EU Competition Law and the European Gas Supply Agreements

How the main infringements have been addressed?

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List of abbreviations

ACER	Agency for the Cooperation of Energy Regulators
CEER	the Council of European Energy Regulators
CNG	Compressed Natural Gas
EEZ	Exclusive Economic Zone
ENTSO-G	the European Network of Transmission Network Operators for Gas
EU	European Union
EUMR	the EU Merger Regulations
GTM	Gas Target Model
ISO	Independent System Operator
ITO	Independent Transmission Operator
LNG	Liquefied Natural Gas
MS	Member States
NRAs	National Regulatory Authorities
NS2	Nord Stream 2
REMIT	the EU Regulation on Wholesale Market Integrity and Transparency
SGS	Security of Gas Supply
TEN-E	Trans-European Network for Energy
TFEU	Treaty of Functioning of the EU
TGD	Third Gas Directive
TPA	Third Party Access
TSOs	Transmission System Operators
UNCLOS	the United Nations Convention of Law of the Sea
WTO	World Trade Organization

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1 Introduction

Natural gas is a form of fossil energy which is largely constituted of methane with the smaller amount of other hydrocarbon gases and nonhydrocarbon ones such as carbon dioxide and water vapor.[1] According to the annual data from each European Member States (MS)[2], natural gas is one of the most frequent fuels in the European Union (EU).[3] It has three stages in its value chain: upstream (extraction and production), midstream (transportation via pipelines and storage) and downstream (the wholesale and retail markets).[4]

In comparison with oil which is traded globally, the market for natural gas is more regional mainly due to the network-bound character and the high cost of construction of the new pipelines.[5] Regarding these specific features of the transportation system, and the need for pipelines, the market liberalization and subsequently the application of EU competition law in the energy sector (gas and electricity) have always been challenging.

The purpose of this thesis is to consider the gas supply contracts from the competition law aspects in order to find how the main anti-competitive arrangements in this sector could be addressed. Moreover, the outcomes of the research on the future gas sales agreements and the development of the European gas market will be considered as well.

In this way, a brief history of the European Energy Policies and the available literature are studied first in this Introduction in order to understand the main problem. Then, the research questions and the methodology will be presented.

1.1 European Energy Policies post market liberalization

An overview to the first decades after the Treaty of Rome (1957) showed that the creation of a common market for energy had no progress in comparison with the other sectors, even though the original idea of the European community was the energy matter.[6] The main reason for that was the natural

[1] Natural gas explained (12/9/2021) https://www.eia.gov/energyexplained/natural-gas/ (last seen 9/4/2021).
[2] Eurostat statistics explained, energy statistics- and overview, (1/7/2020), https://ec.europa.eu/eurostat/statistics-explained/index.php/Energy_statistics_-_an_overview (last seen 30/4/2021)
[3] Nesdam, Anne Karin. "The organization of Norwegian Gas Sales and Competition Law Aspects." Nordisk institutt for sjørett Petroleum law compendium 2(2) (2007) 5.
[4] Ritz, Robert A. "A Strategic Perspective on Competition between Pipeline Gas and LNG." The Energy Journal (Cambridge, Mass.) 40, no.1 (2019) 198.
[5] Talus, Kim. Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law. Norwell: Wolters Kluwer Law & Business (2011) 42.
[6] Talus, Kim. EU Energy Law and Policy: A Critical Account. First ed. Oxford: Oxford University Press, 2013, 15.

resources such as natural gas had a political component,[7] and the European MS were not easily willing to transfer their regulatory power to the EU.[8] Therefore, it was difficult to be regulated at the EU level.[9]

However, the State-control over the energy sector started to change into market-regulation in the 1980s notably as a consequence of the developments in US and UK.[10] The main objective of the market liberalization was to provide the cost-efficiencies for the final customers through reaching the lower prices and a wider range of suppliers.[11] To achieve this purpose, the EU has tried to liberalize the natural gas market through three consecutive legislative packages.[12]

The first liberalization directives (which was called the Firs Energy Package later) were adopted for electricity in 1996 (Directive 96/92/EC) and for gas in 1998 (Directive 98/30/EC).[13] In the First Energy Package a foundation for the energy competitive market was provided. The goal was to end the state supply monopolies and the solution was presented by two ways: to enable the "eligible customers" (which were only the large industrial customers) and to enter the new suppliers. Moreover, the First Gas Directive (98/30/EC) took the initial steps to introduce the unbundling regime and the right of third party access (TPA) to transportation facilities.[14] In this way, MS were allowed to choose between the "regulated TPA" (to stablish the access conditions) or "negotiated TPA" (to allow the owner of the facilities to negotiate the conditions with third parties).[15]

Considering that the First Energy Package contained only the general principles of liberalization, and it left the practical aspects to the MS,[16] a further review to the legislation was necessary.

A Second Energy Package (mostly included Electricity Market Directive 2003/54/EC and Gas Market Directive 2003/55/EC) was adopted in 2003 to pursue the creation of a competitive market for the gas and electricity. The new directives in the Second Energy Package contained more details of sector-specific obligations, such as functional (separate accounting) and legal unbundling in the gas

[7] Talus, Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law, 9.
[8] Talus, Kim. Introduction to EU Energy Law. Oxford: Oxford University Press (2016). 3.
[9] Ibid, 2.
[10] Ibid, 3.
[11] Ibid.
[12] Pogoretskyy, Vitaliy, and Talus, Kim. "The WTO Panel Report in 'EU-Energy Package' and Its Implications for the EU's Gas Market and Energy Security." World Trade Review 19, no. 4 (2020), 535.
[13] Internal Energy Market, Fact Sheets on the European Union https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.1.9.pdf (last seen 6/05/2021).
[14] Loudjeva, Maria. "Ensuring Competition in the EU Gas Market: The Role of DG Competition." International Trade Law & Regulation 21, no.1 (2015), 2.
[15] Vasyl Chornyi and Anna-Alexandra Marhold, 'In Uncharted Waters: The Contested Legal and Political Landscape of Nord Stream 2' in Martha M. Roggenkamp and Catherine Banet (eds.), European Energy Law Report XIV (Intersentia, 2021) (forthcoming), 3.
[16] Loudjeva, "Ensuring Competition in the EU Gas Market: The Role of DG Competition," 2.

sector. Moreover, it substituted the "negotiated TPA" with the obligation for the undertakings to public their tariffs for access to the gas infrastructures.[17]

However, the outcome of the Second Energy Package was not as sufficient as it was expected. A sector inquiry conducted by the EU Commission in 2007 showed serious obstacles such as: high market concentration, failure in cross-border trade development, imperfection in the application of unbundling regime and the remains of vertically integrated suppliers, the lack of transparency for tariffs, the preventive effects of long-term reservation contracts for the TPA and the uncompetitive pricing-mechanisms (namely oil-indexation method) in the gas supply agreements.[18]

Due to the mentioned shortcomings in the First and Second Energy Packages, the EU adopted a new sector-specific legislative package (The Third Energy Package (the Electricity Directive 2009/72/EC) and the Gas Directive 2009/73/EC)) in 2009. It contained the ownership unbundling with the certification of Transmission System Operators (TSOs) rules (Article 9 of the Third Electricity and Gas Directives), presented for facilitating the access to the networks.[19] Moreover, regarding the access to the gas pipelines, there was an obligation for access tariffs to be transparent and the methodologies to calculate of capacity allocation should be published before the enforcement.[20]

The EU also tried to address some specific competition issues in the Third Energy Package. It established new powers for National Regulatory Authorities (NRAs) on one hand, to enforce the more detailed regulations for the TPA) and the EU-level energy authority (Agency for the Cooperation of Energy Regulators (ACER)) on the other hand. In addition, the Third Energy Package enabled the EU to adopt further legislations for specific issues known as "network codes" containing the details for the transparency in the capacity allocation, balancing and tariffs for the network facilities.[21]

Although the First and Second Energy packages included "initial measures" for liberalization, the Third Energy Package took the moving steps towards the "fundamental development" in sector specification, regulatory control and involvement of the public sector in the internal energy market. [22]

In more recent years, the environmental concerns about the energy sector have promoted the EU to make the market not only competitive, but also compatible with the sustainability. In this way, the focus of the Fourth Energy Package is on renewable energy and energy security matters.[23] It intends to enable the EU to meet the energy and climate targets, and it includes eight different legislative

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[17] Ibid.

[18] Sector Inquiry, Energy and Environment, the European Commission https://ec.europa.eu/competition/sectors/energy/2005_inquiry/index_en.html (last seen 6/5/2021).

[19] Vasyl, 'In Uncharted Waters: The Contested Legal and Political Landscape of Nord Stream 2,' 3.

[20] Talus, Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law, 89.

[21] Pogoretskyy, "The WTO Panel Report in 'EU-Energy Package' and Its Implications for the EU's Gas Market and Energy Security," 535.

[22] Ibid.

[23] Talus, Introduction to EU Energy Law, 5.

proposals covering Energy Union governance, electricity market design, rules for the ACER and security of supply.[24] Moreover, in the forthcoming review of the Third Gas Directive (TGD) in 2021, the level of climate ambition is increased in order to achieve a competitive decarbonized gas market.[25]

The study of the European Energy Policies is important because it could help the research to find the main purpose of the European legislator to develop the market and to amend the Energy Policies. Therefore, the mentioned policies will be considered again in various parts of the thesis in detail.

1.2 The application of EU competition law in the energy sector: state of play

The main objective of the EU competition law is to provide the customer welfare through the well-functioning of the internal market.[26] In this way, various literature has considered the European competition law.[27] Articles 101 and 102 of Treaty of Functioning of the EU (TFEU), Merger Regulations (EUMR), rules on public procurements and state aids are considered as the fundamental tools for the application of EU competition law in the common market.[28] In this thesis, EU Competition law refers to Article 101 and 102 of TFEU only, because the main focus of the study is to consider the gas supply infringements that mostly contain the anti-competitive arrangements under Article 101 and 102 TFEU. Some other materials have considered the role of, public procurements[29] and state aids[30] in the market liberalization for the energy sector in detail. Moreover, the EUMR are discussed in both EU law literature and in books focusing on the EU energy markets.[31]

Article 101 TFEU is applied to all forms of collisions (agreements, decisions, or concerted practices) that distort competition between MS.[32] In this way, Article 101(1) TFEU prohibits specific agreements that have the object to distort competition irrespective of their negative effects on the market.[33] If an

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[24] EU legislation, gas and electricity (29/7/2020) https://www.cre.fr/en/CRE-in-the-world/Europe/eu-legislation (last seen 3/3/2021).

[25] Legislative train, revised regulatory framework for competitive decarbonized gas markets (1/4/2021) https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/a-european-green-deal/file/revised-regulatory-framework-for-competitive-decarbonised-gas-markets(last seen 16/4/2021).

[26] Talus, Introduction to EU Energy Law, 57.

[27] For instance, see: Jones, Alison., and Brenda. Sufrin. *EC Competition Law : Text, Cases, and Materials.* 4th ed. Oxford: Oxford University Press, 2009, Ibáñez Colomo, Pablo. *The Shaping of EU Competition Law.* Cambridge University Press, 2018, and Almăşan, Adriana, and Whelan, Peter. *The Consistent Application of EU Competition Law.* Vol. 9. Studies in European Economic Law and Regulation. Cham: Springer International Publishing AG, 2017.

[28] Ibid.

[29] See: Sauter, Wolf. *Public Services in EU Law.* Law in Context. Cambridge: Cambridge University Press, 2014.

[30] See: Righini, Elisabetta, and De Gasperi, Guendalina Catti. "Survey – The Application of EU State Aid Law in the Energy Sector." *Journal of European Competition Law & Practice* 10, no.1 (2019): 53-68, and Hancher, Leigh, Adrien De Hauteclocque, and Francesco Maria Salerno. *State Aid and the Energy Sector.* Oxford: Hart, 2018.

[31] See: Dismukes, David E, and Deupree, Michael W. "The Challenges of the Regulatory Review of Diversification Mergers." *The Electricity Journal* 29, no.4 (2016): 8-14, and Ten Brug, Hans, and Rao Sahib, Padma. "Abandoned Deals: The Merger and Acquisition Process in the Electricity and Gas Industry." *Energy Policy* 123(2018): 230-239.

[32] Talus, Introduction to EU Energy Law, 59.

