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Ownership Unbundling in European Energy Market & Legal Problems under EU Law

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OWNERSHIP UNBUNDLING IN EU & LEGAL PROBLEMS

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INTRODUCTION

In this paper we will examine the issue of ownership unbundling and forced divestiture remedies imposed in a series of recent competition law cases of the energy market –examined above- in relation to the possible existence of a series of legal obstacles.

These energy market decisions belong to a group of antitrust cases in which a structural divestiture remedy has been imposed under the provisions of Article 9 of Regulation 1/2003. This divestiture refers to transmission networks¹ and to generation capacity² and is meant to lead to severe structural changes, which are compatible with the findings of 2007 Sector Inquiry and its Proposals for the Third Energy Package and are assumed to accelerate the progress of the establishment of the internal energy market. By favouring such remedies in these cases, Commission affirmed its position as the latter was expressed in relation to the Third Energy Package. Commission suggested ownership unbundling as the most important remedy, in order to resolve problems in the energy sector, related to vertically integrated big firms. Commission proposed full ownership unbundling,³ meaning the complete separation of ownership of generation assets from ownership of transmission assets and the separation of all network functions from the other activities of the energy supply undertaking,⁴ as the best possible solution, which would also lead to the dissolution of big “national champions”.⁵ Therefore, ownership unbundling and divestiture of assets as an antitrust remedy share a common basis, meaning that they lead to the transfer of corporate assets to a third party. For this reason, we will examine the issue of the legality of these remedies, in the same way as we would examine the legal enforceability of ownership unbundling.⁶

¹ Look to RWE Case (Case 39.402), ENI Case (Case 39.315), GDF foreclosure (Case 39.316) and German electricity balancing market (Case 39.389).

² Look to German electricity wholesale market (Case 30.388).

³ E. Cabau, ‘Unbundling of Transmission System Operators’ in C. Jones (eds.) *The Internal Energy Market: The Third Liberalisation Package*, 90-94.

⁴ Third Energy Package also provides for unbundling of distribution system operators, however neither Commission proposed nor Third Energy Package adopted ownership unbundling as an unbundling form for distribution (unbundling of distribution is limited and refers to management, accounting and legal unbundling). Look to C. Jones (revised and updated by E. Cabau), ‘Unbundling of Distribution System Operators’ in C. Jones (eds.) *The Internal Energy Market: The Third Liberalisation Package*, 183 o.w; Art. 26 Dir. 2009/72/EC and Art. 26 Dir. 2009/73/EC.

⁵ Electricity Directive 2009/72/EC art. 9; Gas Directive 2009/73/EC art. 9.

⁶ J. Pielow, G. Brunekreeft and E. Ehlers, ‘Legal and economic aspects of ownership unbundling in the EU’, (2009) 2 *Journal of World Energy Law & Business*, 96, 109.

However, we should note that there are two major differences between the two cases. First, regarding the antitrust decisions, this transfer was imposed as a result of the application of general competition rules in specific cases where Commission assumed that the undertakings were involved in anticompetitive behaviour and applied its powers deriving directly from the EC Treaty, in order to restore competition; on the other hand in the Third Energy Package, unbundling constitutes a measure of the sector specific regulation, intended for a general and not prespecified group of undertakings. Second, in the Third Energy Package, ownership unbundling is established as the basic and default solution for transmission, however a number of alternatives exist; on the other hand, in the antitrust cases, divestiture was imposed as an obligatory remedy. These differences will be taken into consideration in our further analysis.

Literature suggests that there may be a series of legal objections against ownership unbundling: a) art. 345 TFEU⁷ (former art. 295 EC), b) the issue of EU's competences,⁸ c) the issue of ownership and other fundamental rights under the ECHR an EU Law⁹ and d) the issue of compatibility with the freedom of capital movement and the freedom of establishment.¹⁰

⁷ Look to J. Pielow, G. Brunekreeft and E. Ehlers, 'Legal and economic aspects of ownership unbundling in the EU', 111; J. Pielow and E. Ehlers, 'Ownership unbundling and constitutional conflict: a typical German debate?', (2008) 2 *European Review of Energy Markets*, 1, 13; M. Hunt, 'Ownership Unbundling: the Main Legal Issues in a Controversial Debate' in B. Delvaux, M. Hunt, K. Talus (eds.) *EU Energy Law and Policy Issues* (Brussels, 2008), 71; P. Lowe, I. Pucinskaite, W. Webster and P. Lindberg, 'Effective unbundling of energy transmission networks: lessons from the Energy Sector Inquiry', (2007) 1 *Competition Policy Newsletter*, Spring 2007, 33 available at http://ec.europa.eu/comm/competition/publications/cpn/cpn2007_1.pdf.

⁸ Look to J. Pielow, G. Brunekreeft and E. Ehlers, 'Legal and economic aspects of ownership unbundling in the EU', 102; J. Pielow and E. Ehlers, 'Ownership unbundling and constitutional conflict: a typical German debate?', 9; M. Hunt, 'Ownership Unbundling: the Main Legal Issues in a Controversial Debate', 70.

⁹ Look to J. Pielow, G. Brunekreeft and E. Ehlers, 'Legal and economic aspects of ownership unbundling in the EU', 109; J. Pielow and E. Ehlers, 'Ownership unbundling and constitutional conflict: a typical German debate?', 18; M. Hunt, 'Ownership Unbundling: the Main Legal Issues in a Controversial Debate', 73; P. Lowe, I. Pucinskaite, W. Webster and P. Lindberg, 'Effective unbundling of energy transmission networks: lessons from the Energy Sector Inquiry', 33.

¹⁰ Look to M. Hunt, 'Ownership Unbundling: the Main Legal Issues in a Controversial Debate', 73.

COMPETENCE ISSUES

Art 114 TFEU

One of the first issues that literature points out as a possible problem for ownership unbundling concerns the competence of EU to adopt such a radical structural measure integrated into an analytical framework for the liberalisation of the European Energy Market.¹¹ According to art. 114 TFEU (former art. 95 TEC), EU has the competence to impose measures aiming at the harmonisation of national laws, in order to improve the process of the establishment and function of the internal market.¹² This competence of EU according to this article is limited, as the measures should intend to resolve problems and obstacles to trade and free competition¹³ created by national policies and laws. Therefore, there are three conditions, in order that art. 114 TFEU provides competence for EU independent action. First, there must be or should be highly probable¹⁴ to occur some obstacles to the internal market.¹⁵ Second, these obstacles have to derive from specific national measures or policies.¹⁶ Third, the EU measure has to be designed in order to efficiently remove the obstacles mentioned above –there must be a relation between EU measure and obstacle-.¹⁷ Therefore, EU measures regarding internal market –including energy market- should be imposed after considering the existence of specific parameters. On these grounds, there could be a debate regarding whether the situation in energy market could justify an EU

¹¹ B. Delvaux and A. Guimaraes-Purokoski, 'Vertical Division of Competences in the Energy Field between the European Community and its Member States - Some Remarks on the Evolution of European Energy Law and Policy' in B. Delvaux, M. Hunt and K. Talus (eds.) *EU Energy Law and policy issues*, The Energy Law Research Forum Collection (Brussels: Euroconfidentiel, 2008), 13-16.

