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EU Cross-Border Energy Investments in an International Context

The Case of Commodity Transportation and Transmission
Infrastructure

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Contents

Summary.....	1
Preface	2
Abbreviations.....	3
1. Introduction	4
1.1. Background	4
1.2. Subject and purpose	6
1.3. Method and materials	7
1.4. Delimitations	9
1.5. Outline.....	10
2. The development of shared competence	11
2.1. Opinion 2/91	13
2.2. C-459/03 Mox Plant	15
2.3. C-308/06 Intertanko	16
2.4. C-45/07 Commission v Greece	17
3. Post-Lisbon strategy on energy	19
3.1. Competence to act and its implications.....	19
3.2. Mechanisms for the promotion of energy investment and trade	21
4. Energy transportation: between the WTO and the EU legal orders	24
4.1. Seeking for direct applicability and the available options for service providers	24
4.2. Free trade in services: between the two legal regimes	27
4.3. Art. II:1 of GATS and the new infrastructure exemption regime	28
5. Exemptions and access to the relevant infrastructure	30
5.1. Shaping the principle of third party access in light of competition	31
5.2. The devil lies in the detail: exemptions and their reasoning.....	32
5.2.1. Gazelle decision.....	33
5.2.2. Poseidon decision	34
5.2.3. OPAL decision.....	34
5.2.4. Other decisions of relevance.....	36
6. The outlook of dynamic efficiencies. Are there any incentives to invest and innovate?	38
6.1. Strategic underinvestment	40
6.1.1. GDF, ENI and the network foreclosure.....	41
6.2. Comparative analysis on the instruments for innovation	42
6.2.1. A new regulatory perspective: the promotion of investments via procedural enforcement? ...	46
Concluding remarks and reflections for the future	50
Bibliography	54
Table of Cases	62

Summary

In regard to the energy sector, it is generally presumed that in post-Lisbon era and since the adoption of Third Energy Package the Member States and institutions of the Union act in a shared format. However, by developing new legislation in the field, supra-national institutions tend to shift the competence away from shared (as it currently stands). Even if the guidelines for decisions granting exemptions are laid down in sector specific legislation, the Commission tends to 1) grant divergent infrastructure exemptions on a case-by-case basis and such decisions result in a discriminatory treatment and 2) force mandatory investments if entity is dominant and has refrained from investing in capacity of the relevant infrastructure. On the other hand, whether the remedy should then be rather sought in the realm of competences and the respective international agreements?

While the EU internal natural gas market is subject to the liberalisation processes, investing entities might be “locked-up” concerning their decisional abilities as legislation overly tries to ensure an equal level playing field for every investor. Therefore, one of the possibilities is to challenge the troublesome EU law measure under the WTO. Entities transporting the commodity hold the highest share of incentives to expand, develop and operate on the market. It has to be understood that the Union itself cannot construct the necessary infrastructure in order to satisfy the ever-growing consumer demand for natural gas. The author emphasises that the EU energy *acquis* should not extend outside the internal market otherwise *acquis* would fail.

The Commission has decided to offer an innovative solution to remedy any congestion in infrastructure of natural gas transportation by stepping from a duty to deal to duty to invest. This is an innovative solution that demands for more elaboration as “strategic underinvestment” is prohibited. Why “strategic over-investment” then is not a violation of Art.102(b)?

The author argues that rules related to infrastructure exemption policy and rules on competition prescribed in the primary legislation share similar characteristics, but both are, nevertheless, applied in different scenarios. It is arguable that the Commission acts *ultra vires* in both legal frameworks. Although, the CJEU also has an opportunity to decide upon the application of refusal to deal and the respective essential facilities doctrine, it has, nonetheless, not chosen to follow the path of the Commission. Overall, the author encourages penetration of Art.102(b) TFEU into the sectorial legislation, which then would be a suitable mix of two legal disciplines. Such a mixed legal instrument then would qualify as a solution for boosting up innovation.

Keywords: Directive 2009/73, downstream, energy competence, essential facilities, exemption policy, GATS, infrastructure foreclosure, innovation, interconnectors, investment, midstream, natural gas transportation, refusal to deal, shared competence, strategic underinvestment, third party access, transmission, WTO

Preface

*“If you want to go fast, go alone.
If you want to go far, go together.”*

- African proverb

Most of all, I would like to express my sincere appreciation to Olena Bokareva who guided and supervised me on this interdisciplinary research with her fruitful comments and suggestions in creating the backbone of the thesis in light of division of the Union’s competences and their external implications. I also take this opportunity to express sincere thanks and my sympathies towards colleagues from Lund, classmates, staff of university and people surrounding me in general, as they have positively challenged me with regard to both, legal thinking and social aspects of life.

I would like to express my gratitude to Christopher Frey who indicated and pinpointed the idea of thesis with the initial thoughts on the contemporary and current issues, in terms of the natural gas networks, the EU, as a global energy structure, faces.

Most importantly, I would like to express my eternal appreciation towards my closest ones, especially parents, who unconditionally supported me with an everlasting belief and patience in everything I did, do and will continue doing.

While I just prescribed the social aspect of the abovementioned African proverb, the same proverb could also be translated into the manner how I undertook to conduct this research. Namely, while there are usually already pre-defined separate legal venues, which on their own offer quite efficient remedies, they are not always that efficient as the market player is willing them to be. Such separate legal venues can be optimised of course. By “going together” I think of sculpting of multi-disciplinary and investment friendly EU energy *acquis*, where the market player is capable to enjoy, play and operate in the midstream market for the natural gas profitably.

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Abbreviations

ACER	Agency for the Cooperation of Energy Regulators
AG	Advocate General
Art	Article
CJEU	Court of Justice of the European Union
Directive 2009/73/EC	Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC
DSB	Dispute Settlement Body of the World Trade Organization
EC Treaty	Treaty establishing the European Community
ENTSO-G	European Network of Transmission System Operators for Gas
EU	The European Union
GATS	General Agreement on Trade in Services
ILO	International Labour Organization
IMO	International Maritime Organization
LNG	Liquefied natural gas
MARPOL	International Convention for the Prevention of Pollution from Ships, 1973 and as modified by the Protocol of 1978
MFN	Most favoured nation
NRA	National regulatory authority
PCA	EU-Russia Partnership and Cooperation Agreement as entered into force on 1 December 1997
TEP	European Union's Third Energy Internal Market Package as entered into force on 3 September 2009
TFEU	Treaty on the Functioning of the European Union
TPA	Third-party access
UNCLOS	United Nations Convention on the Law of the Sea of 10 December 1982
WTO	World Trade Organization

1. Introduction

1.1. Background

On May 11, 2015 the Russian Federation made a request for the establishment of a panel in complaint against the EU's Third Energy Package (TEP). One of the grounds invoked relates to infrastructure exemption measures.¹ According to Art.34(1) of the EU-Russia Partnership and Cooperation Agreement (PCA), while also being a mixed agreement, it is explicitly provided that “the Parties shall use their best endeavours to avoid taking any measures or actions which render the conditions for the establishment and operation of each other's companies more restrictive [...]”. The provision is construed so as to prevent a deterioration of the market conditions under which their respective companies operate.²

Art.65 of PCA prescribes that, in terms of cooperation, the principle of the market economy [...] shall be observed against the background of the progressive integration of the energy markets in the EU.³ For instance, cooperation shall also include means, which encourage increased energy trade and investment as well as modernisation of interconnection of gas supply (Art.65(2)). PCA envisages rather limited legal consequences of its provisions. Namely, there is little substance in the agreement.⁴ Since Russia's withdrawal from the Energy Charter Treaty (now the International Energy Charter)⁵, EU-Russia energy cooperation is based purely only on non-legally binding commitments and mutual dialogues.

With regard to the commodity exporters in the EU from third countries, the EU internal legislation is constructed in a form in order to “export” the EU legal system to third countries – *acquis communautaire*. Such a model would be suitable perhaps for energy producers, which consider the EU as an example of the perfect economic development. Hence, the gas exporters to the EU from third countries are willing rather to be unaffected by the EU law so that

¹ WTO, WT/DS476/2, May 28, 2015, Request for the Establishment of a Panel by the Russian Federation. *European Union and its Member States – Certain Measures Relating to the Energy Sector*. Accessed July 20, 2016. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds476_e.htm.

² Elsuwege, van Peter, “Towards a Modernisation of EU-Russia Legal Relations?”, (2012) *Ghent University and Research Foundation-Flanders (FWO) (University of Tartu Centre for EU-Russia Studies)*, CEURUS EU-Russia Paper No. 5, at p 13. Accessed July 29, 2016. <http://ceurus.ut.ee/wp-content/uploads/2011/06/EU-Russia-Paper-51.pdf>. Although, Art.36 of PCA, concerning cross-border supply of services and in relation to no less favourable treatment, provides that only sectors listed in Annex 5 of PCA are entitled to such a treatment – services related to energy (i.e. natural gas) are not among them.

³ Felzmann-Schmidt, Anke, “The breakdown of the EU's strategic partnership with Russia: from strategic patience towards a strategic failure”, *Cambridge Review of International Affairs*, Vol. 29, Issue 1 (2016): 99-127, at p. 117.

⁴ *Supra* note 2, at pp. 6-7.

⁵ Energy Charter Conference, January 15, 2016, *The International Energy Charter and Consolidated Energy Charter Treaty with Related Documents*. Accessed July 27, 2016. <http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>.

they could develop, manage and structure their own operations and resources independently to maximise the revenue they produce.⁶

Due to the historical reasons, the structure of the gas supply chain indicates that the means of transportation of natural gas is limited to inflexible pipelines requiring large-scale investments.⁷ Therefore, the transportation of natural gas has traditionally been considered as a monopolistic activity. As a consequence, today such activities are regulated by the primary and secondary EU legislation on TPA and the general principles on open access to the infrastructure. For the non-EU energy company it would be economically viable to pursue capital-intensive energy infrastructure projects in the internal market if such projects are financed on the basis of derogation from mandatory TPA. Such type of project would require derogation of TPA at least for the period of the return of capital invested or during a certain part of the capital return period.⁸

Art.36(1) of Directive 2009/73/EC establishes that major new gas infrastructure, *inter alia*, i.e. interconnectors as well as “significant increases of capacity in existing infrastructure and to modifications of such infrastructure which enable the development of new sources of gas supply” (Art.36(2)) may, upon request, be exempted for a defined period of time from TPA (Arts. 32; 33; 34)), tariffs and unbundling. “New infrastructure” appears to be capacity created by constructing new interconnection point, while “expanded or modified infrastructure” stands for capacity added by expanding capacity at an already existing interconnection point.⁹ In terms of decisional powers, national regulatory authorities have a possibility to decide on exemption.

Although, Member States are also entitled to make such decisions, based on the opinion submitted by the NRA or the ACER (Art.36(3) and Art.36(7)). Art.36(9) proposes that the final decision is made by the Commission as it holds a power (with a period of maximum 2 months) on whether to require the national regulatory authority to amend or withdraw the decision concerning the exemption granted. The Commission’s decision becomes final and binding.

⁶ Konoplyanik, Andrey, “Regulating energy relations: Acquis or Energy Charter?”, (2011) *Centre for European Reform*, Pipelines, politics and power – the future of EU-Russia energy relations, at pp. 109-110. Accessed August 2, 2016. https://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2011/rp_851-271.pdf.

⁷ Internal market of natural gas has passed through substantial changes in terms of market restructuring since 1998 with its main aim of liberalisation, see e.g. Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, 21 July 1998, OJ L 204, 1-12.

⁸ Commission Press Release. “Questions and Answers on the third legislative package for an internal EU gas and electricity market.” (MEMO/11/125), Brussels, March 2, 2011. Accessed July 30, 2016. http://europa.eu/rapid/press-release_MEMO-11-125_lv.htm?locale=en. TEP proposes to continue separation of production and supply from transmission networks (i.e. ownership unbundling – separation of network activities from commercial activities), facilitate cross-border trade in natural gas and promote cross-border collaboration and investment.

⁹ Yafimava, Katja, “The EU Third Package for Gas and the Gas Target Model: major contentious issues inside and outside the EU”, (2013) *The Oxford Institute for Energy Studies*, at p. 12. The exemption may cover all or part of the capacity of the newly constructed infrastructure, or the existing infrastructure with significantly increased capacity as prescribed in Art.36(6). Accessed August 3, 2016. <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2013/04/NG-75.pdf>.

It is generally considered that the investors in the pipeline transmission¹⁰ capacity inside the EU are primarily transmission system operators. Whereas investors in the pipelines from third countries are primarily the companies purchasing and supplying natural gas¹¹ in cooperation with state-owned or private companies in the selling country.¹² The recovery of investments in transmission pipelines is therefore normally based on long-term arrangements (agreements). If buyers from the EU would require gas supplies it is of paramount importance to ensure that they will not be prevented by any burden created by an improper and inadequate regulatory regime for new capacity i.e. concerning cross-border pipelines.

1.2. Subject and purpose

In the first months of 2015 the Commission conceded that the Union's energy system is still underperforming. The Commission also ascertains that the current structure of the market does not lead to sufficient investments, the internal energy market is still fragmented, while market concentration and weak competition also remain as an issue.¹³ On the way towards a complete Energy Union, as proposed by the Commission, it agrees to take an intensified action in, among others, diversification of gas supply, the modernisation of energy infrastructure, security of supply and the creation of unified internal energy market.¹⁴ Indeed, the Commission has made a step forward with regard to the expansion and modernisation of energy infrastructure as it has already passed a Regulation on Guidelines for trans-European energy infrastructure.¹⁵ In addition, ENTSO-G has shared its observations that some investment decisions have been delayed because of strong emphasis on the short run and absence of a clear vision in long run concerning gas demand and supply.¹⁶ Absence of the new infrastructure risks, nevertheless, of increasing import dependency, which is endangering security of supply.

¹⁰ Art.2(3) of Directive 2009/73/EC defines "transmission" as the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply.

¹¹ Art.2(7) of Directive 2009/73/EC defines "supply" as the sale, including resale, of natural gas, including LNG, to customers.

¹² Directorate General for Internal Policies, "An Assessment of the Gas and Oil Pipelines in Europe (an extensive briefing note)", (2009) PE 416.239, IP/A/ITRE/NT/2009-13, at p. 15.

¹³ Communication from the Commission, "Energy Union Package: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy". [2015] COM 80 final, at p. 7 et seq. Accessed August 16, 2016. <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2015%3A80%3AFIN>.

¹⁴ Ibid, at p. 19 et seq.

¹⁵ Regulation (EU) No. 347/2013 on guidelines for trans-European energy infrastructure with the amendments in Regulation (EU) No. 2016/89 as regards the Union list of projects of common interest. Regulation provides the list of Projects of Common Interest divided in several infrastructure priority corridors and areas, which should receive special funding and benefits from "priority status" in permission procedures.

¹⁶ Vohwinkel, Tim, and Scholz, Ulrich, "The Application of EU Competition Law in the Energy Sector" *J.E.C.L. & Pract.*, Vol. 7, No. 1 (2016): 56-71, at p. 59.

Therefore, the purpose of this research is to elaborate and seek for the most effective climate for incentives to invest and available opportunities for investing entities. While the Union tries to establish and complete the Energy Union, the role and the relationship among the investing entities, national institutions, Member States and the supra-national institutions have to be elaborated in this research. The author proposes the following hypothesis:

In terms of the competences attributed, the Commission has adopted an interventionist approach and acts *ultra vires* with regard to the investments in the EU natural gas infrastructure expansion projects.

Research is structured in order to answer the following research questions in a sequential manner. The conclusion is reached by answering hypothesis, which together with research questions encompass different perspectives and opportunities for commodity transmission services and service suppliers (being active on the cross-border interconnectors at import/export and entry/exit points):

- 1) Does the EU accord certain third country pipeline services and service suppliers less favourable treatment than it accords to like pipeline transport services and service suppliers of other third countries pursuant to relevant decisions granting infrastructure exemptions to those suppliers? As a consequence, whether the EU observes obligations arising under GATS Article II:1?
- 2) If the congestion in gas transportation infrastructure occurs, what and which are the means to address the failing satisfaction of capacity demands from third parties?
- 3) Is the legal framework of congestion and traffic management in secondary legislation sufficient enough to provide the market growth in a long run?
- 4) Whether there exist any appropriate and sufficient instruments that are capable to demand investments with regard to the capacity expansion in gas infrastructure?

It is essential, in seeking for the proper answer, to consider and view questions cumulatively. The author in this research intends to acknowledge and address how the mixture of several different areas of the EU law may interact or even overlap with each other while seeking for the options of secure energy supplies, with a particular emphasis on developments regarding the EU cross-border energy transmission infrastructure.

