning of fair competition rules very serious and fulfill its goal of setting a fully competitive gas market within the EU.

2.1.1.1.1 Article 102 TFEU

Article 102 TFEU imposes a prohibition on abuse of a dominant position within the internal market or its substantial part.⁵² Commission has done so in several cases regarding gas market.⁵³

Article 102 TFEU reads as follows:

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

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) limiting production, markets or technical development to the prejudice of consumers;*
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

⁵¹ Jones. EU Energy Law Vol. II EU Competition Law and Energy Markets, pp. 177

⁵² Treaty on the Functioning of the European Union, Article 102(1)

⁵³ Commission’s investigations in the gas sector 2007-2010, especially Commission v. Gazprom http://europa.eu/rapid/press-release_IP-15-4828_en.htm

*(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*⁵⁴

Article 102 TFEU is one of the tools to achieve a functioning internal market.⁵⁵ By prohibiting the abuse of a dominant position, the Article constrains such behavior of undertakings that are not sufficiently restrained by other competitors that are operating in the market.⁵⁶

Article 102 is constituted of two parts; the Prohibition and the Consequences of Infringement. Prohibition exists if the following conditions are satisfied:

1. There exists one or more undertakings,
2. The undertaking is in a dominant position,
3. That dominant position must be held within the internal market or a substantial part,
4. There is an abuse of the position and
5. It has an effect on inter-State trade.⁵⁷

Dominant position itself is not prohibited. To make the Article applicable to the case, there needs to be demonstrated both dominance and abuse, but there is not necessary to require causal link between the two.⁵⁸

As in the case of Article 101, there can appear prohibited positions both on horizontal and on vertical level. In the case of horizontal dominance, a firm dominates on the same relevant market.⁵⁹ On a vertical level, the dominance mostly concerns downstream markets of the market dominated by the concerned firm,⁶⁰ in our case a gas utility. Vertical dominance is most possibly going to arise in cases where the concerned utility controls a so-called essential facility that is considered as an infrastructure that cannot be duplicated and to which

⁵⁴ TFEU, Article 102.

⁵⁵ Case C-52/09 Telia Sonera Sverige, para. 20-22

⁵⁶ Jones, Sufrin EU Competition Law. 4th edition, p.259

⁵⁷ Ibid., p.261

⁵⁸ Rose, Bailey. European Union Law of Competition. 7th edition. pp. 755-756

⁵⁹ Jones. EU Energy Law Vol. II EU Competition Law and Energy Markets, pp. 247

⁶⁰ Monti. EC Competition Law, pp. 265

there exists requirement of access in order to compete on downstream market.⁶¹ In cases of essential facilities in the gas sector those can be found in transport and distribution networks and in interconnectors, as such facilities cannot be duplicated.⁶² Another type of facilities that might constitute essential facilities is storage facilities, but the latter constitute a prohibition of the Article 102 only in the case that it is the only (largest) facility in its service area.⁶³ As there is a big part of the gas trade determined by essential facilities, the TPA is so important in the sector.

As stated in the introduction, there is a number of big gas utilities in Europe that are present in several Member States and are obtaining a big part of the local gas market. Such a case is Russian Gazprom, for which the European Commission sent a statement of objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets.⁶⁴

2.1.1.1.2 The relationship between Articles 101 and 102

Articles 101 and 102 are not mutually exclusive. As it was stated in *Hoffman-La Roche*⁶⁵ both articles may apply to the same contractual arrangements and the Commission has a liberty to proceed either under Article 101 or 102 TFEU upon exclusive requirements when a contract was concluded by a dominant undertaking.

The Commission has been able to apply both articles in the relevant proceedings in the gas sector since undertakings have been obtaining a dominant position. The practice in inspections by Commission of the gas market is rather new and not so developed, but there were made three waves of investigations that I will look more in depth in the next chapter of the thesis.

⁶¹ Jones. EU Energy Law Vol. II EU Competition Law and Energy Markets, pp. 248

⁶² Ibid.

⁶³ Ibid. pp. 250

⁶⁴ European Commission Press Release, Antitrust: Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets,

⁶⁵ Case 85/76, *Hoffman-La Roche&Co AG v. Commission*

2.1.2 The Gas Regulation 1775/2005

In the trade of gas one needs to distinct between two markets; the physical and financial one. In order to have a fully liberalized gas market, both parts need to be liberalized. In order to liberalize physical market, the Gas Regulation was implemented.

The principal aim and main focus of the Gas Regulation was to establish non-discriminatory rules for access conditions to gas transmission systems.⁶⁶ The Regulation is designed to complete the provisions of the Gas Directive.⁶⁷ Its content is built upon a set of guidelines for good practice developed in the context of the Madrid Gas Regulatory Forum.⁶⁸ There are six specific goals set as the overall objective of the Regulation, set in Article 1(1). Goals of the Regulation help achieving the aim of Regulation, which is setting fair rules for access conditions to natural gas transmission system, which is better achieved at Community level than at the national level.⁶⁹ If the aim would be achieved, than the picture of the gas transmission systems in the EU would show a fully competitive market in the gas trade, at least on the transmission level.

TPA services need to be sufficiently compatible with the competition rules and it needs to be possible to show the benefits of the well functioning internal gas market.⁷⁰ Furthermore, minimum set of practices needs to ensure that system operator offers services on a non-discriminatorily basis, that firm and interruptible TPA services are provided and that network users are offered both long- and short-term services.⁷¹

According to Article 5 of the Regulation TSOs need to provide availability of the maximum capacity at all relevant points. Transmission system operators are recommended to implement and publish non-discriminatory and transparent capacity allocation mechanism

⁶⁶ Regulation EC 1775/2005, Article 4/1(a)

⁶⁷ With Gas Directive in this case I mean the Second Gas Directive.

⁶⁸ Madrid Gas Regulatory Forum-Previous Meetings <https://ec.europa.eu/energy/en/madrid-forum-previous-meetings>

⁶⁹ Regulation No 1775/2005, Preamble para. 23

⁷⁰ Cameron. Competition in energy markets: law and regulation in the European Union., pp. 209

⁷¹ Regulation 1775/2005 on conditions for access to the natural gas transmission networks, Article 4(1)

that is supposed to: 1. provide appropriate information that would help the gas companies to decide on the most efficient and rentable investments, 2. Be compatible with the mechanisms of the gas markets, including hubs and at the same time be flexible and adapt to the situation on the market and 3. be compatible with the network access systems of the Member States.⁷² In the connection with congestion management, Article 5(3) of the Regulation tries to balance the need to free up unused capacity in accordance with the principle of ‘use it or lose it’ on the one hand and, on the other hand still make it available to use to the holders of capacity when necessary and at the same time keep the liquidity of capacity.⁷³ Regarding transparency requirements, the Article 6 sets out six minimum standards. The aim of the Article is to ensure as effective access to gas networks as possible, by providing information on technical requirements and available capacity.⁷⁴ As the aim of this Regulation is to set fair rules for access conditions to natural gas transmission systems and make the rules legally binding, the rules are set in a way to achieve such situation at the Community level. In order to achieve a proper functioning internal gas market, the rules on fair access conditions and third party access are important and Regulation plays an important role at securing them.

2.1.3 Third Gas Directive

The common aim of the energy regulation is to make the energy market fully effective and to create a single EU gas market.⁷⁵ That is additionally seen from the following statement from the Preamble of the Directive: “*Promoting fair competition and easy access for different suppliers should be of the utmost importance for Member States in order to take full advantage of the opportunities of a liberalized internal market in natural gas.*”⁷⁶

⁷² Ibid., Article 5(2)

⁷³ Cameron. Competition in energy markets: law and regulation in the European Union. 2nd edition. , pp. 210

⁷⁴ Ibid., pp. 211

⁷⁵ Directive 2009/73/EC, Preamble, paragraph 60.

⁷⁶ Ibid., paragraph 54

Although rules on unbundling were already present in the Second Gas Directive, market reality after implementation of the Directive was still showing vertical integration with lack of independence of system operators, lack of transparency and TSO cooperation.⁷⁷ To improve situation, the Directive sets rules on unbundling and open and fair retail markets. In order to achieve the latter, Article 37 requires Member States to open their national gas market. The aim of unbundling is to separate supply and production of gas from the TSOs, so that no company would be allowed to hold a majority share or interfere in the work of a TSO.⁷⁸ Energy supply companies would still be able to formally own gas transmission network, but they must do so through a subsidiary⁷⁹.

In the paragraph about the Article 102 TFEU, the essential facilities doctrine was mentioned. The latter is in some way implemented into the Third Gas Directive with the Third Party Access, which is regulated in the Chapter VII of the Directive.

The Directive advises the Member States to ensure the implementation of a system of TPA to the transmission and distribution system.⁸⁰ When imposing the TPA, Member States shall apply the objectives of open and fair access, achieving competitive market in natural gas and avoiding abuses of a dominant position in the market.⁸¹ Furthermore, Member States are allowed, when imposing measure to provide TPA, to take into account several matters that might cause problems to the Member States regarding the market and are described in Article 34(2) of the Directive.⁸²

Both Regulation 1775/2005 and Directive 2009/73/EC aim at a fully operative internal gas market with fair competition and non-discriminatory access conditions. Bigger independence of the transmission system operators is supposed to make unbundling more successful,

⁷⁷ Nikos Katsis, DESFA, EU Unbundling and Regulation

⁷⁸ 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, pp. 4

⁷⁹ Ibid., pp. 5

⁸⁰ Directive 2009/73/EC, Article 32(1)

⁸¹ Directive 2009/73/EC, Article 34(2)

⁸² Directive 2009/73/EC, Article 34(2)

but it is upon the Member States to provide a sufficient level of protection and regulation in order to achieve the aim of Directive. Since Member States need to impose measures to provide effectiveness of the Third Gas Directive, it is important that first of all, they consider what type of measures they need to impose and second of all, that they cooperate very well with the National Competition Authorities that will be able to monitor improvements that are leading towards a fully competitive internal market of gas.

2.2 How fair is competition in the gas market of the EU

Gas is being traded transboundary and is, due to constructions of new pipelines, becoming more widely spread, but yet it is still not (except of the LNG), as global commodity as oil. In the EU a big amount of gas supplies is coming from non-EU countries on the basis of the long-term contracts.⁸³ In addition is gas less exposed to competition in pricing than oil. There are also elements of the natural monopoly in pipeline networks that impose limits on competition in that market.⁸⁴ Gas operations have a vertically integrated character, which means that there is a chain from production to consumption, which causes that an action in one stage has an influence to the other stages in the gas chain.⁸⁵ Gas sector has been under scrutiny of the Commission and the Commission has been applying competition in upstream gas sector in a big extent in order to complement the liberalization process.⁸⁶ Commission has been dealing with three rounds of investigations in the gas sector until now where it has been investigating possible breaches of Articles 101 and 102 TFEU, and sector specific regulation.

2.2.1 Competition policy in the EU

Under the Article 105 TFEU the Commission has to ensure that the principles of the Articles 101 and 102 TFEU are applied in the actions of the actors within the EU and in case

⁸³ European Commission, Energy, Supplier Countries,

⁸⁴ Cameron Competition in energy markets: law and regulation in the European Union. Pp. 304

⁸⁵ Waloszyk. Law and Policy if the European Gas Market. pp. 15

⁸⁶ Cameron. Competition in energy markets: law and regulation in the European Union. 2nd edition. Pp. 304

they are not, it should investigate and propose appropriate measures in order to achieve the goal.⁸⁷

Commission has been, due to its competence assigned by the Article 105, investigating gas companies in three rounds. During investigations it had focus in three areas; the anti-competitive barriers to competition between suppliers, anti-competitive obstacles for effective and non-discriminatory third party access and the anti-competitive behavior of suppliers by imposing ‘destination clauses’ in the contracts with the wholesalers from the EU.⁸⁸

2.2.1.1 Commission’s investigations in 2001

The first round of investigations settled some principles in the EU gas market. One of the important principles is that joint selling of gas by producers is not permitted, unless exceptional circumstances occur.⁸⁹

The scope of investigation was divided into two parts; joint marketing of gas and territorial sales restrictions.