¹² Art 114 TFEU: "...adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."; ECJ, Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union*, ECR 2000, I-08419, at 83: "*Those provisions, read together, make it clear that the measures referred to in Article 100a(1) of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it.*"

¹³ M. Hunt, 'Ownership Unbundling: the Main Legal Issues in a Controversial Debate', 71.

¹⁴ 'sufficiently probable', J. Pielow and E. Ehlers, 'Ownership unbundling and constitutional conflict: a typical German debate?', 10.

¹⁵ ECJ, Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union*, at 84.

¹⁶ J. Pielow and E. Ehlers, 'Ownership unbundling and constitutional conflict: a typical German debate?', 9-10.

¹⁷ ECJ, Case C-436-03, *European Parliament v Council* [2006] ECR I-03733, at 39.

intervention, based on the harmonisation competence of 114 TFEU and whether energy policy falls within the spectrum of competences that should be in principal left at the discretion of Member States.

Competence Issues after Lisbon Treaty

However, after Lisbon Treaty,¹⁸ energy is explicitly included in the list of shared competences between EU and Member States¹⁹ and energy policy is named as one key area of EU interest, while internal energy market is clearly assumed as one key EU objective.²⁰ By listing energy policy as a shared competence, TFEU's meaning is that both EU authorities and Member States –independently- have the competence to impose measures and legislate –at a European, regional or national level-. Actually, EU has the competence to set the minimum regulation standards in the relevant fields –in the energy case guided by the objectives of art. 194 TFEU-, while Member States are free either to take action in the relevant field, in case that EU has ceased or has not begun its own action or to take additional measures going beyond EU minimum regulation –but without violating this minimum standard set by EU-.²¹

Of course, the principles of subsidiarity and proportionality, which binded the competence of the EU legislator, under the old art. 3b TEU²², art. 5 TEC²³ and art. 95 TEC,²⁴ are still binding under the new Treaty.²⁵

¹⁸ Look also about the evolution of the idea of the inclusion of energy in the list of competences of EU to L. Hancher, ‘The New EC Constitution and the European Energy Market’, in M. Roggenkamp and U. Hammer (eds), *European Energy Law Report II* (Antwerp: Intersentia, 2005).

¹⁹ Art. 4.2 TFEU.

²⁰ Art. 194.1 TFEU: ‘*In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:*

(a) ensure the functioning of the energy market;

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

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

(d) promote the interconnection of energy networks.’

²¹ http://europa.eu/scadplus/european_convention/competences_en.htm#COMPETENCES

²² ‘*The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.*

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.’

²³ Same as above (art. 3b TEU.)

Principle of Subsidiarity

According to the principle of subsidiarity, EU will refrain from taking any action, in case that a specific issue can be handled more efficiently at a national or local level – the principle actually concerns shared competence-,²⁶ while EU should not take measures exceeding the extent of intervention, which is necessary for the fulfillment of Treaty objectives (principle of necessity)²⁷. Therefore, there are two conditions that should be fulfilled, in order that a EU measure in a field of shared competence does not violate the principle of subsidiarity.²⁸ The objectives of the measure under question cannot be sufficiently achieved by the Member States,²⁹ while they can be successfully achieved by EU due to the scale or effects of the measure (and the nature of the problem as well). It is clear that this principle puts a limit to EU competence and gives priority to local policies where possible.

Therefore, at this point there is the question whether ownership unbundling as a measure of the Third Energy Package is an action that was legitimately taken by EU, under the perspective of EU's competence and especially of the subsidiarity and proportionality principle. As we observed, especially after Lisbon Treaty³⁰ energy constitutes an issue of clear –shared- competence of EU and EU has in principle the power to legislate –at least regarding some minimum standards- concerning this field. Henceforth there is no reason to examine the debate about whether there are obstacles regarding the internal energy market and whether ownership unbundling can effectively address the relevant problems, under the perspective of 114 TFEU. However, the same questions have still to be answered, in order to examine ownership unbundling, under the spectrum of proportionality and subsidiarity. Regarding the principle of proportionality (and necessity as well), we will extensively analyse it in a

²⁴ J. Pielow and E. Ehlers, 'Ownership unbundling and constitutional conflict: a typical German debate?', 10; M. Hunt, 'Ownership Unbundling: the Main Legal Issues in a Controversial Debate', 71.

²⁵ Art. 1 Protocol on the application of the principles of subsidiarity and proportionality, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (17.12.2007), C 306/150: 'Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 3b of the Treaty on European Union.'

²⁶ P. Craig and G. De Búrca, EU law: text, cases, and materials 4th ed., (Oxford: OUP, 2008), 100; look also to http://www.europarl.europa.eu/factsheets/1_2_2_en.htm.

²⁷ ECJ, Case C-103/01, *Commission/Germany* [2003] ECR, p. I-5369, at 48.

²⁸ ECJ, Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, (12 November 1996), ECR I-5755; ECJ, Case C-233/94, *Federal Republic of Germany v European Parliament and Council of the European Union* (13 May 1997) ECR I-2405.

²⁹ Given of course that national measures are so insufficient that may create a problem regarding the objective. ECJ, C-300/89, *Titanium Dioxide* [1991] ECR, p. I-2867, at 23.

³⁰ Entered into force on 1 December 2009. http://europa.eu/lisbon_treaty/glance/index_en.htm

separate chapter. At this point we will just examine whether the objectives pursued by ownership unbundling cannot truly be addressed by national initiatives and required such an extensive EU intervention.³¹

According to an opinion, the existence of a real problem regarding competition in energy market is doubtful, at least after the Second Energy Package –which provided for less radical measures of unbundling than these included in the Third Energy Package.³² This opinion is based on the assumption³³ that the former regulatory framework was sufficient enough and in case that there was time for its application, the problems observed in the Sector Inquiry would be rather limited. According to this argument, if national authorities had time to act in the former internal energy market framework, it would have been proven that the objectives of internal energy market would be fulfilled by Member States, without any further EU action being necessary³⁴ (therefore, the new regulation violates subsidiarity principle).³⁵ This opinion actually judges the Third Energy Package as a hasty and premature action³⁶ and leads to the conclusion that the idea for such a further step should be implemented only after the existence of clear evidence that the former –and less strict- framework was not effective.

According to a second opinion,³⁷ it is questionable whether EU authorities are better suited than national authorities to address issues of the internal energy market, because of the fact that there are specific features in each national market –that make them a distinct case-, because the markets are still mostly organised at a national level, because some markets may not include some characteristics as those addressed by ownership unbundling, such as high vertical integration of the transmission and because of the strategic element within energy policy. Based on these arguments, this opinion suggests that a stronger regulation at a national level could remove the obstacles in the markets and make EU’s intervention unnecessary.

³¹ This is a matter of both proportionality –and necessity- and subsidiarity.

³² J. Pielow and E. Ehlers, ‘Ownership unbundling and constitutional conflict: a typical German debate?’, 10.

³³ *ibid*, 11.