1.3. Method and materials

The present research is conducted in accordance with the traditional legal dogmatic method as laid down in, mainly, written primary and secondary European legislation and, secondly, the WTO provisions on services. A particular focus is placed on the consistently developing EU energy law in order to affirm or reject the hypothesis and answer the proposed research questions, which are shaped by the legal method used. The author bases his

arguments on the current positive law (*lex lata*), with an insight of historical progress and with a prospective view on the future developments (*lex ferenda*). In essence, the author pursues an argumentation where he leaves also a room for external perspectives from beyond the current [positive] law to be scrutinised and research does not merely attach to the textual analysis and the prevailing legal reasoning.¹⁷ The central subject of the research remains a non-EU natural gas company, which is willing to invest in crucial parts of the cross-border transmission pipelines i.e. cross-border interconnectors. Research uses descriptive approach only where necessary in order to present the specificities and technicalities of the topic in a more elaborated manner. Since research paper is within the legal discipline, the author conducts a legal analysis.

From the perspective of the EU legal system, the author interprets legal provisions in light of the purpose, values, legal, social and economical goals that these provisions aim to achieve, being an equivalent method to teleological interpretation as utilised by the CJEU and which is highly crucial in the EU legal order.¹⁸ Therefore, when conducting analysis in light of teleological interpretation, the author puts emphasis on the EU legal order in its entirety and also when considering teleological interpretation of a single legal provision in accordance with criteria found in *CILFIT* case.¹⁹

While adopting comparative law method, the author compares the EU law against the WTO provisions on services as regards the transportation services and supplies of natural gas from the perspective of the EU energy *acquis* so that the EU law provision becomes clarified. The author seeks to develop a coherent and consistent analysis of cross-border energy investments in the area covered by the EU energy law. Legal analysis is undertaken in order to create a streamlining system where primary element is the market player in the EU natural gas markets on the transmission level – investor in cross-border capacity and the corresponding decision making process. This research stands at the crossroad of the external dimension as it involves the treatment of agreements with third countries.

In the first part research concerns the progress related to the EU external energy policy under the perspective of security of supply, including also extensive efforts to diversify external sources of gas supply. While analysing the conflicting underlying values of the EU external energy dimension and the preservation of internal energy market, the author also takes into account in his analysis the systematic interpretation, which checks the consistency in understanding the exemption regime under secondary law against the wording of primary competition law, i.e. Art.36 of Directive 2009/73/EC versus Art.102(b) TFEU. The primary law in this research is narrowed down to the essential facilities doctrine and the relatively new abuse of strategic underinvestment. Such a comparison between primary and secondary law is necessary in order to select such a meaning of the norm, which corresponds and is consistent with other legal norms i.e. Art.35 of Directive 2009/73/EC

¹⁷ McCrudden, Christopher, “Legal Research and the Social Sciences”, *L.Q. Rev.*, Vol. 122, Issue 4 (2006): 632-650, at pp. 633-635.

¹⁸ Poiães, Miguel, Maduro, “Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism”, (2008) *Working Paper IE Law School (WPLS08-02)*, at pp. 3-4. Accessed August 5, 2016. <http://dx.doi.org/10.2139/ssrn.1134503>.

¹⁹ Case C-283/81 *CILFIT*, ECLI:EU:C:1982:335, para. 20.

and the overall EU energy strategy, and fits in the EU legal framework to the greatest possible extent.

In order to affirm or reject the hypothesis and answer the related research questions, the author performs analysis on the basis of the following legal instruments: international law and conventions, the WTO law, the EU primary law (founding Treaties of the European Union), jurisprudence of the CJEU, the Commission's commitment decisions, the EU legislative proposals and preparatory law (used in order to complement and strengthen the legal analysis), secondary legislation (relevant regulations, directives and the Commission's decisions), scholarly writings - where the author intends to provide insights on the inter-linkage between law and the rationality of economics, which, nevertheless, is limited to qualitative analysis only.

However, in order to make any proposals for improvements of the existing legal setup for boosting up investments, the author aims to provide the reader with a comprehensive and solid analysis regarding the indivisible nexus of the EU external trade, the EU internal actions and development of the EU energy policy in general. Hence, research consists of two inter-linked parts. Whereas the first part covers the relevant framework of the EU energy policy in order for the second part to be more substantiated. When determining "what the [EU] law is", the author adopts a balancing exercise of legal provisions allowing exchange of ideas to emerge.²⁰

1.4. Delimitations

TEP in this research is invoked only when analysing the substantive provisions of Directive 2009/73/EC and the corresponding acts of regulatory authorities, either on the national or supra-national level. Without prejudice to the geopolitical context, among other trending topics, such as ownership unbundling, the author chooses to focus on the principle of TPA only. The author does not go into in-depth sector specific technical specificities, but chooses rather to emphasise certain notions to make them more comprehensible to the reader in the course of making the subject matter more elaborated.

This research has no intention to provide a broad and overly comprehensive development of regulation of the EU internal natural gas markets. Instead it takes into consideration the evolving idea of State of the Energy Union and the increasing importance of security of gas supply.²¹ The EU internal and external energy policies are evaluated and considered as to provide the reader with an understanding whether both of them can come across each other (also in a historical prospect) and how far the EU energy *acquis* is able to reach - with

²⁰ Gutierrez-Fons, A. Jose, and Lenaerts, Koen, "To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice", *Colum. J. Eur. L.*, Vol. 20, Issue 2 (2014): 3-61, at p. 61.

²¹ Communication from the Commission, "State of the Energy Union 2015". [2015] COM 572 final. Accessed August 12, 2016. <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52015DC0572>.

PCA as the primary example. Thus, this research distinguishes the ability and incentives of Member States themselves to enter into mutual relations with third countries concerning the field of energy.

By stressing the aspects of GATS to be applied for the market player's operations within the Union, the underlying analysis switches to the market player who is willing to invest. But still, from the perspective of company from a non-EU country, decisions related to the strategic underinvestment, the refusal to deal, and exemptions are chosen in a manner best fit for the purpose. However, in terms of essential facilities doctrine, the author does not provide approach adopted by the United States on this matter and in the same way does not refer to the common law antitrust legislation or jurisprudence. The doctrine itself is far more legally recognised in the United States than in the EU. Furthermore, the essential discussion wraps around the legal certainty seeking market player, which is capable to foreclose the downstream gas markets by means of innovation. Overall, research focuses on the establishment of a perfect mix of regulatory framework and the prospective insight in future anticipations, where the legitimate expectations and legal certainty of market players from third country (-ies) are observed.

1.5. Outline

The first Chapter introduces reader with the peculiarities and practicalities of the subject, while hypothesis and research questions are proposed.

Chapter II provides an assessment and timeline of the CJEU rulings regarding the EU internal and external actions and how the shared competence fits with them. Chapter III looks at the competence in more detail and with full regard to the EU energy policy, while establishing the role of parties involved.

In Chapter IV the realms of the EU law and the WTO law are contrasted concerning the freedom to provide services, while leading the reader to the major analysis on midstream pipelines.

In Chapter V the author provides a detailed evaluation and search for loopholes with respect to the Commission's steps adopted in its reasoning in granting exemptions. In Chapter VI a similar approach to Chapter V is pursued, but in the context of unilateral conduct - both are counterbalanced. This section seeks for the available remedies for investors, supra-national institutions, market and, at the end of the day, how to bind them altogether.

Chapter VII makes an immense effort to provide a reasoned answer to hypothesis, the corresponding research questions regarding the treatment of capacities and investments in crucial parts of the EU energy infrastructure by summarising the previous six chapters.

2. The development of shared competence

Art.4(2)(i) TFEU distinguishes that the Union and the Member States share competence and powers in the sphere of energy and both are authorised to adopt binding acts in this field. In terms of the EU external energy policy, it is accepted that the complex case law on competences, since the adoption of Lisbon Treaty, is now envisaged in the new Art.216 TFEU.²² In compliance with Art.2(2) TFEU, Protocol 25, on the exercise of shared competence, of the Lisbon Treaty explicitly establishes that:

“[...] when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.”

By such a provision the legislature intends to specify the power of the Union in terms of shared competence. Namely, if the EU provides an approved legal act to the Union, it has an enforceable authority by the Union within the scope of the act itself. Hence, the only option for the EU, concerning the expansion of its competence, is an establishment and implementation of new legislation in new areas and fields respectively. Some scholars suggest that “mixity” will therefore remain relevant in external energy policy – persuading Member States to act together on matters of external energy security.²³

With regard to the incorporation of international law in the EU law, Art.216(2) TFEU provides that “[international] agreements concluded by the Union are binding upon the institutions” and, consequently, they prevail over acts of the Union and its Member States, so that such agreements enjoy supra-legislative status. Nevertheless, the CJEU in *Kadi I* imposed limits to international agreements. Such international agreements cannot have an adverse effect on the constitutional principles of the Treaties – constitutional framework upon which the Union is founded.²⁴ The CJEU in *Kadi I* case elaborated on a principle that international treaty shall not affect the autonomy of the EU legal order.²⁵ Moreover, obligations stemming from such a treaty could not prevent secondary legislation, which implements a UN Security Council Resolution, for being exempted from judicial review under the EU law.²⁶ Accordingly, it is of paramount constitutional importance that acts adopted by the EU “must respect fundamental rights, that respect constituting a condition of their lawfulness”, whereas the CJEU is the only supra-national entity, which has a right to “review in the framework of the complete system of legal remedies established by the Treaty”.²⁷

²² Art.216(1) TFEU provides that “the Union may conclude an agreement if, *inter alia*, the conclusion of an agreement is necessary in order to achieve within the framework of the Union’s policies, one of the objectives referred to in the Treaties”.

²³ Hancher, Leigh, and Salerno M., Francesco. “Energy Policy after Lisbon” in *EU Law after Lisbon*, Oxford, Oxford University Press, 2012, at p. 398.

²⁴ Joined Cases C-402/05P and 415/05P *Kadi and Al Barakaat International Foundation v Council and Commission* (Kadi I), ECLI:EU:C:2008:461, para. 285.

²⁵ *Ibid*, para. 282.

²⁶ *Ibid*, para. 285.

²⁷ *Ibid*.

Although, in contrast to *Kadi I*, where the autonomy of the EU legal order (including the protection of EU core values) was emphasised, in more recent case *Air Transport Association of America* the CJEU engaged in establishing the requirements under which international law actually binds the EU. The CJEU also distinguished the circumstances under which it undertakes to review acts established by the EU in the light of international law - whether international treaties or principles of customary law.²⁸ Namely, the CJEU determined a set of conditions by which it recognised the need to address conflicts between the provisions of the EU and international law.²⁹ In terms of divergence, *Kadi I* differs from case *Air Transport Association of America* by that the former did not perform an analysis on whether principles under scrutiny are recognised as being elements of customary international law and, if so, whether and to what extent the individuals have a possibility to rely on such principles.³⁰

It becomes clear that international agreement, which has a detrimental effect on the EU constitutional principles, cannot form part and integrate in the EU legal order.³¹ On the other hand, the CJEU also tries to find a dialogue and reconcile the relationship between the legal norms of different, but also complementary legal systems.³² International law then has a potential to provide valuable guidance when determining the objectives followed by the secondary EU legislation implementing international obligations, which, however, are binding upon the EU. Indeed, when pursuing such approach, the EU law is then, by definition, open to the external influence of international legal standards. This is what actually characterises closed nature of the internal market. Similarly, it is presumed that Art.216(1) TFEU detects a constitutionalisation of the doctrine of implied powers,³³ whereas the CJEU acts as an establishing entity of such a principle.³⁴ The Lisbon Treaty has also expanded the possibilities for the use of both implied powers and the flexibility clause as provided in Art.352 TFEU by loosening the link between internal objectives and external actions.³⁵

The general guidelines for the liberalisation of internal natural gas market are prescribed in Art.194(1) TFEU. It is understood that they aim to ensure security of energy supply and promote the interconnection of energy networks within the Union.³⁶ Moreover, Art.194(2) TFEU states that the competence

²⁸ Case C-366/10 *Air Transport Association of America*, ECLI:EU:C:2011:864, para. 101. The EU has a strict obligation to comply and contribute to the development of international law, which binds the EU institutions.

²⁹ *Ibid*, paras. 102-110 and paras. 121-130.

³⁰ Mauricio, Ana Julia, "Relationship between European Union Law and International Law through the Prism of the Court of Justice's ETS Judgement: Revisiting Kadi I", *King's Student Law Review*, Vol. 4, Issue 1 (2012): 65-77, at p. 75.

³¹ *Supra* note 20, at pp. 40-41.

³² *Supra* note 30, at p. 76.

³³ Klamert, Marcus. *The Principle of Loyalty in EU Law*, Oxford, Oxford University Press, 2014, at p. 159.

³⁴ Cremona, Marise, "External Relations and External Competence of the European Union: The Emergence of an Integrated Policy" in *The Evolution of EU Law*, 2nd ed., Oxford, Oxford University Press, 2011, at p. 226.

³⁵ *Ibid*.

³⁶ ENTSO-G. "The European Natural Gas Network 2016. Capacities at Cross-Border Points on the Primary Market." (2016) (Transmission Capacity Map). Accessed August 22, 2016. http://www.entsog.eu/public/uploads/files/maps/transmissioncapacity/2016/ENTSOG_C AP_MAY2016_A0FORMAT.pdf.

shall not affect the choice of Member States regarding energy sources and the general structure of the overall energy supply. Art.192(2)(c) TFEU, nevertheless, provides that such particular choices by Member States shall not undermine decisions adopted by the Council, which aims to implement “[...] measures significantly affecting choice of Member States between different energy sources and the general structure of their energy supply”. Indeed, it is clear that supra-national institutions of the EU have a right to intervene into matters related to the energy sources and supplies if they are capable to affect a part of the internal market.

The Commission, with its proposal for a new security of supply regulation and in terms of cooperation with Member States, proposes, *inter alia*, a shift from national approach to regional approach when adopting measures related to security of supply, thus making such measures more effective. What concerns the relationship between Member States and natural gas companies, the new regulation requires a joint action on the construction of bi-directional capacity (reverse flows) at each particular interconnection point as such decisions can no longer be taken unilaterally. Moreover, other Member States, even those only potentially concerned, along the supply corridor, in the decision, should be invited to participate in the implementation of construction projects. ACER will then scrutinise the joint decision and the Commission has an option to adopt a decision requesting amendments to joint decision.³⁷ The new regulation, thus, corresponds more closely the wording of Art.194 TFEU regarding the notion of “cooperation”. Therefore, it is relevant to ascertain the development of shared competence over the years and also analyse the international implications regarding the EU external energy dimension, as the former cannot be viewed in a complete isolation.

2.1. Opinion 2/91

According to the CJEU, the scope of the common rules may be affected or distorted by the international commitments when they fall within the scope of common rules³⁸ or in any event “within an area which is already largely covered by such rules”.³⁹ The latter scenario is envisaged in *Opinion 2/91* and it makes the Union to possess an exclusive competence. Even if there is no possible contradiction between international commitments and the common EU rules, Member States shall not enter into such commitments outside the framework of the Union institutions.⁴⁰ This assumption is valid where, in terms of close cooperation, the subject matter of an agreement or convention falls partly within the competence of the Union and in part within that of Member

³⁷ European Commission. “Fact Sheet: Security of gas supply regulation.” (February 2016). Accessed August 3, 2016. http://europa.eu/rapid/press-release_MEMO-16-308_lv.htm.

³⁸ Case C-22/70 *Commission v Council (AETR)*, ECLI:EU:C:1971:32, para. 30. (*Commission v Council (AETR)*).

³⁹ *Opinion 2/91*, ECLI:EU:C:1993:106, para. 10. (*Opinion 2/91*).

⁴⁰ *Ibid*, paras. 25-26. The [international] commitments arising from that part of Convention No.170, which fall within the area covered by the secondary Union legislation, are of such a type as to affect the Union rules (laid down in that particular EU secondary legislation).

States.⁴¹ This is also the case in *Opinion 2/91*, where the conclusion of Convention No. 170⁴² was a matter standing within the joint competence of Member States and the Union.⁴³

M. Klamert, for instance, argues that the “formula” of *Opinion 2/91* has never been fulfilled to establish exclusive competence, but the CJEU has rather relied on this principle in order to establish jurisdiction for the interpretation of mixed agreements.⁴⁴ He also adds that principle elaborated in *Opinion 2/91* is absent in the current Art.3(2) TFEU.⁴⁵ In turn, it has to be understood that *Opinion 2/91* has developed a more coherent doctrine of shared competence. The duty of cooperation between Member States and the Union must apply as it is of high importance for “the unity in the international representation of the Union”. Whereas such a duty applies in the process of negotiations of mixed agreement, its conclusion and in the subsequent fulfilment of the obligations entered into,⁴⁶ as well as including its ratification.⁴⁷

It can be derived from *Opinion 2/91* that the Member State has a right to introduce or maintain more stringent measures for the protection of certain [working] conditions, which, nevertheless, shall comply with the Treaty.⁴⁸ The CJEU ruled that “the Union enjoys an internal legislative competence in the area [of social policy]”⁴⁹ even in a situation when it was for Member States, not the Union, to encourage improvements in health and safety as prescribed in the Treaty. The Union’s competence at that time was only subsidiary.