[33] Whish, Richard, and David Bailey. Competition Law. 9th ed. Oxford: Oxford University Press, 2018, 127.

agreement does not have such anti-competitive object, the harmful effects on the market should be assessed.[34] All restrictive contracts within the scope of Article 101(1) TFEU are unlawful and automatically void under Article 101(2) TFEU. In a similar way, Article 102 TFEU deals with the abusive conducts (such as discrimination between customers or excessive pricing) of the dominant undertakings.[35]

The purpose of both Articles are to prevent market power enabling the undertakings to impose competitive constraint.[36] However, when the requirements of Article 101(3) TFEU are satisfied, and the justifications for the anti-competitive agreements are accepted, Article 101(1) TFEU is not applicable. That is, Article 101(3) TFEU provides a legal exception to the application of Article 101(1) TFEU, if the pro-competitive effects of the agreement outweigh its anti-competitive impacts on the market.[37] The similar justification is possible for the infringements under Article 102 TFEU.[38] On the other hand, Regulation 1/2003 provides a legal basis for procedural provisions, that how Article 101 TFEU and 102 TFEU should be applied in relevant cases. It grants the Commission the procedural tool to apply the mentioned Articles into individual cases.[39] Based on the Regulation 1/2003, the National Competition Authorities of the MS are responsible to apply EU competition law in their judges if the anti-competitive arrangements affect the trade between European MS.[40]

It is important to note that based on Article 194 TFEU, EU competition law is applicable to the energy market as well, and this point is specified by the Court of Justice of the EU (ECJ) in several cases. [41]

The consideration of the methodology applied to the case-law shows that the application of the EU competition law in the energy sector needs the assessment of the market definition first.[42] It varies from the MS` territory to the EU internal market for the gas or for the gas and electricity together.[43] Based on the Commission guidance[44], both production and geographical dimension must be taken into account. In this way, regardless of some exceptions (e.g. the power system of Baltic States which are parts of the north-west Russia interconnector system), the geographic relevant market for energy in

[34] Ibid, 134.
[35] Talus, EU Energy Law and Policy: A Critical Account, 121.
[36] Whish, Competition Law, 25.
[37] Ibid, 157.
[38] Talus, Introduction to EU Energy Law, 67.
[39] Ibid, 66.
[40] Talus, EU Energy Law and Policy: A Critical Account, 115.
[41] For example: Flaminio Costa (Case 6/64) [1964], Campus Oil (72/83) [1984], Almelo(C-393/92) [1994] and Commission v Italy (118/85) [1987].
[42] Talus, EU Energy Law and Policy: A Critical Account, 113.
[43] Ibid.
[44] Notice on the definition of relevant market (97/C 372 /03).

the EU has a national scope.[45] This point can show that the market integration in the field of energy (gas and electricity) is still incomplete.[46]

Moreover, on one hand Talus considered the specific contracts in different stages of the gas value chain. He classified the agreements into upstream commodity contracts (i.e. upstream supply contracts) and vertical transportation capacity contracts (i.e. vertical capacity reservation agreements) and tried to find the anti-competitive effects of the mentioned contracts; specifically the problem of the long-term supply contracts.[47]

On the other hand, Hancher considered the relevant infringements in the energy market from the EU competition law aspects and classified the infringements based on the application of Article 101 TFEU or Article 102 TFEU.[48] However, it is notable that the position of the suppliers in the gas market is traditionally dominant. That is, in the upstream gas sector, there are few number of the undertakings and in the sales market there are limited suppliers due to the highly vertical integration of production and transport pipelines (infrastructures).[49] Therefore, it is probable that both Articles (101 TFEU and 102 TFEU) applies at the same time to an anti-competitive arrangement and the classification of infringements based on the application of TFEU Articles (i.e. in a way that Hancher did) contains some repetition of the cases.

In addition, there was a need to consider not only the main discussions about the gas supply infringements, but also the possibility of any justifications under Article 101(3) TFEU. Similarly, finding the rationales of infringements was crucial to prevent them in the future. In this thesis, there is an objective to have a novel view to the main features of the gas supply contracts and the structure of the gas market in the EU in order to find the main anti-competitive concerns. In this way, the case-law and the related discussions about the infringements have been considered broadly and the reasons for the infringements as well as the possibility of the justification under Article 101(3) TFEU are discussed.

It is significant to note that the application of the EU competition law in the gas supply contracts has remained noteworthy, although various literature has considered this subject before.[50] This is a dynamic topic and the new cases or amendments to the policies could change successively the position

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[45] Ibid,114.

[46] Talus, Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law, 146.

[47] Ibid 125-177.

[48] Hancher, Leigh, and Christopher W. Jones. EU Energy Law Volume II: EU Competition Law and Energy Markets. 5th ed. Deventer: Claeys & Casteels, (2019), 157-375.

[49] Nesdam, "The organization of Norwegian Gas Sales and Competition Law Aspects," 10.

[50] For instance: Hulshof, Daan, Van Der Maat, Jan-Pieter, and Mulder, Machiel. "Market Fundamentals, Competition and Natural-gas Prices." *Energy Policy* 94 (2016): 480-491, and Chyong, Chi Kong. "European Natural Gas Markets: Taking Stock and Looking Forward." *Review of Industrial Organization* 55, no.1 (2019): 89-109.

of the suppliers and the structure of the market. Moreover, despite the fact that the legal monopoly in the gas sector has been formally abolished due to the liberalization process, the structural of the market lacks a real competition which could deal with the dominant position of the suppliers.[51] Thus, the new investigation in this area is still necessary and it could help the progress of the European supply market and supply contracts in the future.

1.3 Research questions

The main research question in this study is: "How the main infringements relating to the gas supply agreements have been addressed in the EU law?"

Thus, the research initially focused on three subsequent questions: "what are the specific features of the European gas sales agreements" (chapter 2), "what are the main infringements in this area?" (chapter 3) and "what are the EU tools to deal with the anti-competitive practices?" (chapter 4).

1.4 Methodology and delimitation

In this dissertation, various infringements in the gas supply market will be considered in order to find the main rationales for them. Moreover, the structure of the market is considered by the critical view to the EU gas policies. The aim is to find the tools that EU policies could provide to deal with the anti-competitive concerns of the infringements and to what extent these preventive or punitive measures have been successful.

Considering the focus of the research is only on the European gas supply market, the fundamental methodological approach used in this study is the analysis of the EU legal sources. In this way, both primary EU legislation as well as secondary legislation and sector specification rules in the field of gas will be analyzed. Considering the EU case-law and the cases in the national courts of the European MS have a key role to clarify the restrictions of competition in the energy sector,[52] the relevant cases have been widely considered in this thesis (summaries of the main energy cases are presented in the annex). Moreover, to support the mentioned materials, the interpretation of the court decisions will also be used. Regarding the similarities between the electricity market and the gas market, the electricity cases have been exampled wherever they were found relevant.

In chapter 2, the main features of the gas supply agreements will be considered. Gas supply agreements have many different clauses (e.g., risk allocation, delivery conditions, bank guarantees, etc.). In this study, only the clauses will be considered that have the competitive effects on the market such as pricing-mechanisms, duration and volume or quantity arrangements.

[51] Nesdam, "The organization of Norwegian Gas Sales and Competition Law Aspects," 11.
[52] Talus, EU Energy Law and Policy: A Critical Account, 111.

In chapter 3, some infringements (e.g. refusal to supply) are not related to the gas sales market directly; however, the transport facilities are the prerequisite for the sales market,[53] and many abusive conducts are predicted for the dominant suppliers controlling the transport system (vertical integrated suppliers). Therefore, these infringements affect indirectly the gas supply agreements and they are considered in chapter 3 as well.

In the fourth chapter, the study will focus on the legal tools reflecting in the EU policies. Therefore, the research does not contain the political or other strategical tools in order to address the problem.

2 The main features of the European gas supply agreements and the anti-competitive concerns

The aim of this chapter is to find the main features of the gas supply agreements. It would be a prerequisite for considering the main anti-competitive concerns of these contracts and the relevant infringements.

To find the main features of the European gas supply agreements, the contracts should be considered from different aspects. The notable aspects of these contracts are; the pricing mechanisms, duration, quantity arrangements and the other important terms. The mentioned aspects and their anti-competitive concerns are considered separately in the following parts of this chapter.

2.1 The pricing-mechanisms

There are two main different methods to set the gas price in the EU supply contracts[54]: the oil-price indexation and the spot market price. In the first method, the gas price is determined by linking it to the oil products and in the second one the price is determined in the spot market.[55]

In the EU, the Netherlands was the first to propose oil-indexation method in its policy paper known as "Nota de Pous" in the 1960s. Through this pricing-mechanism, the price of natural gas was determined by the alternative fuels such as heavy fuel oil and gasoline.[56] However, the emergence for the market price for the natural gas and the existence of spot markets were due to the Ukraine crisis in 2009 when it was needed that the gas was bought and delivered immediately within a short period (e.g. thirty days or fewer).[57]

[53] Nesdam, "The organization of Norwegian Gas Sales and Competition Law Aspects," 4.
[54] To see the difference with the methods applied in USA supply contracts see: Dyrland, Sondre. *Reguleringen Av Gassmarkedet I USA*. Bergen, 2005. S. 145-161.
[55] Ferrario, Pietro. *Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Kluwer Academic (2017): 1.
[56] Zhang, Dayong, Wang, Tiantian, Shi, Xunpeng, and Liu, Jia. "Is Hub-based Pricing a Better Choice than Oil Indexation for Natural Gas? Evidence from a Multiple Bubble Test." *Energy Economics* 76 (2018): 495.
[57] Ferrario, *Adaptation of Long-Term Gas Sale Agreements by Arbitrators*, 1.

Before the liberalization, the gas trading was under the state-control and away from the competition. The only competition was between various forms of energy resources. Therefore, the long-term agreements were chosen to secure the gas supply within the borders of the EU MS. In this type of contracts, the seller accepted the risk of volume and the buyer accepted the risk of price fluctuations.[58] Thus, the oil-linked price was the best option to secure the price stability.

After the introduction of liberalization on the natural gas market, "the market price" determining by demand and supply in the short-term (spot) market presented as a "competitive price" and became a better reflection of the market operation. However, it is notable that the long-term and oil-indexed contracts are still widely used and prevailed in the EU.[59] The reason for that will be discussed in the next part.[60] To provide more flexibility and near the contracts to the EU competition aspirations, various tools have been developed in the contracts. These flexibility tools are mostly; The price review provisions so called "adaption clauses" which provide the possibility to renegotiate the formula used for the price calculation every a specific period of time.[61] In the same way, some long-term contracts provide the spot-market prices not the oil-indexed ones. In this type of pricing method, the "spot percentages" for the seller can be determined. That is, the seller entitles a percentage of the volumes which are sold at the market price.[62] Moreover, renegotiation in the minimum volume and reference to the spot market price has been predicted in the more recent contracts. It is also possible that the volumes of gas or its arrangements become flexible; for instance the take or pay mechanism could be ignorable for a specific period of time.[63] The aim of the contracting parties to apply such flexibility tools in their contracts is to reduce the anti-competitive concerns of the long-term agreements and to make them more competitive.

It is up to the parties to depend the price review tools on the changes in economic circumstances in such a way that is beyond the control of the both contracting parties; for example, unexpected availability of gas to supply or unexpected fluctuations in demand. An arbitration clause is usually agreed in the long-term contracts for any price disputes.[64]

It is also important to note that at the first stage of market liberalization for natural gas (during 2008-2012), there was a gap between oil-linked prices and the hub-based ones and it led to unjustified losses because the buyers bought the gas at the oil-linked prices through the long-term with take-or-pay arrangements and sold it at the hub-based prices with loss.[65] The main reason for that was the hub-trading in the EU was in progress and the pricing-mechanism was not proper for the physical market.

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[58] Talus, *Introduction to EU Energy Law*, 76-77.
[59] Ferrario, *Adaptation of Long-Term Gas Sale Agreements by Arbitrators*, 13.
[60] See 2.2 part of this chapter.
[61] Ferrario, *Adaptation of Long-Term Gas Sale Agreements by Arbitrators*, 14.
[62] Ibid, 7.
[63] Zhang, "Is Hub-based Pricing a Better Choice than Oil Indexation for Natural Gas? Evidence from a Multiple Bubble Test," 380-381.
[64] Ibid, 381.
[65] Stern, Jonathan, and Rogers, Howard. "The Evolution of European Gas Pricing Mechanisms," In *The European Gas Markets*, Springer International Publishing (2017): 363.

Moreover, the most participants in the European hubs were the local market players while the wholesale market was remained dependent on the long-term and oil-linked contracts. However, in the mid-2016 for the first time the curves for both prices came together[66] and it helped to the development of hubs in the EU.

Although the EU has some active hubs in the Netherlands, Germany, Austria and Italy[67], the hub-trading for the European natural gas has been still in progress and the linkage to the oil products in the supply market is slowly reducing. For example, this reduction was from nearly 80% to less than 30% in 2015. However, the development in the hub-trading is not the same for all MS; In this way, the pricing-mechanism in the north and the west of the EU which account almost the half of the whole demand of the EU is mostly based on hub-prices. At the same time, only the half of gas in the Central of Europe which is about the 10% of the whole demand is hub-based price and even the smaller amount in the south and the east (except Italy) is determined by the hub-prices.[68]

To make the function of European hubs accordingly, two main conditions are necessary; sufficient liquidity (the ratio between the total volume of trades and the physical volume of gas consumed in a specific hub) and transparency (the prices should be public and accessible for the whole market players).[69] In addition, it is necessary to correlate between European hubs.