³⁴ *ibid* 11-12, where the authors refer to several examples from local authorities that provide encouraging initial evidence –according to the authors- for the potential of the former framework and of national initiatives.

³⁵ It also challenges the existence of serious continuing obstacles in the current energy market. J. Pielow, G. Brunekreeft and E. Ehlers, ‘Legal and economic aspects of ownership unbundling in the EU’, 104.

³⁶ And Sector Inquiry as not being up-to-date. *ibid*, 104.

³⁷ M. Hunt, ‘Ownership Unbundling: the Main Legal Issues in a Controversial Debate’, 71.

EC.

We disagree with both the opinions above. Regarding the second one, we could first answer that in any kind of market there are specific national characteristics. According to this argument, in merely no field could EU take action, because of the principle of subsidiarity. Energy markets differ of course from one country to the other; however these differences are not so important that could prohibit a coordinated European action. Indeed, vertical integration, high market concentration, lack of transparency in gas and electricity markets, deficiencies of the regulatory framework concerning TSOs and national regulators and problems deriving from formerly or currently publicly held operators and undertakings constitute common issues in many Member States.³⁸ Furthermore, other problems, such as the lack of cross-border cooperation between TSOs and national regulators and other authorities, have in their own nature a cross-border character. National Regulators have been generally proven ineffective under the previous organization framework and the bridging of the various regulatory gaps³⁹ regarding the powers and authorities of national regulators and the framework of cooperation and coordination between them and between the TSOs at a regional and European level has been proven a very important issue.⁴⁰ The Member States without any apparent high market concentration or vertical integration were the minority of the cases examined. Although each country has its own model of energy market organization –and perhaps different energy supply sources and mixture-, in general the same patterns are widely followed either regarding market structure or energy sources.

Besides, the Third Energy Package did not call for assimilation of all separate local and national cases; it rather suggests a model –including many alternatives- of organization and supervision of the markets and of the regulatory and controlling procedures that may improve competition in general, throughout Europe. Specific

³⁸ For further details look to Commission (EC), ‘DG Competition Report on Energy Sector inquiry’ (10 January 2007) COMP SEC (2006) 1724, 12.

³⁹ Actually, one difficult question is whether this problem of gaps is going to be effectively resolved in future, after the Third Energy Package and its multiple provisions regarding cooperation and cross-border and regional networking of the regulators and other competent authorities. Therefore, we think that it is at least superficial to claim that such problems did not exist before the Third Package or –if existed- could be solved by mere national initiatives.

⁴⁰ C. Jones, *The Internal Energy Market: The Third Liberalisation Package* (Leuven: Claeys & Casteels, 2010), 5-7.; P. Cameron, *Competition in Energy Markets: Law and Regulation in the European Union*, (New York: OUP, 2007), 297-300.

provisions, such as the ITO+ model,⁴¹ which gives Member States the freedom to develop more advanced and effective unbundling models, expressed derogations from unbundling provided for specific small countries⁴² and emerging markets,⁴³ the provision of granting similar exemptions –by the Commission- for small isolated systems,⁴⁴ emergent regions⁴⁵ and for Member States that have recently acceded to the EU,⁴⁶ the important role of ENTSOs within the regulation and supervision of transmission⁴⁷, the provision for regional regulatory authorities,⁴⁸ the provisions for ownership unbundling without privatization in case of publicly owned undertakings – examined in a subsequent chapter-, the level playing field clause,⁴⁹ aiming at the protection of Member States that apply full ownership unbundling and the provision for the special procedure of certification for non-EU companies wishing to acquire an EU TSO, aiming at protecting the EU’s strategic interests, are all examples in which the Third Energy Package respected specific local and national particularities, sensitive interests and strategic issues and gave priority to national, local and regional self-organisation and initiative. Furthermore, the fact that the Third Energy Package does not impose ownership unbundling as one and single option but also offers other alternatives –ITO, ISO and ITO+/ ITO a la carte (mentioned above)- shows that EU’s initiative was not meant to displace national initiative but to offer solutions for the goal of the internal market, from which the Member States will be free to choose what fits best to their national objectives.

Regarding the first opinion, we should first mention that it is based on an ambiguous and hypothetical assumption that Member States if left alone would develop better solutions than EU’s initiative and would remove obstacles. The examples cited as evidence supporting the argument above,⁵⁰ refer only to a few Member States and actually focus on some specific aspects of energy markets’ problems. In no case such examples can constitute evidence that a complete and integrated framework of

⁴¹ Art. 9.9 Dir. 2009/72/EC and art. 9.9 Dir. 2009/73/EC.

⁴² Art. 44.2 Dir. 2009/72/EC and art. 49.6 Dir. 2009/73/EC.

⁴³ Art. 49.2 Dir. 2009/73/EC.

⁴⁴ Art. 44.1 Dir. 2009/72/EC.

⁴⁵ Art. 49.4, 49.5 Dir. 2009/72/EC and art. 49.7, 49.8 Dir. 2009/73/EC.

⁴⁶ C. Jones and W. Webster (updated by E. Cabau), *Derogations and Exemptions: The internal Energy Market: The Third Liberalisation Package*, 444-445.

⁴⁷ Art. 6 Reg. No 713/2009, art. 6, 8 Reg. No 714/2009, art. 6, 8 Reg. No 715/2009.

⁴⁸ Art. 39.2 Dir. 2009/72/EC and art. 35.2 Dir. 2009/73/EC.

⁴⁹ Art. 43, art. 9.12 Dir. 2009/72/EC.

⁵⁰ J. Pielow and E. Ehlers, ‘Ownership unbundling and constitutional conflict: a typical German debate?’, 10-11.

solutions for the numerous aspects of internal energy market –that treated the relevant issues as related rather than isolated and irrelevant issues- was not necessary. Besides, they do not offer any evidence about the supposed value of the former EU framework. On the other hand, Sector Inquiry provided clear evidence that the former framework along with the national regulation had not achieved much. Even if we accept that Sector Inquiry was not up-to-date, it provided the only clear and analytical material – examining all the aspects concerning the internal market- for a decision to be taken about the future steps towards EU energy objectives; therefore, even if we doubt about its conclusions there was no other material to be taken into consideration and of course any relevant decision should be based on relevant analytical material. Furthermore, even this argument –that Sector Inquiry was not up-to-date- is vulnerable. Given that it had already provided discouraging answers about the results of the previous framework, if EU had to wait for a more recent report of the same scale –and given that it is not possible to conduct such a report every second year-, we should have waited for nearly a decade –given the time needed for consultation and for preparation for the application of the new framework- in order to proceed to a change of European energy policy. At the same time, more recent competition law cases in the energy market –as these examined in the other paper- just affirmed the results of the Sector Inquiry and the persistence of the already recognized problems, especially regarding vertical integration.⁵¹ As energy is a very important sector for the internal market and as the process towards the internal energy market already faces serious obstacles, it would not be rational to spend so much time, in order just to check if the Sector Inquiry’s results would be affirmed by a subsequent report. Actually, it is impossible to know whether the situation in European Energy Market would be improved or not without the Third Energy Package and any relevant argument is just hypothetical; the only clear evidence showed that this was not the case, so the opinion above seems quite baseless.