2.2.1.1.1 *Joint marketing of gas*

There were two types of joint marketing made by producers that drew concerns to the Commission: joint marketing arrangements for a single country (GFU case) and joint marketing arrangements concerning a single gas field (Corrib case).⁹⁰

GFU had an exclusive negotiating right for sales of Norwegian gas. The Commission held an opinion that the selling scheme of several Norwegian gas companies was incompatible with the EU competition law as it caused rigidity and lack of liquidity.⁹¹ The outcome of the case was two main commitments made by Statoil and Norsk Hydro, Norway’s biggest producers of natural gas: the discontinuation of all joint marketing and sales activities that

⁸⁷ Treaty on the Functioning of the European Union, Article 105

⁸⁸ Cameron. Competition in energy markets: law and regulation in the European Union. 2nd edition. Pp. 304

⁸⁹ European Commission MEMO/03/89 Application of competition rules to the gas sector

⁹⁰ Cameron. Competition in energy markets: law and regulation in the European Union. 2nd edition. Pp. 305

⁹¹ European Commission Press Release IP/01/830 GFU joint gas sales in Norway

are incompatible with the EC law and to reserve certain gas volumes for new customers which have in the past not purchased gas from Norwegian gas producers.⁹²

Regarding joint marketing sales for a single gas field, the Commission was concerned about the actions imposed on the Irish gas field Corrib where companies Enterprise Energy Ireland Limited, Statoil and Marathon applied for an exemption under the Article 101(3) TFEU to jointly market the gas for the first five years of production. That was in their opinion necessary in order to balance the countervailing purchasing power of the Irish companies.⁹³ In that case the Commission confirmed that the policy of the EU is not to tolerate joint selling of gas, unless there are compelling reasons for a justification of it.⁹⁴ With such explanation, it showed that the exemption of Article 101(3) TFEU will be also in future interpreted restrictively.

The third case investigated by the Commission was the DUC/DONG case that also concerned restrictive provisions contained in the gas supply contracts that were concluded with the Danish gas supplier, DONG.⁹⁵ The case could be split into three issues: joint marketing, restrictions on use and access.

Regarding the joint marketing, the Commission thought that the joint activities reduced the consumer's options on choosing between suppliers or producers and therefore the competition was restricted in a sense of the Article 101 TFEU. Joint marketing provided by the contracts of the gas producers resulted in joint coordination of sales between independent gas operators.⁹⁶ The Commission and Danish competition authorities agreed that the DUC

⁹² European Commission Press Release IP/02/1084 Commission successfully settles GFU case with Norwegian gas producers

⁹³ European Commission Press Release IP/01/578 Enterprise Oil, Statoil and Marathon to market Irish Corrib gas separately

⁹⁴ Ibid.

⁹⁵ European Commission MEMO/03/89 Application of competition rules to the gas sector

⁹⁶ Cameron. Competition in energy markets: law and regulation in the European Union. 2nd edition. Pp. 309-310

partners are free to sell gas into the Danish market without the risk that the reduction clause would be invoked.⁹⁷

Concerning restrictions on use, the supply contracts that DONG required were to report to the DUC partners the volumes of gas that was sold to certain categories of consumers in order to benefit from a special price formulae for these customers.⁹⁸ Commission thought that there is a specific form of use restriction and since the use restrictions that relate to the territory where the buyer of the produced gas may sell it, it will lead to partitioning of the market and the outcome would not be compatible with competition law.⁹⁹

Because of the Commission's opinion and possible measures, DONG undertook to refrain from buying the volumes that are dedicated by the DUC partners to new customers and furthermore not to buy new gas from new DUC partners for three years.¹⁰⁰

Regarding the access, DONG undertook to introduce improved access regime for its off-shore pipeline that link Danish gas fields to the Danish mainland. It also undertook to increase the transparency of the system by publishing information on available capacity in order to allow short-term trading regime that is in line with the access regime and also to introduce interruptible transmission contracts.¹⁰¹

In the cases where the Commission was investigating actions of joint marketing of gas the Commission decided according to the Article 101(1) TFEU and it found two variations of violation of the abovementioned article. In the Corrib case there was an obvious territorial sales restriction within the production and sales of gas. As seen earlier, horizontal agreements are one of the agreements that fall within the scope of Article 101(1) TFEU, and are therefore not permitted. In the GFU case the joint selling of gas was happening in a form of

⁹⁷ European Commission Press Release IP/03/566 Commission and Danish competition authorities jointly open up Danish gas market

⁹⁸ Cameron. Competition in energy markets: law and regulation in the European Union. 2nd edition. Pp. 311

⁹⁹ Ibid.

¹⁰⁰ European Commission Press Release IP/03/566 Commission and Danish competition authorities jointly open up Danish gas market

¹⁰¹ European Commission Press Release IP/03/566 Commission and Danish competition authorities jointly open up Danish gas market

cartel,¹⁰² which is one of the hardcore restriction of the Article 101(1) TFEU and therefore the Commission once again proved that it is exercising its competence in the right way and trying to develop the fully competitive internal market of gas. Another hardcore restriction that appeared in the investigations is also the DUC case where the Commission interpreted the collective negotiation of the DUC members as joint coordination of sales that restricted competition. If we apply the decision of the Commission to the wording of Article 101 TFEU, we can see that the Commission was deciding within the usual interpretation of the Article and therefore showed its intention to develop the gas market to the terms of fair competition as they are applied in other sectors.

2.2.1.1.2 Territorial sales restrictions: 'Destination Clauses'

The purpose of these investigations was to identify and analyze cases that involve long-term exclusive supply contracts that had potential foreclosure effects for new participants.¹⁰³ Commission investigated territorial sales restrictions in gas supply contracts that occurred between non-EU gas producers and EU gas wholesalers, which can also be named destination clauses.¹⁰⁴ These clauses prohibit resale of the gas purchased to consumers that are outside of the usual supply area of the importer.¹⁰⁵ The most relevant cases investigated are the NLNG case, the Gazprom cases and GDF/ENEL, GDF/ENI cases.

In the NLNG case the Commission found only one of the various contracts with the EU wholesalers that included territorial sales restriction and the company agreed to release its customer from such obligation.¹⁰⁶ But the Commission was concerned that the supply contracts contain profit-splitting mechanisms that are affecting the EU markets.¹⁰⁷ Such claus-

¹⁰² Jones. EU Energy Law Vol. II EU Competition Law and Energy Markets, pp. 128

¹⁰³ European Commission Press Release IP/02/1869 Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG

¹⁰⁴ Ibid.

¹⁰⁵ European Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses

¹⁰⁶ Cameron. Competition in energy markets: law and regulation in the European Union. 2nd edition. Pp. 313

¹⁰⁷ European Commission Press Release IP/02/1869 Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG

es oblige the buyer to pass over to the producer a share of the profits that are made when reselling the gas outside of the agreed territory.¹⁰⁸ Since the Commission did not find any such clauses and the NLNG gave an undertaking not to implement such clauses would be implemented in the future, the case was settled.

Russian company Gazprom was investigated in three cases, with collaboration with Italian company ENI, Austrian company OMV and German company Ruhrgas. The cases were settled after the companies deleted the restrictive clause from their contracts and after ENI and OMV committed to take pro-competitive measures that promoted gas-to-gas competition in the EU, including an offer to sell big amounts of Russian gas in Italy and other Member States and therefore develop the Trans-Austrian Gas pipeline¹⁰⁹ (hereinafter: TAG).¹¹⁰ Since there already are few suppliers of gas on the market, the efforts by the Commission should be made in a way to ensure that the suppliers are not further reduced.¹¹¹

In the case between ENI and Russian gas, there were two sets of undertakings included in the settlement of the case.¹¹² Regarding contractual issues, ENI had to oblige to delete territorial sales restrictions from their contracts and get two delivery points instead of one and to delete the provision that obliges Gazprom to obtain ENI's consent when selling gas to other customers in Italy.¹¹³

¹⁰⁸ Cameron. Competition in energy markets: law and regulation in the European Union. 2nd edition. Pp. 313

¹⁰⁹ The TAG is important for the focus of the thesis because it goes through some central European countries, such as Slovenia as well. It also provides cross-border cooperation between countries.

¹¹⁰ European Commission Press Release IP/05/195 Competition: Commission secures improvements to gas supply contracts between OMV and Gazprom

¹¹¹ Legal Aspects of EU energy regulation: implementing the new directives on electricity and gas across Europe-Cameron. Pp. 41

¹¹² European Commission Press Release IP/03/1345 Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses

¹¹³ Ibid.

As accompanying measures ENI gave three undertakings that were to release significant quantities of gas to customers outside Italy over a 5 year period (most likely to benefit: Austria and Germany).¹¹⁴

In the case of OMV and Russian gas, OMV granted the same undertakings as ENI regarding the TAG pipeline and additionally, they agreed to delete territorial sales restrictions from their existing supply contracts and to delete contractual provisions that obliged Gazprom to offer any gas destined for Austria first to OMV and Russian gas. Austria is an important transit route for Russian gas exports to the French, German and Italian gas markets and consequently, it would be an important constraint on OMV.¹¹⁵

In the case of Ruhrgas and Russian gas there were two undertakings implemented: to delete the territorial sales restrictions from the contracts under investigation, to delete the ‘most favored customer’ clauses from their agreements that obliged Gazprom to offer similar conditions to Ruhrgas as it would have offered Ruhrgas’ competitors on the wholesale market in Germany.¹¹⁶

In the GDF contracts with ENEL and ENI, the Commission investigated two contracts concluded by GDF with two Italian companies and each of them was found to contain a territorial restriction clause and constituted a restriction of competition.¹¹⁷ The fact that concerned the Commission was the transportation of natural gas purchased by ENI in northern Europe. GDF transported the gas across French territory to the border with Switzerland where ENI obliged to market the gas exclusively after the gas had left France.¹¹⁸ In the connection with ENEL, the last was required to use the issued LNG gas only in Italy.¹¹⁹ Commission concluded that such measures were made to partition the national markets and prevent con-

¹¹⁴ Ibid.

¹¹⁵ European Commission Press Release IP/05/195 Competition: Commission secures improvements to gas supply contracts between OMV and Gazprom

¹¹⁶ Cameron. Competition in energy markets: law and regulation in the European Union. 2nd edition. Pp. 318

¹¹⁷ European Commission Press Release IP/04/1310 Commission confirms that territorial restriction clauses in the gas sector restrict competition

¹¹⁸ Ibid.

¹¹⁹ Ibid.

sumers of natural gas established in France from obtaining supplies from ENEL and ENI and that was in contravention with the Article 101 TFEU.¹²⁰

In the investigations regarding destination clauses the Commission was looking upon the vertical restrictions on commercial freedom of gas sales. Because vertical restrictions can be as damaging as horizontal restrictions,¹²¹ was the Commission acting rather strict when deciding upon the cases. In the GDF it found that the two clauses restricted the territory where ENI and ENEL were able to resell the gas, which caused partitioning of the market and is therefore not allow to be considered as an exemption of the prohibition of Article 101 TFEU. Commission was also showing its strong position on not allowing destination clauses in the Gazprom cases.

2.2.1.2 Commission's investigations in 2005-2007

In the second round carried the Commission out investigations about the long term contracts on a number of gas market participants.¹²²

2.2.1.2.1 *E.ON Ruhrgaz and GDF*

The Commission started investigation that followed surprise inspections upon alleged collusion that were carried out in 2006 on E.ON and GDF.¹²³ In that case the companies agreed not to sell gas transported over the pipeline in each other's home markets, which presents a territorial restriction that, as seen in previous paragraphs, has a potential on distorting of competition. Companies agreed between that GDF would not sell any gas transported over the MEGAL pipeline in Germany and Ruhrgas would act the same in France. Furthermore was the Ruhrgas' supply area de facto protected by a system of "demarcation agreements". Due to their actions, the companies deliberately denied French and German

¹²⁰ Ibid.