To achieve these objectives, based on the Madrid Forum in 2012 the European Gas Target Model (GTM) was indorsed by the Council of European Energy Regulators (CEER) in co-operation with ACER. GTM is a vision of a single liberalized gas market for the EU and defined as the target for the process of liberalization in the EU gas sector. Moreover, it predicts the connection with the other end-points of the single market such as competition, ensuring the security of gas supply (SGS) and the sustainable development. These purposes aim to be achieved through a series of network codes and the regulations such as the Regulation 1227/2011 so called "REMIT" (EU Regulation on Wholesale Market Integrity and Transparency) to provide the system well-functioning tools for the financial risk management and physical flexibility in the market.[70] Moreover, the correlation between European hubs is envisaged by the GTM. Until now, the main barriers for poor correlation of the hubs are found physical.[71] That is, the lack of trading volume, the risk of manipulation for the prices by the national players and the insufficient liquidity in the market.[72] The mentioned failure in the function of the European hubs could reveal the fact that there is a long way for the long-term supply contracts to be benefited from the spot market price and become less anti-competitive.

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[66] Ibid, 362.
[67] European Traded Gas Hubs: the supremacy of TTF https://www.oxfordenergy.org/wpcms/wp-content/uploads/2020/05/European-Traded-gas-hubs-the-supremacy-of-TTF.pdf (last seen 5/5/2021)
[68] Ibid, 363.
[69] Ferrario, *Adaptation of Long-Term Gas Sale Agreements by Arbitrators.* 13.
[70] Stern, "The Evolution of European Gas Pricing Mechanisms," 365-367.
[71] Ibid, 370-372.
[72] Ferrario, *Adaptation of Long-Term Gas Sale Agreements by Arbitrators.* 14.

2.2 Duration, quantity arrangements and other important terms

2.2.1 Duration of the contracts

The gas supply agreements in the EU has been traditionally long-term (between twenty to thirty years) and they are used in different parts of the market. For instance, between MS and importers, between wholesalers and retailers and non-household consumers (e.g. power plants and local distributors).[73]

Considering that there is a direct connection between the stability and efficiency of the long-term agreements and the satisfaction of the contracting parties for their investments recoveries,[74] the long-term duration is the most acceptable form in the upstream and sales market for the natural gas in the EU.[75] In other words, long-term supply contracts contain SGS and from the sellers` point of view it contains the security of demand which motivates the investors in exploration, production and transportation investments. It also reduces the risk of volatile-price movements (price fluctuations) form the buyers` view. It is important to note that the infrastructure in gas market is highly capital-incentive. [76] Moreover, there is uncertainty for the future market in this case. Therefore, there should be strong incentives for the investors, in the form of long-term agreement with the high volumes of gas, to accept such risk to construct a new infrastructure. Therefore, the European Commission admitted frequently that the long-term contracts have positive effects in the large-scale investments and the SGS in its considerations.[77]

However, the long-term contracts are not flexible enough for the competitive market in the EU after market liberalization. It means, there is little room for the other competitors to make various choices for the consumers and increase the consumer welfare. Moreover, for the new undertakings it is limited to access to the natural gas, customers and the capacity for transmission. When the structure of the market is built on the long-term contracts and the contracts` volumes are high, there are barriers for the other competitors to entry and access the customers[78] (see; Distrigaz[79], E.ON[80] and the electricity case EDF[81]). All the mentioned cases settled with the commitments containing the reduction of the contract duration and the elimination of the barriers. Moreover, the competitors offered the return of the volume to the market which made a basis of competition for the other undertakings.

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[73] Ferrario, *Adaptation of Long-Term Gas Sale Agreements by Arbitrators*, 1.
[74] See Gaille, S. Scott. "The Use of Quantity Terms to Improve Efficiency and Stability in International Gas Sales & Purchase Agreements." *Energy Law Journal* 29, no.2 (2008): 645.
[75] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 150.
[76] Ibid, 178.
[77] Ibid, 183.
[78] Ibid, 79.
[79] (Case COMP/37.966) [2007]
[80] (Case COMP/39.317) [2010]
[81] (Case COMP/39.386) [2010]

2.2.2 The quantity arrangement and other important terms

In the long-term supply contracts, the take-or-pay clause is the most common quantity arrangement and it is widely used to increase the chance for the revenue flow and repayment of the loans specifically in the large-scale projects.[82] By this mechanism, the buyer pays for the specific volume regardless of the factual demand and the price would be fixed and regardless of any actual fluctuations in the market.

On the other hand, by a destination clause the buyer would be limited to resell the purchased gas in other areas. Then, it enables the seller to differ prices in various areas for the same product. Similarly, through the profit-splitting mechanism, the buyer is obliged to give the producer a share of the profits that are made for the reselling the gas outside of the territory which was agreed.[83]

It is notable that the gas suppliers have usually dominant positions and the structure of the market is oligopolistic. Therefore, their long-term contracts are more probable to make foreclosure for the new competitors[84] (see GDF-ENEL, GDF-ENI[85])

In this way the destination clause or the similar terms make the situation more restrictive since this method prevents or limits the buyer from the second selling of natural gas in other MS` markets (outside the national boarders).[86] This mechanism not only has anti-competitive concerns, but also is against the market integration in the EU.[87] Thus, the elimination of the destination clause can change the long-term supply contracts into better form to balance the risk between contractual parties.[88] This point has been achieved in all the exampled cases.

2.3 The outcomes of the consideration regarding the anti-competitive concerns

In this chapter of the thesis, the main aspects of the gas supply agreements in the EU have been considered. As it was mentioned before, the long-term agreements with their specific mechanisms (for price and volume) could be accepted only for the investments in infrastructures[89] which provide SGS for the MS. In this way, two important points should be considered.

First, from the competition law aspect, the private investments for the infrastructures is different from the situation that the pipelines are built under the State funding or under the special rights[90] which was common before the market liberalization. The long-term supply agreements in the latter one is more anti-competitive and the investment-justification is not available for them. That is, the

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[82] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 11.
[83] This mechanism is more usual in the LNG contracts, see: Hancher, L. "Splitting hairs? Profit-sharing mechanisms in contracts under EC Competition Law. "*European Review of Energy Markets* 2, no.3 (2008): 89-99.
[84] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 185.
[85] (Case COMP/38.662) [2004]
[86] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 78.
[87] Ibid, 82.
[88] Ibid, 175.
[89] Ibid, 156.
[90] Ibid, 218.

long-term contracts making the foreclosure for the other competitors are not allowed when they are under the Sated funding or special rights.[91]

Second, the gas upstream market in the EU is very often integrated with the midstream market (transportation). Therefore, long-term supply contracts contain the arrangements for the capacity reservations. Although the long-term gas supply contracts are highly incentive for the investors, the long-term capacity contracts could be harmful for the market liberalization.[92] To reduce the anti-competitive concerns of the latter contracts, the Commission tries to apply the ownership unbundling and TPA regulations in its considerations.

The main infringements regarding the gas supply agreements and the applicable EU tools to address their anti-competitive concerns will be discussed in the following chapters.

3 Main infringements in the gas supply agreements: justifications and rationales

In this chapter, the main infringements, relevant to the European gas supply agreements are considered. Although the anti-competitive effects of the infringements, some efficiencies can justify the negative effects of the unlawful practices. Therefore, the application of Article 101(3) TFEU in the gas cases is important. This point is considered in the second part. Moreover, to find the main reasons for the infringements are crucial to prevent the similar anti-competitive behavior in the future. Thus, the last part of this chapter contains the main rationales for the infringements.

3.1 An overview to the main infringements

The main infringements related to the gas supply contracts and important discussions about each category are presented in this part. Considering that both Article 101 TFEU and 102 TFEU can apply to an unlawful arrangement at the same time,[93] the classification of the infringements in this part is not based on the possibility of the application of Article 101 TFEU or Article 102 TFEU. The objective of classifying the infringements is the consideration of case-law and finding the frequent anti-competitive arrangements in the gas supply market.

3.1.1 Excessive and Unfair prices

In a competitive market, the price is the best indicator to show that the market-mechanisms are well-functioning.[94] However, there is a form of abuse of dominant position which stops the market from reaching a competitive price. In other words, the dominant undertaking prevents the market to be the

[91] Ibid, 230.
[92] Ibid, 126.
[93] See Hoffman(Case 85/76)[1976]. Moreover, the refusal to supply in the Marathon(CaseCOMP/36246)[2003] was considered under both Articles 101 TFEU and 102 TFEU.
[94] Hancher, *EU Energy Law Volume II : EU Competition Law and Energy Markets*, 364.

single regulator of the price[95] and charges all the customers (see Gazprom)[96] or only some of them (i.e. discriminatory) above the competitive prices. In the second form, the setting of the higher prices is to make foreclosure for the other competitors.[97]

It is important to note that not all high prices are abusive. The excessive price should be unlawful.[98] That is, the excessive price does not have any reasonable relation to the economic value of the supplied product. In this way, the analysis should be based on the suppliers` real costs.[99] For instance, the national authority of the MS has considered into account the average costs of the gas suppliers to find the unlawful prices (Elsam A/S Case[100] and the Spanish temporary congestion case[101]).

On the other hand, adopting a "method" by a dominant supplier which does not have a reasonable relation to the economic value of the product, can artificially increase the prices and amount the abuse of the dominant position in the form of excessive and unfair-pricing formula.[102] A clear example of that pricing-method is the oil-indexation in the gas supply agreements. The Commission found that the oil-indexation price-mechanism in the long-term contracts led to unfair prices since it is excessive compared with the available price benchmark (such as competitive prices at gas hubs).[103] This decision could be an end for the oil-indexation as a pricing-mechanism, for the long-term gas supply agreements in the EU. As an indicator for that; since the Commission decision in 2018, a wave of renegotiations has started for the long-term contracts between MS and Gazprom to make the prices more flexible.[104] Moreover, the Commission`s assessment is also crucial because the spot-market prices considered as a relevant benchmark.[105] Therefore, the price reasonability in the supply agreements should be determined in a comparison with the European hub-prices such as Dutch TTF hub, German NCG hub etc.[106]

3.1.2 Exclusive dealing agreements

Exclusive dealing agreements or non-compete obligations refer to a situation that the buyer is prevented from purchasing the all or a majority of its demand from anyone other than the dominant

[95] Whish, Richard, and David Bailey. *Competition Law*. 9th ed. Oxford: Oxford University Press, 2018: 738.
[96] (Case AT.39816) [2018]
[97] Talus, *Introduction to EU Energy Law*, 66.
[98] Whish, *Competition Law*. 738.
[99] United Brands(Case C-27/76) [1978].
[100] Danish Competition Council [2005] Elsam A/S and its appeal in [2006].
[101] Empresas Electricas, Tribunal de Defensa de la Competencia (Case 552/02)[2004]
[102] Gazprom decision para 68.
[103] Ibid, para 63.
[104] Mikulska, Anna. "Gazprom and Russian Natural Gas Policy in the First Two Decades of the 21st Century." *Orbis (Philadelphia)* 64, no.3 (2020): 413.
[105] Loudjeva, "Ensuring Competition in the EU Gas Market: The Role of DG Competition," 7.
[106] Gazprom decision para73.

undertaking.[107] Moreover, this abusive obligation should be capable of having foreclosure effect for the other competitors which are as efficient as the dominant undertaking.[108](See Almelo case)[109]

To find whether the non-compete clause has the foreclosure effect, it is important to consider whether the other suppliers are still free to compete for the entire demand of the customers. In addition, we have to consider the possibility for the buyers to switch from one supplier to another one.[110]

Despite the positive effects of the long-term supply contracts on the investment, the duration of the contract is one of the indicators that shows the dominant undertaking imposes barriers to entry for the other competitors and prevent the buyers to switch from itself. The longer the duration of the supply contract, the more probable for the foreclosure effects[111] (see the Gas Natural/ Endesa[112] and E.ON-Ruhrgas[113]).

It is important to note that exclusive dealing agreements are different from a situation that the buyer buys the whole or the main of its need from one supplier deliberately. Therefore, it is necessary that the contract contains a specific obligation. [114] However, in the initial part of the liberalization process, the structure of the gas market lacked the variety of suppliers. Therefore, the customers did not have the alternative choice to satisfy their gas requirements, and the abusive conduct of the single supplier was expected (see Distrigaz[115]). In the same way, the long-term contracts of the few suppliers strongly prevented the other competitors to maintain the monopole structure of the market (see EDF). These situations will be considered in more detail in chapter 4 to find how the EU has used its legal tools to change the structure of the market and force the market to become more competitive with the verity of the suppliers.

3.1.3 Unlawful joint selling

Joint selling is a form of co-operation agreements in order to share the cost and risk and to increase the investment and innovation between undertakings.[116] Joint selling is usually pro-competitive due to efficiency in costs and operation specifically when the market position of the undertaking concerned is weak.[117] However, if it leads to restrict the competition, reduces the variety of customer choices and makes foreclosure for other undertakings, it is unlawful. The concern is more probable if at least one of the parties has a strong market position.[118]

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[107] Whish, *Competition Law*. 699.
[108] Ibid, 700.
[109] (Case C-393/92) [1994].
[110] Talus, *Introduction to EU Energy Law*. 66.
[111] Whish, *Competition Law*. 702.
[112] (Case COMP/37542)[2000].
[113] (Case T-360/09)[2012].
[114] Whish, *Competition Law*. 700.
[115] (Case COMP/37966)[2007].
[116] Whish, *Competition Law*. 597.
[117] Hancher, *EU Energy Law Volume II : EU Competition Law and Energy Markets*. 182.
[118] Whish, *Competition Law*. 612.