On the other hand, what was made clear from Sector Inquiry concerned the inadequacy of rules focusing on behavioural rather than structural aspects of the energy market⁵², the importance of the creation of a ‘level playing field’ for energy

⁵¹ K. Talus and A. Johnston, ‘Comment on Pielow, Brunekreeft and Ehlers on ‘ownership unbundling’’, 7.

⁵² *ibid*, 4, where the authors argue that ownership unbundling provides the necessary commercial incentives for independent action of TSOs.

undertakings⁵³ and the need for radical changes, in order that the healthy consolidation of European Energy Market could be achieved.⁵⁴ It also affirmed that the problems of the internal energy market –as being generally common in all Member States and as energy market becomes more and more interconnected under technical and structural terms- need an overall, common and general European framework of solutions.

Conclusions

Therefore, we believe that ownership unbundling as a measure of the Third Energy Package, does not oppose subsidiarity principle and seems to fulfil in general all the competence related conditions –proportionality will be examined later-, as energy constitutes a field of primary EU interest and a key part of the overall effort for the internal market, as the measure is designed to address a set of complex and continuing problems that had not been resolved by national means –which seem inadequate without a central coordination- and as there is strong evidence that ownership unbundling –although not undoubtedly proven as the most efficient solution (see also in the chapter about proportionality)- and generally radical structural remedies seem to constitute a much more promising set of solutions⁵⁵ than these previously applied.

⁵³ Dir. 2009/72/EC Preamble, par. 7 and Dir. 2009/73/EC Preamble, par. 5.

⁵⁴ N. Kroes, 'Competition in the energy sector: Preliminary results of the Commission's inquiry and next steps in anti-trust enforcement', Speech at the First Annual Seminar and Conference on Energy Law and Policy (Brussels, 9 March 2006).

⁵⁵ K. Talus and A. Johnston, 'Comment on Pielow, Brunekreeft and Ehlers on 'ownership unbundling'', 4, 7.

FREEDOM OF MOVEMENT OF CAPITAL & FREEDOM OF ESTABLISHMENT

Content of the Freedoms and Relation between them

Freedom of capital movement⁵⁶ and freedom of establishment⁵⁷ constitute two major principles of EC Law. Both freedoms focus on the freedom of a person to invest in other Member States. Although the first freedom refers to a broad category of capital movements,⁵⁸ the concept of the right of establishment involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.⁵⁹ According to an opinion expressed by Advocate-General Alber⁶⁰ these two freedoms can be distinguished upon the issue whether the investor starts becoming involved in the undertaking under question, rather than just investing in the undertaking's capital (definite influence criterion⁶¹).⁶² Recent case law has also taken into consideration the purpose of the legislation, when trying to answer the freedom

⁵⁶ Art. 63.1 TFEU (former art. 56 EC): 'Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

⁵⁷ Art. 49 TFEU (former art. 43 EC): 'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

⁵⁸ Look to Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [article repealed by the Treaty of Amsterdam] (OJ 1988 L 178, p. 5), ECJ, 452/04 Fidium Finanz [2006], par. 5, ECJ, 483/99 Commission v French Republic [2002] and ECJ, 503/99 Commission v Kingdom of Belgium [2002].

⁵⁹ ECJ, 221/89, Factortame, par. 20.

⁶⁰ ECJ, Opinion of Advocate General Alber delivered on 14 October 1999, Case C-251/98, C. Baars v Inspecteur der Belastingen/Ondernemingen Gorinchem.

⁶¹ M. Hunt, 'Ownership Unbundling: the Main Legal Issues in a Controversial Debate', 79.

⁶² ECJ, Opinion of Advocate General Alber Case C-251/98, 26-30: "...1. Where the free movement of capital is directly restricted such that only an indirect obstacle to establishment is created, only the rules on capital movements apply.

2. Where the right of establishment is directly restricted such that the ensuing obstacle to establishment leads indirectly to a reduction of capital flows between Member States, only the rules on the right of establishment apply.

3. Where there is direct intervention affecting both the free movement of capital and the right of establishment, both fundamental freedoms apply, and the national measure must satisfy the requirements of both."

within which this legislation falls (legal purpose criterion).⁶³ Recent literature and case law seems to accept that both principles can apply simultaneously to most cases, except for those where it is clear that the situation under question is related to definite influence on the undertaking.⁶⁴ Generally, concerning investment in energy infrastructure, each restriction to the freedom of establishment will also constitute a restriction to the capital movement, as capital movement is a condition for investing in an energy asset, uptaking its control and exploiting it. On the other hand, not all restrictions to capital movement can result to restrictions to the freedom of establishment, as establishment requires extended and definite control –more than a simple capital investment- over the asset. However, it is irrelevant to our study whether a situation is related to one freedom or the other or both.⁶⁵

Acceptable Restrictions to the Freedoms

Generally, as ownership unbundling refers to the complete ownership separation of specific business activities, it certainly creates a limitation to both freedoms. Freedom of capital movement is limited, as companies which own specific assets (transmission or generation) cannot invest on or have to disinvest from other assets; freedom of establishment is limited as these companies cannot maintain subsidiaries or own undertakings involved in specific activities.⁶⁶ Therefore, ownership unbundling excludes specific companies from a series of activities, declares a series of activities as incompatible to each other and forces companies involved in these activities to dispose specific assets and investments.

However, EU Law accepts that restrictions to both freedoms may be justified under specific circumstances. Art. 51⁶⁷ and 52⁶⁸ TFEU (former 45 and 46 TEC) provide a

⁶³ M. Hunt, 'Ownership Unbundling: the Main Legal Issues in a Controversial Debate', 80, where Lasertec (Case 492/04 Lasertec [2007]) and Holbock (Case C-157/05 [2007]) cases are cited.

⁶⁴ *ibid*, 81 where the Opinion of Advocate General Kokott (delivered on 15 February 2007) Case C-464/05 Maria Geurts and Dennis Vogten v Belgische Staat is cited.

⁶⁵ We should however note that according to art. 63 TFEU, freedom of capital movement also concerns non EU nationals. Look also to ECJ, Joined cases C-163/94, C-165/94 and C-250/94 Sanz de Lera [1995].

⁶⁶ The concept of establishment within the meaning of Art. 49 TFEU involves the actual pursuit of an economic activity through a fixed establishment in another MS for an indefinite period (*ECJ, Case C-221/89 Factortame*) and refers to the right to purchase, exploit and transfer real and personal property (*ECJ, Case C-63/86 COM v. Italy*).

⁶⁷ "The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority."

number of reasons for derogations from the rule of 49 TFEU. Art. 65 TFEU⁶⁹ (former art. 58 TEC) provides reasons for derogation from the rule of 63 TFEU. A combined study of art. 51, 52 and 65 TFEU shows that reasons related to public interest, such as public safety, public security, public health and public policy can provide acceptable reasons for the limitation of the freedoms of capital movement and establishment.