¹²¹ Jones. EU Energy Law Vol. II EU Competition Law and Energy Markets, pp. 177

¹²² European Commission Competition Sectors Gas

¹²³ Antitrust: Commission fines E.ON&GDF Suez 553 million EUR each for market-sharing in French and German gas markets

gas consumers the benefits granted in the Directive.¹²⁴ Because of the breaches the companies were fined.

With the decision in this case confirmed the Commission its position that territorial restriction clauses infringe Article 101 (ex 81) TFEU.¹²⁵ The Commission decided in this area not only that contract clauses that explicitly forbid resale of products in a specific territory distort competition, but also that other contractual mechanisms that have equivalent effects to territorial restrictions lead to the same result as they make resale less attractive or economically feasible.¹²⁶ The Commission also stated in the Paragraph 49 of the Commission Guidelines on Vertical Restraints¹²⁷ that “*a hardcore restriction set out in Article 4(b) of the Block Exemption Regulation relates to market partitioning by territory or by customer.*”

But what I find more important is that, furthermore, the Commission stated in the same decision that such a hardcore restriction might be the result of either direct obligations not to sell to customers in certain territories or a result of indirect measures that are aimed at distributors not to sell to such customers such as a certain type defined in the contract.¹²⁸

2.2.1.2.2 ENI Group

ENI Group was investigated upon alleged foreclosure of the Italian Gas Supply Markets. Behavior of the ENI Group was suspected that it has been aimed at the exclusion of potential competitors from Italian gas supply markets (so called market foreclosure) and therefore the Commission decided to start investigation.¹²⁹ ENI proposed to divest its stakes in the transmission pipelines as this structural remedy has the potential to remove the concern

¹²⁴ Ibid.

¹²⁵ Nyssens Harold, Osborne Lain: Profit splitting mechanisms in a liberalised gas market: the devil lies in the detail, Competition Policy Newsletter, pp 26

¹²⁶ Ibid.

¹²⁷ Commission Notice, Guidelines on Vertical Restraints OJ C 291, pp. 1

¹²⁸ Nyssens, Osborne. Profit splitting mechanisms in a liberalised gas market: the devil lies in the detail, pp 26

¹²⁹ Antitrust: Commission initiates proceedings against the ENI group concerning suspected foreclosure of Italian gas supply markets

of the conflict of interest that is resulting from a vertical integration made by the Company.¹³⁰

Commission explained that the legal base for the decision lies in Article 11(6) of Council Regulation 1/2003 and Article 2(1) of Commission Regulation 773/2004. This is important because Commission showed that it is not deciding such cases only on the basis of the Treaty, but also upon the sources of secondary, sector specific legislation.

2.2.1.2.3 RWE AG

RWE AG was investigated by the Commission due to a suspected foreclosure of German gas supply markets. The Commission suspected that there might have been a possible exclusion of potential competitors from the RWE's gas transport network in its core area (North Rhine-Westphalia) by putting in place artificial obstacles that the competitors had to overcome.¹³¹ Inspection of the RWE started by the Commission in 2006 because of the suspicions that RWE creates obstacles to third party access.¹³²

The key concern of the investigation was a potential abuse of a dominant position by raising rivals' costs and preventing new entrants from getting access to capacity on gas transport infrastructure in Germany. New entry into gas market means access to gas transport infrastructure and prevention from it can hinder the development of competition in energy markets that are in the process of being liberalized. Suspected obstacles in the presented case were, in particular, high prices charged for access to gas networks operated by RWE, inflation of RWE TSO's, maintenance of an artificial network fragmentation and failure to release transportation capacity to allow customer switching.¹³³

¹³⁰ Antitrust: Commission welcomes ENI's structural remedies proposal to increase competition in the Italian gas market

¹³¹ European Commission Memo /10/29 Antitrust: Commission initiates proceedings against RWE Group concerning suspected foreclosure of German Gas supply markets

¹³² European Commission Memo 07/186 Antitrust: Commission initiates proceedings against RWE Group concerning suspected foreclosure of German Gas supply markets

¹³³ Ibid.

Due to Commission's concerns and to avoid the fine, RWE proposed following commitments.¹³⁴ RWE committed to divest around 4000 km of the German high transmission network, which actually equals RWE's high-pressure transmission network in Germany. Furthermore committed RWE that in the parts of the network where RWE is not an exclusive owner, it divests entire share. As a next commitment made by RWE was a commitment to divest auxiliary equipment that is necessary for the operation of the transmission network. RWE also committed to divest intangible assets that are necessary for operation of transmission network. Additionally, RWE committed to supply the purchaser for a limited period of up to five gas years following closing of the divestiture with auxiliary services necessary for the operation of the transmission network.¹³⁵

It seems that although Commission showed its relatively strong position on the protection of fair competition in the gas markets, the gas utilities still did not act in accordance to it. Therefore the Commission investigated on more cases regarding horizontal restriction, such as in the case of E.ON Ruhrgas and GDF. As stated earlier, the Commission showed its strong stand that it will not look only upon a strict formal interpretation of contractual clauses, but it will look into any types of arrangements, which is as well in accordance with the interpretation of Article 101 TFEU. Additionally, in the case of ENI group focused the Commission to the sector specific legislation and applied secondary legislation in its decision, which shows the development of the fair competition in the sector.

2.2.1.3 Commission's inspections in the natural gas sector 2007-2010

After the investigations made in Western Europe, the Commission continued its work in 2007 in several companies in the Central and Eastern European countries. In the new investigations the Commission focused on the companies of Central and Eastern Member States and furthermore on the upstream supply level in which the competition may be hampered

¹³⁴ RWE's commitments are summarized from the Notice published in case COMP/B-1/39.402. Therefore I am referring to that source only at the end of the relevant paragraph of the thesis.

¹³⁵ Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/39.402 — RWE Gas Foreclosure, Official Journal of the European Union

or delayed.¹³⁶ The Commission decided for the inspections due to suspicions of exclusionary behavior, such as market partitioning, obstacles to network access, barriers to supply diversification and possible exploitative behavior, such as excessive pricing.¹³⁷ The Commission again based its decisions primary on the Articles 101 and 102 TFEU.

2.2.1.3.1 Gazprom

The European Commission published a Fact Sheet on the Statement of Objections to Gazprom as the Gazprom has been negligent to the EU competition rules.¹³⁸ In the Fact Sheet it is stated that a number of territorial restrictions in its supply agreements with wholesalers preventing the export of gas in eight EU Member States in Central Europe and the Baltics.¹³⁹

The Commission stated that Gazprom might be hindering cross-border gas sales by imposing export ban clauses, destination clauses and other measures that prevent cross-border flow of gas.¹⁴⁰

As stated by the Commission in the factsheet on the Statement of Objections to Gazprom,¹⁴¹ territorial restrictions mean that Member States have no access to imported gas at potentially more competitive prices. Furthermore, states the Commission, the negative impact of territorial restrictions is that they are preventing cross border flows of gas and are consequently leading to market partitioning.

¹³⁶ Antitrust: Commission confirms unannounced inspections in the natural gas sector

¹³⁷ Ibid.

¹³⁸ Antitrust: Commission sends Statement of Objections to Gazprom - Factsheet

¹³⁹ Ibid.

¹⁴⁰ European Commission MEMO 15/4829 By such other measures the Commission means measures such as requesting wholesalers to obtain Gazprom's approval for exports or refusing to change the location to which the gas should be delivered under certain circumstances.

¹⁴¹ European Commission MEMO 15/4829 Antitrust: Commission sends Statement of Objections to Gazprom - Factsheet

In the present case, the Commission's preliminary conclusion is that Gazprom charged unfair prices in five Central and Eastern European countries.¹⁴²

Regarding the charging of unfair prices by Gazprom, the latter was violating Article 102, as it abused dominant position that affected interstate trade in the five Central and Eastern European countries. Therefore it is important that the Commission recognized the violation by Gazprom and investigated on the case. Only in that way can the Commission contribute to constant development of the fully liberalized market.

2.2.2 Long term contracts v. trading hubs in competition law perspective

Marketing of gas in the past was highly determined by the so-called long-term contracts between the buyers and suppliers that are usually determined by oil-indexed contract prices that are being monthly recalculated.¹⁴³ In such contracts the delivery of gas is settled for a certain time period, which is usually more than five years and it can go up to as much as five years.¹⁴⁴ That leads to a certainty of the supplier that he will sell a certain amount of its gas to the buyers and will not have to compete with other utilities on a day-to-day basis. Additionally, it is rather common that the parties of the contract include in the contract a take-or-pay obligation, where they agree on an annual volume of gas a buyer needs to receive, no matter its demand and if not, it has to pay a certain amount. Long-term contracts also include the volume flexibility where they decide a minimum and maximum volume that will be traded in a certain time period.¹⁴⁵ Another aspect that makes the long-term contracts flexible is the carry forward possibility, when the parties move the volumes of the traded gas from one year to another.¹⁴⁶ If we refer long term contracts to the Article 101 TFEU, the Article prohibits agreements that may effect trade between Member State and have an effect of preventing, restricting or distorting competition. Therefore, the long-term

¹⁴² Those countries are: Bulgaria, Estonia, Latvia, Lithuania and Poland.

¹⁴³ Stern, Jonathan. International gas pricing in Europe and Asia: A crisis of fundamentals, Energy Policy, pp. 43

¹⁴⁴ RWE presentation on Energy Trading and Gas Supply, January 2011

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

contracts in itself could also be non-restrictive to competition, but when they are including the take-or-pay obligations in themselves, than they restrict competition to a big extent, as the new players are not able to enter the trade and additionally, they harm the end-users as the prices of gas are not set by the free market. If we relate long term agreements with take-or-pay obligations to the provisions of the Article 101 TFEU we can see that the conditions of the prohibitive agreements are fulfilled as there are two or more undertakings entering a conduct that is in a form of an agreement, which has an object of restricting competition that has an appreciable effect.

Therefore the goal of the European Commission is to reduce the long-term contracts for the sell of gas and instead impose trade of gas in the trading hubs.¹⁴⁷ The plus side of trading hubs is that trading happens anonymously, so that the parties of the trade do not know who is the seller and who is the buyer.¹⁴⁸

Because the liberalization of the gas market is relatively new, the trading hubs have also not been historically present in the gas market. They are, as the European gas market in general, in different developing stages around Europe. Therefore they could theoretically be split into four categories; advanced hubs, advancing hubs, developing hubs and illiquid hubs.¹⁴⁹ The two hubs that are considered as advanced hubs are National Balancing Point hub in Great Britain and TTF hub in the Netherlands.¹⁵⁰ The two hubs are determined with broad liquidity, sizeable forward markets that are a contribution to their role in supply hedging, larger presence of financial players and price reference for other EU hubs and for long-term contracts indexation.¹⁵¹ The advancing hubs are found in the North-West of Europe and are determined by an ongoing increasing liquidity, they are more reliant on spot

¹⁴⁷ Commission Staff Working Document Impact Assessment 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, A policy framework for climate and energy in the period 202 up to 2030

¹⁴⁸ Competing gas hub theories and the Europeanization of energy politics

¹⁴⁹ RWE presentation on Energy Trading and Gas Supply, January 2011

¹⁵⁰ The Oxford Institute for Energy Studies. The Evolution of European traded gas hubs, pp. 59

¹⁵¹ Ibid.

products and balancing operations and they progress on supply hedging role.¹⁵² The developing hubs are found in the Central European region and they are following the trend of the advanced and advancing hubs.¹⁵³ There are hubs in Iberia and the Baltics that are illiquid and they are determined by an improving liquidity from a lower base that are taking advantage of enhanced interconnectivity and the liquidity is partially driven by market obligations imposed on incumbents.¹⁵⁴ Markets at the illiquid hubs are still significantly more reliant on long-term contracts and the market places are very embryonic organized.¹⁵⁵

The situation of the various hubs in Europe reflects, to a big extent, the situation of the development of the EU gas market. Illiquid hubs are mostly located in the Eastern Europe and the Baltics where there is known to be no cross-border cooperation of the gas trading and the countries are dependent purely on the Russian gas.¹⁵⁶ The West-North European hubs are either advanced or advancing and very functioning. The trade on the hubs is rather big and broad in comparison to the Member States where the gas market is not that liberalized. Trading hubs have consequences for fair competition in the gas market to the extent that there is no long-term obligation for the buyers to buy a certain amount of gas in a long term. If we i.e. take a look at the NBP hub, we can see that 70% of the gas sold is over the Counter volumes and the price is not oil indexed, but it reflects commodity price with no geographic differentials.¹⁵⁷ Such market based pricing is found in the TTF hub as well, where shippers are responsible for keeping balance in the so-called “green zone” in their portfolios while buying and selling the gas.¹⁵⁸

Developed trading hubs within the EU would bring a very liberalized financial market of gas trade that would be within the policy of the EU regarding fair competition. As seen at

¹⁵² RWE presentation on Energy Trading and Gas Supply, January 2011

¹⁵³ The Oxford Institute for Energy Studies. The Evolution of European traded gas hubs, pp. 64

¹⁵⁴ RWE presentation on Energy Trading and Gas Supply, January 2011

¹⁵⁵ Ibid.