It is notable that Price-fixing is an indispensable part of the joint selling agreements.[119] Therefore, it is more likely to restrict the competition by object as it eliminates the price-competition.[120] However, it is allowed, when it is a part of an overall economic activity (e.g. joint production and selling) or when the prices charged to immediate customers in the form of joint-distribution.[121]

Joint selling varies in form: the undertakings could maintain their co-operation in the form of an agreement or they can stablish a full-function joint venture. If the stablished joint venture does not constitute a "concentration" under EUMR[122], it is still possible to be considered under Article 101 TFEU.[123]

According to the Commission investigations, the unlawful joint selling has happened from a single field (see the Britannia[124] and Corrib cases[125]) and from several fields (see GFU[126]). Moreover, the contracts may contain the other restrictions to raise prices profitably for the undertakings or indirectly market partitioning (see DONG/DUC[127]).

3.1.4 Market partitioning and territorial sales restrictions

Market partitioning is an agreement between undertakings not to sell the contractual product it the home markets of each other.[128] (See GDF/E.ON[129] for the gas market and EPEX Spot/ Nord Pool Spot[130] for the electricity market).

In a similar way, territorial sales restriction and export bans are some usual methods in supply contracts to protect the position of the dominant undertakings in the market and enable them to price maintenance. The territorial restrictions are usually in the form of the export bans (destination clause) and have the same effect to the market. They obliged the buyer to use the purchased gas it the destination country. Sometimes the seller must give the consent on the re-export selling.[131] In a similar way, the other forms of contractual and non-contractual restrictions have the same effects as the territorial restrictions. For instance, The Commission indicated some contractual and non-contractual measures in Gazprom supply contracts, which prevented the free flow of gas in the Central and the Eastern European market. These measures were mostly in two forms: first the right of Gazprom to increase the take-or-pay obligation if the contractual party re-exported the gas and second it was

[119] Hancher, *EU Energy Law Volume II : EU Competition Law and Energy Markets*. 182.
[120] Whish, *Competition Law*. 618.
[121] Regulation(EU) No 1218/2010 on the application of Article 101(3)Article 4(a).
[122] EUMR,Article 3.
[123] Whish, *Competition Law*. 598
[124] (Case IY/E-3/35.354) [1998].
[125] (Case COMP/37708) [2001].
[126] (Case COMP/36072) [2002].
[127] (Case COMP/38187) [2003].
[128] Whish, *Competition Law*. 541.
[129] (Case COMP/39401) [2009].
[130] (Case AT/39952) [2014].
[131] Loudjeva, "Ensuring Competition in the EU Gas Market: The Role of DG Competition." 4.

needed for the Gazprom consent in every re-export of gas. Such conducts are abusive and they are restrictive for the competition by object.[132]

The mentioned clauses are used in both horizontal and vertical agreements. It is notable that territorial restrictions particularly in the vertical agreements could lead to market partitioning[133] as well (see GDF/ENI/ENEL,[134] Bulgargaz[135] and EDF[136]).

Although some positive effects that are possible for such restrictions, the Commission has always tried to eliminate the sales restrictions since destination clauses have been used widely in the long-term gas contracts.[137] Moreover, other than anti-competitive effects of territorial restrictions, they are against the purpose of market integration in the EU[138].

3.1.5 Refusal to supply (capacity hoarding, discriminatory access and underinvestment)

Refusal to supply is a form of abuse of the dominant position that prevents the access to the transportation infrastructures (i.e. to make network foreclosure) and restricts the competition in the downstream market.[139]

Considering that many EU gas suppliers are still vertically integrated and benefit from the control of the infrastructures (e.g. Gazprom), the refusal to supply and other similar anti-competitive practices could be considered as the infringements relevant to the supply contracts.

Based on the sector inquiry, the refusal to supply is mostly in the form of capacity hoarding. That is, the available capacity does not offer or it is reserved by the agreements (usually previous long-term agreements), while the whole reserved capacity is not always used[140] (see GDF/E.ON[141]). This arrangement shows that the using of the infrastructures is not efficient.

Moreover, it may contain a delay to access or access under unreasonable and high price-terms (e.g. high tariffs) to increase the price in the downstream market (i.e. margin squeeze).[142] It is notable that

[132] Gazprom decision para56-58.
[133] Talus, Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law,159.
[134] (Case COMP/38662) [2004].
[135](Case AT.39849) [2018].
[136] (Case COMP/39386) [2010].
[137] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law.* 160.
[138] Talus, *Introduction to EU Energy Law.* 81.
[139] Hancher, *EU Energy Law Volume II : EU Competition Law and Energy Markets.* 333.
[140] Loudjeva, "Ensuring Competition in the EU Gas Market: The Role of DG Competition." 5.
[141] (Case COMP/39401)[2009].
[142] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law,* 203.

the refusal to access in latter form is not direct[143] (see RWE[144] and Marathon cases[145]). In the similar way, the discriminatory access has the same effect and restrict the competition for the undertakings.[146]

Another form of refusal to supply is refusing to accept the strategic investment (underinvestment). It happens when despite the third parties` willingness, the investment to the additional infrastructure is disagreed without an objective justification, because the dominant undertaking wants to keep its position and to maximize its profitability in the downstream market (i.e. to imply market power)[147] (see ENI[148]). It is important to note that there is a duty for dominant undertakings to take the necessary steps and accept the investments to address the lack of capacity when the existing one cannot meet the demand.[149]

The refusal to supply is also considerable from the doctrine of the essential facilities` perspective. In other words, pipelines and interconnectors are the examples of the essential facilities in the natural gas and the electricity market and if the control over these facilities enables the undertaking to control and eliminate the competition in the downstream market[150], the dominant undertaking may be forced to contract with the other competitor(s).[151] In this way, the essential facilities should be an indispensable requirement to access the downstream market[152]. Moreover, the assessment of indispensability should be considered in the entire market with the impossibility of the downstream market to be supplied form the alternative resources.[153] In addition, the infrastructures should be economically or legally impossible to be duplicated.[154]

It seems that Doctrine of essential facilities applied traditionally in the cases, to provide the fairly access to the infrastructures for the third-parties.[155] Therefore, after the liberalization in the network industries and the sector specific regulations (TPA and unbundling regimes), there should be a little room for the application of the doctrine of essential facilities in the gas cases directly. However, due to the weak unbundling in the natural gas sector, it is still possible for the Commission to apply this doctrine to grant the fair and non-discriminatory access to the transportation facilities.[156]

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[143] Ibid, 209.
[144] (Case COMP/39.402) [2009].
[145] (Case COMP/36246) [2003].
[146] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 209.
[147] Loudjeva,"Ensuring Competition in the EU Gas Market: The Role of DG Competition." 6.
[148] (Case COMP/39315) [2010].
[149] Loudjeva,"Ensuring Competition in the EU Gas Market: The Role of DG Competition." 6.
[150] Talus, *Introduction to EU Energy Law*, 70
[151] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 205.
[152] Based on the test in Oscar Bronner (Case C-7/97)
[153] Talus, *Introduction to EU Energy Law*. 75.
[154] Guidance on the Commission's enforcement priorities in applying Article 82(2009/C 45/02), para 25.
[155] Talus, *Introduction to EU Energy Law*. 76.
[156] Hancher, *EU Energy Law Volume II: EU Competition Law and Energy Markets*. 302.

3.2 Possible justifications for the infringements (application of Article 101(3) TFEU)

Article 101(3) TFEU provides a legal exception to prohibit the application of Article 101(1) TFEU[157] when the positive effects and the efficiency provided by the arrangement outweigh its harmful effects to the market.[158] This legal exception is also available for the abusive conducts of dominant undertakings (i.e. Article 102 TFEU cases).[159] However, due to the dominant position of the undertakings, the harmful effects of their anti-competitive practices are stronger. Therefore, it is difficult for the justification to be accepted in such cases. In this part, the possibility of application of Article 101(3) TFEU in the gas supply infringements is considered.

There are some cumulative conditions, which are necessary for the application of Article 101(3) TFEU.[160] Among which, two requirements are important to note in the gas cases:

First, the restriction should be an indispensable part of the arrangement in order to achieve the efficiency.[161] In other words, the restriction of competition is the single way of achieving the expected efficiency.[162] However, this justification presented in the case of unlawful joint selling and it was failed to be accepted. Because in DONG/DUC case; the joint selling was not actually "necessary" to provide efficiency for the proper function of the joint production and in Britannia case; it was not an "indispensable part" of the objective for the field development.[163] Therefore, wherever the indispensability factor is not proved and the efficiency is achievable from other ways, the Commission does not accept such justification.

Second, the objective of the market liberalization is to benefit the customer with the lower prices and the higher variety of choices from the alternative suppliers.[164] Therefore, to justify a restriction, the customers should receive (directly or indirectly) a fair share of the overall benefit.[165] This was the presented defense in Corrib case. In this case, it was mentioned that the restriction of competition in the form of unlawful joint selling was necessary to meet the customer demand. Moreover, the field owners used the joint selling agreement to balance the countervailing purchasing power between seller and buyers in the market for the first period of 5 years of production. The buyers in the case were: the Irish energy companies, Bord Gais Eirean and the Electricity Supply Board.[166] However, the

[157] Whish, *Competition Law*, 157.
[158] Talus, *Introduction to EU Energy Law*, 61.
[159] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 133.
[160] Guidelines on the application of Article 81(3)(2004/C 101/08) para 42.
[161] Ibid, para 73.
[162] Whish, *Competition Law*, 169.
[163] Nesdam,"The organization of Norwegian Gas Sales and Competition Law Aspects," 43,44.
[164] Loudjeva,"Ensuring Competition in the EU Gas Market: The Role of DG Competition." 1.
[165] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 84.
[166] Talus, *EU Energy Law and Policy: A Critical Account*,120.

Commission concluded that it did not provide any benefit to the customer (even indirectly) that was sufficient to justify the negative effects of the restriction.[167] Therefore, the defense was rejected.

On the other hand, Article 101(3) TFEU is applied when the infringement satisfies the requirements of one of the so-called block exemptions. There are some block exemptions that are available for the gas infringements. Specifically, for the vertical integration companies[168] and co-operation agreements;[169] however, most block exemptions contain market share caps[170] that due to the high market share of undertakings are not applicable for the gas suppliers.

Moreover, the block exemptions are not applicable in the case of hard-core restrictions. While most of gas supply infringements contain the restriction of competition by object (e.g. market partitioning and the restriction to resell of the gas). Therefore, these infringements are excluded from the block exemption and a self-assessment by Article 101(3) TFEU is necessary for them.[171]

As it mentioned in the second chapter, the investment in the gas sector is highly costly. Hence, some of anti-competitive arrangements are necessary to secure the investment and provide the incentive for the investors.[172]

In this way, it is notable that the investment alongside the long-term agreements secure the supply of gas. Therefore, the application of EU competition law should not reduce the incentives for the investments since it affects the SGS negatively. As an example, in a refusal to supply case, if the undertakings are forced to supply, the incentive for the investment may reduce,[173] which have the negative effect on the market development and SGS. Therefore, the investment costs[174] and the matter of SGS[175] have been the expected defense for the infringements; however, such justifications have been narrowly accepted.[176] The reason for that is the justification for the costs, only in the case of private investments is not against the competition law requirements,[177] while, the investments in the gas infrastructures are widely under the MS` participations or under their controls (e.g. exclusive licensing systems) to secure their gas supply as the national priority.[178] Moreover, the importance of the SGS is an open question to be accepted as a defense for the infringements after the market liberalization.[179]

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[167] Nesdam, "The organization of Norwegian Gas Sales and Competition Law Aspects." 41.
[168] Regulation No.330/2010 on the application of Article 101(3).
[169] See: https://ec.europa.eu/competition/antitrust/legislation/horizontal.html (last see 14/3/2021)
[170] Whish, *Competition Law*, 172.
[171] Loudjeva, "Ensuring Competition in the EU Gas Market: The Role of DG Competition." 4.
[172] See 2.2.1 of chapter 2.
[173] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 231.
[174] Ibid 156.
[175] The defense in this situation is based on the public security factor under Article 36 TFEU, see: Talus, Kim. *EU Energy Law and Policy: A Critical Account.* First ed. Oxford: Oxford University Press, 2013, 89-92.
[176] Talus, *EU Energy Law and Policy: A Critical Account*, 166.
[177] See the discussion in 2.2.1 of chapter 2.
[178] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 250.
[179] Talus, *EU Energy Law and Policy: A Critical Account.* 166.