As discussed beforehand, the CJEU had to elaborate on a point where the international agreement covers the same subject matter as the Union legislation and both allow for the adoption of more stringent provisions (while both - the EU law and the ILO Convention laid down minimum standards only).⁵⁰ It is understood that essence of the reasoning has to be interpreted so as to encompass that “where the agreement covers the same subject matter as the Union legislation, the Union needs to negotiate so as to avoid conflict, or, alternatively, so as to be persuaded that new rules need to be adopted at international level, which may require the amendment of the existing EU legislation”.⁵¹ While under the ILO Constitution the Union is not itself allowed

⁴¹ Directorate General for Internal Policies, “Implementation of the Lisbon Treaty Improving functioning of the EU: Economic and Monetary Policy (study for the AFCO Committee)”, (2016) PE 556.952, at p. 15.

⁴² International Labour Organization, “C-170 - *Chemicals Convention, 1990 (No .170) (Convention concerning Safety in the use of Chemicals at Work)*” as entered into force on November 4, 1993. Accessed August 7, 2016. http://www.ilo.org/dyn/normlex/en/F?p=NORMLEXPUB:12100:0:NO::p12100_instrument_id:312315.

⁴³ *Opinion 2/91*, para. 15. Therefore, that the EU rules covered broadly the same subject matter it was a sufficient ground to exclude the need for any conflict between provisions of the Convention and those of the Union secondary legislation.

⁴⁴ *Supra* note 33, at p. 155.

⁴⁵ *Ibid*, at p. 157.

⁴⁶ *Opinion 1/94*, ECLI:EU:C:1994:384, para. 109. (*Opinion 1/94*).

⁴⁷ *Opinion 2/91*, para.38.

⁴⁸ *Ibid*, para. 16.

⁴⁹ *Opinion 2/91*, para.17.

⁵⁰ *Ibid*, para. 18.

⁵¹ Eeckhout, Piet, *EU External Relations Law (2nd edition)*, Oxford, Oxford University Press, 2011, at p. 86.

to conclude Convention No. 170, the CJEU provided that the Union's external competence may, if necessary, be exercised through Member States acting jointly in the interest of the Union.⁵² Such an implied flexibility grants a competence for the EU and forms the legal basis to exercise EU external powers on which the Union itself is eligible to conclude the energy interdependence clauses.⁵³

2.2. C-459/03 Mox Plant

In terms of international agreements and the status of mixed agreements in the EU legal order, the CJEU decided that Ireland was in a breach of the duty of sincere cooperation by instituting dispute settlement proceedings against the United Kingdom to a tribunal under UNCLOS, rather than before the CJEU, in relation to matters, which fell within the EU competence (interpretation of the EU law) without prior consultations with the Commission. Namely, a breach of such nature “involves a manifest risk that the jurisdictional order laid down in the Treaties and consequently the autonomy of the Union legal system may be adversely affected”.⁵⁴

This case prescribes division of competences between the Union and its Member States as the reasoning explicitly establishes that “the question as to whether a provision of a mixed agreement comes within the competence of the Union is one which relates to the attribution and, thus, the very existence of that competence, and not to its exclusive or shared nature.”⁵⁵ Hence, it could be derived that a provision of a mixed agreement comes within the scope of the competence of the EU, as soon as the crucial provision does not fall purely within the exclusive competence of Member States. This will depend solely on existence of the EU external competence, but it will not depend on whether or not the EU has exercised its competence by adopting secondary legislation in such a particular policy field.⁵⁶ To be more precise, the CJEU in *Mox Plant* case also established a principle that in the field of mixed agreements the Member State has a positive duty to inform and consult the respective institutions of the Union before an individual action is undertaken by the Member State.⁵⁷ It was also relevant “whether and to what extent the Union, by becoming a party to an international Convention”, enabled itself to exercise its external shared competence (concerning the protection of environment).⁵⁸

⁵² Koutrakos, Panos, *EU International Relations Law*, Bloomsbury Publishing, 2015, at p. 196.

⁵³ Vooren, van Bart. “EU External Energy Policy: The Legal and Policy Impact of the New Competence” in *The Treaty of Lisbon and the Future of European Law and Policy*, Edward Elgar Publishing, 2012, at p. 299. Similarly, *Opinion 2/91* para.11 prescribes that the Union interests would be negatively affected if Member States would have a right to enter into international agreements capable of affecting EU rules already adopted in areas falling outside common policies or of altering their scope.

⁵⁴ Case C-459/03 *Commission v Ireland (Mox Plant)*, ECLI:EU:C:2006:345, para. 154. (*Mox Plant*).

⁵⁵ *Ibid*, para. 93.

⁵⁶ Schrijver, Nico, “Case C-459/03 Commission of the European Communities v. Ireland, Judgment of the Court (Grand Chamber) of 30 May 2006”, *Common Market L. Rev.*, Vol. 47, Issue 3 (2010): 863-878, at p. 873.

⁵⁷ *Mox Plant*, para.179.

⁵⁸ *Mox Plant*, para.95-96.

2.3. C-308/06 Intertanko

In *Intertanko* case the CJEU established that the invalidity of secondary Union legislation could not be assessed by reference to either international agreement due to two reasons prescribed further. First of all, the CJEU adopted such reasoning because the Union was not bound by and party to MARPOL, while Member States were at that time.⁵⁹ Secondly, the assessment could not be made because of the overall nature of UNCLOS, which, nevertheless, lacks the direct effect.⁶⁰ In other words, the CJEU did not emphasise and review the Union law in light of binding international law and the related obligations, but took account of the obligations of Member States and associated its reasoning with the principles of international law.

On the one hand, *Intertanko* case sees the conferral of rights on individuals as a crucial criterion⁶¹ while, on the other hand, in another case the CJEU has decided that “even if the convention (here on biological diversity) contains provisions, which do not have direct effect, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Union as a party to that agreement.”⁶² This requires further clarification concerning the issue as to whether international agreements need to confer rights upon individuals in order to be directly effective. Generally, the CJEU widely accepts that international agreements (with the exception of the WTO agreements) have direct effect within the EU legal order.

In order to establish the direct effect, CJEU applies a two-step test:

“the CJEU can examine the validity of the Union legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, additionally, the Treaty’s provisions appear, as regards their content, to be unconditional and sufficiently precise.”⁶³

Hence, in some cases the CJEU denies the direct effect of individual provisions of such agreements because of their lack of precision or unconditionality, and the CJEU only denies the direct effect on the basis of the “nature and the broad logic” of the agreement in the case of the WTO and also of the UNCLOS.⁶⁴ It implies that there is a difference between the ordinary EU free trade and association agreements on the one side and the WTO agreements on the other.

⁵⁹ Case C-308/06 *Intertanko*, ECLI:EU:C:2008:312, para. 52. (*Intertanko*).

⁶⁰ Eeckhout, Piet, “Case C-308/06 the Queen on the Application of Intertanko and Others v Secretary of State for Transport, Judgment of the Court of Justice (Grand Chamber) of 3 June 2008”, *Common Market L. Rev.*, Vol. 46, Issue 6 (2009): 2041-2058, at p. 2053 et seq.

⁶¹ *Intertanko*, paras. 59-64. General view is that the CJEU examines legality of the EU law in light of the WTO rules only if the EU legislation intends to implement a particular WTO provision. For the reasoning see Case C-149/96 *Portugal v Council*.

⁶² Case C-377/98 *Netherlands v Parliament and Council*, ECLI:EU:C:2001:523, para. 54.

⁶³ *Intertanko*, para. 45.

⁶⁴ *Intertanko*, paras. 53-66.

As regards the WTO, the CJEU has explicitly referred to the reciprocity and mutual advantageousness of the provisions.⁶⁵ Secondly, another influencing factor is the procedure under which the question is raised (i.e. actions for annulment by Member States, infringement proceedings against Member States or cases involving individuals). In fact, it is acknowledged that secondary legislation, by violating the primary EU law or international agreements, may give rise to non-contractual liability. Nevertheless, with respect to the violations of international agreements concluded by the EU, a pre-condition is that the agreement is considered to have direct effect and that it does not fall under the “WTO exception” of the doctrine of direct effect.⁶⁶ Thus, as distinguished in *Intertanko*, international agreements concluded by the Union have primacy over the secondary Union legislation.

2.4. C-45/07 Commission v Greece

Essentially, in terms of division of powers between the EU and its Member States, the CJEU ruled that Member State, by submitting to the IMO a proposal for monitoring the compliance of ships and port facilities with certain requirements of the international convention (for the Safety of Life at Sea), had failed to fulfil its obligations under the duty of sincere cooperation. Therefore, the mere initiation of a procedure that might have led the IMO to adopt a new rule that would have interfered with the EU rules (Regulation No. 725/2004 on enhancing ship and port facility security) was a sufficient ground for the CJEU to conclude that the proposal submitted by Member State amounted to an illegitimate exercise by the latter of an exclusive EU competence. In this case the CJEU clarified the obligations arising for Member State from the duty of sincere cooperation for the implementation of an international agreement.⁶⁷

It could be argued that the duty of sincere cooperation is particularly relevant where, as in this case, the EU is not a party to international agreement and Member States act jointly in the interests of the EU.⁶⁸ Nevertheless, even in a field of shared competence (such as the negotiation of a mixed environmental agreement) the CJEU has ruled that Member States are under a specific duty of action and abstention once the Commission has initiated an action in that area.⁶⁹ For instance, the CJEU decided that Member State had violated the obligation of sincere cooperation and thus weakened the EU’s unity and negotiating stance by its unilateral proposal to a list of a particular substance

⁶⁵ Case C-149/96 *Portugal v Council*, ECLI:EU:C:1999:574, para.42. (*Portugal v Council*). Including also political reasons e.g. the room for negotiations and the denial of direct effect of the WTO law by major EU trading partners.

⁶⁶ Herrmann, Christoph, “The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy”, *J. World Investment & Trade*, Vol. 15, Issue 3-4 (2014): 570-584, at pp. 577-579.

⁶⁷ Case C-45/07 *Commission v Greece*, ECLI:EU:C:2009:81.

⁶⁸ *Opinion 2/91*, section VI.

⁶⁹ Case C-246/07 *Commission v Sweden*, ECLI:EU:C:2010:203, para. 91. For example, Member State has such a duty once the Commission has submitted proposals to the Council, which, however, not yet fully adopted by the latter, signifies a starting point for the EU’s common strategy.

before the EU had time to propose position on that matter, in an area of shared competence.⁷⁰

⁷⁰ Ibid.

3. Post-Lisbon strategy on energy

An express competence in the sphere of energy was only conferred with the Treaty of Lisbon entry into force.⁷¹ With regard to the energy sector, prior to the Lisbon Treaty as the relevant legal bases for the promotion of competition was used e.g. Art. 102 TFEU. In fact, most of the legislative documents then were adopted on the basis of the approximation of laws/internal market competence (current Art.114 TFEU). Moreover, both provisions usually were used in combination with other legal bases where necessary - e.g. environment (Art.191 TFEU).⁷² It is clear that prior to the Lisbon regime the legal basis for energy was rather fragmented. Indeed, the evolving nature of such a field of policy requires to be assigned under a more concrete Treaty provision.

Directive 2009/73/EC already prescribes a duty for entities, which are in the process of planning projects and during the planning phase of such projects, to evaluate and test the positive effects of exempted infrastructure projects with regard to competition, security of supply and the likely market interest, including a positive duty to implement the rules on congestion management. Moreover, whereas the location of infrastructure concerns more than one Member State, ACER should “handle as a last resort” the infrastructure exemption request in order to facilitate its administrative handling, as well as its cross-border implications.⁷³ Directive 2009/73/EC also establishes “the possibility of temporary derogations for security of supply reasons only, in particular, to new pipelines within the Union transporting gas from third countries into the Union”.⁷⁴

3.1. Competence to act and its implications

In essence, there is no expressly defined external competence to act in the field of energy attributed to the Union in Art.194 TFEU, but the power is rather shared (Art.4(2) TFEU). Indeed, second indent of Art.194(2) TFEU, however, provides that Member States remain competent to conclude international agreements that relate to the composition of their energy mix, and that they could not be pre-empted by any EU internal action from doing so. However, such a divergent action indicates that there could possibly exist diverse energy mixes across different Member States. Thus, Member States have two options – either to upload their interests to the EU internal and external energy policy; or they may pursue their own national interests with disregard for the common

⁷¹ Peeters, Marjan, “Governing Towards Renewable Energy in the EU: Competences, Instruments and Procedures”, *Maastricht J. Eur. & Comp. L.*, Vol. 21, Issue 1 (2014): 39-63, at pp. 43-44. As M. Peeters suggests, rights under Art. 194 TFEU can be exercised only if they do not adversely affect other parts of the Union law.

⁷² Fisher, E. et al., *Environmental Law: Text, Cases, and Materials*, Oxford, Oxford University Press, 2013, at pp. 131-133.

⁷³ Directive 2009/73/EC, recital 35.

⁷⁴ *Ibid.*

EU interest. The worst scenario is that Member States would act individually with a result of diverse policies towards the major exporting countries.⁷⁵

Similarly, it may be considered that the Union's competence is limited to the four internal aspects prescribed in Art.194 TFEU and thus energy policy is constrained to the internal market only – i.e. free movement of goods and undistorted competition.⁷⁶ With regard to the supra-national division split of competences, the CJEU has distinguished in *AETR* case that when concluding agreements “with one or more third countries or an international organisation, such agreements are to be negotiated by the Commission and concluded by the Council, subject to any more extensive powers which may have been vested in the Commission”.⁷⁷

Nevertheless, by adopting such a decision in *AETR*, the CJEU was aware that the relevant internal measures could not be separated from the external relations.⁷⁸ As discussed, the CJEU envisages a need for the external unity in order to safeguard legislative processes internally. Hence, any external actions of the EU require that they are implied from internal rules adopted by the Union, and as a consequence Member States will be pre-empted from acting. When a matter concerns the subject of a common policy, Member States are bound in every case to act jointly to defend and fulfil the Union's interests.⁷⁹ For example, M. Cremona argues that such a developed external unity assists as a safeguard for the framework of internal policy, while the mutual trust and reciprocity that emerge in the process of structuring of a certain and specific internal policy provides the ground for the transfer of powers necessary in achieving external unity.⁸⁰ In essence, the exercise by the Union of a shared competence in a certain sphere of law has a potential to trigger *AETR* principle (e.g. when the Union concludes international agreement, which is within the ambit of shared competence).

Similarly, the TEP (based on Art.114 TFEU) emphasises that the Union already enjoys quite extensive competence in the area of energy policy. Indeed, even if TEP does not give institutions of the Union the necessary power to require a particular investment or to require Member States to promote a particular cross-border infrastructure per se, it enables the Commission, nonetheless, to influence national energy choices to a considerable extent. Moreover, as will be further shown, TEP introduces a shift in the balance of competences between the European, national and regional levels.⁸¹ Hence, on several matters at least, Member States have lost relevant powers and opportunities to move forward with further inter-governmental and *ad hoc* arrangements on the regional energy market level.⁸²

⁷⁵ Wessel A., Ramses, Bart Van Vooren. *EU External Relations law: Text, Cases and Materials*. Cambridge University Press, 2014, at p. 445.

⁷⁶ *Supra* note 23, at p. 397.

⁷⁷ *Commission v Council (AETR)*, para. 75.

⁷⁸ *Commission v Council (AETR)*, paras. 54-55.

⁷⁹ *Commission v Council (AETR)*, para. 77.

⁸⁰ Cremona, Marise. “EU External Relations: Unity and Conferral of Powers”, in *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, at p. 67.

⁸¹ Aalto, Pami and Temel K. Dickle, “European Energy Security: Natural Gas and the Integration Process”, *Journal of Common Market Studies*, Vol. 52, Issue 4 (2014): 758-774, at p. 762.

⁸² *Supra* note 23, at p. 375.

Besides, Art.58 of PCA, regarding investment promotion and protection, explicitly establishes that the respective competences and powers of Member States and the Union already in place should not be affected in an adverse manner. Namely, “the cooperation shall aim to establish a favourable climate for investment, both domestic and foreign, especially via better conditions for investment protection [...]”. In addition and also with regard to investment, Art.58(2) of PCA then goes to emphasise that cooperation shall be also aimed to the conclusion “where appropriate, between the Member States and Russia agreements for the promotion and protection of investment” as well as to “exchange information on laws, regulations and administrative practices” in that field. This implies that PCA is not construed as to impose conditions (and to have legal relationships), which could have an adverse impact on the structure of EU decisional formation and the unity of internal market as such.