¹⁵⁷ Institute of Energy for South-East Europe. The outlook for a natural gas trading hub in SE Europe, pp. 25

¹⁵⁸ Ibid., pp. 28

the two advanced hubs, the price of gas is not prone to oil prices, but is based on the economical situation of supply and demand. Therefore, more companies are able to enter and compete in the trade. As the sales of gas are anonymous, there is less possibility for restrictive agreements between companies, which brings the situation a step closer to the fully liberalized market.

2.2.2.1 Pipeline Competition

Because of its specificities and strong connections of the transportation of gas to the pipelines, the transmission of gas represents a sort of natural monopoly. Therefore it is even more important to strictly observe trade of gas and consideration of fair competition rules in the so called physical market of gas.¹⁵⁹

Pipeline competition appears in cases where in the network of two or more transmission system operators those compete between each other.¹⁶⁰

When assessing pipeline competition the relevant market and measurements of market concentration need to be made and in the case of pipeline competition the relevant product market is service of gas transportation.¹⁶¹ In order to secure fair pipeline competition, the company that owns pipelines needs to impose fair conditions for other entities to use the pipeline. As it was stated in the *Exxon/Mobil case*¹⁶² “it is always cheaper and quicker for the incumbents to increase their capacity than it is for a newcomer to build a new pipeline.”¹⁶³

Such organization of pipelines is considered as the Third Party Access and was also described earlier in the thesis, with the Third Gas Directive. Third Party Access (hereinafter: TPA) presents a legally enforceable right for third parties that are not owners of the net-

¹⁵⁹ Physical market is a basic type of market and it involves buyers and sellers of the physical commodities.

In: Panebianco. Gas spot markets: How does it work and who are the players? Pp. 5

¹⁶⁰ Ketil Boe. Gas Directive and Third Party Transport Rights – What Pipeline Volumes are Available. pp. 49-50

¹⁶¹ Beukenkamp Annelieke. Pipeline-to-Pipeline Competition: An EU Assessment. pp. 18

¹⁶² Exxon/Mobil Case No IV/M.1383 1999

¹⁶³ Ibid., Recitals 98-100

work pipelines to have a non-discriminatory access to pipeline networks.¹⁶⁴ TPA is important because it is the first step in establishing competitive access, is necessary in the liberalized market and separates the ownership of the network infrastructure from the ownership of commodity.¹⁶⁵ The essential part of TPA in the competition of gas network is that the owners of the network either agree or are obliged to allow the transit of the third parties' gas through their network.¹⁶⁶

Organization of access to the system is regulated in the Chapter 7 of the Directive. Article 32 of the Directive states that the Member States shall ensure the implementation of a system of third party access to the transmission and distribution system based on published tariffs and that those tariffs need to be applied objectively and without discrimination between system users. Article 34 of the Directive¹⁶⁷ imposes the rules on the access to upstream pipeline networks. In the paragraph 1 it is stated that the Member State shall take the necessary measures to ensure that natural gas undertakings and eligible customers are able to obtain access to upstream pipeline networks.¹⁶⁸ In order to provide such access, the Member States shall apply the objectives of fair and open access, achieving a competitive market in natural gas and avoiding any abuse of a dominant position.¹⁶⁹ Furthermore, paragraph two lists the matters that may be taken into account. But the list is open ended and therefore further matters could be taken into consideration.

TPA could be interpreted as plausible for both, the owner of the pipeline that would sell out its spare capacities, and the users of pipelines that would be able to transfer their gas

¹⁶⁴ Kotlowski Aleksander. Third Party Access Rights in the Energy Sector: A Competition Law Perspective. *Utilities Law Review*, Vol. 16, No. 3, 2007. Pp.101

¹⁶⁵ Onal Mehmet. TPA rights regime under EU rules for natural gas pipelines and conditions for refusal of access p.7

¹⁶⁶ Ibid.

¹⁶⁷ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, Article 34

¹⁶⁸ Ibid., Art 34(1)

¹⁶⁹ Ibid., Art 34(2)

through pipelines that are already built and not have enormous expenses in building their own pipelines, especially if the gas providers are smaller entities.

3 Picture of gas market in Central Europe regarding liberalization and fair competition

Gas market in Central Europe is different from the gas market in the Western Europe, due to its historical background of communism and totally state owned companies. There is also lower energy consumption present in the Central and Eastern European countries.¹⁷⁰ As the energy market in the Central (and Eastern) European countries was not as developed, the main major investors in the gas market were foreign companies.

The main investors in the area are two German companies, E.ON Ruhrgas and RWE, two French companies: EDF and GDF Suez and Italian company Enel.¹⁷¹ There is only one Central European energy company that has important assets in other Central and Eastern European countries and that is Czech company CEZ.¹⁷² Another important fact of the Central and Eastern European countries is that most of their markets are very concentrated and they have one incumbent company that is dominating the market with market shares 80-90%.¹⁷³ As the countries entered EU in 2004 and 2007, the energy Directives were introduced later and some of the countries were granted some exceptions.¹⁷⁴ Due to the smaller size of the gas markets and lower development of the gas markets in the Central European countries, some authors state that there is still ‘no real competition’ present.¹⁷⁵ To get a better picture of what ‘no real competition’ in the Central European Countries mean, we

¹⁷⁰ Seven case studies of Changing Strategies of Major European Energy Utilities since Market Liberalization,

¹⁷¹ Seven case studies of Changing Strategies of Major European Energy Utilities since Market Liberalization,

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

can take a short look at some of the gas markets in the area.¹⁷⁶

3.1 Situation on the Gas Market in Hungary

Hungary has four large gas suppliers and one major player in the wholesale market is E.ON Földgáz Trade.¹⁷⁷ Although country has some limited domestic sources of gas, dominance of the Russian gas is still present and that fact leads to a lack of competition in the country and high prices of gas for buyers.¹⁷⁸ In addition it was also reported that imports from Austria increased due to favorable price conditions putting considerable pressure on take-or-pay clauses from long-term agreement with Gazprom.¹⁷⁹ The fact of present take-or-pay clauses does show that unfair competition was present in the Hungarian gas market.

But the fact that gas wholesale market concentration has been decreasing for a couple of years primarily due to diversified imports¹⁸⁰ shows a promising fact that the Hungarian gas market is moving towards liberalization of its gas market.

3.2 Level of competition and cross border cooperation in gas market of Czech Republic

In Czech Republic is the largest gas company RWE that also has shares in six of the eight distribution companies in the country.¹⁸¹ For example, in 2012 there were 25 entities that imported gas into the country, of which the largest ones were RWE Transgas, WINGAS Gmbh&CO. and VNG Energie.¹⁸² As said, there is a national gas company CEZ, that is

¹⁷⁶ The three largest markets in Central Europe are Romania, Poland and Hungary.

¹⁷⁷ European Commission, Energy, Reports on Member States, Hungary

¹⁷⁸ Hungary: Security of Gas Supply and Dependency on Imports,

¹⁷⁹ European Commission, Energy, Reports on Member States, Hungary

¹⁸⁰ Ibid.

¹⁸¹ Seven case studies of Changing Strategies of Major European Energy Utilities since Market Liberalization,

¹⁸² European Commission, Energy, Country Reports

also present in the markets of other Member States. Gas was mostly imported from Russia and Norway through long-term contracts, which is not in all cases that plausible according to the Commission's opinion on the effect of such contracts to the competition. But what is plausible is that the gas was also bought through European exchanges.¹⁸³ Additionally, it was also reported competition in the retail market have been increasing,¹⁸⁴ which is an indicator of the country's compliance with the EU's energy liberalization package. Market concentration might as well get lower since the GAZELLE pipeline was completed and it connects OPAL and MEGAL gas pipelines that expand to the transmission of the gas supplying Germany and France.¹⁸⁵ Furthermore, Czech-Polish interconnector plays an important role in the integration and liberalization of the gas market in the region and because of cooperation with Slovakia and Hungary, a positive effect in a form of the price stability has shown lately.¹⁸⁶ Such a positive effect shows the increase of the market competition. Because of that positive effect and the importance of the cross border cooperation in the gas market it was reported that the further investment in cross-border connectors will also increase the competition in the gas market.¹⁸⁷

Regarding unbundling, in 2013 a certification decision regarding NET4GAS was issued and it opted for the status of Independent Operator and furthermore, gas distribution companies are legally unbundled from the Transmission system operator, gas trading companies and gas storage operators.¹⁸⁸ The last is very plausible regarding the Third Gas Directive whose one of the main new goals is to achieve unbundling that promotes competition in a sense that it prohibits the system operators to promote its gas suppliers and pro-

¹⁸³ Slaba, Gapko Petr, Klimešova Andrea. Main drivers of natural gas prices in the Czech Republic after the market liberalization. In: Energy Policy Journal, Volume 52 (2013) pp. 199

¹⁸⁴ European Commission, Energy, Country Reports, Czech Republic

¹⁸⁵ European Commission, Energy, Country Reports, Czech Republic

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

ducers and therefore distort the competition. Because of unbundling, different suppliers of gas are able to enter into the relevant gas market.

In December 2015, Czech national Energy Authority issued a Regulation on the Rules of gas market in Czech Republic, where it set rules of gas market liberalization in accordance with EU legislation.¹⁸⁹ That fact is important because it shows that not only Member States with advanced gas competitive market are following instructions of EU regarding liberalization of the gas sector.

3.3 Does Poland comply with rules of EU on the internal gas market?

Maybe the least competition-developed country is Poland, where a national company PGNIG, which is still 100% state owned, holds a near monopoly position in the market.¹⁹⁰ There was recently launched a ruling from the CJEU in a case of the European Commission against Poland.¹⁹¹

The CJEU ruled that Poland's national legislation on regulating natural gas prices for non-household off-takers fails to comply with the EU internal energy market rules.¹⁹² The Commission argued in this case that the Articles 47 and 56 of the Polish Energy Act, that require all the undertakings to submit to the President of URE for approval of tariffs that they intended to apply, and provide a financial penalty for non-compliance with that obligation, were contrary to Article 3(1) of Directive 2003/55, because the mentioned Articles discriminate between undertakings.¹⁹³ The Commission argued that because of the URE's intervention in pricing, the Republic of Poland has also failed to fulfill its obligations under

¹⁸⁹ ERU 349/2015 Public Notice of 8 December 2015, on the Gas Market Rules

¹⁹⁰ Seven case studies of Changing Strategies of Major European Energy Utilities since Market Liberalization,

¹⁹¹ Judgment of the Court (Sixth Chamber) of 10 September 2015. *European Commission v Republic of Poland*. Case C-36/14

¹⁹² C-36/14, para. 30

¹⁹³ C-36/14, para. 13

Article 25(1)(h) of the Directive 2003/55 on the placing up bodies responsible for regulating the gas market, particularly in terms of transparency and competition.¹⁹⁴ Commission claimed in its statement that Poland mostly failed to fulfill the condition of proportionality when imposing a measure in its Energy Act as it did not impose any time limit regarding obligation to submit for approval of the prices of the gas supply.¹⁹⁵ Additionally, the Commission stated that, since there is a 95% monopoly of one energy utility in Poland, that obviously distorts competition, the State should intervene in order to eliminate monopoly.¹⁹⁶ The Court also agreed with the Commission's statement that the regulatory mechanism of Polish natural gas supply prices for non-residential customers does not meet the requirement of proportionality as it's not limited in time and does not establish distinction between customers that are supplied.¹⁹⁷