Moreover, ECJ has also accepted in the Case *Commission v Italian Republic*⁷⁰ that the freedom of capital movement can be restricted on the grounds of “strengthening the competitive structure of the... (energy) market...”.⁷¹ The need for the opening of the energy market is recognised as a sufficient reason that can justify limitations of the freedoms of establishment and capital movement.⁷² In a series of other cases, ECJ has also accepted that reasons of public interest highly related to energy policy can justify a limitation of these freedoms.⁷³ In *Commission v French Republic*⁷⁴ ECJ accepted that⁷⁵ “*the safeguarding of supplies of petroleum products in the event of a crisis, falls undeniably within the ambit of a legitimate public interest. Indeed, the Court has previously recognised that the public-security considerations which may justify an obstacle to the free movement of goods include the objective of ensuring a minimum supply of petroleum products at all times (Campus Oil, paragraphs 34 and 35). The same reasoning applies to obstacles to the free movement of capital, inasmuch as public security is also one of the grounds of justification referred to in Article 73d(1)(b) of the Treaty*”.⁷⁶

Therefore, EU jurisprudence seems to accept that energy policy –concerning either the issue of energy security or opening to competition- constitutes a sufficient

⁶⁸ “The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.”

⁶⁹ “The provisions of Article 63 shall be without prejudice to the right of Member States: (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested; (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.”

⁷⁰ ECJ, C-174/04 *Commission v Italian Republic*

⁷¹ *ibid*, par. 37.

⁷² M. Hunt, ‘Ownership Unbundling: the Main Legal Issues in a Controversial Debate’, 86-87.

⁷³ Look for example to ECJ Case 72/83, *Campus Oil Ltd v Minister for Industry and Energy* [1984], especially par. 32-51 about energy security;

⁷⁴ ECJ, Case C-483/99, *Commission of the European Communities v French Republic* [2002]

⁷⁵ *ibid* par. 47.

⁷⁶ ECJ, Case C-503/99, *Commission of the European Communities v Kingdom of Belgium* [2002] repeated the same argument (look to par. 46).

background that can support derogations from the principle of free establishment and free movement of capital.

However, these derogations can only be accepted under specific circumstances. First, the derogation has to be non-discriminatory.

Principle of Non-Discrimination

Both Treaties –in a series of different provisions –and ECJ case law⁷⁷ accept the existence of a principle of non discrimination in EU Law. A number of provisions in the Treaties manifest the principle of equality. Articles 18-25 TFEU generally prohibit discrimination, while other Treaty articles provide for non-discrimination in particular fields.⁷⁸ Art. 49 TFEU explicitly provides for non-discrimination based on nationality regarding establishment, while art. 55 TFEU (former art. 294 TEC) prohibits discrimination based on nationality regarding the participation in companies' capital.⁷⁹ ECJ traditionally accepts that non-discrimination belongs to a series of general principles of EU Law, inspired by Member States' constitutional traditions.⁸⁰ The protection of art. 49 TFEU is explicitly expanded on companies according to art. 54 TFEU (former art. 48 TEC).⁸¹

It is well established case law that the general non-discrimination principle is among these general principles of community law. According to this principle, similar situations shall not be treated differently unless differentiation is objectively justified⁸² and different situations shall not be treated in the same way.⁸³

⁷⁷ Look for example to Second Skimmed-Milk Powder Case (ECJ HNL v Council and Commission 83/76,94/76, 4/77,15/77,40/77 [1978]) and T. Hartley, *European Union law in a global context: text, cases and materials* (Cambridge: CUP, 2004), 383 (discrimination between different categories of farmers); ECJ, 130/75, *Prais v. Council* [1976] (minority discrimination); ECJ, 21/74 *Airola v Commission* [1975] (sexual discrimination); ECJ, joint Cases 124/76 and 20/77, *Moulin Pont à Mousson and others*, [1977] (trade discrimination); ECJ, 212/97, *Centros* [1999] (discrimination due to the national law of establishment).

⁷⁸ Look for example to art. 40.2 and 45.2 TFEU.

⁷⁹ “Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.”

⁸⁰ ECJ, Judgement of 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft*, [1970].

⁸¹ “Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. “Companies or firms” means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.”

⁸² ECJ, joint Cases 117/76 and 16/77, *Ruckdeschel and others*, [1977].

Therefore, we have to examine whether ownership unbundling creates indeed a discrimination against specific undertakings. It seems that ownership unbundling, as imposed by the Third Energy Package as a general measure of European Energy Law, addressed to all undertakings concerned throughout the European Union –which henceforth constitute a non-predefined group of undertakings, specified according to general and uniform rules- no matter where their establishment is and who their shareholders are, does not impose a discriminatory measure. However, according to an opinion,⁸⁴ although ownership unbundling is an indistinctly applicable measure, it may result to discriminatory results, as private undertakings may be in a worse position in comparison to public undertakings in other Member States. The reason for this discrimination concerns art. 345 TFEU –which we are going to examine later- and the protection of property rights according to Member States ownership rules. We could also argue that discrimination may be caused due to the character of ownership unbundling as a measure within the Third Energy Package. As explained above, although ownership unbundling is the standard solution of the Third Energy Package, there is also provision for a number of more favourable –for the undertakings- and less strict alternatives. We could argue that a company active in Member State X, which applies full ownership unbundling, would be in a less favourable position than another company active in Member State Z, which applies a more lax unbundling system, such as the ITO model. Of course, the level playing field clause may offer some protection to the first company, in case that undertakings controlling generation or supply activities in one member state try to exercise direct or indirect control over a TSO from another member state that has opted for full ownership unbundling.⁸⁵ However, this provision does not put the company from State X in the same position as the second company, in terms of the general European Market; it just secures equal rights to companies entering the same market. Although the two arguments above provide a basis for criticism concerning the possible results of the application of ownership unbundling, they cannot negate the non-discriminatory character of the

⁸³ ECJ, 283/83, Racke, [1984]; ECJ, joint Cases 124/76 and 20/77, Moulins Pont à Mousson and others, [1977], par. 16-17.

⁸⁴ M. Hunt, 'Ownership Unbundling: the Main Legal Issues in a Controversial Debate', 86.

⁸⁵ EU Commission, Commission Staff Working Paper, Interpretative Note on Directive 2009/72/EC Concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas 'The Unbundling Regime', Brussels, 22 January 2010, 5, available at http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_the_unbundling_regime.pdf.

measure at least in principle, as they actually concern possible results that may occur in future.

The second condition for the justification of derogations from the freedoms of capital movement and establishment refers to the principle of proportionality. The accordance of ownership unbundling with this principle will be examined separately, as it is related to other issues, such as protection of property, which we will analyse below.