3.2. Mechanisms for the promotion of energy investment and trade

The EU has adopted an information exchange mechanism in Decision No. 994/2012 (covering only agreements concluded with third countries), which requires Member States to inform the Commission about their intergovernmental agreements with third countries having an impact on the internal energy market and on the security of energy supply in the Union. In turn, the Commission has a right to assess the compatibility of those agreements with the EU law requirements and, if necessary, provide advice on how to solve the identified problems.⁸³ Therefore, this mechanism can be considered as a preventive instrument aiming to avoid conflicts between the EU and international law, including the resulting commitments provided by Member States.

Nevertheless, the information disclosure requirement is related only to legally binding agreements and it is specifically designed for Member States themselves to decide whether or not a particular intergovernmental agreement with a third country has an impact on the energy market of the EU.⁸⁴ It is noteworthy that the preamble of Decision No. 994/2012 explicitly distinguishes that “the information exchange mechanism, including assessments to be made by Member States in implementing it, is without prejudice to the application of the Union rule on infringements, state aid and competition.”⁸⁵ Similarly, Decision has to be considered as a widened version of Art.13(6)(a) of Regulation No. 994/2010, which requires that intergovernmental agreements, which have “an impact on the development of gas infrastructure and gas supplies” be communicated. It has to be presumed

⁸³ Decision No. 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, 27 October 2012, OJ L 299, recital 17.

⁸⁴ Elsuwege van Peter. “The EU’s governance of external energy relations: the challenges of a rule-based market approach” in *The European Union’s Shaping of the International Legal Order*, Cambridge University Press, 2013, at p. 226.

⁸⁵ Supra note 83, recital 19.

that both legal institutes are complementary to each other, as agreements submitted under Regulation No. 994/2010 are considered being submitted for the purposes of Decision No. 994/2012.⁸⁶

Regulation No. 994/2010, based on Art.194(2) TFEU, however, envisages the shared responsibility to ensure the security of supply, which is placed on natural gas undertakings, the Commission and the competent authorities of respective Member States.⁸⁷ Moreover, Directive 2009/73/EC also establishes that security of supply shall be assessed in light of the factual circumstances of each situation, including the rights and obligations stemming from international law i.e. international agreements between the Union and the third countries concerned.⁸⁸ The Commission therefore assists (and is encouraged), where appropriate, in submitting recommendations to negotiate relevant agreements with third countries, addressing the security of energy supply to the Union or to include the (necessary) issues in other negotiations with those third countries.⁸⁹

Pursuant to Art.3(2) of Decision No. 994/2012, the scope of assessment prescribed in the provision is not defined further, and neither are its legal consequences. Namely, the compatibility check will mostly look at the rules on competition and internal market, which thus means that beyond a legality assessment there may also be a policy-oriented assessment focusing on the security of supply of the EU, which would be in line with Art.194(1) TFEU. However, the potential impact or role of this check by the Commission, concerning the infringement proceedings arising in future, is left open by the Decision.

Similarly, there is no clear guidance provided what type of action has to be invoked if the Commission finds incompatibility with the security of supply.⁹⁰ For instance, in terms of Art.3(2), discussions under Art.7(d) of Decision No. 994/2012 could be triggered as the “Commission shall facilitate coordination among Member States with a view to supporting the development of multilateral intergovernmental agreements involving several Member States or the Union as a whole”. If the current intergovernmental agreements were found to violate objectives of the EU energy policy, in terms of legal violation, is it possible for this mechanism then be used to trigger their replacement by the EU and Member State mixed energy agreements with the specific third country?⁹¹ Art.194 TFEU and Decision No. 994/2012, both jointly, is a

⁸⁶ Supra note 75, at p. 467. Following this communication, the Commission checks the agreement, and informs the Member State if there may be a problem.

⁸⁷ As it is defined in Art.2(2) of Regulation No. 994/2010, as opposed to NRAs, and the ACER who only need to be consulted in certain matters (see Article 3 in relation to responsibility for security of gas supply) and Article 4 (establishment of a preventive action and an emergency plan).

⁸⁸ Directive 2009/73/EC, recital 22.

⁸⁹ Ibid.

⁹⁰ Communication from the Commission, “The EU Energy Policy: Engaging with Partners beyond Our Borders”. [2011] COM 539 final. Accessed August 18, 2016. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0539>. One of the objectives is to strengthen partnerships for secure, safe, sustainable and competitive energy, as well as pursue a better promotion of EU policies beyond its borders with a) market integration partners, b) key energy suppliers and transit countries, c) key energy players worldwide.

⁹¹ Supra note 75, at p. 468. It is certain that Commission’s Directorate-General for Energy sees Decision No. 994/2012 as an instrument potentially leading such international agreements

developing and expanding legal setup to enable Member States to get along with the EU external energy policy.

However, there might be a future friction between the EU and international law in respect of intergovernmental agreements in the field of energy, which Commission finds incompatible with the EU law. In practice, to remedy such a friction, the Commission suggests to be involved before Member State and a third country conclude such problematic agreements (as opposed to the current compliance checks of intergovernmental agreements under Decision No. 994/2012 after Member State and a third country have concluded such agreements).⁹² This change indicates a shift of tasks from Member States to the EU. Moreover, this is achieved by using Art.5 TFEU on subsidiarity as a legal ground to ensure compliance of intergovernmental agreements with the EU law and to create legal certainty. In terms of the EU action, the Commission itself insists that such an intervention qualifies as “an essential added value for resolving conflicts between Member States under international treaty law and the EU law.”⁹³ The Energy Union Strategy emphasises this point that the re-negotiation of such agreements is highly complicated due to the already fixed positions of the signatories, which, in turn, exerts additional (political) pressure not to change any aspect of the agreement in question.⁹⁴

being concluded by the Union. See for explanation <https://ec.europa.eu/energy/en/topics/international-cooperation/intergovernmental-agreements>.

⁹² Commission’s proposal for a decision, “on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU”. [2016] 2016/31 (COD), COM 53 final, at p. 2.

⁹³ Ibid, at pp. 3-4.

⁹⁴ Supra note 13.

4. Energy transportation: between the WTO and the EU legal orders

The Lisbon Treaty has drawn a clear distinction between the obligation to establish free trade within the Union and the objective of gradually liberalising trade with third countries.⁹⁵ On the other hand, the broad scope and the extensive reach of GATS extend to measures concerning imports of commodity in so far as they affect suppliers of wholesale trade services. Such a broad scope of GATS is designed to capture all forms of service supply. Therefore, it is hard to conceive of any regulatory measure on the part of the EU law, which does not affect the supply of service, as covered by GATS.⁹⁶ Nonetheless, the Union and Member States retained shared competence in the conclusion of GATS.⁹⁷ In terms of the CJEU, there is no indication that the “right to trade”⁹⁸ is extended to a right for the third country commodity entering or leaving the Union. At the same time, third country entities operating in the internal market and seeking an exemption for the energy infrastructure have to manoeuvre through two legal orders in order to acknowledge and comply with the most favourable legal framework. However, further arguments reveal that such a reliance on two different legal regimes, for an entity linked to the supplies of natural gas and conducting operations in the Union, might be more complicated as it initially could seem.

4.1. Seeking for direct applicability and the available options for service providers

While Art.216(2) TFEU recognises the binding nature of agreements concluded by the Union, the CJEU, in general, has decided that it disallows the WTO law as a ground for legal complaint by a provider, which delivers energy services.⁹⁹ The legislator in Decision 94/800/EC¹⁰⁰ holds a similar view to the

⁹⁵ Jacobsson, Johanna, “Liberalisation of Service Mobility in the EU’s International Trade Agreements: As External as it Gets”, *Eur. J. Migration & L.*, Vol. 15, Issue 3 (2013): 245-262, at p. 246. J. Jacobsson suggests that the EU has not completed the internal market as 1) the liberalisation of trade in services with third countries is still underperforming and 2) there are significant impediments to the circulation of both services and service suppliers with regard to the third country nationals (at p. 246). Nevertheless, while the internal market is incomplete, the limits are put to the external liberalisation as well – third-country service suppliers cannot expect to be offered better treatment than it is already provided by the EU law to service suppliers which originate in Member States (at p. 261).

⁹⁶ Eeckhout, Piet, “Constitutional Concepts for Free Trade in Services” in *The EU and the WTO: Legal and Constitutional Issues*, Bloomsbury Publishing, 2002, at p. 231.

⁹⁷ *Opinion 1/94*, paras. 95-98.

⁹⁸ Case 240/83 *ADBHU*, ECLI:EU:C:1985:59.

⁹⁹ *Portugal v Council*, para. 47: “Having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Union institutions.”

¹⁰⁰ Decision 94/800 of December 22, 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in

CJEU that the “agreement establishing the WTO [...] is not susceptible to being directly invoked in the courts of the Union and its Member States per se”. On the contrary, Regulation No. 1225/2009 establishes that “the language of the [international] agreement should be brought into the Union’s legislation as far as possible”.¹⁰¹ Nevertheless, such a language requirement should be more elaborated, not as it currently exists - defined in broad and vague terms, also being left vulnerable against different interpretations.

From the perspective of the CJEU, the WTO law can be directly invoked in the courts of the Union where the latter intends to 1) “implement a particular obligation assumed in the context of WTO agreement” and 2) “where the EU act in question refers explicitly to specific provisions of those [international] agreements”.¹⁰² Such an obvious lack of direct applicability to market players makes it impossible for the natural gas entity to mount a legal challenge to the Union measure on the basis of the WTO law. Some scholars suggest that the matter of direct applicability should rather concern the market players themselves, not, nonetheless, that of the Member States.¹⁰³

Similarly, it is acknowledged by the CJEU that the Union’s most important commercial partners hold a view that the WTO law is not among the rules applicable by their judicial organs when reviewing the legality of their domestic law (non-enforceability of the WTO agreements), thus direct applicability is disallowed.¹⁰⁴ One might conclude that in the reasoning of the CJEU as such there is an explicit reference to the lack of reciprocity if one were to consider the applicability of the WTO law. For instance, in *LVP* case the CJEU decided that regulation adopted by the Union cannot be regarded as a measure intended to ensure implementation of the WTO norms and the Union had no intention to implement a particular obligation or provision of the WTO law.¹⁰⁵ The CJEU exempted the Union from an obligation to implement panel or Appellate Body recommendations within a strict timeframe.

With reference to Art.216(2) TFEU, the CJEU has initially recognised that international agreements concluded by the Union shall have primacy over provisions of the secondary Union legislation. Therefore, such provisions envisaged in secondary legislation must, “so far as possible”, be interpreted in a manner consistent with those agreements.¹⁰⁶ For example, even if certain provisions laid down in Directive 2009/73/EC mention liability of the market participants concerning international obligations, secondary law is not explicit on the precise reach and scope of such provisions in relation to international law.¹⁰⁷ Namely, even if the WTO law has primacy over provisions laid down in TEP, from the perspective of the EU law, the CJEU and supra-national

the Uruguay Round multilateral negotiations, December 22, OJ L 336/1, final recital in the preamble.

¹⁰¹ Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, December 22, OJ L 343, recital 5.

¹⁰² Case C-21/14P, *Commission v Rusal Armenal*, ECLI:EU:C:2015:494, para. 41.

¹⁰³ Bogdany, von Armin, and Makatsch, Tilman. “Collision, Co-existence or Co-operation?” in *The EU and the WTO: Legal and Constitutional Issues*, 2002, at p. 145.

¹⁰⁴ *Portugal v Council*, para. 43.

¹⁰⁵ Case C-306/13 *LVP NV*, ECLI:EU:C:2014:2465, para. 58.

¹⁰⁶ Case C-280/93 *Germany v Council*, ECLI:EU:C:1994:367, paras. 110-111.

¹⁰⁷ Directive 2009/73/EC, Art.11(3)(b)(i) and recitals 21, 22.

institutions enjoy a wide margin of discretion in determining how narrowly or extensively the legislator has originally intended the provisions at stake to be designed.

Although it is clear that TEP does not provide unconditional and sufficiently precise reference to the WTO law, it refers, however, to international obligations in general in order to secure the security of supply. Besides, apparently that is the reason why Directive 2009/73/EC provides that the notion of security of supply, qualifying as an imperative requirement in the EU energy law, should be assessed in light of the obligations arising under international law, in particular international agreements between the Union and third countries in question.¹⁰⁸ While Directive 2009/73/EC does not refer explicitly to any international legal instrument (e.g. the WTO law), it indirectly invokes the matter of international obligations in a rather broad and unspecific manner.

The EU legislator has adopted the so-called “WTO enabling” Regulation No. 2015/476 (formerly Regulation No. 1515/2001). Art.1 of Regulation No. 2015/476 establishes the most important idea of this legal instrument. Namely, when the DSB adopts a Union measure taken, the Commission has a non-mandatory right to take one or more of the measures implemented by the former, whichever the Commission considers appropriate to either repeal or amend the disputed measure, or adopt any other measure deemed to be appropriate in the situation in order to ensure the Union’s compliance with the recommendations and rulings provided in the reports of the DSB. This, again, leaves a wide margin of discretion for supra-national entities of the Union.¹⁰⁹ Overall, this view requires for a more uniform interpretation of provisions of the covered agreements regarding members of the WTO, which come from different jurisdictions. Essentially, the new interpretations only elaborate more on the already existing rights and obligations under the covered agreements. It becomes clear that the DSB, when adopting its conclusions, actually binds the CJEU.¹¹⁰

Important to add that in case of an arisen conflict between the EU and the WTO norms there is no intent to implement a particular WTO obligation on the side of the CJEU. Indeed, in *Ikea* case the CJEU ascertained that legality of the Union law could not be reviewed in light of the WTO law (as interpreted by the DSB’s recommendations), since it is clear from the Union law per se, which here excluded certain repayment of rights, that the latter did not have an intention to give effect to a specific obligation assumed under the WTO.¹¹¹ Therefore, the only viable solution for entity providing energy services is to challenge incompatible provisions of TEP *via* the WTO dispute settlement.

¹⁰⁸ Directive 2009/73/EC, recital 22.

¹⁰⁹ Steinbach, Armin, “EC Liability for Non-compliance with Decisions of the WTO DSB: The Lack of Judicial Protection Persists”, *Journal of World Trade*, Vol. 43, Issue 5 (2009): 1047-1069, at p. 1051.

¹¹⁰ Tsymbrivska, Oksana, “WTO DSB Decisions in the EC Legal Order: Approach of the Community Courts”, *Legal Issues of Economic Integration*, Vol. 37, Issue 3 (2010): 185-202, at pp. 198-200. While to date the CJEU refuses panel or Appellate Body reports, adopted by the DSB, as being non-binding to the courts of the Union. The practice of the CJEU is that it tries to avoid inconsistencies with decisions of the DSB to the greatest possible extent. This indicates an indirect observance and respect to decisions provided by the DSB (at p. 202).

¹¹¹ Case C-351/04 *Ikea Wholesale*, ECLI:EU:C:2007:547, para. 35.

4.2. Free trade in services: between the two legal regimes

In terms of services, it should be rather acknowledged whether a measure is capable of preventing or significantly impeding the market access of a service supplier.¹¹² The core subject matter and prohibition prescribed in *Alpine Investments* case affected offers for investment made to addressees established in Member State of service supplier and also offers made to potential recipients in other Member States. The CJEU established that the free access to the service market was affected and influenced directly in other Member States and was, therefore, capable of hindering the intra-Union trade in services.¹¹³

It is argued that the restrictions to be eliminated, according to Art.56 and 57 TFEU, require not only the abolition of discrimination, but also elimination of any restriction, even if indistinctly applicable, for market access to be promoted. By contrast, in GATS there is no movement from discrimination to restrictions on market access. GATS, thus, remains strictly limited to the protection of foreign suppliers and the respective supply of commodity only. Slightly different from provisions of the Treaty, GATS does not protect domestic service providers in a domestic context, unless market rights are affected.¹¹⁴ The requirement of non-discrimination covers both services and service providers under GATS.

In comparison to the EU law and in conformity with the WTO law, the Panel has implemented a rather broad and extensive view of the scope of GATS, as well as of the notion “affecting”. It is, every measure can be caught and fall within the scope of GATS in so far it affects the supply of a service even to a very small extent.¹¹⁵ First of all, it does not matter whether such a measure applies directly to a supply of service. Secondly, it is irrelevant if the measure regulates other matters but, nevertheless, affects trade in services for the measure to be caught by the scope of GATS.¹¹⁶

The general question here is the focus on how the measure, in fact, affects the supply of the pipeline services and/or the service suppliers involved. For instance, Art.17(1)(c) of Directive 2006/123/EC (Directive on the services) ascertains that the freedom to provide services in another Member State shall not be applicable to the gas sector. The preamble of Directive 2006/123/EC, furthermore, signifies its application to “providers established in a Member

¹¹² Case C-384/93 *Alpine Investments*, ECLI:EU:C:1995:126.

¹¹³ *Ibid*, paras. 35-38.