In its consideration the Court concluded that the findings of the Commission were correct and that the Republic of Poland, when applying a state intervention system that is consisted of the obligation for energy companies practice of natural gas supply prices that need to be approved by the president of Regulatory Office for energy, and where this obligation is not limited in time and whose national law does not require administration to periodically review the need for and modalities of application in the gas sector, depending on the evolution of it, which is characterized by its application to an undefined circle of beneficiaries or customers, without distinguishing between customers according to their situation, failed to fulfill the requirement of provisions of Article 3(1),(2) of Directive 2009/73/EC.¹⁹⁸

The judgment of the CJEU in the above mentioned case is important, as we have seen that Poland's gas market is one of the least developed gas markets in the EU and is still consists of a monopoly to a big extent. Additionally is the judgment important because it is one of

¹⁹⁴ C-36/14, para. 15

¹⁹⁵ C-36/14, para. 35

¹⁹⁶ C-36/14, para. 37

¹⁹⁷ C-36/14, para. 62

¹⁹⁸ C-36/14, Court's ruling

the very first judgments made by CJEU regarding the Third Gas Directive, which is a sign of constant and further development of the common gas market, especially since the CJEU gave an answer to preliminary ruling in the case *Federutility and others*¹⁹⁹ on the questions regarding the second Gas Directive. In that case the Court decided that the Articles 3(2) and 23(1) of the Directive 2003/55 do not preclude national legislation that permits determination of the price level for the supply of natural gas defined as reference prices, as long as such intervention pursues economic interest, compromises the free determination of prices for the supply of natural gas in so far as is necessary in object and in time and is defined, transparent, non discriminatory and verifiable and guarantees equal access for EU gas companies to consumers.²⁰⁰

3.4 Level of fair competition in the Slovenian gas market

Slovenian gas market is rather small and relatively new. Except of the small production onshore in the 80's there is no production of gas in the country. Therefore gas market is mostly present at midstream and downstream level. Country gets most of the gas from the Austrian TAG pipeline and the suppliers of the gas are Austrian OMV and Russian Gazprom.²⁰¹ Gas comes into the country also through Croatia from the South and from Italy in the West.²⁰² All together, Slovenia gets 42% of imported gas originating in Russia, 16% originated in Algeria, 7% of gas comes from Italy and 35% from Austria.²⁰³

Slovenia was, in addition, also cooperating with the Russian gas incumbent Gazprom in the project of the South Stream Pipeline, where it would play an important strategic role in transmission of gas, as it would go through Slovenia to Austria and then further to other European countries. There is also a primarily spot for further power exchanges located at

¹⁹⁹ Case C-265/08 *Federutility, Assogas, Libarna Gas SpA, Sadori Gas Srl, Egea Commerciale Srl, E.On Vendita Srl, Sorigenia SpA v. Autorita per l'energia elettrica e il gas*, 20. 04. 2010

²⁰⁰ C-265/08, Findings of the Court

²⁰¹ ENI world oil and gas review 2015, pp. 74

²⁰² Plinovodi, 10-year Development plan for the Gas Transmission System (in Slovenian) Pp. 7

²⁰³ *Ibid.*, pp.33

Borzen in Ljubljana.²⁰⁴

The biggest gas supplier in Slovenia is the local company Geoplin d.o.o. (herein after: Geoplin). It supplies gas to Slovenian users from its foreign contractors. Gas transmission system operator in Slovenia is Plinovodi d.o.o. (herein after: Plinovodi). On the first sight, such a structure seems pretty much in accordance with the Third Gas Directive, but the issue is that Plinovodi has been in the hands of Geoplin, the biggest provider of gas in the country.

In the last couple of months, there have been made big changes in the energy sector in Slovenia. The Slovenian National Holding planned, together with the gas distributor Petrol, to totally separate gas provider company Geoplin from the gas transmission operator Plinovodi, in three steps. First of all, Geoplin and Plinovodi would be separated and Plinovodi would be renamed into Infrastruktura.²⁰⁵ After the separation, the shares of the gas transmission operator would be sold, where the state would hold the majority, 50,01% of the shares.²⁰⁶ In the last step would the state sell 15% of Geoplin to the local gas distribution company Petrol and keep 25% of the shares of that company. That would lead Geoplin to become a player on the gas market and not anymore strategic investment of the state.²⁰⁷ The strategy seems very plausible in a sense of the free internal gas market, but what brought my attention is the fact that Plinovodi would as a gas transmission operator operate the gas network as a commercial public service, which means that it would, to big extend, be controlled by the state. That seems a bit concerning as the state would be a part owner of that company, instead of let it open to a free competitive market.

But until now, the gas system operator in Slovenia Plinovodi d.o.o., reports regularly on the reported available capacities that can be used by third parties and it also sets the conditions

²⁰⁴ RWE presentation on Energy Trading and Gas Supply, January 2011 pp. 6

²⁰⁵ Dnevnik: Premiki v energetiki (Changes in the Energy sector)

²⁰⁶ Ibid.

²⁰⁷ Ibid.

on how to apply for the third party access and therefore complies with the regulation of the EU.²⁰⁸

The company also cooperates in a big extent with foreign companies. In its report of the 10-years plan there are 18 projects of connecting points with foreign companies that were also supported by the European Commission and recognized as the projects of common interest.²⁰⁹ In its report from 2014, reported Plinovodi d.o.o., that the biggest interest of use of available capacities of the pipeline system in Slovenia is present in the pipeline towards Croatia and it is also reported that the demand for capacity of that pipeline is bigger than availability.²¹⁰ That pipeline goes from the Austrian entry point to the Croatian point, which has lately included a lot of short-term contracts.²¹¹ That shows first of all, that the cross-border cooperation is present which means that the gas market is not closed only to a national level and second of all, short term contracts are more plausible in a sense of the Third Gas Directive than long term contracts as they encourage competition in the market.

Regarding control of the gas company and gas operator's actions, it can be believed that there would be actions imposed by the Slovenian courts in case of non-competitiveness with the EU competition rules. The reason to believe so is because there were decisions made against both electricity and mobile companies made already upon antitrust rules.²¹² But since the Slovenian gas market is rather less developed than average Member States' market and there is no production of gas present in the country, some time should pass before making some certain conclusions.

Geoplina has been investigated and decided about by the Slovenian Competition Protection Agency (herein after: CPA) regarding its anti-competitive behavior. On the 19th of July

²⁰⁸ Plinovodi: Obvestila (Information for public)

²⁰⁹ Plinovodi: 10-year Development plan for the Gas Transmission System (in Slovenian)

²¹⁰ Plinovodi: 10-year Development plan for the Gas Transmission System (in Slovenian) Pp. 18

²¹¹ Ibid. Pp. 19

²¹² Supreme Court of the Republic of Slovenia, Case U 5/2008 Unfair competition Elektro Slovenia

2013 the CPA published that it will launch a procedure against Geoplin due to the possible anti-competitive behavior, more precisely the abuse of dominant position in the Slovenian gas market, and asked all the participants in that market, that have any kind of information regarding Geoplin's actions, to provide the information to the CPA.²¹³

The CPA then launched its decision in January 2015. In its decision of the procedure regarding violation of the Article 9 of ZPOmk-1 (Slovenian law of Consumers Protection) and Article 102 TFEU from the 12.1.2015 concluded the CPA that Geoplin had been abusing its dominant position in the gas market of industrial consumers in the market of the Republic of Slovenia and consequently also in a considerable part of the common internal market of the EU at least since the 1st of July 2007.²¹⁴

The CPA wrote in its decision that Geoplin's actions could potentially harm the trade of gas between the Member States, especially with signing long-term contracts of the gas supply with industrial consumers, as in these contracts the minimum amount of the received gas is settled at the time of signing the contract.²¹⁵ Geoplin also included fines in its contracts in cases when its contractors would not take in the amount of gas as negotiated in the contract.²¹⁶ Geoplin did, with such actions tie its customers to itself and therefore prevented and/or make difficult for them to enter other markets, with which it violated Article 9 ZPOmk-1 and Article 102 TFEU.²¹⁷

Due to its findings the CPA decided that Geoplin has to stop with such anti-competitive practices within the three months after the decision and furthermore to inform the CPA

²¹³ Slovenian National Competition Authority: Geoplin d.o.o., Sklep z dne 19.07.2013 (Decision regarding Geoplin)

²¹⁴ Slovenian National Competition Authority: Geoplin d.o.o., Sklep z dne 12.01.2015 (Decision regarding Geoplin)

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

about the sanctions it imposed in order to achieve the purpose of the decision.²¹⁸ Additionally, Geoplin was not allowed to make any further actions in the future that are similar to the ones that had been imposed prior to the CPA decision.²¹⁹

But unfortunately the Administrative Court did not agree with the whole procedure of the CPA and it abolished its decision because, in the Court's opinion, the CPA did not take into account the economic consideration of the factors that are needed in order to define the relevant market.²²⁰ The Court returned the decision of the CPA into new procedure and ordered the CPA to take into consideration the so-called problems that the Court underlined. But in such a decision by the court it seemed as the Court was not deciding completely objectively as it, in some way, protected the Geoplin, and on the other side, it did not take into account the fact that CPA was deciding in compliance with the practice of the European Commission. Furthermore, the Court also exposed the fact that, in its opinion, the CPA did not prove the dominant position of Geoplin in the Slovenian gas market, although the CPA provided information of the very high market share of Geoplin and its liquidity.²²¹

Because of the decision of the Administrative Court filed Geoplin a request for interim measure to uphold the CPA decision. But both Administrative Court and furthermore the Supreme Court of the Republic of Slovenia refused the Geoplin's request.²²² Geoplin underlined in its complaint that the CPA did not clarify enough what kind of actions Geoplin needs to uphold in the future and that Geoplin therefore is not able to choose appropriate measures, which has lead to damage for the company.²²³ But the Supreme Court decided

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Slovenian National Competition Authority, Public Notice on the Judgment of the Administration Court RS in the case of Geoplin, 02.06.2015

²²¹ Slovenian National Competition Authority, Public Notice on the Judgment of the Administration Court RS in the case of Geoplin, 02.06.2015

²²² Ibid.

²²³ Ibid.

and underlined that it is clearly seen from the CPA's decision, which actions are prohibited in the future, and furthermore, that Geoplin did not prove clearly enough on what kind of irreversible damage was done to the company.²²⁴ Therefore Geoplin is still obliged to impose the measures that are competitive friendly and in accordance with the CPA's requirements.

Recently, there was a new case launched by the CPA upon the request for concentration of two companies, Geoplin as the supplier of the gas and Petrol as one of the biggest distributors of gas in the country. Geoplin already possesses 39% of the shares of Petrol.²²⁵ Due to the consideration of the market share and market power of the two companies, the CPA decided to refuse the permission of concentration of the two companies as it would present a dominant position in the market that would most possibly be abusive.²²⁶

Only the future will show what the changes will bring, but according to Petrol's and Geoplin's history, the state involvement might as well hold the market very rigid. Additionally, the European Commission reported that the CPA should have more financial resources to be able to work optimally and observe all the actions of the business actors that might represent a concern to the fair competition.²²⁷

3.5 Picture of gas market in Croatia

Croatia holds reserves of gas that are possible for exploration and production of gas, but its upstream gas market is still uncertain as the Croatian government postponed signing of the deals with Eni SpA, Medoil Plc, INA Industrija Nafta d.d., Oando Inc and Vermilion Energy Inc for on-shore and off-shore drilling.²²⁸

²²⁴ Ibid.