That is, the MS should secure their gas supply from a way that is compatible with the EU competition law. As a conclusion, there should be a way to balance the fundamental rights of the investors, which provide the SGS for the MS and the creation of a competitive market in the EU.[180] The competitive means of SGS and the development in the EU market from the security of gas perspective will be considered in chapter 4.[181]

As it was considered in this part, the justification for the gas supply infringements is very difficult to be accepted and Article 101(3) TFEU has been rarely applicable. Therefore, it is important that the infringements should be prevented from happening. To find the useful ways to address the anti-competitive practices and prevent them in the future, it is necessary to find the main reasons for the infringements. This key concept is considered in the next part.

3.3 The main rationales for the infringements

To find the main reasons for the infringements in the gas supply market, two important factors should be considered: the anti-competitive form of the gas supply contracts and the specific structure of the market. The first one was considered in detail in chapter 2.[182] In this part, the specific structure of the EU market for the natural gas is considered.

Before the liberalization process, the market was integrated vertically and under the control of the national monopoly of the MS. [183] After the liberalization process, the EU has tried to separate the competitive market from the non-competitive part by unbundling regime;[184] however, the ownership unbundling is still failed to be implemented properly and the main suppliers are still vertically integrated.[185]

On the other hand, EU is highly dependent on the importing of natural gas[186]; Russia has traditionally been the main supplier with the cover of about 40% of the whole demand and since mid-2017, Norway has become the second one with the cover of 29-34% of the whole demand. [187] The other European main suppliers are Algeria and Qatar with 10% of import shares. Although the domestic EU suppliers have been growing, the current suppliers of natural gas remained in the market with a clear dominant position.[188]

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[180] Talus, *Introduction to EU Energy Law*, 73.
[181] See 4.1.1 part of chapter 4.
[182] See 2.3 of chapter 2.
[183] Praduroux, Sabrina, and Talus, Kim. "The Third Legislative Package and Ownership Unbundling in the Light of the European Fundamental Rights Discourse." *Competition and Regulation in Network Industries* 9, no.1 (2008): 4.
[184] Ibid.
[185] Praduroux, Sabrina, and Talus, Kim. "The Third Legislative Package and Ownership Unbundling in the Light of the European Fundamental Rights Discourse." *Competition and Regulation in Network Industries* 9, no.1 (2008): 5,6.
[186] Talus, Kim. "Long-term Gas Agreements and Security of Supply - between Law and Politics." *European Law Review* 32, no.4 (2007): 535.
[187] Mikulska, "Gazprom and Russian Natural Gas Policy in the First Two Decades of the 21st Century," 405.
[188] Ibid.

Regarding these two reasons, the structure of the market paves the way for the infringements particularly the abusive conducts of the undertakings with the strong position.

As an example, Gazprom (the main Russian gas supplier to the EU[189]) has a very strong position in the European gas market in the EU. This position has become a monopoly in Central and Eastern of European market[190] and it has led to various abusive conducts such as market partitioning, unfair pricing and sales restrictions for the mentioned countries. Moreover, Gazprom has plenty of pipelines to deliver natural gas to the EU[191], which intensifies the strong position of this supplier in the market and provides the ability for its home country (Russia) to treat natural gas as an energy weapon[192] to endanger the SGS for the EU. [193]A clear example for this ability is the Ukraine crisis in 2006 and 2009.[194]

Despite the fact that the Commission was successful in its proceeding against the anti-competitive practices of Gazprom in the market, the dominant position of such supplier has not changed.[195] Therefore, it is necessary for the EU to develop the market in a way that the dominant position of the suppliers become under the control and the harmful effects of their abusive conducts will be minimize. In the next chapter, we will consider what tools the EU has to cover the contractual relations with the dominant suppliers and to develop the gas market in a more competitive way.

It is also very important to note that the level of dependency to the import of gas is not the same for all MS.[196] Therefore, the dominant position of the suppliers and the probable their abusive conducts are not similar for all the MS. Moreover, they vary in their strategies to extend the import of gas (specifically from Russia). For instance, contrary to Germany`s willingness to extend the import of the gas from Russia[197], Poland stipulates that this country due to the supply alternatives (i.e. Liquefied Natural Gas (LNG) possible contracts) and relay on its domestic producers will not renew the long-term agreement with Russia after it finishes in 2022.[198] Thus, the EU should consider various geopolitical decisions of the MS, when it desires to make a more competitive market for the natural gas. This important subject will be considered in the next chapter.

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[189] Gazprom is a state-controlled gas supplier. This company is vertically integrated and rather than its dominant domestically position, it has the complete monopoly over the exportation of Russia natural gas, see: https://www.gazprom.com/about/ (last seen 14/3/2021).
[190] Mikulska,"Gazprom and Russian Natural Gas Policy in the First Two Decades of the 21st Century."410.
[191] Ibid.
[192] Ibid411.
[193] Talus, "Long-term Gas Agreements and Security of Supply - between Law and Politics." 535.
[194] Mikulska,"Gazprom and Russian Natural Gas Policy in the First Two Decades of the 21st Century," 411.
[195] Ibid405.
[196] On the share of the European MS in the gas dependency to Russia-import see: https://ec.europa.eu/eurostat/statistics-explained/pdfscache/46126.pdf page 9 (last seen 14/3/2021)
[197] For instance, the NS2-project. It is a planned pipeline for the import of gas between Russia and Germany, which crosses the Baltic Sea with the parallel Pipelines of the existing pipeline (i.e. Nord Stream 1),see: Szydło, Marek. "Disputes Over the Pipelines Importing Russian Gas to the EU: How to Ensure Consistency in EU Energy Law and Policy?" *Baltic Journal of Law & Politics* 11, no.2 (2018): 95-126.

[198] Mikulska, "Gazprom and Russian Natural Gas Policy in the First Two Decades of the 21st Century," 415.

4 The EU tools to cope with the anti-competitive concerns of the infringements

As it was discussed in the previous chapter, the infringements relating to the gas supply agreements have two main causes: the anti-competitive forms of the contracts and the unsuitable structure of the market for competition.[199] Therefore, the EU should make its utmost effort to address both problems and consequently deal with the infringements. In this chapter, the EU tools categorizing in two main groups are discussed in the first part: the sector specific regulations and other EU tools relating to the development of gas market are discussed first. Considering that they try to cope with the problems of the structure of the market and they aim to prevent the infringements, they are called "preventive measures" in this dissertation. The second measures are applied when an infringement happened. Therefore, the EU tools in this situation do not act preventively, instead they have the punitive role in order to end the infringement and minimize its effect for the market. These "punitive measures" are the application of the EU competition law by the Commission or by the National Authority of the MS and they are considered in the second part of this chapter. It is notable that the purpose of the EU competition law is to support the application of sector specific regulations[200] and other preventive tools. Therefore, there is a connection between two groups of the EU tools. According to the importance of the structural remedies in the form of commitments, the last part has an emphasis on the role of the structural-remedy-commitments.

4.1 Preventive measures

As it was discussed before, the structure of the European gas market has some anti-competitive consequences. Therefore, a change in the structure of the market (i.e. restructure of the market) in a pro-competitive way can prevent the infringements.[201] In this part, two significant problems making serious concerns on the supply contracts are considered first: the SGS and the problem of vertically integrated gas suppliers who could distort competition by their abusive conducts in the sales market. If the market can solve these two problems, there would be a development of the structure of the market and the anti-competitive practices in the gas supply market are expected to be reduced.

Moreover, all supply contracts should be under the control of the EU gas policies and the sector specifications as well as the EU competition rules should be applicable to them. Considering that the MS vary in their contractual strategies with the dominant suppliers[202], particularly with the non-European ones, their contracts make new challenges for the application of the EU policies. Therefore, the gas policies should be updated enough to meet the latest challenges in the supply market. In this way, the last part will consider the role of the improvements in the European gas policies.

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[199] See 3.3 part of chapter 3.
[200] Talus, *Introduction to EU Energy Law*, 84.
[201] Ibid, 81.
[202] Vasyl, The Contested Legal and Political Landscape of Nord Stream 2', 1.

4.1.1 Restructure of the market to address the problem of the SGS in order to prevent the anti-competitive effects on the sales market

SGS means the availability of gas in affordable price and in the technical and sustainable reliability.[203] Therefore, affordability, availability, accessibility and acceptability are four significant elements in the definition of the SGS. [204]

As we have seen in the previous chapters, SGS is one of the main reasons for the long duration of the contracts.[205] Moreover, it could be a justification for the infringements related to the gas supply agreements.[206] Thus, it is important to consider SGS from the competition law aspect. In other words, how the SGS can be obtainable without having harmful effects for the competitive market.

Since the liberalization process started, EU has always had the argument between two concepts of the SGS and creating a competitive gas market. That is, from one side the competition law promotes the need for short-term agreements and the development of the hub-trading for natural gas and on the other hand the long-term agreements which provide the SGS for the MS have anti-competitive effects. They make barriers for the potential undertakings to enter the market and benefit the customers from the variety of suppliers with the competitive prices.[207]

Therefore, it is crucial for the gas market to be compatible with the requirements of the competition law and at the same time provide the SGS. This objective could be achievable from two ways: First, the flexible form of long-term supply contracts and second the development of the structure of the market. [208] The first point (i.e. the flexible tools of the long-term contracts) has been discussed in detail before[209]. Then, the development of the structure of the market is considered in this part. We want to see how the market could be developed to provide the SGS without the anti-competitive effects.

In order to reduce the anti-competitive effects of the SGS as a problem on the sales market, three main points should be considered separately: Solidarity between MS at the emergency situation, The TSOs certification system (Third Country Clause) and diversification of the energy resources.

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[203] Talus, Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law, 45.
[204] Keypour, Javad. "The Outcome of Directive 2009/73/EC Amendment on EU's Natural Gas Security." *Baltic Journal of European Studies* 9, no.1 (2019), 77.
[205] See 2.2.1 part of chapter 2.
[206] See 3.2 part of chapter 3.
[207] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 178-179.
[208] Ibid, 122.
[209] See 2.2 part of chapter 2.

4.1.1.1 Solidarity between MS at the emergency situation

There were two cut off in transmission of gas to the EU via Ukraine in 2006 and 2009 and the reason for both crisis was mostly the disagreement between Russia and Ukraine on the price of gas. [210] After the first mentioned crisis, which led to the interruption in the importing of gas, the security of supply became the most important issue that revealed the high dependency of the EU on the importer suppliers[211] and from the EU competition law`s point of view, it showed how the position of the suppliers are dominant for the market. Considering that the trend for the EU dependency of the import of gas is going to rise in the future,[212] the risk of abusive conducts specificity through making similar crisis are high. To address the problem, EU has always promoted the MS for solidarity at the emergency situation. [213]

Solidarity is an important concept[214], which has been repeated in the legislation several times.[215] However, there are two specific regulations focusing on the solidarity for the EU SGS: The Regulation 994/2010, which was replaced by the new Regulation 2017/1938 in November 2017.[216] The incentive for both Regulations were the Ukraine crisis. Therefore, the purpose of the Regulations are to reduce the negative effects of a probable similar crisis in the future and to find an explicit response for that emergency.[217]

It is notable that the SGS is side by side with the sovereignty of each Member State over its natural resources. Before the crisis, MS were responsible for their own gas supplies[218]. However, the crisis showed that there is a need for the guarantee of the gas supply at the EU level. [219] Therefore, the mentioned sovereignty of the MS became limited by Article 194 TFEU in favor of the EU-level, due to the crucial role of the SGS. [220]

The solidarity needs the safe and reliable operation of the gas system within the MS and the sufficient capacity of their infrastructures. [221] In this way, according to the new Regulation, the solidarity between MS in an emergency situation is obtainable through two means: first to classify the connected MS in the "risk-groups" and second to concrete solidarity "measures" that the MS are obliged to take in a gas crisis. In this way, according to Annex I of the Regulation 2017/1938, 13 main risk-groups

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[210] Rodríguez-Fernández, Laura, Fernández Carvajal, Ana Belén, and Ruiz-Gómez, Luis Manuel. "Evolution of European Union's Energy Security in Gas Supply during Russia–Ukraine Gas Crises (2006–2009)." *Energy Strategy Reviews* 30 (2020), 1.
[211] Talus, Kim. "Long-term Gas Agreements and Security of Supply - between Law and Politics," 1.
[212] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 35.
[213] Fleming, Ruven. "A Legal Perspective on Gas Solidarity." *Energy Policy* 124 (2019), 107.
[214] About the challenge on the concept of solidarity see: Poland v Commission (T-883/16) [2019]
[215] For example, Article 194 TFEU, preamble 13 and Article 9 (4) of Directive 2004/67, Preambles 5, 22, 25, 36 and Articles 1 and 8 (2) of Regulation 994/2010 and Article 13 Regulation 2017/1938.
[216] Fleming, Ruven. "A Legal Perspective on Gas Solidarity,"102.
[217] Ibid, 103.
[218] Ibid, 110.
[219] Ibid 102.
[220] Ibid, 110.
[221] Ibid, 108.

were established which have 4 main categorizes (Eastern Gas, North Sea Gas, North African Gas and South-East Gas) and the MS are obliged to take specific measures for solidarity in a probable emergency situation.