¹¹⁴ Cottier, Thomas, and Oesch Matthias, “Direct and Indirect Discrimination in WTO law and EU law”, (2011) *NCCR Trade Regulation Swiss National Centre of Competence in Research (Working paper No 2011/16)*, at p.9. Accessed August 22, 2016. http://www.nccr-trade.org/fileadmin/user_upload/nccr-trade.ch/hi/CottierOeschNCCRWP16.pdf

¹¹⁵ Nancy J. King, and Kishani Kalupahana, “Choosing Between Liberalization and Regulatory Autonomy under GATS: Implications of U.S.- Gambling for Trade in Cross Border E-Services”, *Vand. J. Transnat'l L.*, Vol. 40, Issue 5 (2007): 1189-1300, at p. 1207.

¹¹⁶ *Supra* note 96, at p. 228.

State” only, and this directive “does not cover external aspects”. Wording explicitly disregards the framework of GATS.¹¹⁷

Reasoning, with regard to the market access of like pipeline services and service suppliers, indicates similarities between both legal frameworks. However, the EU rules on the issue scrutinised are much more elaborated. Even if the infrastructure exemption regime and the Commission’s decisional tendencies imply that different decisions regarding the same pipeline services and pipeline service suppliers continue to take place, it could qualify as an indistinctly applicable measure. In such a situation it would be an indirect discrimination on the part of the Commission.

As there exists *de facto* unequal treatment in relation to exemptions granted to the new gas infrastructure, any rule is liable to hinder or make less attractive the exercise of freedom to provide services. Hence, it has to be determined whether exemption regime fulfils four cumulative imperative requirements as provided in *Gebhard* case. In practice, and first of all, the Commission decisions are issued in a rather discriminatory manner, where each new and particular infrastructure is exempted on a case-by-case basis without consistent and explicit guidelines offered by the Commission. Secondly, in general terms, the public interest could be promoted by such diverse decisional practice anyway as it still could make the competition more effective between the services and service suppliers. Indeed, such type of exemption policy as it exists currently, could be a suitable instrument, which secures that one monopolist does not foreclose the market. The fourth condition indicates that in the present practice the Commission usually goes beyond what is necessary when granting a specific type of infrastructure exemption as will be seen in the further research.¹¹⁸

4.3. Art. II:1 of GATS and the new infrastructure exemption regime

In general, Art. II:1 of GATS prohibits discrimination between like services and service suppliers from different countries. The aim of the MFN treatment obligation and the principle of non-discrimination, prescribed in Art II:1 of GATS, is to “ensure equality of opportunity for services and service suppliers from all WTO members.”¹¹⁹ MFN treatment is there to guarantee a level playing field in all sectors, “whether or not the service sector has been the subject of a market access or national treatment commitment”.¹²⁰ The different treatment renders it more difficult for undertakings to exercise the right to

¹¹⁷ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, 28 December 2006, OJ L 376, 36-68. Recital 16.

¹¹⁸ Case C-55/94 *Gebhard*, ECLI:EU:C:1995:411, para. 37.

¹¹⁹ Van Hoorn, Victor, “Unbundling”, “Reciprocity” and the European Internal Energy Market: WTO Consistency and Broader Implications for Europe”, *European Energy & Environmental Law Review*, Vol. 18, Issue 1 (2009): 51-76, at p. 64.

¹²⁰ There is also a possibility to limit the MFN obligation of Art. II:1 of GATS by listing an exemption under Art. II:2 of GATS.

provide transport services via natural gas pipelines, being qualified as new major gas infrastructure.

Scholars suggest that the meaning of Art. II:1 of GATS covers not only *de jure*, but includes also *de facto* discrimination.¹²¹ Although, the exemption granted by the Commission in case of *OPAL* decision required a Russian supplier (described as a dominant undertaking) to implement a “gas release” program, which required to sell 3 billion cubic meters of its gas annually at a government-set, fixed price to competing gas suppliers on the Czech market. The requirement was imposed regardless of what amount of additional capacity is booked by the Russian supplier if it is willing to exceed 50 per cent cap on the ability to operate the *OPAL* pipeline. Indeed, while there is no equivalent and similar requirement imposed in other decisions and on other suppliers, it could qualify as a violation of the MFN treatment obligation, because “[only] a Member that bans trade with all foreign suppliers does not violate MFN”.¹²²

Pursuant to Art. XVII:3 of GATS, treatment could be considered as less favourable if it modifies the conditions of competition in favour of a particular WTO member and the respective services and/or service suppliers. Thus, as the WTO itself argues, article intends to cover any laws or regulations.¹²³ Such a treatment shall also cover any advantage, favour, privilege or immunity. As a consequence, an undertaking active in the gas sector, which is willing to be active also in the supply market, will be in a potentially less favourable position than one of its competitors, which have a possibility to use the exempted major gas infrastructure being subject to different conditions applicable (as decided by the Commission).

¹²¹ WTO, WT/DS27/AB/R, September 9, 1997, Appellate Body Report. *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas)*, para. 233. Accessed August 28, 2016. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm.

¹²² Footer E., Mary, and Carol, George. “The General Agreement on Trade in Services” in *The World Trade Organization: Legal, Economic and Political analysis*, New York, Springer, 2005 at p. 827.

¹²³ WTO, WT/WGTCP/W/114, April 14 1999, Working group on the Interaction between Trade and Competition Policy. The Fundamental WTO Principles of National Treatment, *Most Favoured Nation Treatment and Transparency (Background Note by the Secretariat)*. para.23. Accessed August 23, 2016. https://www.wto.org/english/tratop_e/comp_e/w114.doc.

5. Exemptions and access to the relevant infrastructure

The principle of TPA is perceived to be the first step in establishing competitive access. It is aimed at creating capacity to compete, which enlarges the market for suppliers of commodity and allows consumers a wider choice of their supplier.¹²⁴ So the owners of the network agree or are obliged by law to allow the transit of commodity belonging to third parties for reasonable access tariffs (regulated access) with no possibility of individual exemptions or discounts. Competition law regards TPA as the exception to the rule that companies (even dominant ones) are not required to aid their competitors with extra efforts. Regulation, on the other hand, establishes TPA as the main principle with a limited number of possible exemptions.¹²⁵ Therefore, the author tries to evaluate the implication of sector specific regime governing access to infrastructure and its exemptions.

In order for the infrastructure to be exempted, it has to meet several, not always strictly cumulative, but exhaustive, criteria as envisaged in Art.36 of Directive 2009/73/EC: 1) enhance competition in gas supply and security of supply, 2) be too risky to be invested in infrastructure unless exempted, 3) be owned by an entity legally separate from the system operators in whose systems it will be built, 4) infrastructure should charge its users, 5) exemption should not be detrimental to competition in general or the effective functioning of the internal market, or of the regulated system to which infrastructure would be connected. Moreover, “when deciding whether to grant exemption, consideration shall be given, on a case-by-case basis, to the need to impose conditions regarding the duration of the exemption [...]”. When deciding on such matter, the account should be taken of “the additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances”.¹²⁶ When the competent authority issues a notification to the Commission regarding the exemption decision, the information shall include, *inter alia*, also how and to what extent such infrastructure would contribute, in terms of security of supply, “to the diversification of gas supply”.¹²⁷

¹²⁴ Onal, Mehmet, “Third Party Access Rights Regime Under European Union Rules for Natural Gas Pipelines and Conditions for Refusal of Access”, *CEPMLP Annual Rev.*, (2013), at p. 7. Accessed August 29, 2016.

¹²⁵ Vijver, van der Tjarda, “Third Party Access Exemption Policy in the EU Gas and Electricity Sectors: Finding the Right Balance between Competition and Investments” in *Energy Networks and the Law: Innovative Solutions in Changing Markets*, Oxford Scholarship Online, 2012, at p. 334.

¹²⁶ Directive 2009/73/EC, Art.36(6).

¹²⁷ Directive 2009/73/EC, Art.36(8)(e).

5.1. Shaping the principle of third party access in light of competition

Since Art.32 of Directive 2009/73/EC establishes the general rule that TPA must be provided, Art.36 determines that major new gas infrastructures may, upon request, be exempted for a defined period of time from Art.32. Since TPA is a legal principle, exemptions should only be awarded if and insofar as they are necessary. Therefore, necessity and proportionality test should be invoked for the analysis in order to adjust the duration of exemption and the extent (percentage) of capacity to which exemption applies.

Directive 2009/73/EC also sets the general framework for the refusal of access (Art.35). The provision also adds that where there is a refusal on the basis of lack of capacity, Member States take necessary measures to enhance the network “as far as it is economic to do so or when a potential customer is willing to pay for them”. Art.35(2) therefore envisages a positive requirement for Member States to ensure and provide mandatory guidance to natural gas undertakings. Therefore, in order to justify refusal of access in accordance with Art.35(1), gas undertaking shall first demonstrate that no capacity is available. Such a refusal, however, must be assessed on a case-by-case basis. Art.35 thus cannot be interpreted as a static provision.

The Commission requires project promoters to conduct a market test to measure demand before they can obtain an exemption.¹²⁸ Moreover, project promoters should not only test the market demand, but should also act in compliance with such test. Indeed, this may require project developers to make changes in their plans if the market demand appears to be greater than they had first anticipated. As the competition assessment should have a strong forward-looking element, it may lead to analytical difficulties if there are strong signals from the market that firm’s current dominance may disappear in the (near) future.¹²⁹ In case if a planned infrastructure project would constitute natural monopoly, the access regime shall be particularly strict, which indicates that exemption from TPA is not given easily.¹³⁰ The existence of market test signifies the “give-aways”, which project developer has to bear in order to preserve its business and commercial viability as regards development of the project.

In fact, the Commission even emphasises that “the new infrastructure should have the effect of decreasing the market power of the dominant undertaking” and there should also be significantly improved possibilities for non-dominant entities to enter the concerned markets or possibilities to expand their market positions in such markets.¹³¹ Hence, the share of capacity in new infrastructure,

¹²⁸ Commission of the European Communities. “Commission staff working document (working paper) on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No. 1228/2003 on conditions for access to the network for cross-border exchanges in electricity (New Infrastructure Exemptions)”. [2009] SEC 642 final. Para. 28.3. Accessed August 25, 2016. https://ec.europa.eu/energy/sites/ener/files/documents/sec_2009-642.pdf.

¹²⁹ Supra note 125, at p. 340.

¹³⁰ Supra note 128, para. 21.

¹³¹ Supra note 128, para. 34.

held by the dominant entity, should be substantially lower than its initial market share. Such a view, presented by the Commission, implies that this would disqualify any request from dominant entity with a shareholding in the project that is higher than its current market share. Although, by putting too much attention on dominant entity's present market share and its share of capacity in new infrastructure would lead to a situation in which a monopolist would be allowed to book much higher share of capacity than entity that barely meets the dominance threshold – even though the rules should be toughest on those with the highest degree of market power.¹³²

5.2. The devil lies in the detail: exemptions and their reasoning

Too strict approach to dominant firms entails a risk of decreasing incentives to invest in new infrastructure; which may be to detriment of the market as a whole – here in the pipeline networks and the related cross-border interconnections. In general, the idea behind exemption regime is to balance long-term (dynamic) efficiency gains over short-term (allocative) advantages in light of the market liberalisation process. For instance, security of supply has been invoked as a justification to exemptions regarding several new liquefied natural gas regasification terminals (mainly due to alternative sources of natural gas supplies from non-EU countries).¹³³ Although, the only situation in which such an exemption would perhaps not be granted is where owner of the facility is an incumbent and new infrastructure would in future increase its market dominance and/or where such investment would have a negative impact on the investment conditions for other new major gas infrastructure projects (i.e. infrastructure of same type).¹³⁴ Idea here lies within the fact that anti-competitive effects might outweigh the positive security benefits. However, viable option still is a temporary right to supra-normal profits and extended monopoly in exchange for new facilities.

Apparently the most common concern for the Commission is that the newly built capacity should not go to dominant players in such a manner that they expand their market share or manage to foreclose the competition. Therefore, capacity caps are imposed in order to avoid such a risk.¹³⁵ It is established that most of these decisions do not really provide regulatory relax, but rather change the regulatory framework in such a manner as to maximise the gains from the new investment – no balancing of positive and negative effects is performed. Furthermore, exemption rather removes a regulatory obligation in

¹³² Supra note 125, at p. 340.

¹³³ See, for instance, Commission decision of *LNG Porto Empedocle* (IT) (C (2012) 3123) and Commission decision of *National Grid Grain LNG* (UK) (C (2013) 3443).

¹³⁴ Talus, Kim. *EU Energy Law and Policy: A Critical Account*, Oxford, Oxford University Press, 2013, at p. 97.

¹³⁵ Commission decision of May 16, 2013 on the exemption of the Trans Adriatic Pipeline from the requirements on third party access, tariff regulation and ownership unbundling laid down in Articles 9, 32, 41(6), 41(8) and 41(10) of Directive 2009/73/EC. C(2013) 2949 final.

those cases where that obligation would be counterproductive to the aims of energy legislation.¹³⁶

At the same time, complicated reasoning by the Commission in its decisions illustrates a careful assessment of the competitive risks. Namely, the more recent decisions indicate the analysis of structure of competition closely, by looking, for instance, at the incentives and capacity of project participants to foreclose the market. The major concern is, nevertheless, that exemption procedure is not carried out in a manner, which subsequently balances risks to competition and the corresponding increase in investment properly.

5.2.1. Gazelle decision

In this decision the Commission engaged in balancing the positive and negative effects of the exemption.¹³⁷ This project connects, via the Czech Republic, two areas of Germany. With regard to balancing between the costs and benefits, the Commission, however, envisaged a risk that this new pipeline might result in other pipelines being underutilised with resulting higher costs for those using that other pipeline.¹³⁸ As a result, any possible price increase would be small, while the benefits resulting from exemption would be significant.¹³⁹

The Commission acknowledged that risks surrounding Gazelle are closely linked to OPAL and therefore aligned duration of exemption of these two projects (22 years).¹⁴⁰ With regard to the upstream production markets, Gazelle was not about to strengthen Gazprom's market power. The Commission determined that there will be a change of gas transits to OPAL, which meant that the construction of Gazelle is about to ensure that competitors of Gazprom still would have sufficient import capacities.¹⁴¹ Similarly, the Commission observed that Gazelle does not lead to strengthening of the market position of an entity, which is the most important player on the Czech wholesale and retail markets.¹⁴²

However, the Commission proposed several amendments. First of all, Gazelle's operator has a duty to offer and provide adequate capacity for bi-directional flows of commodity, ensuring that Gazelle enhances security of supply.¹⁴³ Secondly, the national authority shall ensure that the users of infrastructure have a right and capacity to trade their contractual capacities on the secondary market.¹⁴⁴

¹³⁶ Lowe, Philip, and Marquis, Mel. *European Competition Law Annual 2012: Competition, Regulation and Public Policies*, Oxford, Hart Publishing, 2014, section 4.2. regarding gas infrastructure.

¹³⁷ Commission decision of May 20, 2011 on the exemption of the "Gazelle" interconnector according to Article 36 of Directive 2009/73/EC. C(2011) 3424 final. Paras. 27-36 and paras. 63-69.

¹³⁸ Ibid, paras. 63-65.

¹³⁹ Supra note 128, paras. 67-69.

¹⁴⁰ Supra note 128, paras. 55-56.

¹⁴¹ Supra note 128, para. 33.

¹⁴² Supra note 128, para. 34.

¹⁴³ Supra note 128, para. 44 and 51. See also Art.7 of Regulation No.994/2010.

¹⁴⁴ Supra note 137, Article 5 at p. 15.

5.2.2. Poseidon decision

The Commission acknowledged fact that the dominant supplier controlled all gas import infrastructures was of significance. Effects on the markets with exemption were seen as positive but limited, compared to the potential additional capacity that could be made available.¹⁴⁵ As there was a potential for additional capacity, the Commission imposed a number of conditions on the national decision, including a requirement of market testing (*via* Open Season procedure¹⁴⁶) to make full use of all the technical capacity reasonably available to third parties. Assumption was made that the intended effects of the project would also depend on whether it would provide access for new producer countries, which had not previously supplied the country. Indeed, if this were the case, the positive effect of security of supply on national and the EU level would be substantially stronger.¹⁴⁷

Moreover, the Commission took into account another condition for granting exemption, being related to the level of risk that the investor must demonstrate. It also noted that risks involved in the case of “traditional” and “non-traditional” sources of gas supply were different.¹⁴⁸ Therefore, the Commission required that this difference, regarding risks involved, should be reflected in the final decision and gave discretion to national authorities in determining whether and to what extent different derogation periods should be granted, depending on the actual origin of the gas eventually contracted for with respect to the pipeline, and amend the decision based on these factors.¹⁴⁹

5.2.3. OPAL decision

In this decision the national regulator granted an exemption for the flow of gas into the Czech Republic for 22 years, but not for flows within Germany or for reverse flows. Furthermore, authority made TPA conditional upon various requirements with the aim to prevent capacity hoarding and ensure proper congestion management. The Commission, however, amended the national decision, and imposed additional conditions.