²²⁵ Petrol, information about the ownership structure

²²⁶ Slovenian National Competition Authority, Public Notice regarding Merger procedure between Petrol d.o.o. and Geoplin d.o.o., 04.01.2016

²²⁷ Finance: Evropska Komisija opozarja na ovire in finančne reze glede AVK

²²⁸ Natural gas Europe: Croatia's awards likely to follow general elections in November

Biggest gas company in the country is a national company INA. Otherwise, Croatia is having a good cross-border cooperation of gas trade with Slovenia, especially because of the inter-connection point in the north-west of the country.²²⁹ Croatian imports of gas are mostly from Italy.²³⁰ That fact might present a concern as it means that there is no variety of actors in the Croatian gas market and it shows the, mostly, overall picture of the gas market especially in Central and Eastern European countries and it also shows that the market liberalization has not been imposed to the biggest extend yet.

3.6 Conclusion

In Central Europe, the gas market is not yet fully developed in terms of fair competition and liberalization. Most of the gas is imported from Russia and cross-border cooperation is not as developed as it is in the Western Europe. As seen in example of Hungary, because of the dominance of the Russian gas there has been a lack of competition. The situation confirms the meaning of the provisions of Article 102 TFEU that prohibits abuse of dominant position in the market.

But the Central European countries are slowly moving towards liberalized gas market with various competitors present. One example is Czech Republic, where there were recently imposed national rules on unbundling, that are implementing provisions of the Third Gas-Directive. The regulation imposed an Independent Operator and it unbundled distributor of gas from the TSOs, gas trading companies and storage operators, which will impose less rigid market more prone to competition that should lead to better choice for consumers and more fair prices of natural gas.

Another aspect of market liberalization is also that the process is being controlled by the Commission, CJEU and National Competition Authorities. The first two were involved in the case of regulation of Polish regulation of natural gas prices and showed that the supervision of the development of the fully-competitive, liberalized market. National Competition Authority of the Republic of Slovenia on the other hand, showed its big involvement

²²⁹ Plinovodi: 10-year Development plan for the Gas Transmission System (in Slovenian)

²³⁰ ENI world oil and gas review 2015, Pp. 74

on supervision of imposing of fair market and gas trade. It investigated the biggest national gas provider several times, on the terms of merger control, as also on abuse of dominant position.

4 How to successfully enter the European gas market under the condition of ‘fair competition’

When one is entering the European gas market, one needs to consider rules competition rules in the EU. In order to successfully enter the European gas market, one needs to consider what type of agreements he is making with other gas utilities. One needs to consider that the agreements are not violating the legislation of the EU, both on primary and secondary level. On the primary level gas utilities need to consider that the agreements they are making are not violating Article 101 TFEU, in a sense seen earlier. The agreements should not distort competition and present horizontal or vertical restrictions. Furthermore should the acts of the gas utilities entering the market not cause a dominant position that is abusive in the market of a Member State and also as a part of internal market. When entering the EU gas market, it is also important to consider the sector specific regulation, such as provisions of the Third Gas Directive or Gas Regulation.

Business utilities are of course trying to find a solution that is economically best for them and yet not taking into account all the rules of the liberalized gas market. On the other hand, the Commission might think mostly about the legal aspect of the actions of the utilities, not yet taking a full consideration of the economic consequences for the companies.

4.1 Stringent requirements by the Member States

Member States' authorities need to impose stringent and consistent requirements in order to the gas utilities to obey them and consequently to achieve a liberalised market. A proof that consistency of the authorities could be successful is seen in the case of E.ON, where E.ON gave up its resistance against liberalisation.²³¹ The possible reasons that the E.ON gave up

²³¹ Kopp. Politics, Markets and EU Gas Supply Security, Case studies of the UK and Germany pp. 283

its resistance is that either the company was not able to resist any longer the push for liberalisation or that non-cooperation would be economically harmful in the long term.²³²

In order to achieve mutual interest between gas utilities and governments of the EU Member States, the EU should develop a regulatory framework that balances the interests of the EU and its external suppliers.²³³ Regulators should, during their work, still take a strong stand with respect to the enforcement of the competition rules so that the exporters to the EU would either accept market reality or risk losing market imports for reasons other than competition in the gas market.²³⁴ Furthermore, should the regulators impose a system where the transportation of gas between new entry and exit points would be a matter of EU internal coordination and where the European TSOs would have to guarantee access for all gas exporters to all customers within the EU.²³⁵

4.2 Modernizing way of trading gas

Since the Commission is not very positive towards long term contracts, due to the provisions that such contracts include, such as destination clauses or take-or-pay obligations of supply contracts, it is important for the gas companies to modernize such contracts and make them more plausible in sense of fair competition. One of the examples is Norwegian company Statoil that has modernized most of their long term contracts and moved away from oil indexation after commercial negotiations with their counterparts.²³⁶

One of the ways to conclude what the guidelines for energy utilities on how to act on the relevant market is, can also be found through Madrid European Gas Regulatory Forum. Madrid Forum is gathering twice per year and on the Forum the new guidelines for the internal energy market are being imposed. The purpose of the Madrid Forum is to encourage

²³² Kopp. Politics, Markets and EU Gas Supply Security, Case studies of the UK and Germany pp. 283

²³³ Ibid. pp. 289

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Statoil: operations In: <http://www.statoil.com/en/ouoperations/gas/pages/market.aspx>

greater convergence of views for the European Energy Market.²³⁷ The composition of the forum with representatives from Member States governments, European Commission, Council Presidency, EU parliament and representative from all sections of the gas industry and consumer associations and the EEA²³⁸ shows its variety and openness for the development of the gas market in Europe.

One of the very important Forums was the 18th Madrid Forum held in 2010 where the consultations with the aim of achieving a common understanding of the Third Energy Package and its impact on the European gas markets were being held.²³⁹ After the 18th Madrid Forum, the Council of European Energy Regulators (herein after: CEER) wrote down three main Recommendations that were based on the considerations of the current situation on the European gas market.²⁴⁰ In the first recommendation the CEER stated that the entry-exit systems should be imposed in all Member States and that in order to fulfill this work, the Member States, TSO's and other stakeholders should be involved in this work.²⁴¹ In the second recommendation the CEER is proposing to review the market liquidity and market integration on the basis of which the National Regulatory Authorities would then consider whether measures would improve efficiency in the use of interconnection capacity. CEER also developed, as one of the Recommendations, proposals on how to identify and integrate new capacity based on market demand.²⁴²

²³⁷ Cameron. Competition in energy markets: law and regulation in the European Union. pp. 101

²³⁸ Ibid.

²³⁹ EU Commission, 'Gas Regulatory Forum',

²⁴⁰ CEER Vision for a European Gas Target Model, Conclusions Paper, 1st December 2011

²⁴¹ Ibid.

²⁴² Ibid.

5 Conclusion

As seen, energy sector has been one of priorities of the EU regarding competition law. As stated in introduction, fair competition is applied to the gas sector through application of the Articles 101 and 102 TFEU when the actions of gas companies make it applicable. On the other hand, it is also included to the market through sector specific legislation.

It has been rather successful at imposing competition rules to gas sector both through case law, as through sector specific legislation, such as energy legislative packages. But the market of gas is not completely liberalized yet, especially not in the Central European countries. One of the reasons is that in the whole European Union, there are seven big energy utilities that are present in several Member States. Most of them are cooperating with each other, mainly through mergers and acquisitions and trying to strengthen their position in the market, which sometimes presents a violation of the provisions of TFEU. Instead, the companies should, according to the Commission work in a way that is compatible with the EU law.²⁴³

A rather common action that was seen from the companies' side is joint marketing of gas, that Commission also investigated. In those cases it was deciding according to the Article 101(1) TFEU and it found two variations of violation of the abovementioned article. In the Corrib case there was an obvious territorial sales restriction within the production and sales of gas, in a form of horizontal agreements. The latter are one of the agreements that fall within the scope of provisions of Article 101(1) TFEU, and are therefore not permitted. In the GFU case the joint selling of gas was happening in a form of cartel,²⁴⁴ which is one of the hardcore restriction of the Article 101(1) TFEU and therefore the Commission once again proved that it is exercising its competence in a way of protecting fair competition that leads towards a fully competitive internal market of gas. Another hardcore restriction that appeared in the investigations is also the actions in DUC case where the Commission inter-

²⁴³ Commission's investigations in the GFU and Corrib cases.

²⁴⁴ Jones. EU Energy Law Vol. II EU Competition Law and Energy Markets, pp. 128

preted the collective negotiation of the DUC members as joint coordination of sales that restricted competition. In this case the Commission did not allow the joint marketing to be interpreted as a block exemption and therefore did not allow it, which shows the Commission's strong stand against hardcore restrictions of Article 101 TFEU.

Another type of restrictive actions that the Commission did not tolerate and therefore investigated is destination clauses. Therefore the Commission was looking upon the vertical restrictions on commercial freedom of gas sales. Because of damaging effects of vertical restrictions,²⁴⁵ was the Commission acting rather strict when deciding upon the cases. In the GDF it found that the two clauses that restricted the territory where ENI and ENEL were able to resell the gas caused partitioning of the market. Therefore it did not allow to impose an exemption of the prohibition of Article 101 TFEU. Commission was also showing its strong position on not allowing destination clauses in the Gazprom cases.

But although Commission showed its relatively strong position in the protection of fair competition in the gas markets, the gas utilities were still violating the EU rule on competition. Therefore the Commission investigated more cases regarding horizontal restriction, such as in the case of E.ON Ruhrgas and GDF. The Commission showed its strong stand and it looked into any types of arrangements that could distort competition, which is in accordance with the interpretation of Article 101 TFEU. Additionally, in the case of ENI group the Commission applied sector specific legislation and showed that the companies need to consider Gas Directive and Regulations as well when acting on the gas market.

Commission's work on progression of fair competition in gas market is constant. In the last round of investigation it investigated that was, first of all abusing its dominant position that affected interstate trade in the five Central and Eastern European countries and therefore violated the prohibition of Article 102 TFEU. Second of all, it imposed territorial restrictions that might result in unfair prices of gas that clearly violates the provisions of Article 101 TFEU. Therefore it is important that the Commission recognized the violation by Gazprom and investigated on the case.

²⁴⁵ Ibid., pp. 177

But it is not just upon the gas companies to change their businesses, it is also upon the Member States to impose the rules that help providing a fully liberalized market in the States and therefore provide a free choice for the consumers. As seen, one of the tools to achieve it is trading hubs. They have consequences for fair competition in the gas market to the extent that there is no long-term obligation for the buyers to buy a certain amount of gas in a long term. If we i.e. take a look at the NBP hub, we can see that 70% of the gas sold is over the Counter volumes and the price is not oil indexed, but it reflects commodity price with no geographic differentials.²⁴⁶

Developed trading hubs within the EU would bring a very liberalized financial market of gas trade that would be within the policy of the EU regarding fair competition. As seen at the two advanced hubs,²⁴⁷ the price of gas is not prone to oil prices, but is based on the economical situation of supply and demand. As the sales of gas are anonymous, there is less possibility for restrictive agreements between companies, which brings the situation a step closer to the fully liberalized market.

Another aspect of gas market that plays an important role at liberalization is access to transmission system in a form of Third Party Access that can be plausible for both the owner, and the users of pipelines that would be able to transfer their gas through pipelines that are already built and not have enormous expenses in building their own pipelines, especially if the gas providers are smaller entities. Another important aspect regarding transmission systems is also making transmission system operators independent from gas companies. As that was not fully achieved after the second energy legislative package, it is important that both the Member States and the EU develop and supervise the development of unbundling in the markets.

Central European countries will in the near future have a lot of work at achieving fully developed market in terms of fair competition and liberalization. On the other hand, the European Commission might need to help them in order to become less dependent from the

²⁴⁶ Institute of Energy for South-East Europe. The outlook for a natural gas trading hub in SE Europe, pp. 25

²⁴⁷ NBP and TTF.

Russian gas imports. That is important because, as seen in example of Hungary, because of the dominance of the Russian gas there has been a lack of competition.

But some of the Central European countries are slowly moving towards liberalized gas market with various competitors present. One example is Czech Republic, where there were recently imposed national rules on unbundling, that are implementing provisions of the Third Gas Directive. The regulation imposed an Independent Operator and it unbundled distributor of gas from the TSOs, gas trading companies and storage operators, which will should lead to a better choice for customers and more fair prices.