Moreover, according to the new Regulation, there should be a clear definition at national, regional and Union level for the responsibility of the MS in a gas crisis, and there should be a plan for coordination between MS to respond to the emergencies.[222] In this way, The main task of each risk-group is to imply the solidarity measure[223] and to find the "common risk assessments" at the group level and at the national level of the MS.[224]

On the other hand, to achieve the co-operation between national TSOs, "ENTSO-G" (European Network of Transmission Network Operators for Gas) was stablished. This network has conducted a gas "stress test" every 4 years and according to Article 7 of the Regulation 2017/1938, the MS have to notify their common risk assessment and national risk assessment to the Commission every 4 years.

As we have seen in the previous chapter, the dominant position of the suppliers makes them capable of the abusive conducts and these anti-competitive practices are more probable by creating an emergency situation. Therefore, Solidarity between MS is a vital tool for the EU to tackle the infringements in the crisis. However, until now, the result of the "stress test" has showed that the MS have a pure national approaches[225] which is not effective for an emergency situation and preventive for the future infringements. Therefore, the EU has not been completely successful in this preventive measure.

4.1.1.2 The TSOs certification system (The Third Country Clause)

Two Ukraine crisis showed that the danger for the EU SGS is probable when the owner and the operator of the transmission system are from a third country or third countries. To deal with this problem, the Transmission certification system is proposed by the TGD under Article 11. The clause was also called 'Lex Gazprom, because the objective of the Third Country Clause was to prevent a third non-EU undertaking (traditionally Gazprom) from controlling the EU networks.[226] The TGD allowed each Member State to decide whether the third-non-EU`s investment may lead to the detrimental in the energy security.[227]

The aim of the TGD is to eliminate the risk of the security of energy supply for the MS or for the Community.[228] In this way, the NRAs of the MS must request an opinion from the Commission in

[222] Article1 Regulation 2017/1938.
[223] Article13 Regulation 2017/1938.
[224] Fleming, Ruven. "A Legal Perspective on Gas Solidarity," 106.
[225] Ibid, 104.
[226] Pogoretskyy,"The WTO Panel Report in 'EU-Energy Package' and Its Implications for the EU's Gas Market and Energy Security," 545.
[227] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 118.
[228] Yafimava, Katja. "Gas Directive amendment: implications for Nord Stream 2."*The Oxford Institute for the Energy Studies*, (2019): https://www.oxfordenergy.org/wpcms/wp-content/uploads/2019/03/Gas-Directive-Amendment-Insight-49.pdf (last seen 7/4/2021), 5.

order to assess that a TSO certification will not put the risk in the security of energy supply for their market or for the EU as a whole. The NRAs have to insure the Commission that the entity concerned from a third country or third countries complies with the unbundling obligation. However, the domestic TSOs are excepted from this obligation.[229] It seems that the SGS in the case of domestic TSOs is a national decision and it does not contain a risk for the European market at large. Therefore, the MS will decide about that independently. Moreover, it is possible to benefit from the exemption under Article 36 of the Directive.[230] To apply the exemption, the MS should notify the Commission which has the power to approve, to reject or to request for amendments. The EU decision would be binding and final. [231]

As it was considered in this part, the TSOs certification system is another way to protect the SGS when it contains a risk for the market in the case of third country entities. [232] It needs the approval at the EU level to prevent the danger for the supply of gas in the whole energy market.

4.1.1.3 Diversification of the energy resources

The SGS as a problem is also addressable by the development of the alternative energy resources (e.g. renewable forms of energy, LNG, Compressed Natural Gas (CNG), etc.). Specifically, the growing demand for LNG and the increase in the number of LNG producers provide a new replacement for the natural gas in European market. [233] This form of gas is more flexible and is not bound to the pipelines. Therefore, the importers can replace their contracted volumes in the short-term LNG-contracts with the spot market-price.[234]

Although in 2019 only 20% of the total gas imported to the EU market was LNG and the rest (80%) remained importing by pipelines[235], the affordable liquefaction technology has enabled the countries around the world to import the LNG to the EU recently. [236]

Another attempt to restructure of the market to provide the verity of the suppliers is TEN-E (Trans-European Network for Energy) measure. It aims to develop the infrastructures and diversification of suppliers in order to change the "single supplier" model practicing mostly by the MS in the Central and Eastern of Europe. It seems that such diversification can reduce the dominant position of the main suppliers (particularly Gazprom) and their probable abusive conducts, because the TEN-E measure has a focus on any supplier other than the Russian one. [237]

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[229] Article 10 and Article 11(5) of the TGD.
[230] Vasyl, 'In Uncharted Waters: The Contested Legal and Political Landscape of Nord Stream 2,' 7.
[231] Yafimava, "Gas Directive amendment: implications for Nord Stream 2," 5-6.
[232] Vasyl, 'In Uncharted Waters: The Contested Legal and Political Landscape of Nord Stream 2,' 7.
[233] Mikulska,"Gazprom and Russian Natural Gas Policy in the First Two Decades of the 21st Century," 414.
[234] Ibid, 413.
[235] Ritz, Robert A. "A Strategic Perspective on Competition between Pipeline Gas and LNG." *The Energy Journal (Cambridge, Mass.)* 40, no.1 (2019), 200.
[236] Ibid, 198.
[237] Pogoretskyy, "The WTO Panel Report in 'EU-Energy Package' and Its Implications for the EU's Gas Market and Energy Security," 547.

As we have seen in this part, it is possible for the European gas market to solve the problem of the SGS and at the same time follow the requirements of the competition law. That is, there will not be a conflict between the SGS and the competition law requirements, if the supply agreements are flexible enough and the structure of the market is well designed. The EU energy market should build the structure of the market in a way that the diversification of resources and verity of suppliers deal with the problem of SGS and to reduce the subsequence anti-competitive concerns on the sales market.

In the next part we will see how the EU has tried to deal with the dominant position of the vertical integrated suppliers which have led different abusive conducts in the sales market.

4.1.2 Restructure of the market to deal with the problem of vertical integrated suppliers (the application of unbundling regime) in order to prevent of abusive conducts of such suppliers in the sales market

EU energy market is supplied historically with vertical integrated companies. [238] The sector inquiry showed that the market concentration and high levels of vertical integration made serious foreclosures for the market liberalization. [239] Considering that the transport facilities are the prerequisite for the sales market,[240] many abusive conducts are predicted for the dominant suppliers controlling the transport system.

In this way, the key factor to address the problem is unbundling. It has been repeated in all three Energy Packages (in the First Energy Package as Account unbundling, in the second one as functional and legal unbundling and in the third Energy Package as the ownership unbundling). [241]

The aim of the unbundling is to separate the non-competitive parts from the competitive segments[242] and it requires the separation of the entities performing the production or supply from the TSOs.[243]

The main objective for the unbundling regime is to pave the way for the TPA which is crucial for the liberalized market through the possible use of infrastructures.[244] It prevents the dominant undertakings in the upstream market from exercising the control (directly or indirectly) over downstream market[245] and reduce their ability to conduct abusive behavior in the latter market. Moreover, according to the TGD, the capacity of the pipelines and the storage should be transparent, however in vertical integrated undertakings, such data is not completely available and it leads to the failure in functioning of the transport market.[246] Therefore, a complete unbundling (i.e. ownership

[238] Vasyl, 'In Uncharted Waters: The Contested Legal and Political Landscape of Nord Stream 2,' 2.
[239]
[240] Nesdam,"The organization of Norwegian Gas Sales and Competition Law Aspects,"4.
[241] Pogoretskyy, "The WTO Panel Report in 'EU-Energy Package' and Its Implications for the EU's Gas Market and Energy Security," 535.
[242] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 112.
[243] Articles 9–23 of the TGD.
[244] Hancher, *EU Energy Law Volume II: EU Competition Law and Energy Markets*, 217.
[245] Vasyl,'In Uncharted Waters: The Contested Legal and Political Landscape of Nord Stream 2,' 3.
[246] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 16.

unbundling) makes the TSOs responsible independently from producers or upstream suppliers to comply the obligations of the TGD (transparency and granting TPA).[247]

However, for the network belonging to the vertical integrated companies before the date of the TGD,[248] there are two other optional models (Independent System Operator model (ISO)) and (Independent Transmission Operator model (ITO)).[249] In the ISO model, the infrastructure can belong to the vertical integrated companies but the TSO should be separated from the vertical integrated undertaking to apply the unbundling rules. In the ITO model the TSO and the infrastructures belong to the vertical integrated supplier, but some specific requirements apply to the decision-making process and the relationship between two entities.[250]

We have to note that many EU gas pipelines belonged to the vertical integrated undertakings since before the date of the TGD.[251] Therefore, instead of ownership unbundling, the lighter regimes of ISO or ITO can be applicable to them.[252] It shows that the EU has a long way to achieve the fully ownership unbundling in its gas infrastructures; however, many of the mentioned pipelines are old and need to be reconstructed[253]. Moreover, the increasing need for the natural gas forces the investors to build the new infrastructures in the EU[254] that should be under the ownership unbundling requirements. In the next part the most recent pipeline-project (Nord Stream 2 (NS2)) will be considered as an example and how the EU TGD could be applied to it.

4.1.3 The development of policies in order to extend the application of the EU gas policies to the recent supply contracts

It has been discussed before that the EU is dependent on the external gas resources and the demand in this case is growing.[255] Thus, on one hand the European supply contracts mostly in the form of long-term agreements will continue for the future, and on the other hand, since the EU is dependent on its suppliers and the affordable alternatives are not widely available,[256] the market position of the suppliers will remain dominant.

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[247] Vasyl, 'In Uncharted Waters: The Contested Legal and Political Landscape of Nord Stream 2,' 3.
[248] 3. September 2009.
[249] Moreover, there are some specific rules about unbundling requirements for the government-controlled entities. See: Article 9(6) TGD.
[250] Pogoretskyy, Vitaliy, and Talus, Kim. "The WTO Panel Report in 'EU-Energy Package' and Its Implications for the EU's Gas Market and Energy Security." *World Trade Review* 19, no.4 (2020), 539.
[251] For example, the Gazprom pipelines that are two main groups: first the "Eastern import pipelines" (Nord Stream1, South Stream and Turkish Stream) and second, the "connected pipelines" (OPAL, NEL and EUGAL), see: Szydło, Marek. "Disputes Over the Pipelines Importing Russian Gas to the EU: How to Ensure Consistency in EU Energy Law and Policy?" *Baltic Journal of Law & Politics* 11, no.2 (2018), 97.
[252] Vasyl, 'In Uncharted Waters: The Contested Legal and Political Landscape of Nord Stream 2,' 3.
[253] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 188.
[254] Ibid, 35.
[255] Keypour, "The Outcome of Directive 2009/73/EC Amendment on EU's Natural Gas Security," 78.
[256] Ibid,77.

However, despite the dependency of the EU on the external supply of gas, MS vary to decide for their contractual relations and the extension of supply contracts with the dominant suppliers particularly Gazprom in the future.[257] Therefore, the EU through the gas policies aims to provide a basis, on which the different contractual relations of the MS become compatible with the requirements of the competition law. In this way, the policies should be updated and capable of meeting the newest challenges in the supply market.

Another reason for the necessity to update the rules is to deal with the conflict between two models of energy governance: the liberalized model implying by the EU and the static model which is based on the vertical integration of the suppliers and practicing mainly by Russia (Gazprom). The second model contains the control of the government over the supply of gas[258] and is more probable for the anti-competitive practices such as abusive conducts.

A clear example of the EU effort to update its policies is the amendments to the TGD in 2016 for the quality of gas[259] and in 2019[260] to extend the application of the mentioned Directive to the interconnectors and the gas transmission lines from third countries (importing pipelines).[261] Before the amendments, there was a doubt in the definition of the interconnectors and importing pipelines. As a consequence, the EU TGD could not apply to the interconnectors which cross border lines between MS and pipelines from the third countries[262] and there was a gap in the EU policies (specifically the TGD) to cover all supply contracts such as the importing pipelines.[263] The amendment in 2019 filled this gap.

Moreover, the amendments covered both the upstream pipelines (which bring the gas to the transmission point) and the upstream pipelines from a third country to make them subject to the TGD and the obligation of TPA,[264] which was a success for the EU legislator.

Another example of the amendment in the mentioned gas policies was about an uncertainty that the EU rules could extend to the specific activities in the Exclusive Economic Zone (EEZ) of the MS or to the continental shelf. This matter needed to be considered on a case-by-case basis.[265] This point was considered for the recent gas project; Nord Stream 2 which runs through Russia, Finland, Sweden, Denmark and Germany for about 1,230 Kilometers long and located in the EEZ and the continental shelf of some MS (particularly Germany). The mentioned parts were not under the direct territorial scope of the application of the European Treaties but under the application of the United Nations

[257] Vasyl, 'In Uncharted Waters: The Contested Legal and Political Landscape of Nord Stream 2,' 1.
[258] Pogoretskyy, "The WTO Panel Report in 'EU-Energy Package' and Its Implications for the EU's Gas Market and Energy Security," 532.
[259] Regulation EU2015/703 establishing a network code on interoperability and data exchange rules.
[260] The amendment to the TGD signed in May 2019 and became applicable in July 2019. See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0692&from=EN (last seen 7/4/2021).
[261] Vasyl, 'In Uncharted Waters: The Contested Legal and Political Landscape of Nord Stream 2,' 6.
[262] Ibid, 6.
[263] Vasyl,'In Uncharted Waters: The Contested Legal and Political Landscape of Nord Stream 2,' 2.
[264] Ibid, 7.
[265] Ibid,9.