While it considered that OPAL (land extension of the offshore Nord Stream pipeline) is beneficial to security of supply, partly because it would be supplied

¹⁴⁵ Talus, Kim. *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law* (Energy and Environmental Law & Policy Series (Vol:18): Supranational and Comparative Aspects). Edited by Kurt Deketelaere. Kluwer Law International, 2011, at p. 110.

¹⁴⁶ ERGEG Guidelines for Good Practice on Open Season Procedures, May 21, 2007, Ref. C06-GWG-29-05C. A two-step process, whereas in the first stage the entity (usually the network operator) assesses demand by shippers for infrastructure services in order to implement potential projects (e.g. costs, volume) – how much infrastructure the market actually needs and under what terms it would like this infrastructure to be marketed. In the second stage entity offers capacity and establishes applicable conditions and pricing mechanisms for this service to the participants in the open season. The resulting capacity then could be allocated on a transparent and non-discriminatory basis.

¹⁴⁷ Commission decision of May 22, 2007, Poseidon exemption decision. SG-Greffe (2007) D/203046.

¹⁴⁸ Supra note 145, at p. 108.

¹⁴⁹ Supra note 147, at p. 7.

by Nord Stream¹⁵⁰, the Commission expressed competition related concerns¹⁵¹ and was concerned that the pipeline cannot achieve the completion of Czech market and thus imposed a capacity cap of 50 per cent on the capacity that any dominant firm may acquire. The Commission was mainly concerned about the risk that dominant firms would be able to book a high percentage of capacity. However, the cap could be exceeded if gas release, 3 billion cubic meters a year, to the market was implemented, otherwise 50 per cent of capacity has to be auctioned off to third parties.¹⁵² Nevertheless, such gas release should have been accompanied by the corresponding capacity release and the German regulator had to approve both release programmes. German regulator modified the national exemption in line with these conditions.¹⁵³

Scholars argue that it would have been valuable if the Commission had offered a more detailed reasoning concerning the dominance of Gazprom as such analysis can be derived from decisions discussed beforehand. Indeed, while Gazprom has an export monopoly concerning the supply of Russian gas, it is less clear from the Commission's decision how this position impacts OPAL pipeline itself. Gazprom has refrained from the gas release. It decided, however, to opt for an option to use only 50 per cent of the pipeline.¹⁵⁴ At the same time, Nord Stream functions and operates underutilised (around 40 per cent of capacity used).¹⁵⁵ Indeed, as the commodity flows through Nord Stream from Russia (and therefore from Gazprom), it does not necessarily mean that Gazprom remains a dominant player throughout the various segments of OPAL pipeline. Therefore, the Commission currently lacks a proper reasoning with regard to the dominance, which results in a wide-reaching legal uncertainty.¹⁵⁶

¹⁵⁰ Commission decision of June 12, 2009, OPAL exemption decision. C(2009) 4694. Para. 37.

¹⁵¹ *Ibid.*, para. 78.

¹⁵² *Ibid.*, para. 89.

¹⁵³ Hancher, Leigh, "Cross Border Infrastructure Projects: The EU Exemption Regime", (2011) Tilburg Law School Research Paper No. 10/2011, TILEC Discussion Paper No. 2011-006, at p. 15. Accessed August 7, 2016. <http://dx.doi.org/10.2139/ssrn.1749117>.

¹⁵⁴ Commission Press Release. "Gas Markets: Commission reinforces market conditions in revised exemption decision on OPAL pipeline" (IP/16/3562), Brussels, October 28, 2016. Accessed October 29, 2016. http://europa.eu/rapid/press-release_IP-16-3562_en.htm. In the Commission's revised and increasingly stringent decision, the use of 50 per cent of OPAL pipeline's capacity is now exempt from rules on TPA and the operation of the remaining 50 per cent of pipeline capacity will be subject to strict EU market obligations. Significant amount of OPAL firm short-term capacity is required to be made available as reliable capacity for competing entities (increased up to 20 per cent in case of demand). The Commission even has left open a possibility to further increase this capacity if the benefits outweigh the costs. Overall, in accordance with this decision, Gazprom is allowed to use 30 per cent more capacity in OPAL gas pipeline, while more stringent provisions are adopted in order to ensure transparent and non-discriminatory access.

¹⁵⁵ Grätz, Jonas, "The impact of EU law on Gazprom and its implications", (2013) *Center for Security Studies (Platts 7th European Gas Summit, Vienna)*, at p. 8. Accessed September 10, 2016. http://www.platts.com/IM.Platts.Content/ProductsServices/ConferenceandEvents/2013/pc378/presentations/16.%20Dr.%20Jonas%20Gratz_ETH%20ZURICH.pdf.

¹⁵⁶ *Supra* note 125, at p. 343.

5.2.4. Other decisions of relevance

Similarly, NEL pipeline, owned also partly by a Russian service supplier, was denied request for the exemption on the basis that pipeline does not qualify as an interconnector. Although in NEL pipeline decision the definition of interconnector in Art.2(17) of Directive 2009/73/EC was interpreted strictly in denying exemption for NEL, exemption requests were granted to the third country service suppliers or owners of other pipelines, which also do not qualify for the definition of an interconnector in the secondary legislation.¹⁵⁷

On the contrary, despite requirements that the transmission system line must “cross or span the borders” of two Member States and be built for the “sole purpose” as envisaged in the secondary legislation, the TAP pipeline was granted exemption even though it does not meet these requirements. To be more explicit, pipeline leaves the EU and then returns to the EU via the initial non-EU state (spans the border). Since pipeline crosses a non-EU country, the Commission granted pipeline an exemption and decided that the term “interconnector” shall be interpreted so as to encompass that “[...] gas pipelines which span the borders of (at least) two EU Member States, regardless as to whether the territory of a non-EU country is crossed in between.”¹⁵⁸ The Commission rather interprets the concept “interconnectors between Member States” broadly, otherwise it would exclude pipelines, which connect Member States, but happen to start, end, or cross a third country.¹⁵⁹

Nevertheless, the Commission did not address the issue that TAP pipeline supplies gas also to non-EU country. Hence, the sole purpose of TAP pipeline is not only related to the connection of transmission systems of two Member States, but also includes one non-EU country as a direct beneficiary. Indeed, such a principle that the connection between states shall be built for the sole purpose of connecting national transmission systems of Member States, being the key element of definition of the interconnector, in this decision is not observed. Also from both, *NEL* and *TAP*, decisions it is clear that the Commission lacks proper consistency in its reasoning regarding the definition of elements falling under the secondary legislation.

With regard to investment in the private infrastructure, while there is a lack of quantitative specifications on costs or technical characteristics specified in Directive 2009/73/EC, exemption was awarded, for instance, to *BBL*¹⁶⁰ pipeline project, which was relatively inexpensive – 0,5 billion euro (if one has to consider and measure the scale of investments by standards in the natural gas industry). This indicates that also an inexpensive project is capable to obtain exemption if it meets a set of criteria and creates a situation where it is inconvenient to refuse exemption to any project. In terms of Art.36(1)(b), which requires entity to demonstrate the existence of risks, in *BBL* decision

¹⁵⁷ Supra note 1, at p. 4.

¹⁵⁸ Supra note 135, para. 55.

¹⁵⁹ Directive 2009/73/EC, recital 35 expressly envisages that “the possibility of temporary derogation should apply, for security of supply reasons, in particular to new pipelines within the Union transporting gas from the third countries into the Union”.

¹⁶⁰ Commission decision of July 12, 2005, *BBL* exemption decision. CAB D(2005) 674.

exemption was accepted even on the basis of risks being insignificant to the project.¹⁶¹

On the other hand, the starting point when granting these exemptions is developed mainly on the assumption and idea that infrastructure constructed for a specific purpose should be qualified as a sunk cost. Hence, as a consequence, in the event if there exists insufficient demand for the infrastructure built, the losses would be considerable.¹⁶² However, the initial presumption for entities, which start investing in capacity, is rather the protection of their own interests to operate in the internal market - at least in a long run. From the perspective of sector specific rules, nevertheless, there continues to occur a regulatory dilemma either to take into account solely the intentional element of entity, which is willing to invest in infrastructure, or interpret criteria laid down in Art.36 statically.

¹⁶¹ Ibid, at pp. 3-4.

¹⁶² Talus, Kim. *Introduction to EU Energy Law*, Oxford, Oxford University Press, 2016, at p. 40.

6. The outlook of dynamic efficiencies. Are there any incentives to invest and innovate?

This chapter evaluates the relationship between Art.102(b) TFEU, i.e. refusal to deal, and infrastructure exemptions. As the author has discussed before, Directive 2009/73/EC fails to provide any quantitative criteria for granting an exemption. Art.36 itself does not contain any quantitative financial or technical characteristics of infrastructure to be considered as “major new gas infrastructure” or infrastructure providing “significant increases of capacity”. In theory, all gas infrastructure projects could be considered as very expensive, thus all of them would be able to fall within the category of “major” projects and as providing “significant increases” in capacity. Therefore, any infrastructure project could be exempted. Apparently, Directive 2009/73/EC only prescribes that exemption shall be of limited duration, without any specification as regards its maximum length. To be more precise, Directive 2009/73/EC increases powers of the Commission in the process of granting exemptions, but does not improve the issue of transparency.¹⁶³

Article 102(b) TFEU prescribes that “(...) limiting production, markets or technical development to the prejudice of consumers” is a violation. Therefore, dominant entity is capable to limit the activities that of its rivals on the market if no prejudice to consumers result.

Being similar to sectorial legislation on granting exemptions, the Commission is entitled to adopt at any time decisions under Article 102(b) TFEU, even where “a practice has already been the subject of a decision by a national court or authority and the decision contemplated by the Commission conflicts with that national court’s or authority’s decision”.¹⁶⁴ Moreover, the CJEU has held that Art.102 TFEU is also applicable where the conduct in question is compatible with sector specific regulation and the conduct has been approved or encouraged by a regulatory authority.¹⁶⁵ Thus, the Commission can intervene alongside national competition authorities and regulators.

If an entity does not choose to invest in a project, which would be eligible for exemption as provided by Art.36, it would possibly qualify, in turn, as a refusal to deal if the investing entity is dominant on the market concerned and if there are requests for capacity from other market participants.¹⁶⁶ Therefore, it can be

¹⁶³ Yafimava, Katja, “Transit: The EU energy *acquis* and the Energy Charter Treaty” in *Research Handbook on International Energy Law*, Edward Elgar Publishing, 2014, at pp. 606-607.

¹⁶⁴ Case C-344/98 *Masterfoods and HB*, ECLI:EU:C:2000:689, para. 48.

¹⁶⁵ Case C-280/08P *Deutsche Telekom v Commission*, ECLI:EU:C:2010:603, paras. 80-82. Art. 102 TFEU is inapplicable only in a scenario if the national legislation itself creates a legal framework, which completely eliminates any possibility of competitive activity to take emerge.

¹⁶⁶ Directorate for Financial and Enterprise Affairs Competition Committee, OECD, “Policy Roundtables – Refusals to Deal 2007”, (2009) DAF/COMP(2007)46. Accessed August 14, 2016. <https://www.oecd.org/daf/43644518.pdf>. The refusal of essential facilities (refusal to deal) takes place when no relevant access to the requesting party or a competitor is granted. However, such access is essential for the party in order to participate in the downstream market. Doctrine requires the holder of facility to impose reasonable access conditions for an adequate fee (at pp. 9-10). For instance, system operator does not invest in cross-border projects to increase available transmission capacity, because it might have a negative impact on downstream production or on the sales activities of an entity in the same company group.

argued that Art.102(b) TFEU, in form of a refusal to deal, offers a specific framework for the design and application of TPA and the corresponding rules of the sector specific regulation.¹⁶⁷ In contrary to exemption regime under Art.36, the structure of refusal to deal, by its own nature, cannot incorporate and take into account other objectives, such as security of supply and investment incentives. Refusal to deal is an instrument, which functions mainly as a corrective tool for market failures, while Art.36 functions as a factor for promotion of the market development.¹⁶⁸ Moreover, refusal to deal is less flexible than regulation, which concerns the technicalities and the different objectives that latter evaluates. With regard to exemption regime and, secondly, unilateral conduct concerning the energy infrastructure, in a situation where competition is already limited, dominant entity has even a stricter obligation to avoid anti-competitive behaviour.

Even if sectorial rules try to largely adopt and incorporate competition principles, the Commission seems to accept that when sector specific regulation does not achieve results in certain situations, it has an option to apply rules on competition in such cases.¹⁶⁹ Some scholars even argue that in the process of liberalisation of energy markets competition law has gained priority over the former.¹⁷⁰ As regards the capacity in energy infrastructure, competition rules seem to supplement the shortcomings of sectorial rules. Therefore, the author assumes that regulation, i.e. Art.35 and Art.36, is *lex specialis* in relation to Art.102(b) TFEU, as *lex generalis*, in so far and to the extent to which both cover the same issues, whereas normally the former rules should be applied instead. It could be argued that if there exists a potential competition issue and the entity possesses ability to amend and/or remedy its behaviour, the competition law can be enforced. In the subsequent analysis

OECD document also provides an opinion that by accepting a temporary monopoly, the investment and innovation incentives could be facilitated, which overall would result in dynamic efficiencies (long-run benefits to consumers). If an authority forces the company to give its competitors access to the bottleneck, this may cause an adverse effect from the perspective of all market players, as it would discourage most of the companies from investing in the future (reduced incentives to innovate) (at pp. 215-216).

¹⁶⁷ Kotlowski, Alexander, "Access Rights to European Energy Networks – A Construction Site Revisited", (2009) EU Energy Law and Policy Issues – Energy Law Research Forum Collection, 2nd edition (ed., B. Delvaux, M. Hunt and K. Talus, eds., Euroconfidentiel), at p. 27. Accessed August 15, 2016. <http://ssrn.com/abstract=1434296>.

¹⁶⁸ Hancher, Leigh, and Hauteclouque, de Adrien, "Manufacturing the EU Energy Markets: The Current Dynamics of Regulatory Practice", *Competition & Reg. Network Indus.*, Vol. 11, Issue 3 (2010): 307-334, at pp. 325-326.

¹⁶⁹ Commission Press Release. "Joaquín Almunia (Vice-President of the European Commission responsible for Competition Policy). Competition v Regulation: where do the roles of sector specific and competition regulators begin and end?" (SPEECH/10/121), Brussels, March 23, 2010. Accessed August 8, 2016. http://europa.eu/rapid/press-release_SPEECH-10-121_en.htm. J. Almunia expresses a view that in sectors, which are subject to the liberalisation and sectors experiencing continuous and structural market failures, in order to refrain from the application of competition law, company cannot use the sectorial rules as safeguard measure. There is a risk that dominant companies have capacity and potential to violate *ex ante* sectorial rules. Accordingly, J. Almunia admits that the competition analysis shall not ignore the regulatory context and regulatory objectives and such a detailed examination should be adjusted to the peculiarities of sector in question.

¹⁷⁰ Diathesopoulos, Michael D., "Third Party Access and Refusal to Deal: How Sector Regulation and Competition Law Meet Each Other", (2010) at p. 38. Accessed August 26, 2016. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1732210.

the author takes into account the intention of sector specific regulation and that it is not about to substitute rules on competition, although it does not define to what extent the latter would be applied.

6.1. Strategic underinvestment

The general understanding under the notion of “strategic underinvestment” seems to be that while the essential facilities doctrine is limited to the access refusals, where no objective justification for the refusal exists, “strategic underinvestment” seems to exclude certain objective justifications (e.g. the capacity is in full use) and even requires extensions of capacity under this doctrine – an expanded version of essential facilities doctrine. Furthermore, the Commission explicitly envisages the fact that if the current capacities are actually used by the holder of essential facility for its own supply business, it is not enough to exclude abuse under Art.102(b) TFEU.¹⁷¹ In terms of essential facilities, it should not be mechanically assumed that an easy access to the essential infrastructure automatically leads to a healthier competition to emerge.¹⁷² Similarly, it has to be understood that refusal to deal usually is not solely based on a genuine lack of capacity. Refusal to deal is rather enabled in a situation of inefficient operations or unwillingness of the entity to overcome capacity constraints.¹⁷³

The Commission’s Guidance Paper, as a starting point, has distinguished that if property is a result of significant investment, then refusal to deal is, in theory, justifiable.¹⁷⁴ In principle, such a view is supported by the necessity of dominant player to recoup adequate return on investments for the development of inputs, likewise in Art.36(1). With regard to efficiencies, Guidance Paper then goes further and demands dominant entity to demonstrate if entity has refused access to facilities, including any negative impact, which an obligation to share the input is likely to have on its own level of innovation.¹⁷⁵ As regards exemption regime under Art.36 and by analogy Art.102(b) TFEU, if dominant entity has previously supplied the input in question, but with the new increased capacities refuses to do so; it does not, in fact, affect incentives to innovate on side of the dominant entity.¹⁷⁶ Moreover, in the absence of new capacity constructed, such an investing entity would not be able to pursue commercial activities on the market.