Another aspect of market liberalization that will in the future play a relevant role is also that the process is being controlled by the Commission, CJEU and National Competition Authorities. The first two were involved in the case of regulation of Polish regulation of natural gas prices and showed that the supervision of the development of the fully-competitive, liberalized market. National Competition Authority of the Republic of Slovenia on the other hand, showed its big involvement on supervision of imposing of fair market and gas trade. It investigated the biggest national gas provider several times, on the terms of merger control, as also on abuse of dominant position and showed its strong stand regarding competition protection.

Achieving a state of a fully liberalised market with fair competition rules and totally liberalised market of gas trade is a lengthy and complicated procedure. Because of all the aspects that need to be considered and 27 different situations of the market of gas in the EU, the common internal market is a very high goal to be achieved, but not impossible. As long as the Member States cooperate with the Commission and supervise the acts of the companies in accordance with the Energy Legislative package and with the Articles 101 and 102 TFEU, the tendency will go towards the achievement of fully competitive internal market.

6 Table of reference

Books

- Akman Pinar. The Concept of Abuse in EU Competition Law: Law and Economic Approaches. Portland (Bloomsbury Publishing) 2012
- Bøe Moen Ketil. Dyrland Sondre. EUs gassmarkedsdirektiv. 1st edition. Bergen (Fagbokfor.) 2001
- Cameron Peter D. Competition in energy markets: law and regulation in the European Union. 2nd edition. Oxford (Oxford press) 2007
- Cameron. Legal Aspects of EU energy regulation: implementing the new directives on electricity and gas across Europe. Oxford (2005) Pp41-58
- Dahl Hans Jørgen. Impacts on the European Gas Directive on gas exporters: recent experiences with the new Norwegian regulatory regime for accessing the natural gas transportation system. 1st edition. Dordrecht. (Kluwer Academic) 2004
- Gordon Greg. Paterson John. Usenmez Emre. Oil and Gas Law - Current Practice and Emerging Trends. 2nd edition. Dundee. (Dundee University Press) 2011
- Jones Alison. Sufrin Brenda. EU Competition Law. 4th edition. Oxford. (Oxford University Press) 2010
- Jones Christopher W. Et al. EU Energy Law Volume II EU Competition Law and Energy Markets Leuven. (laeys&Casteels) 2005
- Kaasen Knut. Petroleumskontrakter: med kommentarer til NF 05 og NTK 05. 1st edition. Oslo. (Universitetsfor.) 2006

- Rose Vivien. Bailey David. European Union Law of Competition. 7th edition. Oxford (Oxford University Press) 2013
- Talus Kim, Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law. Edition. Alphen Aan den Rijn, (Kluwer Law International) 2011
- Waloszyk Monica. Law and Policy of the European Gas Market. 1st edition. Cheltenham. (Edward Elgar) 2014

Articles

- Laperta Carlos, Moselle Boaz. Network Industries, Third Party Access and Competition Law in the European Union. In: Northwestern Journal of International Law and Business. Volume 19, Issue 3 Spring (1999) pp. 454-478
- Massadeh Ali A. The Essential Facilities Doctrine Under Scrutiny: EU and US Perspective. In: UEA Law School Working Paper Series.
- Talus Kim. Role of the European Court of Justice in the opening of Energy Markets. In: ERA Forum 8:435–448 (2007) pp. 435-448
- Tsygankova Marina. The export of Russian gas to Europe: breaking up monopoly of Gazprom. 2007. <http://www.ssb.no/a/publikasjoner/pdf/DP/dp494.pdf> . [22. 09. 2015]
- Scholz Ulrich, Purps Stephan. The Application of EC Competition Law in the Energy Sector. In: Journal of European Competition Law and Practice. Volume 1, (2010) pp. 63-73
- Schweitzer Heike. Commitment Decisions under Article 9 of Regulation 1/2003: The Developing EC Practice and Case Law. In: EUI Working Paper Law, No. 2008/22 (2008) pp. 1-28
- Westphal Kirsten. Institutional change in European natural Gas Markets and Implications for Energy Security: Lessons from the German Case. In: Energy Policy. Volume 74 (2014) pp. 35-43

- Soriano Garcia Jose Eugenio. Internal Gas Market according to the Law of Competition - Provisions of the Community's Third Package. In: European Energy and Environmental Law Review. Volume: 19 Issue: 4 (2010) pp. 175-199
- Scholz Ulrich. Purps Stephan. The Application of EU Competition Law in the energy sector. In: Journal of European Competition Law and Practice. Volume: 4, Issue: 1 (2013) pp. 63 – 82
- Beukenkamp Annelieke. Pipeline-to-Pipeline Competition: An EU Assessment. In: Journal of Energy and Natural Resources Law. Volume: 27:1 (2009) pp. 5-41
- Mravec Michal. Understanding the lack of Competition in Natural Gas Markets: The Impact of Storage Ownership and Upstream Competition. In:
- Dinnage D. James. Joint Activities Among Gas Producers: the Competition Man Cometh. In: Journal of Energy and Natural Resources Law. Volume: 16:3 (1998) pp. 249 – 285
- Fernandez Salas Mariano. Klotz Robert. Moonen Sophie. Schnichels Dominik. Access to gas pipelines: lessons learnt from the Marathon case. In: Competition Policy Newsletter. Volume: 2 (2004), pp. 41-43
- Torello Alessandro. «CROSS-BORDER COOPERATION BETWEEN AUSTRIA, ITALY AND SLOVENIA: MULTIMODAL TRANSPORT AND SUSTAINABLE DEVELOPMENT» In: Annals of the University of Oradea. International Relations and European Studies (RISE), Issue: III (2011), pp. 170-188
- Talus Kim. Just what is the scope of the Essential Facilities Doctrine in the Energy Sector?: Third Party Access-friendly Interpretation in the EU v. Contractual Freedom in the US. In: Common Market Law Review, Volume: 48:5 (2011), pp. 1571-1598
- Locatelli Catherine. EU-Russia trading relations: the challenges of a new gas architecture In: Econ Papers (2015), pp. 314-320
- Bøe Moen Ketil. The Gas Directive and Third Party Transportation Rights –

- What Pipeline Volumes are available? In: Journal of Natural and Energy Resources Law, Volume: 21:1 (2003), pp. 49-84
- Wälde, T.W., Gunst, A., International Energy Trade and Access to Energy Networks, Oil, Gas & Energy Law Intelligence, Vol:4, Issue: 2, August 2006
 - Nygaard, Dagfinn: Third Party Use of Production Facilities, in (Ed) Hammer Ulf, Articles in Petroleum Law, pp 129-163
 - Nyssens Harold, Osborne Lain: Profit splitting mechanisms in a liberalised gas market: the devil lies in the detail, Competition Policy Newsletter
 - Pitofsky Robert, Patterson Donna, Hooks Jonathan. The Essential Facilities Doctrine under U.S. antitrust law, Antitrust Law Journal, Vol. 70, No. 2, pp. 443-462
 - Stern, Jonathan. International gas pricing in Europe and Asia: A crisis of fundamentals, Energy Policy, Vol. 64, January 2014, pp. 43-48
 - Kotlowski Aleksander. Third Party Access Rights in the Energy Sector: A Competition Law Perspective. Utilities Law Review, Vol. 16, No. 3, 2007. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1073962
 - Slaba Monika, Gapko Petr, Klimešova Andrea. Main drivers of natural gas prices in the Czech Republic after the market liberalization. In: Energy Policy Journal, Volume 52 (2013) <http://www.sciencedirect.com/science/article/pii/S0301421512007288>

Legislation:

- Directive 2003/55/EC Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the international market in natural gas and repealing Directive 98/30/EC,
- Directive 2009/73/EC Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC,

- Treaty on the Functioning of the European Union TFEU C 326/49
- COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
- COMMISSION REGULATION (EC) No 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
- Directive 98/30/EC Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas
- Regulation (EC) No 1775/2005 Regulation 1775/2005 of the European Parliament and of the Council of September 28 2005 on conditions for access to the natural gas transmission networks

Case law

- Case U 5/2008 Distorting competition by Elektro Slovenia, Judgment of the Supreme Court of the Republic of Slovenia
- Case C-52/09, *Konkurrensverket v. Telia Sonera Sverige AB*, judgement of 17 Feb 2011,
- Case C-67/96 Albany International BV v. Stichting Bedrijfspensionenfonds Textielindustrie (1999)
- Case No IV/M.1383 Exxon/Mobil, (1999)
- Case C-36/14 European Commission v Republic of Poland. Judgment of the Court (Sixth Chamber) of 10 september 2015.
- Case C-265/08 of 20 April 2010. Federutility, Assogas, Libarna Gas SpA, Sadori Gas Srl, Egea Commerciale Srl, E.On Vendita Srl, Sorgenia SpA v. Autorita per l'energia elettrica e il gas
- Case C-205/03 P-FENIN v. Commission, Opinion of AG Maduro
- Case T-360/09 E.ON Ruhrgas v. Commission
- Case C-52/09 Telia Sonera Sverige, judgment of 17 February 2011

- Case T-41/96 Bayer v. Commission, judgment of the Court of First Instance of the 26th October 2000
- Case C-49/92P Commission v Anic Partecipazioni (Polypropylene), judgement of the Court of 8 July 1999

Web sources:

- European Commission, Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European Gas and Electricity Sectors, Final Report. 2007. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0851&from=EN> Downloaded: 06. 10. 2015
- Antitrust: Commission sends Statement of Objections to Gazprom - Fact-sheet
- http://europa.eu/rapid/press-release_MEMO-15-4829_en.htm Visited: 12.10. 2015
- Antitrust: Commission actions against cartels – Questions and answers http://europa.eu/rapid/press-release_MEMO-09-323_en.htm?locale=en Visited: 05.11.2015
- Antitrust: Commission fines E.ON&GDF Suez 553 million EUR each for market-sharing in French and German gas markets http://europa.eu/rapid/press-release_IP-09-1099_en.htm?locale=fr Visited: 05.11.2015
- Antitrust: Commission initiates proceedings against the ENI group concerning suspected foreclosure of Italian gas supply markets http://europa.eu/rapid/press-release_MEMO-07-187_en.htm?locale=en Visited: 05.11.2015

- Antitrust: Commission welcomes ENI's structural remedies proposal to increase competition in the Italian gas market http://europa.eu/rapid/press-release_MEMO-10-29_en.htm?locale=en Visited: 05.11.2015
- E.ON Ruhrgas Norge <http://www.eon-ruhrgas-norge.no> Visited: 24.11.2015
- Antitrust: Commission initiates proceedings against RWE Group concerning suspected foreclosure of German Gas supply markets http://europa.eu/rapid/press-release_MEMO-07-186_en.htm?locale=en Visited: 05.11.2015
- Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/39.402 — RWE Gas Foreclosure, Official Journal of the European Union <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:310:0023:0024:EN:PDF> Visited: 06.11.2015
- Antitrust: Commission confirms unannounced inspections in the natural gas sector http://europa.eu/rapid/press-release_MEMO-11-641_en.htm?locale=en Visited: 10.11.2015
- Questions and answers on the Third Legislative Package for an Internal EU gas and electricity market, http://europa.eu/rapid/press-release_MEMO-11-125_en.htm?locale=en Visited: 14.11.2015
- Seven case studies of Changing Strategies of Major European Energy Utilities since Market Liberalization, <http://www.ifri.org/sites/default/files/atoms/files/etudesn10cschulke.pdf> Visited: 14.11.2015
- Onal Mehmet. TPA rights regime under EU rules for natural gas pipelines and conditions for refusal of access. www.dundee.ac.uk/cepmlp/gateway/files.php?file.. Visited: 15.11.2015
- Catherine Bannet: Market Regulation: EU competition law and gas market regulation, The Norwegian Gas Regime under EU scrutiny. <http://www.uio.no/studier/emner/jus/jus/JUS5411/v15/presentasjoner/eu->