ART. 345 TFEU

Content of the Provision

According to art. 345 TFEU (former 295 TEC) ‘The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.’ That means that Member-States are free to regulate ownership rights, according to their national policy and goals and EU cannot interfere. According to ECJ however, this right of the Member States does not mean that this regulation can oppose the fundamental EU policies, goals and principles.⁸⁶ On the other hand, this means that EU can take measures that affect property rights, if these measures are designed to

⁸⁶ ECJ, Case C-452-01, Margarethe Ospelt and Schlössle Weissenberg Familienstiftung, at 24: ‘...such a system remains subject to the fundamental rules of Community law, including those of non-discrimination, freedom of establishment and free movement of capital’; ECJ, Case C-182/83 Fearon [1984] ECR 3677, at 7: ‘Consequently, although article 222 of the treaty does not call in question the member states’ right to establish a system of compulsory acquisition by public bodies, such a system remains subject to the fundamental rule of non-discrimination which underlies the chapter of the treaty relating to the right of establishment.’; ECJ, Case C-503/04, Commission/Germany, (2007) at 37: ‘With regard, thirdly, to Article 295 EC, according to which ‘this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership’, it should be recalled that that article does not have the effect of exempting the Member States’ systems of property ownership from the fundamental rules of the Treaty.’; ECJ, Case C-463/00 Commission v Spain [2003] ECR I-4581 at 67: ‘However, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 295 EC, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. That article does not have the effect of exempting the Member States’ systems of property ownership from the fundamental rules of the Treaty.’; ECJ, Case C-483/99 Commission v France [2002] ECR I-4781 at 44; ECJ, Case C-503/99 Commission v Belgium [2002] ECR I-4809 at 44; ECJ, Case C-300/01 Salzmann [2003] ECR I-4899 at 39: ‘As a preliminary point, it must be recalled that, although the legal regime applicable to property ownership is a field of competence reserved for the Member States under Article 222 of the EC Treaty (now Article 295 EC), it is not exempted from the fundamental rules of the Treaty (Konle, paragraph 38). Thus, national measures such as those at issue in the main proceedings, which regulate the acquisition of land for the purposes of prohibiting the establishment of secondary residences in certain areas, must comply with the provisions of the Treaty on the free movement of capital’.; ECJ, Case C-302/97, Konle [1999] ECR I-3099 at 38; ECJ, Case 182/83 Fearon v Irish Land Commission [1984] ECR 3677 at 7.

serve fundamental EU goals.⁸⁷ Improvement of competition in the European energy market certainly is an issue that falls within the key objectives of EU and can justify measures that affect property rights. What art. 345 TFEU prohibits is the imposition of nationalisations or privatisations by EU and the intervention into domestic ownership legal orders, except if the latter are opposed to specific fundamental EU principles.⁸⁸

Ownership Unbundling and Publicly Held Undertakings in relation to 345 TFEU

One could argue that as ownership unbundling asks for an ownership separation of assets, public undertakings will have to privatise their own utilities; therefore there is an infringement of art. 345 TFEU. However, this is not true. Publicly held generation and transmission assets do not have to be privatised, as it would be enough to apply measures that guarantee effective separation of each activity from the other.⁸⁹ For example, transfer of the assets to different ministries or independent public authorities would be sufficient, as long as these two different public bodies can be assumed –and function- as distinct entities.⁹⁰ Therefore, Member States are still free to choose the model for organisation of the transmission or generation market –either public or private-.⁹¹

Moreover, ownership unbundling is designed to apply –according to the Third Energy Package- to both public and private undertakings. Therefore, there is no discrimination issue in principle.⁹² Such a problem can however occur, if we consider the case of cross-border competition between private undertakings from Member States that have applied full privatisation and public undertakings from Member

⁸⁷ J. Pielow and E. Ehlers, ‘Ownership unbundling and constitutional conflict: a typical German debate?’, 13-14, who name internal market as one objective that can justify such measures.; ⁸⁷ K. Talus and A. Johnston, ‘Comment on Pielow, Brunekreeft and Ehlers on ‘ownership unbundling’’, 4, who comment that it is rational to expect that to some extent property law is going to be unified, on the grounds of economic unification and the establishment of the internal market.

⁸⁸ M. Hunt, ‘Ownership Unbundling: the Main Legal Issues in a Controversial Debate’, 72.

⁸⁹ *ibid*, 72; J. Pielow and E. Ehlers, ‘Ownership unbundling and constitutional conflict: a typical German debate?’, 14, who also argue that this is not the case for municipal or communal networks –as they are not organised into different ministries- and the only applicable solution for them would be ISO –and ITO we could suggest- model.

⁹⁰ E. Cabau, ‘Unbundling of Transmission System Operators’ in C. Jones (eds.) *The Internal Energy Market: The Third Liberalisation Package*, 142-143.

⁹¹ K. Talus and A. Johnston, ‘Comment on Pielow, Brunekreeft and Ehlers on ‘ownership unbundling’’, 4.

⁹² M. Hunt, ‘Ownership Unbundling: the Main Legal Issues in a Controversial Debate’, 72; E. Cabau, ‘Unbundling of Transmission System Operators’, 141.

States that have preferred to retain both generation and transmission under public control. As it is possible that both these activities could be put under public control – even by two different public bodies-, the private company from the first country would be possibly found in a difficult position, regarding their effort to enter the market of the second country, as in the latter all the relevant assets would be publicly held⁹³ and the relevant public undertakings could have a competitive advantage due to the coordination of their activities and their synergies.⁹⁴ Besides, the public undertaking from the second country would be in an equal position to a domestic private undertaking, if the first would enter the market of the first country; therefore there would be an equal treatment against undertakings from countries that have preferred privatisation.⁹⁵

We can answer that although in the second country the relevant assets would be controlled by public bodies, these two bodies –according to the Third Energy Package- should be administered in a totally separate way –as two distinct persons-;⁹⁶ general competition rules –e.g. art. 101 TFEU about concerted practices- and sector rules of the Third Energy Package about Third Party Access and Certification Procedure⁹⁷ as well as the active role of Regulators can further guarantee that such phenomena of discrimination against private companies from third countries will not occur.

Conclusions

Although the provisions above show that ownership unbundling as a measure of the Third Energy Package does not nominally –at least- violate art. 345 TFEU especially regarding the non-discrimination aspect of the Treaty rule, we should admit that in practice it is likely that effective separation of activities in Member States where both

⁹³ M. Hunt, ‘Ownership Unbundling: the Main Legal Issues in a Controversial Debate’, 73.

⁹⁴ J. Pielow and E. Ehlers, ‘Ownership unbundling and constitutional conflict: a typical German debate?’, 15.

⁹⁵ The ‘level playing field’ clause, mentioned above, may not apply to this case as it refers to cases where Member States chose a different unbundling model –ISO, ITO, full-, while in this case both Member States may have applied the same model with the exception that one of them has retained the activities under public control.

⁹⁶ E. Cabau, ‘Unbundling of Transmission System Operators’, 142-143, who actually refers to ‘strong legal safeguards’ against the violation of ownership unbundling rules.

⁹⁷ *ibid*, 142.

generation and transmission will be publicly held will be a difficult task and that discriminatory effects as the one described above may occur.

Therefore, we conclude that in principle ownership unbundling does not violate art. 345 TFEU.

FUNDAMENTAL RIGHTS AND ESPECIALLY THE RIGHT TO PROPERTY

Legal Basis for the Protection of the Right to Property in EU

In this chapter we examine the compatibility of ownership unbundling with some fundamental EU rights and especially with the right to property.