¹⁷¹ Commission decision COMP/39.317 E.On Gas (relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union). [2010] OJ C 278/06, para. 40.

¹⁷² Diathesopoulos, Michael D., “Essential Facilities Doctrine in Relation to Incentives to Invest”, (2010) at p. 12. Accessed August 21, 2016. <http://dx.doi.org/10.2139/ssrn.1732152>.

¹⁷³ Faella, Gianluca, and Merlino, Pietro, “Strategic Underinvestment as an Abuse of Dominance under EU Competition Rules” *World Competition Law and Economics Review*, Vol.36, Issue 4 (2013): 513-539, at p. 518.

¹⁷⁴ Communication from the Commission, “Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings”. [2009] OJ C 45, para. 89.

¹⁷⁵ Case T-201/04 *Microsoft v Commission*, ECLI:EU:T:2007:289, para. 659.

¹⁷⁶ *Supra* note 174, para. 90.

6.1.1. GDF, ENI and the network foreclosure

Both *GDF*¹⁷⁷ and *ENI*¹⁷⁸ cases consider network foreclosure as a direct form of abuse of dominant position. In *GDF* case transmission system operator abstained from investing in import capacity and additional capacity of LNG terminal. In this case the financial analysis indicated that the construction of additional capacity would have been sufficiently profitable to transmission system operator due to the existing capacity requests. Consequently, GDF made a commitment either to release constrained capacity or to create additional capacity.¹⁷⁹ In essence, the Commission considered that it was abusive for GDF to reserve its own pipeline capacity for itself, even if the capacity was fully used. When decision was adopted, a new principle also stepped in – it is abusive for dominant entity (shipper of commodity) to reserve capacity in its pipeline for a long period of time.¹⁸⁰

Similarly, in *ENI* case the entity was active on the gas transportation and supply markets. Decision there, similar to *GDF* foreclosure case, was not based on the profitability of expansion projects - on long-term capacity demand from competitors. Transmission system operator did not explore the possible offers in terms of the financial contribution to infrastructure expansions. The Commission had concerns over the intention of ENI to strategically refrain from carrying out, proposing or agreeing to investments in additional capacity on the relevant import infrastructure. By such a strategy ENI had intention to keep the import capacity fully packed, thus maximising its revenues on the downstream market. In addition, it did not evaluate any third party demand via Open Season procedure.¹⁸¹

In *GDF* case entity made commitment to immediately release a large amount of its long-term reservations of gas import capacity at several entry points, and then to continue reducing its share below 50 per cent of these reservations i.e. a mandatory requirement to implement long-term release of at least 50 per cent. According to the Commission, threshold of 50 per cent of the total capacity enables the right balance between the rights of entity and the need to create competitive market conditions and the capacity to compete.¹⁸² The Commission was able to rely on the financial analysis provided by GDF, which actually indicated that investment would have been beneficial and profitable after all.¹⁸³

¹⁷⁷ Commission decision COMP/39.316 Gaz de France (relating to a proceeding under Article 102 TFEU of the Treaty on the Functioning of the European Union). [2010] OJ C 57/9. (*GDF*).

¹⁷⁸ Commission decision COMP/39.315 ENI (relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union). [2010] OJ C 352/10. (*ENI*).

¹⁷⁹ *GDF*, paras. 31-40.

¹⁸⁰ Maier-Rigaud, F. et al., “Strategic Underinvestment and Gas Network Foreclosure – the ENI Case”, (2011) EC Competition Policy Newsletter, Vol. 1, 18-23. Accessed August 22, 2016. <http://dx.doi.org/10.2139/ssrn.1903788>.

¹⁸¹ *ENI*, paras. 55-60.

¹⁸² Commission Press Release. “Antitrust: Commission accepts commitments by GDF Suez to boost competition in French gas market.” (IP/09/1872), Brussels, December 3, 2009. Accessed August 10, 2016. http://europa.eu/rapid/press-release_IP-09-1872_en.htm?locale=en.

¹⁸³ *GDF*, para. 39.

In essence, ENI did not take any positive step to meet the needs of third parties for additional capacity and even decided to ignore such demands. In contrast to *GDF* decision, it was not even necessary for the Commission to make an in-depth evaluation whether the investment in additional capacity would have been technically and economically viable.¹⁸⁴ Nevertheless, a very similar approach as regards the 50 per cent capacity cap was also pursued in *OPAL* decision. Therefore, it becomes apparent that the intent of the Commission is to view Art.102 TFEU and Art.36 as parallel and even overlapping systems. Whereas in both scenarios it is crucial that decision should require that exemption enhances competition and that it cannot be detrimental to competition per se. Art.102(b) TFEU itself does not require any enforced obligation to invest. Thus, forced investment has developed from the obligation of forced sharing.

6.2. Comparative analysis on the instruments for innovation

As the present research concerns cross-border interconnectors only, the exemption-seeking applicant has a positive requirement to show that this infrastructure has a positive effect on competition because it simply allows access and entry of a new competitor to the market. However, the regulatory framework concerning Art.102(b) TFEU and Art.36, both, is based on the assumption that a competitive market structure automatically improves security of supply. Thus, it could be argued that one should consider competition and security of supply as indivisible elements. Then, by definition, a new supply route is capable to improve competition and also make improvements in the energy security.¹⁸⁵

On the other hand, new capacity constructed is not functional on the market itself (i.e. infrastructure cannot diversify the gas supply itself), as Art.36 does not refer to any possible and real providers of gas supplies, which are, in fact, the real contributors to the diversification of gas supply. In this scenario, entity willing to make the infrastructure expansions, pursuant to Art.36, acts *ex ante*, as it forecasts the capacity needed for its own activities concerning transportation and supply markets. Under Art.102 TFEU, nonetheless, the energy security is improved when dominant entity makes the necessary adjustments and/or investments in the relevant interconnectors. Such decisions implemented should be considered *ex post*, as only after the actions, taken by dominant entity, there occurs an intervention by the relevant authority.

Theoretically the requirement of “competition to be increased” removes the possibility of entities, being in dominant position, to apply for exemption as provided in secondary law. Then the total impact of the investments on competition could be considered as potentially negative. Nevertheless, even if investors, having dominant position, undertake the project implementation, it

¹⁸⁴ Supra note 180.

¹⁸⁵ Supra note 162, at p. 39.

should not be automatically concluded that project itself has an adverse effect on competition and the functioning of markets concerned.¹⁸⁶

As regards the incentives to invest, AG Jacobs in *Bronner* case, for example, argues that in a long run it is pro-competitive and in the best interest of consumers to allow entity to maintain for its own use the infrastructure it has developed solely for the purpose of its own business, because then also investment is not endangered. Otherwise, if the access to essential facility would be allowed easily, there would be lack of incentives for competitors to develop a competing infrastructure. After all, as AG suggests, while competition would be boosted in the short-term, it would be decreased in the long-term.¹⁸⁷ However, again, this is also a controversial view that every entity operating in the relevant market will be only free riding on the inputs, with a total decline in innovation concerning new capacities. The author observes that this argument retains valid as, indeed, when there is a forced sharing of infrastructure, which includes high costs and risky investments, it could be as an obstacle to any incentives to innovate. Another view is that the assertion suggested by AG Jacobs is invalid for gas industry due to the financial input that a newcomer has to bear in order to start operations on the infrastructure related markets, which are usually already occupied by the existing historical and dominant competitors (incumbents).

On the contrary, it is generally perceived that competition law is more forthcoming towards access rights and much stricter regarding refusal to deal. In so far it concerns investments; there is a presumption that competition law itself is not the right tool to be used in the process of designing and transforming the market structure or actually to provide incentives for innovation.¹⁸⁸ Sectorial regulation then is construed and constructed so as to build the market more functional, which could also include imposition of new duties. However, it is not that in all cases the Commission intervenes with Art.102 TFEU and obliges entities to risk with costly investments to promote the entry and growth that of competitors.¹⁸⁹ An option for dominant entity is to adopt alternative organisational solutions to reorganise the limited capacity.

Some scholars suggest that there should not be a false dilemma, as it exists at the present stage, between open access to infrastructure and the market in development, with regard to the incentives to invest.¹⁹⁰ This can also be considered as a conflict between long-term and short-term competition – a balance between sectorial regulation and Art.102 TFEU. Both solutions, however, promote certain benefits in their application, albeit each individually bears serious dangers and arising costs. The unilateral application of either option bears considerable shortcomings. For instance, competitor prescribed in the Commission's decision expressed intent to build infrastructure for its

¹⁸⁶ Commission decision of February 8, 2008, exemption decision on the Austrian section of the Nabucco pipeline. CAB D(2008) 142.

¹⁸⁷ Case C-7/97 *Oscar Bronner*. Opinion of AG Jacobs, ECLI:EU:C:1998:264, paras. 57-58.

¹⁸⁸ Hancher, Leigh, and Larouche, Pierre, "The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest", (2010) *TILEC Discussion Paper No. 2010-024, Tilburg Law School Research Paper No. 014/2010*, at p. 17. Accessed September 4, 2016. <http://dx.doi.org/10.2139/ssrn.1628573>.

¹⁸⁹ Commission decision IV/34.801 FAG - Flughafen Frankfurt/Main AG (relating to a proceeding under Article 86 of the EC Treaty). [1998] OJ L 72/30, at p. 28.

¹⁹⁰ *Supra* note 172, at p. 17.

own commercial operations, but was rejected to do so by the owner. The outcome of decision was, in fact, that the owner was the one responsible, already from the beginning, to take into account the likely interest for infrastructure.¹⁹¹

The only feasible solution would be combining sectorial rules with the primary law on competition, which then would balance costs and benefits in the most efficient, economically lucrative and socially (i.e. for the benefit of consumers) profitable manner. For instance, an amended version of Art.36 could make an explicit reference and address, in the wording of article, the issue of strategic underinvestment. Thereby, Art.36 would be structured in a textual design to include a complete boundary how far the article itself actually extends. But still, the duration of protection and refusal to deal in terms of property rights should not be detrimental to consumers. Entity can and is entitled to control the property in so far it does not cause adverse welfare effects to consumers.

In the current circumstances it is complex to make adjustments and to merge, although only to a certain extent, the primary and secondary law. Indeed, under each case and decision the relevant authorities undertake cautious analysis of the whole context of each particular situation and the market concerned, including careful analysis of the management and regulation of competition in general. Under both regimes there is no clear and constantly developing line of an explicit decisional practice and the establishment of precedents. There are simply too many variables to be determined and linked together in each particular decision.

In turn, for instance, AG Maduro holds a view that any excess in the scope and duration of property rights involve balancing the interest of free competition. When such a positive balancing occurs, it provides incentive for the investment and the technical development to advance and evolve.¹⁹² It indirectly implies that the rules on exemptions, under Art.36, are not absolute prerogatives with an unlimited application in time and unlimited material applicability, as it is established by analogy in case *KPN Telecom*.¹⁹³ Nevertheless, it does not mean that entities, as equivalently efficient competitors to the incumbent, shall enjoy fruits of the latter's commercial success. Whereas Guidance Paper scrutinises that if entity would have known in advance that infrastructure will be subjected to forced and mandatory sharing, it might have decided contrary; not to innovate or pursue it in a very sub-optimal form.¹⁹⁴ However, the author emphasises that in the absence of necessary investments entity would not be able itself to pursue commercial activities on the market.

¹⁹¹ Commission decision IV/34.689 *Sea Containers v Stena Sealink* (relating to a proceeding pursuant to Article 86 of the EC Treaty – Interim measures). [1994] OJ L 15/8-19, paras. 70-76.

¹⁹² Case C-109/03 *KPN Telecom v OPTA*. Opinion of AG Maduro, ECLI:EU:C:2004:437, para. 53.

¹⁹³ Case C-109/03 *KPN Telecom v OPTA*, ECLI:EU:C:2004:749. Case regarding access to the telecommunications networks.

¹⁹⁴ *Supra* note 174, para. 88.

In terms of overall consumer welfare objective, the overall objective is still the protection of benefits for consumers, which the competition produces.¹⁹⁵ Therefore, the general view is that sectorial regulation in the energy sector, which is capable to threaten or create distortions of competition, is never in the interest of consumers. As regards Art.102 TFEU, the CJEU views competition rules in the primary law as being designed not only to protect the immediate interests of “individual competitors or consumers, but also to protect the structure of the market and thus competition as such”.¹⁹⁶ It indicates that the protection of structure of competition leads to consumer welfare in a longer term, as opposed to short-term welfare. However, the CJEU does not have an unequivocal position on consumer protection. Namely, in *TeliaSonera Sverige* case the CJEU ruled that “Article 102 TFEU must be interpreted as referring not only to practices which may cause damage to consumers directly [...] but also to those which are detrimental to them through their impact on competition.”¹⁹⁷ This interpretation signifies the ambivalent and inconsistent reasoning by the CJEU with regard to the thresholds of consumer welfare.

From an economic point of view, already historically established dominant entities tend to invest more in the network industries if the total investments of entrants (new competitors) increase.¹⁹⁸ In telecommunications sector, for example, while the access regulation is not affected by investment of entrants, national regulators then tend to respond to larger investment in infrastructure by existing incumbent, which can be categorised as Art.36 type of reasoning. Consequently, access regulation provides easier access to third parties and thus deters incumbent’s interest to invest in the essential infrastructure already at first place.¹⁹⁹ Similarly, in *Telekomunikacja Polska* decision the Commission concluded that the imposition of access to the upstream inputs, being under control of dominant entity, exceeds the need to preserve *ex ante* incentives to invest and exploit essential infrastructure (downstream) only for the benefit of one entity.²⁰⁰

Apart from the CJEU, it seems that the Commission tends to ease the requirement regarding the elimination of competition. *Telekomunikacja Polska* decision shows that it is sufficient for likely effects of refusal to supply (input) to exist. Hence, it does not automatically mean that rivals were actually forced to exit the market. It is enough and sufficient to prove that competitors are put

¹⁹⁵ Peeperkorn, Luc, “Coherence in the Application of Articles 101 and 102: A Realistic Prospect or an Elusive Goal?”, *World Competition: Law & Economics Review*, Vol. 39, Issue 3 (2016): 389-412, at p. 410.

¹⁹⁶ Case C-286/13P *Dole Food Company and Dole Fresh Fruit Europe v Commission*, ECLI:EU:C:2015:184, para. 125.

¹⁹⁷ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83, paras. 22-24.

¹⁹⁸ Grajek, Michal, and Röller, Lars-Hendrik, “Regulation and Investment in Network Industries: Evidence from European Telecoms”, (2009) *European School of Management and Technology Berlin, Humboldt University*, at p 16. Accessed August 27, 2016. <http://edoc.hu-berlin.de/series/sfb-649-papers/2009-39/PDF/39.pdf>.

¹⁹⁹ *Ibid*, at pp. 17-18.

²⁰⁰ Commission decision COMP/39.525 *Telekomunikacja Polska* (relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union). [2011] OJ C 324/7, para. 807. The Commission established that the dominant incumbent, *Telekomunikacja Polska*, had presented unreasonable conditions for the wholesale access and delayed negotiations concerning access to its network.

in a disadvantageous position, which thereafter makes them to compete less aggressively.²⁰¹ In the Commission's perception, entity responsible for the network has a duty to provide at least small part of capacity in the relevant infrastructure for the competing companies. Accordingly, capacity holder has a potential to pursue a tactic, which is to the detriment of competitors in reaching their customers and subsequently making a delay in the growth of investments.²⁰²

It is questionable whether competition authorities should be entitled to implement business decisions with long-term effects, where they have limited knowledge, such as Art.102(b) TFEU and the trend of strategic underinvestment. From the economic perspective, companies usually tend to invest only with an approximate knowledge of future supply and demand, sometimes the future market developments even being unknown, including the forecasted strategies of rivals. There are scholars who suggest that investments should be considered as restructuring the market platform itself rather than being a standard for behaviour of competitors within a particular environment and setup.²⁰³ The idea, underlying operations on the market, should be that entities are able to adopt themselves to different investment decisions in terms of ability to adapt themselves to risky market fluctuations.

The stability of regulatory environment also has an impact on investment decisions. Nevertheless, Art.102(b) TFEU regulates the conduct if entity only abuses the dominant position with different innovative types of such abuses, while Art.36 itself is, by definition, a consistent set of rules, which can be found also in Directive 2003/55/EC.²⁰⁴ The notion of "investment" is interpreted differently by entities, which try to maximise the profit on the market, and expert regulators, because both decision makers pursue different aims. Thereby, competition authorities themselves are not able to establish which investment is actually necessary, has a potential and will provide profitability. The author suggests a merged set of legal rules, which elaborate more and integrate technical issues and the market peculiarities in one bundle, as opposed to the current *ex post* interventions, which are based on a vision how the market behaviour, perfect structure of the market should look like (including the compliance with mandatory and stringent methodologies).