- [competition-law-and-gas-market-regulation-spring-2015-banet.pdf](#) Visited: 15.11.2015
- Damson Garba Silas. The Impact of Pre-emption Right on the commercial Viability of JOA Interest: Is the UK approach a model for other jurisdictions? www.dundee.ac.uk/cepmlp/gateway/files.php?file Visited: 16.11.2015
 - E.ON, About us, structure assets http://www.eon.com/en/about-us/structure/asset-finder.html?_charset_=UTF-8&arearegion=all&business-area-scope=on&business=gas&listingSearchTerm=&go=Find+Assets Visited: 24.11.2015
 - E.ON, Structure of the company, http://www.eon.com/en/about-us/structure/company-finder.html?_charset_=UTF-8&arearegion=all&business-area-scope=on&business=sales&business=distribution&business=trading&business=gas-storage-and-transport&business=exploration-and-production&listingSearchTerm=&go=Find+Companies#cf-list-view Visited: 24.11.2015
 - E.ON Structure of the company, http://www.eon.com/en/about-us/structure/company-finder.html?_charset_=UTF-8&arearegion=all&business-area-scope=on&business=sales&business=distribution&business=trading&business=gas-storage-and-transport&business=exploration-and-production&listingSearchTerm=&go=Find+Companies#cf-list-view Visited: 24.11.2015
 - ENGIE, natural gas and LNG <http://www.engie.com/en/businesses/gas/gas-energies/natural-gas-lng/> Visited: 24.11.2015
 - EDF Group <https://www.edf.fr/en/the-edf-group/world-s-largest-power-company/history> Visited: 24.11.2015
 - RWE, about RWE <https://www.rwe.com/web/cms/en/10122/rwe/about-rwe/> Visited: 24.11.2015

- RWE Annual report 2014:
<https://www.rwe.com/web/cms/mediablob/en/2696788/data/10122/6/rwe/about-rwe/RWE-Annual-Report-2014.pdf> Visited: 24.11.2015
- GDF Suez – ENGIE Group <http://www.engie.com/en/businesses/gas/gas-energies/natural-gas-lng/> Visited: 25.11.2015
- ENGIE, group strategy, International presence
<http://www.engie.com/en/group/strategy/our-international-presence/europe/>
Visited: 25.11.2015
- Gazprom, about marketing
<http://www.gazprom.com/about/marketing/europe/> Visited: 25.11.2015
- EFET, 11th meeting of the European Gas Regulatory Forum, 18-19 May 2006,
http://www.efet.org/Cms_Data/Contents/EFET/Media/Documents/Public%20-%20Presentations/EFET%20slides%20for%20Madrid%2011%20FINAL.pdf
Visited: 02.12.2015
- European Commission Press Release IP/01/578 Enterprise Oil, Statoil and Marathon to market Irish Corrib gas separately http://europa.eu/rapid/press-release_IP-01-578_en.htm?locale=en Visited: 08.12.2015
- European Commission Press Release IP/01/1170 Commission insists on effective access to European pipelines for Norwegian gas
http://europa.eu/rapid/press-release_IP-01-1170_en.htm?locale=en Visited: 08.12.2015
- European Commission Press Release IP/05/195 Competition: Commission secures improvements to gas supply contracts between OMV and Gazprom
http://europa.eu/rapid/press-release_IP-05-195_en.htm?locale=en Visited: 10.12.2015
- European Commission Press Release IP/03/1345 Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses

- http://europa.eu/rapid/press-release_IP-03-1345_en.htm?locale=en Visited: 10.12.2015
- IAI Working Papers, Sartori Nicolo. The European Commission vs. Gazprom: An Issue of Fair Competition or a Foreign Policy Quarrel? <http://www.iai.it/sites/default/files/iaiw1303.pdf> Visited: 11.12.2015
 - ENI World Oil and Gas Review 2015, Natural Gas http://www.eni.com/en_IT/attachments/azienda/cultura-energia/wogr/2015/02-Sezione-Natural-Gas.pdf Visited: 11.12.2015
 - Siol Novice: Plinovod severni tok 2, južni tok http://www.siol.net/novice/gospodarstvo/2015/09/plinovod_severni_tok_2_juzni_tok.aspx?format=json&mob=1&hide_hf=1&os=wf&ver=1.0 Visited: 14.12.2015
 - Plinovodi, o družbi, obvestila (information for public) <http://www.plinovodi.si/o-druzbi/obvestila/> Visited: 14.12.2015
 - Reuters: If Vladimir Putin carry on the latest threats, it will only hurt Russia <http://blogs.reuters.com/great-debate/2015/12/09/why-vladimir-putins-latest-round-of-threats-would-only-hurt-russia/> Visited: 15.12.2015
 - Plinovodi, 10 years development plan <http://www.plinovodi.si/wp-content/uploads/2011/09/RN-2015-2024.pdf> Visited: 15.12.2015
 - European Commission, Energy - Country Reports, Hungary https://ec.europa.eu/energy/sites/ener/files/documents/2014_countryreports_hungary.pdf Visited: 15.12.2015
 - European Commission, Energy - Country Reports, Czech Republic https://ec.europa.eu/energy/sites/ener/files/documents/2014_countryreports_czechrepublic.pdf Visited: 17.12.2015
 - Slovenian Competition Protection Agency, Odločba 306 http://www.varstvo-konkurence.si/si/ostali_dokumenti/arhiv_odlocb/odlocba306/ Visited: 11.01.2016

- Petrol, o podjetju <http://www.petrol.si/o-podjetju/petrol/skupina-petrol/geoplin-doo-ljubljana> Visited: 12.01.2016
- Dnevnik, Novice Premiki v energetiki, Geoplin se deli <https://www.dnevnik.si/1042722395/posel/novice/premiki-v-energetiki-geoplin-se-deli-mol-do-servisov-agip> Visited: 12.01.2016
- European Commission, Energy - Country Reports, Slovakia https://ec.europa.eu/energy/sites/ener/files/documents/2014_countryreports_slovakia.pdf Visited: 14.01.2015
- Finance: Evropska komisija opozarja na finančne reze glede AVK <http://www.finance.si/8804014/Evropska-komisija-opozarja-na-ovire-in-finančne-reze-glede-AVK?metered=yes&sid=451297947> Visited: 15.01.2016
- RWE Energy trading and gas supply in Europe, January 2011 <http://www.rwe.com/web/cms/mediablob/de/1031564/data/213092/3/rwe/investor-relations/events/archiv-veranstaltungen/Praesentation.pdf> Visited: 20.01.2016
- Kopp Sandu-Daniel. Politics, Markets and EU Gas Supply Security, Case studies of the UK and Germany , Springer Research http://download.springer.com/static/pdf/244/chp%253A10.1007%252F978-3-658-08324-3_5.pdf?originUrl=http%3A%2F%2Flink.springer.com%2Fchapter%2F10.1007%2F978-3-658-08324-3_5&token2=exp=1453730438~acl=%2Fstatic%2Fpdf%2F244%2Fchp%25253A10.1007%25252F978-3-658-08324-3_5.pdf%3ForiginUrl%3Dhttp%253A%252F%252Flink.springer.com%252Fchapter%252F10.1007%252F978-3-658-08324-3_5*~hmac=26bedd14eed32174fe1a31a724fbab1fd6c5bb0f57e02447fcb9ccf223b7818c Visited: 25.01.2016

- European Commission, Energy, Madrid Gas Regulatory Forum
http://ec.europa.eu/energy/gas_electricity/gas/forum_gas_madrid-en.htm
 Visited: 27.01.2016
- CEER Vision for a European Gas Target Model, Conclusions Paper, 1st December 2011
http://www.ceer.eu/portal/page/portal/EER_HOME/EER_CONSULT/CLOSED%20PUBLIC%20CONSULTATIONS/GAS/Gas_Target_Model/CD/C11-GWG-82-03_GTM%20vision_Final.pdf Visited: 28.01.2016
- Statoil, Presentation Gas
<http://www.statoil.com/en/ouoperations/gas/pages/market.aspx> Visited: 05.02.2016
- European Commission Press Release, 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 Visited: 07.05.2016
- European Commission, Energy, Supplier Countries,
<https://ec.europa.eu/energy/en/topics/imports-and-secure-supplies/supplier-countries> Visited: 07.05.2016
- Competing Gas Hub theories and the Europeanisation of Energy Politics,
<http://www.naturalgaseurope.com/competing-gas-hub-theories-and-the-europeanisation-of-energy-politics-24295> Visited: 08.05.2016
- IMPACT ASSESSMENT 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 A policy framework for climate and energy in the period from 2020 up to 2030
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014SC0015&from=EN> Visited: 08.05.2016

- Commission objects to GFU joint gas sales in Norway:
http://europa.eu/rapid/press-release_IP-01-830_en.htm?locale=en Visited:
08.05.2016
- Commission successfully settles GFU case with Norwegian gas producers,
http://europa.eu/rapid/press-release_IP-02-1084_en.htm?locale=FR Visited:
08.05.2016
- Application of competition rules to the gas sector:
http://europa.eu/rapid/press-release_MEMO-03-89_en.htm?locale=FR Vis-
ited: 08.05.2016
- Commission and Danish competition authorities jointly open up Danish gas
market http://europa.eu/rapid/press-release_IP-03-566_en.htm?locale=FR
Visited: 08.05.2016
- Commission Press Release IP/02/1869 Commission settles investigation into
territorial sales restrictions with Nigerian gas company NLNG Visited:
09.05.2016
- Commission Press Release IP/02/1869 Commission settles investigation into
territory sales restrictions with Nigerian gas company NLNG
http://europa.eu/rapid/press-release_IP-02-1869_en.htm?locale=FR Visited:
09.05.2015
- Commission Press Release IP/03/1345 Commission reaches breakthrough
with Gazprom and ENI on territorial restriction clauses
http://europa.eu/rapid/press-release_IP-03-1345_en.htm?locale=en
- Commission Press Release IP/04/1310 Commission confirms that territorial
restriction clauses in the gas sector restrict competition
http://europa.eu/rapid/press-release_IP-04-1310_en.htm Visited: 09.05.2016
- European Commission: Competition, Energy
http://ec.europa.eu/competition/sectors/energy/gas/gas_en.html Visited:
09.05.2016

- Commission Press Release, IP/04/573 Commission settles Marathon case with Gaz de France and Ruhrgas, http://europa.eu/rapid/press-release_IP-04-573_en.htm?locale=en Visited: 09.05.2016
- The Oxford Institute for Energy Studies. The Evolution of European traded gas hubs <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/02/NG-104.pdf> Visited: 09.05.2016
- Hungary: Security of Gas Supply and Dependency on Imports, <http://www.naturalgaseurope.com/hungary-security-of-gas-supply-and-dependency-on-imports> Visited: 09.05.2016
- ERU 349/2015 Public Notice of 8 December 2015, on the Gas Market Rules https://www.eru.cz/documents/10540/2124871/PTP_349_2015_ENG.pdf/d8576c7d-7ef5-4a0d-b852-ef0646270a34 Visited: 10.05.2016
- Natural Gas Europe: Slovakia remains caught between Russia and Brussels as EU presidency looms <http://www.naturalgaseurope.com/slovakia-remains-caught-between-russia-and-brussels-as-eu-presidency-looms-29291> Visited: 10.05.2016
- Commission, Competition Report 2001 http://ec.europa.eu/competition/publications/annual_report/2001/competition_policy_en.pdf Visited: 12.05.2016
- Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the EC - De minimis Notice, OJ C 368/13, 22.12.2001, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:368:0013:0015:EN:PDF> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:368:0013:0015:EN:PDF> Visited: 12.05.2016
- Commission, Guidelines on Vertical Restraints, http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf Visited: 13.05.2016

- 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 https://ec.europa.eu/energy/sites/ener/files/documents/2010_01_21_the_unbundling_regime.pdf Visited: 13.05.2016
- European Commission, Market Legislation, Third Energy Package, <https://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation> Visited: 13.05.2016
- Nikos Katsis, DESFA, EU Unbundling and Regulation, http://www.inogate.org/documents/3_EU%20Unbundling%20and%20Regulation.pdf Visited: 14.05.2015
- Panebianco Giorgia. Gas spot markets: How does it work and who are the players? www.dundee.ac.uk/cepmlp/gateway Visited: 14.05.2016