According to art. 1 of the 1st Protocol of the European Convention of Human Rights (ECHR) property⁹⁸ is recognised as a fundamental human right and no deprivation of this property can be ordered, unless there are reasons of justified public interest.⁹⁹

Property is also recognised as a fundamental right by the Charter of Fundamental Rights of the European Union¹⁰⁰, which also recognises that nobody can be deprived of it except if there are reasons of public interest and the person is fairly compensated.¹⁰¹ According to art. 6.2 of old TEU, EU recognises the rights included in the Charter of Fundamental Rights¹⁰² and accepts as general principles of European Law all freedoms protected by ECHR and deriving from the common constitutional traditions of Member States.¹⁰³ Moreover, especially after the recent Lisbon Treaty,¹⁰⁴

⁹⁸ Covering any kind of interests and rights that constitute assets. ECtHR, *Iatridis v Greece*, Judgement of 25th March 1997, 30 EHRR 97, at 54.

⁹⁹ Art. 1, 1st Protocol ECHR: *‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’*

¹⁰⁰ 18.12.2000 (OJ C 364/01)

¹⁰¹ Art. 17.1 Charter of Fundamental Rights of the European Union: *‘Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.’*

¹⁰² We have to note that ECHR binds all the states that ratify it as far as their national law is concerned while the Charter refers to the institutions and bodies of EU and to the Member States only when they implement EU law. Art. 51.1 Charter of Fundamental Rights of the European Union.

¹⁰³ Art. 6 of the former TEU: *‘(1) The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 on the 12th December 2000 December 2007 are set out as adapted at Strasbourg, and the Charter of Fundamental Rights and the contracts*

the path towards the official accession of EU to ECHR opened and the details about this procedure were defined;¹⁰⁵ therefore, this official accession is generally a matter of time.¹⁰⁶ Furthermore, all Member States' constitutions include relevant provisions regarding the protection of property rights and property is also recognised as a national fundamental right.¹⁰⁷ Therefore, property is a protected right under European Law and ECJ examines any possible harm caused by EU measures to property rights.¹⁰⁸

Possible Violations of Fundamental Rights

Ownership unbundling apparently constitutes a deprivation of property, as the undertakings are requested to transfer some of their property assets –transmission network or generation infrastructure- to third parties.¹⁰⁹ The property of energy companies is also protected by ECHR, as they have a legal personality and property

are legally equal. The provisions of the Charter set out in the contracts the Union's powers be expanded in any way. The principles set out in the Charter rights, freedoms and principles laid out in the general provisions of Title VII of the Charter governing its interpretation and application, and taking into account the mentioned in the Charter of explanatory notes to the sources of those specified.

(2) The Union shall accede to the European Convention on Human Rights and Fundamental Freedoms. This candidate does not change the responsibilities set out in the treaties of the Union.

(3) The fundamental rights as guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Union law.'

¹⁰⁴ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Protocol relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

¹⁰⁵ Look to art. 218.6a.ii and 218.8 TFEU. Look also to art. 67 TFEU about the position of fundamental rights within EU's structure: *'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.'*

¹⁰⁶ 'On 17 March 2010, the Commission proposed negotiation Directives for the EU's accession to the Convention. On 4 June 2010, EU Justice Ministers gave the Commission the mandate to conduct the negotiations on their behalf. On 26 May 2010, the Committee of Ministers of the Council of Europe gave an ad-hoc mandate to its Steering Committee for Human Rights to elaborate with the EU the necessary legal instrument for the EU's accession to the ECHR.' Council of Europe, EU accession to the European Convention on Human Rights, available at http://www.coe.int/t/dc/files/themes/eu_and_coe/default_EN.asp. Look also to V. Reding, 'The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe', Hearing of the European Parliament's Constitutional Affairs Committee, Brussels, 18 March 2010, available at http://ec.europa.eu/commission_2010-2014/redoing/pdf/speeches/speech_20100318_1_en.pdf

¹⁰⁷ J. Pielow and E. Ehlers, 'Ownership unbundling and constitutional conflict: a typical German debate?', 19.

¹⁰⁸ Mostly guided by ECHR and national constitutions. *ibid*, 21.

¹⁰⁹ ECtHR, *James v United Kingdom* [1986] 8 EHRR 123.

as a concept is totally compatible with either a legal or a natural personality.¹¹⁰ We should note that not only ownership unbundling constitutes a deprivation that may violate protection of property but ISO model –requiring transfer of management of specific assets to an independent third party- seems to fall within the spectrum of this right as well.¹¹¹ Although under ISO model, the assets are not legally transferred, the relation of the owner to the asset is severely weakened, as the owner loses the power of administration of the asset¹¹² and the exercise of substantial ownership rights is quite limited.¹¹³

Apart from the right of ownership, ownership unbundling may also violate the occupational freedom¹¹⁴/ freedom to pursue an economic activity¹¹⁵ and the right to property of the shareholders, as far as their rights on the undertaking are concerned, while ISO model can also violate the freedom of association, regarding the shareholders.¹¹⁶

Conditions for Justified Limitations or Deprivations of Property

However, according to our opinion ownership unbundling as a measure of the Third Energy Package does not actually violate the freedoms noted above and especially the right to property. First, art. 1, 1st Protocol ECHR explicitly recognises that a person

¹¹⁰ J. Pielow, G. Brunekreeft and E. Ehlers, ‘Legal and economic aspects of ownership unbundling in the EU’, 110. The authors express a doubt about whether this right can also be recognised for totally public undertakings.

¹¹¹ J. Pielow, G. Brunekreeft and E. Ehlers, ‘Legal and economic aspects of ownership unbundling in the EU’, 111; J. Pielow and E. Ehlers, ‘Ownership unbundling and constitutional conflict: a typical German debate?’, 12, text to note 57. And within the spectrum of the freedom of capital movement as well, F. Säcker, ‘*The “deep” independent system operator - A German perspective on implementing an effective and efficient unbundling of TSOs.*’, (2008) 2 European Review of Energy Markets, 10, available at <http://www.ee.institute.org/european-review-of-energy-market/erem6-article-saecker>.

¹¹² ECJ, Case C-44/79 Hauer, ECR 1979, I-3727, no 19: ‘Having declared that persons are entitled to the peaceful enjoyment of their property, that provision envisages two ways in which the rights of a property owner may be impaired, according as the impairment is intended to deprive the owner of his right or to restrict the exercise thereof.’

¹¹³ F. Säcker, ‘*The “deep” independent system operator - A German perspective on implementing an effective and efficient unbundling of TSOs.*’, 10.

¹¹⁴ *ibid.*, 10-11.

¹¹⁵ K. Talus and A. Johnston, ‘Comment on Pielow, Brunekreeft and Ehlers on ‘ownership unbundling’’, 5, who also mention that this freedom is related to the right to property, also citing Nold case. ECJ, Case C-4/73, Nold [1974] ECR 491.