Convention of Law of the Sea (UNCLOS). Therefore, the proposal for the amendment to the TGD was offered in order to extend EU policies to and from third countries that fall within EU jurisdiction, including the territorial sea and EEZ of the MS.[266] That is, due to the amendment, the requirements of the TGD (i.e. TPA, Unbundling, regulated and transparent Tariffs) are not only applicable to the inside transmission system of the EU, but also to the Germany`s territorial sea and its EEZ. [267]

These examples show that the EU has tried to accompany its polices with the latest challenges in the supply market. This matter is also considerable from the third-country point of view. In this way, different aspects of the EU gas policies mainly the Third Energy Package were challenged by Russia with number of claims under the dispute settlement mechanism of World Trade Organization (WTO).[268]

These mutual challenges in the gas policies indicate clearly that despite the strong tension between the EU and the gas suppliers (i.e. the downstream vs upstream country-relations), both parties are dependent on each other.[269] Therefore, the role of laws is incredibly important for both contractual parties. In other words, policies should be updated to make a balance for the interaction between legislations and supply contracts. Moreover, the progress in the gas policies gives the MS a strong tool to prevent the anti-competitive practices of the dominant suppliers in their agreements. The EU amendment in the TGD is the successful attempt in this way, and although it is applicable to the all third-country pipelines, NS2 has been the single affected pipeline until now. [270]

The last important point is due to the development of the EU legislation, the laws including the unbundling and TPA regime should apply to third-party pipelines entering the MS` territories such as Gazprom pipelines. However, if the third-country seeks and proves the exemption containing the fact that its practices do not have a detrimental effect on the competition, the unbundling requirement could be waived.[271] This is a key element which shows the main purpose of the EU legislator to amend the policies. The EU competition law is the crucial measure determining where the rules should be applied and where should be exempted. In this way, we have to note that Gazprom -as one of the contractual parties in the mentioned project (NS2)- has a long background of anti-competitive practices and abusive conducts. Therefore, it is difficult to meet the requirements of the exemption.[272] It seems that the challenges about the exemption of ownership unbundling in NS2 continues in the

[266] Szydło, "Disputes Over the Pipelines Importing Russian Gas to the EU: How to Ensure Consistency in EU Energy Law and Policy?"101.
[267] Yafimava, "Gas Directive amendment: implications for Nord Stream 2," 2.
[268] Vasyl Chornyi and Anna-Alexandra Marhold, 'In Uncharted Waters: The Contested Legal and Political Landscape of Nord Stream 2,' 12.
[269] Pogoretskyy, "The WTO Panel Report in 'EU-Energy Package' and Its Implications for the EU's Gas Market and Energy Security," 549.
[270] Yafimava, "Gas Directive amendment: implications for Nord Stream 2," 13.
[271] Ibid.
[272] NORD STREAM2: sanctions, snapbacks and solutions https://huri.harvard.edu/files/huri/files/riley_-_nord_stream_2.pdf?m=1618864282 page 3 (last seen 30/3/2021).

future[273] and we have to see to what extend the EU will be successful to impose the undertakings to apply the ownership unbundling in their new or renewing projects in the future.

4.2 Punitive measures (the application of EU competition law with a focus on the role of structural-remedy-commitments)

In this part the EU legal tool to deal with the anti-competitive concerns of the gas supply agreements is considered. The EU is this way does not act preventively, but has a vital role to tackle the happened infringements.

The European Commission has tried to face the infringements with the application of EU competition law. In the same way, EU competition law is applicable directly and may be invoked in proceedings of the domestic courts of the MS when the trade between them is affected.[274]

According to Article 7(1) Regulation 1/2003, the Commission may impose behavioral remedies (e.g. to finish a kind of conduct or the ask to do it) or structural remedies (e.g. to allow the access to infrastructure). The type of the remedies is proportionate to the infringement and effectively bring the infringement to an end.[275] However, if the undertaking under investigation propose commitments meeting the anti-competitive concerns of the case, the Commission may accept to make those commitments legally binding under Article 9 Regulation 1/2003 and close the case without adopting a formal decision.[276]

One important reason promoting the undertakings to propose commitments is the formal decision against them is eventually published. It leads to many probable civil claims for damages. Therefore, the settlement under Article 9 Regulation 1/2003 is preferred for them.[277] What satisfied the Commission to accept the commitments and not to issue a formal decision is the sufficiency of reasons.[278] That is, as long as the commitments are not insufficient to address the anti-competitive concerns, the Commission is flexible to accept them.[279]

In the energy sector, the Commission has widely accepted the commitments for structural remedies. The general consideration of the cases shows that the structural-remedy-commitments in the energy sector has been broadly accepted. In other words, there is a significant number of cases in the gas and the electricity market which settled under Article 9 Regulation 1/2003 by the commitments to the

[273] See: https://cepa.org/cepa_files/2019-CEPA-report-Nord_Stream_2.pdf (last seen 30/3/2021)
[274] Whish, *Competition Law*, 256.
[275] According to Article 7(1) Regulation 1/2003;"Structural remedies can only be imposed either where there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the undertaking concerned than the structural remedy."
[276] Whish, *Competition Law*, 264.
[277] Loudjeva, "Ensuring Competition in the EU Gas Market: The Role of DG Competition," 4.
[278] Whish, *Competition Law*, 264.
[279] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 174.

structural remedies.[280] Therefore, this part has a focus on the role of structural-remedy-commitments in the gas cases.

There are different types of structural remedies in the gas commitments. Considering that the anti-competitive concerns about the gas supply agreements are: the restrictive clauses, the unfair methods of pricing and the long-durations with high volumes, it is expected that the structural remedies contain the commitments to deal with the mentioned concerns. Thus, the structural remedies in this part is divided into 3 main categories and will be considered separately: the elimination of restrictive clauses, the price review and the reduction of the duration/volume.

4.2.1 The structural remedies to eliminate the restrictive clauses in the contracts

As it discussed before, some limitations in the gas supply agreements such as use and resales bans are restrictive to the competition.[281] Moreover, the territorial restrictions in the form of destination clause enables the seller to differ prices in various areas for the same product and maintain its dominant position in the destination market.[282] Therefore, according to the case-law[283], the structural remedies which proposed in the commitments were based on the elimination of such anti-competitive clauses and made the risk between contractual parties, more balanced.[284]

It is notable that despite the prohibition of destination clause in ample case examples, such clauses continue to exist,[285] and the Commission should continue its investigations to the future supply contracts in order to prevent the harmful effects of these restrictive clauses. However, the important commitment in Gazprom case in 2018, obliged this main supplier to eliminate the restrictive clauses in its current and future contracts.[286] Therefore, many supply agreements for the import of gas are expected to be less anti-competitive in the future.

4.2.2 The structural remedies to review the price and pricing-mechanisms in the contracts

The pricing-mechanisms in the gas supply agreements were discussed before.[287] As it mentioned, the oil-indexation has been widely used to make stability for the price, particularly in the long-term agreements. However, based on the market development (i.e. European hub trading) and the switching capability of the customers (mainly due to the development of the LNG market in the EU)[288], the oil-linkage prices are not still justifiable. This important matter was indicated in Gazprom case and the oil-indexation identified as unfair in comparison with the spot prices determining in the European

[280] Whish, *Competition Law*, 268, 269.
[281] See 2.2.2 part in chapter 2.
[282] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 159.
[283] E.ON/GDF, ENI, Distrigaz, Gazprom/ENI and Gazprom,
[284] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 175.
[285] Talus, *EU Energy Law and Policy: A Critical Account*, 128.
[286] Gazprom decision para 56-58.
[287] See 2.1 part in chapter 2.
[288] Talus, *EU Energy Law and Policy: A Critical Account*, 132.

hubs. In this case, the Commission considered that Gazprom adopted the unfair pricing-method, which was excessive, compared with other competitive price benchmarks, and unjustified by its relevant costs.[289] In this way, Gazprom proposed to adopt the price revision clause to its contracts in order to achieve the competitive price in the Central and the Eastern gas market.[290]

The importance of such structural remedy is to review a large number of importing contracts for various MS. Moreover, regarding the Commission`s view to consider the oil-pegged prices as unfair, the future contracts will be expected to benefit from the flexibility of the price-mechanism.[291]

4.2.3 The structural remedies to reduce the long-term duration of the contract with high volumes of gas

As it discussed before[292], the long-term contracts intensified with the high volumes of gas had anti-competitive effects for the market and made serious foreclosure for the potential undertakings.[293]

Therefore, the reduction of the duration was necessary to address the concerns of the long-term supply contracts. In this way, many cases has been settled by the commitments containing the reduction of duration in the supply contracts of the dominant undertakings[294]. Moreover, to minimize the anti-competitive effects, the undertaking concerned guaranteed to return a specific amount of total volumes to the market[295] or to release a large share of gas, which was previously reserved for themselves[296] and prevented the other competitors to enter the market.[297] The released volumes could be sold in the spot market. Therefore, such decisions could lead to the development of the European hubs.[298] It is also a beneficial way to use the maximum capacity of the network and to reduce the unused capacity under the contracts.[299] In addition, a plan to reduce the long-term capacity reservation for each year was accepted as a part of the commitments to challenge the dominant position of the suppliers.[300]

A fundamental question in this area is; from the Commission`s point of view, how long the duration of a contract is suitable and pro-competitive? This point is important because despite the anti-competitive consequences, the long-term contracts have positive effects in the large-scale investments and the

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[289] Gazprom decision para 62.
[290] Ibid, para 103.
[291] Loudjeva,"Ensuring Competition in the EU Gas Market: The Role of DG Competition," 7.
[292] See: 2.2.1 part in chapter 2.
[293] Talus, *Introduction to EU Energy Law*, 80.
[294] EDF, Endesa/Natural Gas, E.ON/Ruhrgaz and Distrigaz.
[295] E.g. in Distrigaz, through the commitment, the undertaking proposed to return specific volume of gas to the market, which was previously connected to industrial users and electricity producers.
[296] E.g. RWE.
[297] E.g. GDF Suez approximately 10 per cent, amounting to around 7 billion cubic meters released per year and in EDF: through the commitments, EDF guaranteed that 65% of its total volumes every year returned to the market.
[298] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 194.
[299] It is notable that in E.ON, the long-term reservation was considered as the refusal to supply. E.ON proposed to oblige itself to return the capacity to the market and extended its capacities.
[300] Talus, *Introduction to EU Energy Law*, 72

SGS[301] and they continue to exist in the gas supply market.[302] Therefore, supply agreements need an indicator to explain what duration is permitted. The consideration of cases does not show a similar view.[303] For instance, 25-year,[304] 15-year,[305] 14-year and[306] 10-year,[307] durations were accepted by the Commission for the older cases and 4-year[308] or 2-year[309] durations were accepted in more recent cases[310]. It seems that the explanation for the accepted duration should be considered on a case-by-case basis with a focus on all situations of the market to find a balance for SGS. That is, the more developed market, the shorter duration of the contracts is permitted. Moreover, the duration of the contract accompanied with the specified volume must justify the planned investment.[311] Therefore, the assessment of the anti or pro-competitive duration should be considered for each case based on its investment-costs individually.

Another significant point about the structural remedies in some cases[312] is when the long-term supply contracts combined with the long-term capacity reservation agreements, the mere reduction of the duration or volume could not solve the problem and the additional structural remedy in the form of ownership unbundling is necessary.[313] That is, the supplier should not be the same undertaking which makes arrangements for the transport reservations.[314]

In this way, the Commission has considered the interest of the third parties into account[315] and accepted the structural-remedy-commitments for different cases[316] including a large scale of ownership unbundling.[317] Considering that the ownership unbundling is an important purpose of the TGD and could promote the incentives of the vertically integrated suppliers to leave the control of the network infrastructures, the Commission preferably accepted such commitment.[318]

As a conclusion, we can see that the structural-remedy-commitments not only have benefits to deal with the anti-competitive concerns, but also make some aspirations of the TGD achievable.[319]

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[301] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 183.
[302] Ibid, 188.
[303] Talus, *EU Energy Law and Policy: A Critical Account*, 128.
[304] Transgas/Turbogas (case COMP/35494) [1996].
[305] E.g. Electricidade de Portugal/Pego (case IV/34598) [1993].
[306] REN/Turbogas (case IV/E-3/35485) [1996].
[307] Exxon/Shell (case IV/33640) [1994].
[308] When the contract meets over 50% of the customer demand. E.ON(case COMP/39.317)[2009].
[309] When the contract covers 50% to 80% of the customer demand. Distrigaz.
[310] Talus, *Introduction to EU Energy Law*, 79-80.
[311] Talus, *EU Energy Law and Policy: A Critical Account*, 126.
[312] E.g. GDF/E.ON
[313] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 174.
[314] Ibid, 168.
[315] Ibid, 173.
[316] Such as ENI, RWE and E.ON.
[317] Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law*, 172.
[318] Loudjeva, "Ensuring Competition in the EU Gas Market: The Role of DG Competition," 6.
[319] Ibid, 5.