6.2.1. A new regulatory perspective: the promotion of investments via procedural enforcement?

While exemptions under Art.36 are implemented by reasoning adopted by the Commission, as regards Art.102(b) TFEU and the case of strategic underinvestment, it raises obvious doubts about the effectiveness of the latter policy, due to its largely extensive nature. To be more specific, it is not a secret that decisions regarding strategic underinvestment are adopted by using the

²⁰¹ Ibid, para. 815.

²⁰² Ibid, para. 818.

²⁰³ Purps, Stephan, and Scholz, Ulrich, "The Application of EU Competition Law in the Energy Sector", *J.E.C.L. & Pract.*, Vol.4, No.1 (2013): 63-82, at p. 48.

²⁰⁴ Directive 2003/55/EC (predecessor to the current Directive 2009/73/EC), Art.22 (exemptions for new infrastructure).

commitment procedure envisaged in Art.9 of Regulation No. 1/2003. Therefore, such policy is controversial as it is developed by commitments of entities concerned and not by reasoned decisions. Indeed, the policy reduces transparency and stringency, because cases are terminated by commitments decisions, whereas the principles established do not come before the CJEU.²⁰⁵

Such voluntary commitments, given by the relevant entity, signify the willingness to comply with the applicable competition rules, but also signalise limited possibilities for appeal. However, this also raises an issue what and where to seek the limits of Art.9 of Regulation No. 1/2003. As previously discussed, while in *GDF* decision the company committed to release transport capacities to third parties for a substantial period of time and through different mechanisms²⁰⁶ (behavioural remedy), in *ENI* decision the company committed to divest parts of its gas transmission networks (structural remedy) i.e. ownership unbundling and substantial divestiture of entity's shareholdings in transmission system operators.²⁰⁷ In *GDF* decision, besides commitments proposed by entity, the Commission added and stated that it takes into account results of the market test. The Commission was simply comfortable with the commitments *GDF* offered, but decision itself did not conclude whether there was an infringement.²⁰⁸ In both *ENI* and *GDF* decisions, the comments of third parties were taken into consideration through the market testing process.

The author agrees with other scholars that if entity undertakes a degradation of essential infrastructure, e.g. by means of an inefficient capacity management, it would have an impact on the overall quality of transportation services provided by other businesses in general.²⁰⁹ The author also acknowledges that entities can offer commitments even if they know in advance of the charges they could possibly face and that such accusations have a potential not to survive the judicial review provided by the CJEU.²¹⁰ From the business perspective it seems sensible as entities would have an incentive to avoid the costs and risks associated with the continuation of subsequent proceedings and also, then prospective, judicial procedure.²¹¹ Pursuant to such scenario described, entity has a room for manoeuvre. Although, but not very surprisingly, private entities and national competition authorities have a tendency to cite and invoke commitment decisions as precedents.²¹²

Indeed, TEP has created a more elaborated system regarding investments in infrastructure. In fact, sectorial regulation clearly establishes, pursuant to Art.22(7) of Directive 2009/73/EC that the organisational powers of the network development and the necessary investment decisions remain with

²⁰⁵ Jones, Alison, and Brenda Sufrin. *EU Competition Law: Text, Cases and Materials, 6th edition*. Oxford, Oxford University Press, 2016, at p. 508.

²⁰⁶ After the completion of market testing (Art.27(4) of Regulation No. 1/2003) commitments were revised.

²⁰⁷ *ENI*, paras. 63-71. Commission in these paragraphs discussed the proportionality of the proposed commitments in more detail than it did in comparison to *GDF* decision.

²⁰⁸ *Supra* note 182.

²⁰⁹ Maniadaki, Katerina, "Chapter 6: Net Neutrality Violations as Refusals to Deal" in *EU Competition Law, Regulation and the Internet: The Case of Net Neutrality*, International Competition Law Series, Vol. 60, Kluwer Law International, 2015, at pp. 234-235.

²¹⁰ *Supra* note 173, at p. 539.

²¹¹ *Supra* note 173, at p. 536.

²¹² *Supra* note 173, at p. 539.

national regulatory authority, not with the Commission.²¹³ Accordingly, only transmission service operators and national regulatory authorities participate in the planning process, however under economic conditions only.²¹⁴

According to Art.9 of Regulation No. 1/2003, in terms of the procedural decision-making, the Commission has to state the concerns related to competition only in its preliminary assessment. Therefore, an in-depth analysis of Art.102(b) TFEU and the corresponding theory of harm is not necessary. On the other hand, the Commission implements a far-reaching solution in the absence of the final assessment provided by the CJEU.²¹⁵ With regard to the benefits to the market player, the Commission actually makes legally binding and entity accepts commitments in the absence of explicit mentioning of any infringement committed by the latter. Moreover, the Commission in *EDF* decision prescribed the relevance of ensuring that entity's commitments are linked in an adequate manner and that it takes into account the future legislative or regulatory changes and reforms of the state where entity operates, and also changes on the Union's level in its analysis of the proposed commitments. Any observations and views, from the perspective of the Commission, going beyond this should be considered as disproportionate or outside the scope of initiated proceedings as concerns the objections laid down in Commission's Statement of Objections.²¹⁶

The CJEU has stepped in to distinguish and elaborate more on the commitment procedure in *Alrosa*²¹⁷ case. From *Alrosa* case it can be derived that when accepting commitments, the Commission enjoys, in fact, a large margin of discretion regarding the proportionality test and the assessment. The CJEU by deciding *Alrosa* case has set the boundaries of the proportionality test in Art.9 of Regulation No. 1/2003. Namely, application of the principle of proportionality, in terms of Art.9 of Regulation No. 1/2003, is designed in order to only verify that the commitments "address the concerns Commission expressed to the undertakings concerned and that the latter do not offer less onerous commitments that also are able to address those concerns in an adequate manner".²¹⁸ The CJEU also holds an opinion that it should step in, by a judicial review, only in a scenario when the "Commission's assessment is manifestly incorrect."²¹⁹ As a consequence, entity then has the option either to, first of all, offer far-reaching commitments or, as an alternative option, face the risk of an adopted infringement decision bearing fines of high amounts and possible remedies too.

In light of *Alrosa* case and to the detriment of company, the Commission initially lists concerns on the preliminary legal assessment, but afterwards the

²¹³ Hofmann, Michael, "Commitment Decisions in the European Energy Sector – Implementation of Sector-Specific Regulation via Competition law" *Eur. Networks L. & Reg. Q.*, Vol. 2014, Issue 2 (2014): 131-140, at p. 138.

²¹⁴ According to Art.13(1)(a) of Directive 2009/73/EC, TSO should "operate, maintain and develop (...) secure, reliable and efficient" transmission facilities.

²¹⁵ *Supra* note 213, at p. 139.

²¹⁶ Commission decision COMP/39.386 Long-term Contracts France (EDF) (customer foreclosure) (relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union). [2010] OJ C 133, para. 54.

²¹⁷ Case C-441/07P *Commission v Alrosa*, ECLI:EU:C:2010:377.

²¹⁸ *Ibid*, para. 41.

²¹⁹ *Ibid*, para. 42.

Commission is actually not bound by a rigid proportionality assessment regarding the initial legal assessment conducted. The Commission's conduct now is defined by a wide margin of discretion and thus companies might feel endangered so that they would be indirectly forced to offer far more extensive commitments as truly necessary in order to get acceptance by the Commission.

M. Hofmann in his article, therefore, ascertains that the Commission with such broad powers goes beyond the mere protection of a competitive market. Also by this assessment it could be determined that the Commission performs the role of regulatory authorities. The line between sectorial regulation and competition law becomes severely blurred also in this situation prescribed. Hence, sector specific rules have a possibility to overlap with the regulatory framework and the primary law.²²⁰ As a result then would be the application of two, normally separate, legal formulas and setups now being applied in parallel – causing legal uncertainty on the side of companies. Therefore, the theory of strategic underinvestment proves itself being problematic, especially accompanied with far reaching remedies. The analysis, with respect to the commitments, shows that competition and regulation have a tendency to fuse together and it has actually already occurred.

²²⁰ Supra note 213, at p. 140.

Concluding remarks and reflections for the future

As discussed beforehand, Member States have an opportunity to exercise their own competence only in so far where the EU does not exercise or has already decided not to exercise its own competence (as explicitly provided in the explanatory note on the division of competences).²²¹ Therefore, even if in the current state of law the competence still falls under the notion “shared”, the EU has a priority right of acting there. This implies that what we consider a shared competence in the present situation may be a *de facto* exclusive competence within several years. So that there exists a general presumption that even in areas where the EU has already shared its powers, in terms of competence, with Member States, such competence is still rather exclusive than shared.²²² According to R. Wessel, because of the existence of the “duty of genuine cooperation” (Art.10 EC Treaty) and the “overriding logic of the internal market” as interpreted by the CJEU, the attribution doctrine and its narrow boundaries can be not strictly complied with, and essentially ignored when transferring the competences to the Union.²²³

On the other hand, pursuant to Art.3 TFEU, the EU competition rules fall under the Union’s exclusive competence. Exemption regime holds in itself principles for the promotion of competitive market structure to develop, while strategic underinvestment, related to the natural gas infrastructure, falls undoubtedly under the EU’s exclusive competence. As a consequence, it can be derived that in such a situation shared competence meets exclusive competence – the expansion of energy (Art.194 TFEU) infrastructure against the potential abusive unilateral conduct (Art.102(b) TFEU) in a market foreclosure scenario. This clearly establishes a shift from shared to exclusive competence, concerning the model subject to analysis. But apparently competence in the field of energy becomes rather hybrid. It is also derived from the analysis that in the sphere of energy occurs a competence shift – agreements being concluded by both the EU and its Member States (being mixed agreements to which Member States must give their consent) to the EU alone having the power to negotiate and conclude such agreements.

The author deducts that, by means of regulatory authorities, the evolving nature of the energy sector regulation and *ex-post* enforcement of the EU competition rules in the energy sector indicates that the Commission does not miss any possibility to increase its competence in the sector or even over-step it. Similarly, where the Commission is trying to integrate and liberalise the energy markets, by announcing its agenda and enforcing it, there is less

²²¹ Division of competences within the European Union as updated January 26, 2016. Accessed September 22, 2016. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Aai0020>.

²²² Wessel, A. Ramses, “Integration by Stealth: On the Exclusivity of Community Competence. A Comment on the Ronald van Ooik Contribution”, (2007) *University of Twente*, at p. 43. Accessed September 23, 2016. <https://www.utwente.nl/bms/pa/research/wessel/wessel17.pdf>.

²²³ *Ibid*, at p. 49.

competence left for the actions to be taken by Member States.²²⁴ Other scholars, however, suggest that, with full regard to the previous Treaties and the Lisbon regime, the attribution of new powers to the Union cannot occur “as the limits of competence have already been reached”.²²⁵ The author concludes, with regard to the shift in competences and regulatory intervention by the Commission concerning infrastructure capacities that hypothesis has to be affirmed and actions of the Commission in that regard can be considered as *ultra vires*.

From the view point of the CJEU, apart from the analysis and fact that an individual operating within the EU has limited possibilities to mount a legal challenge against the EU legislation on the basis of the WTO law, as there is a lack of direct effect. A different perspective has been recognised with regard to PCA. In *Simutenkov* case such an assumption was reversed, as Art.23 of PCA holds, although in a slightly different context than energy (i.e. non-discrimination on the basis of nationality of legally employed workers), the direct effect. It remains to be seen as to whether a Russian company, for instance, operating on the transmission level within the EU can rely before the CJEU directly on other provisions envisaged in PCA. *Simutenkov* case actually clearly shows that the CJEU is active in transposing the notions prescribed in the EU substantive and constitutional law into the bilateral agreements of the Union without prejudice to their teleological variations.²²⁶

What concerns the relationship with third countries; the current PCA with Russia is not detrimental to the Union per se.²²⁷ However, since Russia has joined the WTO, the expectations of its gas exporters and gas transportation services and service suppliers (including the related investment projects) to and within the Union are highly increasing, at least in terms of legal certainty and legitimate expectations. Art.II:1 of GATS, therefore, can be considered as an overriding instrument concerning TEP in general as the scope and applicability of GATS is broader than, for instance, internal market provisions governing the free movement of goods and freedom to provide services.

A possible solution might entail that a gas exporter country in its cooperation and partnership agreement includes a provision that the legal framework for e.g. EU-Russia common energy space, natural gas as a commodity in particular, shall be Directive 2009/73/EC and the related documents, as far as the EU

²²⁴ Pakalkaite, Vija, “Competence Creep Through the Backdoor: EU Energy Regulation and Competition Policy”, (2014) *Central European University*, 5th Biennial ECPR Standing Group for Regulatory Governance Conference Barcelona, at pp. 16-17. Accessed September 10, 2016. <http://reggov2014.ibe.org/bcn-14-papers/75-172.pdf>.

²²⁵ Ooik, van Ronald, “The European Court of Justice and the Division of Competences in the European Union”, (2007) *Europa Instituut, the University of Amsterdam*, at p. 39. Accessed September 15, 2016. <https://www.uva.nl/binaries/content/documents/personalpages/o/o/r.h.vanooik/nl/tabblad-een/tabblad-een/cpitem%5B7%5D/asset?1355372762078>.

²²⁶ Hillion, Christophe, “Case C-265/03, Igor Simutenkov v. Ministerio de Educacion y Cultura, Real Federacion Espanola de Futbol”, *Common Market L. Rev.*, Vol. 45, Issue 3 (2008): 815-834, at p. 832.

²²⁷ Commission Press Release. “The EU-Russia Partnership – basic facts and figures.” (MEMO/11/104), Brussels, February 22, 2011. Accessed September 5, 2016. http://europa.eu/rapid/press-release_MEMO-11-104_en.htm?locale=en. Although, new agreement has been under negotiations since 2008, it is presumed that following Russia’s accession to the WTO, a more detailed agreement is yet to be negotiated.

internal energy *acquis* is concerned. However, the EU *acquis* currently does not cover and perhaps also will not in future cover the full length of all major gas supply chains destined in Member States. There are scholars who suggest that the use of the EU *acquis* for the creation of common energy space would actually fail.²²⁸

In terms of the third and fourth research questions, the regulatory use of commitments and, thus, the enforcement of Art.102(b) TFEU in the energy sector has contributed to the liberalisation of the EU energy markets and has brought various benefits, either direct or indirect, for the affected entities. Research shows that we have moved to an unavoidable divergence of competition and regulation. For example, certain specific elements under the regulatory law are unavoidable in the enforcement process of competition law. The Commission's Commitment decisions remain an optimal solution for the current market design.

Likewise, while infrastructure exemption decisions entail a view on future developments, the wider the geographic market, the less likely is that a firm can fall under the presumption as being dominant. Therefore, the issue of dominance is central in Art.36 and Art.102(b) TFEU as the former sets criteria that dominant firm should be barred from strengthening its position on the newly exempted infrastructure. The Commission statically assumes that the augmentation of capacity automatically provides a subsequent rise in competition. When granting the access to energy facilities, different economic conditions should be taken into consideration, especially where the facilities in question are not purely essential or monopolistic.

The infrastructure exemption regime lacks a proper base for argumentation and that is the major concern for investing companies. Two similar legal regimes indirectly signalise that the Commission intends to adopt approach of regulatory competition – while sector specific regulation is more detailed in comparison to essential facilities doctrine and the abuse of strategic underinvestment, the former cannot achieve the incentives to innovate as the latter uses legal remedies to demand such efficiencies and innovation. The Commission has used the opportunities provided by general competition law to circumvent the shortcomings of the sector specific regulation. However, there should be close and consistent cooperation between the regulators and enforcers of competition law because regulation and competition enforcement in the EU natural gas market can be expected to co-exist.

Effective remedies are existent in the *ex ante* treatment of cross-border pipeline transmission capacities in terms of, for instance, Gas Network Codes²²⁹. On the contrary, *ex post* perspective indicates that the Commission actively forces and imposes its own long-term vision of the market design for the EU natural gas transmission markets, and the market growth is up to this supra-national body. The author suggests that rules for exemptions and strategic underinvestment should merge and by that become more elaborated. While the

²²⁸ Konoplyanik, Andrey, “A Common Russia-EU Energy Space: The New EU-Russia Partnership Agreement, Acquis Communautaire and the Energy Charter”, *J. Energy & Nat. Resources L.*, Vol. 27, Issue 2 (2009): 258-291, at p. 269.

²²⁹ European Commission. “Gas Network Codes”. Accessed September 14, 2016. <https://ec.europa.eu/energy/en/topics/markets-and-consumers/wholesale-market/gas-network-codes>.

former provides detailed analysis for the substantive conditions of granting exemptions and their procedural guarantees, the latter already implements them. Nevertheless, the Commission indeed pursues active antitrust and sectorial intervention, but until now such activism results in the overall benefits for the internal market in general – the process of market liberalisation is on its way.

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