5 The outcome of the research and conclusion

The focus of this research was "how the infringements in the gas supply agreements have been address in EU law?". To find the answer, the main features of the European gas supply agreements and the main anti-competitive arrangements in this area have been considered. This study showed that the gas supply infringements have two main reasons: (1) the anti-competitive forms of the contracts and (2) the unsuitable structure of the market.

Regarding the anti-competitive forms of the agreements, the long-term duration of the supply contracts and the restrictive clauses were found as the main concern. The long-term form of supply contracts is like a double-edged sword. That is, in addition to the anti-competitive effects, it contains the SGS. From the sellers` point of view, the long-term agreements contain the security of demand motivating the investors to accept the risk of high-costly investments. Keeping these positive effects in mind, the role of long-term agreements in the supply market is undeniable. However, to make the contracts compatible with the requirements of the competition law, the flexible tools for the pricing-mechanism have been considered in this dissertation. The current study showed that the contracting parties of the supply contracts are more willing to apply the adoption clauses such as price review provisions, and make their contracts more flexible. In this way, the role of the significant commitment in Gazprom case was noteworthy: This case had a profound effect on many European supply contracts by eliminating the restrictive clauses and by introducing the oil-indexation as the unfair pricing-mechanism. Therefore, it is predictable that the European supply contracts in the future will benefit the higher level of flexibility in their duration and their price-mechanisms.

Regarding the unsuitable structure of the market; in this thesis, the vertical integrated suppliers and the dominant position of them were considered as the main problems. Therefore, the unbundling regime and the need for restructuring of the market with the variety of the suppliers or a plan for replacing the alternative resources for natural gas were considered as the key solutions. The fundamental problem in this case is the EU is highly dependent on the importing of natural gas. Therefore, the few external suppliers are dominant and traditionally they have been vertically integrated. Another problem for the EU is that the MS are not similar in their strategies for the import of gas. Thus, the MS are not in the same danger of abusive conducts of the dominant suppliers. This matter has placed the European MS in different positions to extend or to reduce the import of gas for the future.

Having considered these problems, it is necessary for the EU to improve its tools to develop the market in a way that the dominant position of the suppliers would become under control, and the harmful effects of their abusive conducts would be minimized. To achieve this purpose, the EU tools were studied in this thesis and based on their applicability they were categorized into two clusters: The first cluster includes the tools which have the preventive effects on the infringements. They aim to

restructure of the market in a more competitive way in order to prevent the anti-competitive arrangements. The second cluster contains the tools that have the punitive effects to minimize the harmful impacts of the infringements on the market. In this form, the EU has tried to accept the commitments involving a change to the structure of the market (e.g. by unbundling or accepting the investment in the infrastructures) or by a change to the form of the supply contracts (e.g. by reduction of long-term duration or by elimination of the anti-competitive clauses).

All the mentioned measures centered around the concept of the SGS. This means, most of the anti-competitive arrangements -specifically in the form of long-term agreements- are about finding a way to secure the supply of gas for the MS. Therefore, the EU has tried to solve the problem of the SGS via the more competitive resources. In this way, the development of the market for other forms of energy has been considered in this study briefly. According to the various discussions in this research, the EU attempts have not been successful in this area mainly due to the fact that the decision for the SGS has still remained political for the MS and they motivations to invest on the alternative forms of energy are still in progress.

On the other hand, the EU has suggested some solidarity plans and certification regimes to reduce the risk for the SGS. However, due to the fact that MS very in their strategies to deal with the problem of SGS, the EU seems to have a long way to convince the MS to coordinate their decisions particularly at an emergency situation in the form of solidarity or to change their plans for the SGS from the single supplier model.

This research also challenged the conventional problem of dominant position of the gas suppliers. The EU has tried to extend the scope of the rules to the gas importing contracts. In this way, the amendments to the gas policies have had a crucial role to impose the obligations of the TGD to the newest gas projects. Specifically, the concept of the ownership unbundling is presented as one of the most important objectives of the mentioned Directive.

The study in the case of ownership unbundling showed that the EU has only been successful in the form of commitments for some internal suppliers. That is, only the state owned European undertakings have been forced to ownership unbundling through the Commission investigations. Therefore, the EU has not been successful to impose the unbundling regime properly to the gas importing pipelines yet. The reason behind this issue is that; although, the EU has focused on the ownership unbundling to reduce the dominant positions of the suppliers, the exemption for the pipelines belonging to the vertical integrated undertakings since before the date of the TGD caused the widely application of slighter regimes (ITO or ISO) instead of ownership unbundling.

In this way, there was a hope that renewing projects for the current pipelines, which are old, led to the ownership unbundling. Moreover, the new construction projects were expected to imply the ownership unbundling regime. However, the challenges about the application of the exemption for ownership unbundling regime in NS2 -as the newest project- could reveal the fact that the EU has not

still been able to impose the ownership unbundling for the external gas infrastructures. According to the exemption, the contracting parties must prove that their practices do not have the detrimental effect to the competition. It is important to note that Gazprom as one of the contracting parties in this project has a long background in anti-competitive arrangements. Moreover, such projects expand the dependency of the EU to the external supply of gas and increase the risk of abusive conducts of the dominant undertakings. Considering that the similar investments continue in the future, if the exemption of the ownership unbundling will be accepted for NS2 (or for similar projects), the risk of abusive conducts and the subsequent infringements will be increased in the future. The single hope in such situation would be the application of EU competition law as the punitive measure to address the probable anti-competitive arrangements. The commitment for the Gazprom case in 2018 was a significant example of empowering the EU punitive measure to deal with the abusive conducts of the strong suppliers. However, the preventive measures changing the structure of the vertical integrated market is highly preferred and should be a fundamental priority of the EU.

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Annex (Summaries of the main energy cases)

1. Almelo case

(Case C-393/92) [1994]

In this case, the exclusive purchasing obligation imposed on local distributors by the regional distributors, which had the collective dominant position in the market. The arbitration award was appealed in 1994 and the European Court considered the arrangements as unlawful.

2. Britannia case

(Case IY/E-3/35.354) [1998]

In this case, Britannia was a large gas field in which the producers decided to joint sell the produced gas either to the UK or to a Continental market. Considering that in this case, the trade between Member States was not appreciably affected and the agreement was abandoned in 1994, the Commission did not make a formal decision.

3. the Gas Natural/ Endesa

(Case COMP/37542) [2000]

In this case, Endesa (a dominant electricity producer) was obliged to gain almost all of its necessary gas from the Gas Natural (dominant gas supplier in Spain) and the contract contained the resell restriction for the buyer. As Endesa was a dominant buyer the Commission considered that the contract had serious foreclosure effects for the European gas market. The case was closed since the contractual parties decided to reduce the duration of the contract as well as reduction of the contractual quantities to 75% and the buyer acquired the right for reselling the contractual gas.

4. Corrib case

(Case COMP/37708) [2001]

This case was about the upstream gas industry. The producers decided to joint sell the gas in order to meet the customer demand. Considering that the field owners withdrew their rights for the jointly market, the case was settled without a formal decision. 5. GFU case (Case COMP/36072) [2002] In this case, the Norwegian Gas Negotiating Committee (GFU) on behalf of the producers of natural gas, negotiated for sales contracts. In order to achieve this objective, the GFU scheme was prepared; however, the scheme was not compulsory and the case was not considered under article 106 TFEU. The case was settled when the Commission reached an agreement with Norwegian North Sea producers Statoil ASA and Norsk Hydro AS to abolish GFU and provide the situation that the producers can sell their gas individually.

5. DONG/DUC case

(Case COMP/38187) [2003]

In this case, gas producers at the Danish continental shelf and the Danish incumbent company DONG decided to joint sell the produced gas in order to meet costs regarding the investment in building and the development of the infrastructures. Moreover, the contact contained the priority of selling the additional volume of gas for DONG and other horizontal and vertical restrictions. The case was settled by the offer of gas to new customers for a period of 5 years and the elimination of all the contractual restrictions.

6. Marathon cases

(Case COMP/36246) [2003]

In this case, Marathon was an American company complained against some European gas operators (such as Thyssengas, BEB and Ruhrgas in Germany, Gaz de France and Gasunie in Netherland) for the refusal to supply. The case was settled when the undertakings proposed commitments in order to achieve transparency in the access conditions for their pipelines.

7. Spanish temporary congestion case

(Case 552/02) [2004] Empresas Electricas, Tribunal de Defensa de la Competencia

In this case, four electricity producers in Spain market charged high prices for short-term electricity generation agreements and it was considered as the abuse of dominant position. They got fines for their abusive conduct.

8. GDF/ENI/ENEL case

(Case COMP/38662) [2004]

In this case, GDF (the gas supplier in France) had contracts with ENI and ENEL (the undertakings in Italy) and restricted both buyers from the resell and the use of purchased gas outside Italy. Although the territorial restriction was removed in both contracts, the Commission adapted the formal decision.

9. Elsam A/S Case

Danish Competition Council [2005] Elsam A/S and its appeal in [2006].

In this case, there was an unfair pricing-method practicing by Elsam A/S in its supply contracts and it considered as the abuse of dominant position in the wholesale OTC (Electricity grids) market for the western Denmark. Their prices were higher than the average total costs and based on the United brands test, it was identified as excessive and unfair price.

10. Distrigaz case

(Case COMP/37966) [2007]

In this case, Distrigaz was the state-owned gas supplier, which had a dominant position in Belgium market. It had long-term contracts with different customers such as the industrial customers, power plants, and the resellers. The buyers did not have the alternative for their gas requirements and the contract was considered for the abusive conduct of the supplier. The case was settled when Distrigaz proposed a commitment to modify the contracts and it was obliged itself from future contracts exceed five-year duration. Moreover, the prohibition of the destination clause and tacit renewal were specified.

11. GDF/E.ON case

(Case COMP/39401) [2009]

In this case, there was an agreement to the supply of natural gas transported through MEGAL gas pipeline (which was jointly owned by both companies. The undertakings decided not to sell gas in each other`s territorial market) even after the market liberalization for the gas in the EU. The Commission decided a formal decision in this case and fined the companies, even after the undertakings finished their agreements.

12. RWE case

(Case COMP/39.402) [2009]

In this case, RWE Energy AG, Essen and its subsidiaries (RWE) was a dominant transmission system operator in the German gas market. This undertaking was under the Commission investigation for the long-term reservation which restrict the other competitors from accessing the downstream market and determining the high tariffs which lead to margin squeeze. The case was settled when RWE proposed the commitment for releasing the reserved capacity and made it available for the third party access. Moreover, it obliged itself to make tariffs for the access condition transparent.

13. ENI case

(Case COMP/39315) [2010]

In this case, ENI (the main gas supplier in Italy) was under the Commission investigation for the capacity hoarding and underinvestment for the infrastructures in Italy. The case was settled after the undertaking proposed to remove all restrictions in the access to the pipelines and to accept investment in the transportation infrastructures.

14. EDF case

(Case COMP/39.386) [2010]

In this case, EDF (gas and the electricity main supplier in France) made restrictions in its long-term supply contracts with the large industrial customers, which was considered as abuse of the dominant position. The case was settled when EDF proposed a commitment to reduce the contractual volume and duration. Moreover, the company accepted to eliminate the anti-competitive clauses such as resale restrictions.

15. E.ON-Ruhrgas case

(Case T 360/09) [2012]

In this case, the long-term supply agreements between E.ON-Ruhrgas and the regional and local distributors, was considered as anti-competitive by German Federal Cartel Office (FCO). The mentioned agreements contained the exclusive dealing obligation for the local distributors (buyers). FCO ordered E.ON to terminate the contracts. Moreover, E.ON was obliged not to have long-term contracts in its future supply agreements.

16. EPEX Spot/ Nord Pool Spot case

(Case AT/39952) [2014]

In this case, there was an agreement between EPEX Spot and Nord Pool Spot in the European spot power exchange market with the non-compete clause in the territorial market of each other. The case finished with the formal decision and high fines for the undertakings. 18. Bulgargaz case (Case AT.39849) [2018] In this case, Bulgaria Energy Holding (BEH) and its subsidiary "Bulgargaz" had long-term contracts with the wholesalers and made territorial restrictions for them. The restriction prevented the buyer from exporting the purchased electricity from BEH. The undertaking fined for the anti-competitive practices.

19. Gazprom

(Case AT.39816) [2018]

In this case, the Commission identified that the long-term Gazprom prices in all contracts with the Member States in the Central and Eastern Europe were excessive and unfair. Moreover, Gazprom`s contracts contained the re-export bans or resell restrictions, which prevented the wholesalers for the resell of gas outside of the border of their countries. The case was settled in 2018 after Gazprom proposed the commitment and accepted to eliminate all foreclosures and obliged itself to review the pricing mechanisms for current and the future contracts in order to achieve the competitive prices.