¹¹⁶ F. Säcker, ‘*The “deep” independent system operator - A German perspective on implementing an effective and efficient unbundling of TSOs.*’, 10-11.

can be legitimately deprived of its property due to reasons of public interest.¹¹⁷ Art. 17.1 Charter of Fundamental Rights of the European Union also repeats this provision, while ECtHR accepts that fundamental rights have to be balanced with the general social interests.¹¹⁸ This means that according to EU Law the right to property is not established as inviolable and forced transfer of assets can be legitimate under specific reasons. ECJ recognises that all rights related to property have to be interpreted according to the social function and role of property.¹¹⁹ It also recognises that specific limitations to property could be acceptable if they are based on reasons of public interest and if they are justified by the general EU objectives.¹²⁰ The above conclusion is also affirmed by the constitutional traditions of Member-States.¹²¹ Ownership unbundling is related to the opening of energy market to free competition and to the establishment of an internal energy market; both these objectives fall within the spectrum of EU's key objectives and certainly are issues of high public and community interest.¹²² Fundamental rights, such as the right to property cannot impair the establishment and the function of a competitive energy market.¹²³ Therefore, it is possible that certain limitations to the right to property can be imposed, in order that these objectives are fulfilled.

¹¹⁷ Look also to A. Grgiæ, Z. Mataga, M. Longar and A. Vilfan, *The right to property under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights and its protocols*, (Strasbourg: Council of Europe, 2007), 13.

¹¹⁸ ECtHR, *Soering v. United Kingdom*, Judgment of 7 July 1989, at 89.

¹¹⁹ ECJ, Case C-4/73, *Nold* at 14: 'the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder .'; S. Praduroux and K. Talus, 'The third legislative package and ownership unbundling in the light of the European fundamental rights discourse' (2008) 9 CNRI 3.

¹²⁰ *ibid* at 14: 'For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest.

Within the community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the community, on condition that the substance of these rights is left untouched .'; M. Hunt, 'Ownership Unbundling: the Main Legal Issues in a Controversial Debate', 73.

¹²¹ ECJ, Case C-44/79 *Hauer*, at 20: "Therefore, in order to be able to answer that question , it is necessary to consider also the indications provided by the constitutional rules and practices of the nine member states . One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest . thus some constitutions refer to the obligations arising out of the ownership of property (german grundgesetz , article 14 (2), first sentence), to its social function (italian constitution , article 42 (2)), to the subordination of its use to the requirements of the common good (german grundgesetz , article 14 (2), second sentence , and the irish constitution , article 43.2.2*), or of social justice (irish constitution , article 43.2.1*). In all the member states , numerous legislative measures have given concrete expression to that social function of the right to property . Thus in all the member states there is legislation on agriculture and forestry , the water supply , the protection of the environment and town and country planning , which imposes restrictions , sometimes appreciable , on the use of real property ." This argument also affirms the social function of property.

¹²² Look for example to the preamble and art. 3, 4.2, 170.1 and 194 and Title VII, Ch.1 TFEU.

¹²³ ECJ, Case C-44/89 *Von Deetzen / Hauptzollamt Oldenburg* [1991] at 28.

In order that such limitations are acceptable, the limitations should not be so extensive that they harm the substance of the right to property, meaning that a limitation cannot result to an absolute negation of the person's property rights.¹²⁴ Regarding ISO model this is clearly not the case, as this model does not negate the economic utility of the asset under operation and the owner keeps earning profits from that. On the other hand, ownership unbundling is indeed a measure that results to the full divestiture of the asset. However, this does not mean that the substance of the property right, meaning its economic value, has to be harmed, as compensation.¹²⁵ Compensation, although not provided by the Third Energy Package can derive from the transfer of the assets under ownership unbundling to a third party; actually, Third Energy Package does not ask for a confiscation or for a forced donation of the undertakings' assets but it just prohibits simultaneous ownerships of two different types of assets. This means that a company that actually owns these two different types of assets, can sell at a fair price -formed by the market-¹²⁶ to another company one type of these assets. However, somebody could argue that a forced sale of assets also constitutes a violation of the right to disposal –one aspect of the right to property- and that it is difficult to achieve a fair price, as ownership unbundling will create an increased offer of similar assets in the European market at the same time. Although one opinion argues that a compensation less than the real market value can be acceptable, in case that the relevant measure is related to some important objectives of public interest, such as an economic reform¹²⁷ and while we may accept that under special circumstances the compensation requirement can be omitted,¹²⁸ we believe that the provisions of the Third Energy Package about ownership unbundling are imperfect regarding the lack of a compensation scheme for the undertakings.

Furthermore, another key requirement in order that such a divestiture could be accepted as legitimate has to do with the principle of proportionality, which we will

¹²⁴ ECJ, Case C-4/73, Nold at 14: '*...it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the community, on condition that the substance of these rights is left untouched.*'; Look also to J. Pielow, G. Brunekreeft and E. Ehlers, 'Legal and economic aspects of ownership unbundling in the EU', 107-108.

¹²⁵ Art. 17.1 Charter of Fundamental Rights of the European Union calls for 'fair compensation'.

¹²⁶ J. Pielow and E. Ehlers, 'Ownership unbundling and constitutional conflict: a typical German debate?', 26, who talk about 'full value measured at the market price'.

¹²⁷ K. Talus and A. Johnston, 'Comment on Pielow, Brunekreeft and Ehlers on 'ownership unbundling'', 6, who also cite the ECtHR Case, James v United Kingdom.

¹²⁸ ECtHR, *Pressos Compania Naviera SA v. Belgium*, Judgement of 20-11-1995.

examine in a separate chapter.¹²⁹ Concerning all the other aspects of the issue of the right to property, it seems that ownership unbundling does not violate in principle the fundamental property rights, although one problem can be identified regarding the compensation of the undertakings under unbundling for the divestiture of their assets.

Other Freedoms & Rights

Regarding the other rights mentioned above, -freedom to pursue an economic activity and freedom of association- as well as the property rights of the shareholders of undertakings that will fall within the field of application of ownership unbundling and ISO model, our opinion is the same as this concerning property rights.

First, freedom of economic activity is not an absolute right –like property- and it can be limited for reasons of public interest.¹³⁰ Second, the substance of this right is not harmed¹³¹ as the undertakings are not restricted from any business activity but just from either transmission or generation, so they can keep their key or most profitable activity and transfer the other one.¹³² Regarding freedom association, we refer to the analysis above about freedom of capital movement.¹³³ Regarding the shareholders' property rights, the same analysis, as this about the property rights of undertakings, applies. Proportionality requirement has to be fulfilled as well regarding the limitation of all these rights.

¹²⁹ *ibid.*, 6. According to both ECJ's and ECtHR's case law.

¹³⁰ ECJ, Case C-4/73, Nold [1974].

¹³¹ Joined Cases C-184 and 223/02, Kingdom of Spain and Republic of Finland v European Parliament and Council of the European Union [2004].

¹³² K. Talus and A. Johnston, 'Comment on Pielow, Brunekreeft and Ehlers on 'ownership unbundling'', 5-6.

¹³³ Commission, Press Release (IP/04/17) of 07/01/2004, 'Free movement of capital: Commission calls on United Kingdom to apply Court of Justice ruling', available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/17&format=HTML&aged=0&language=EN&guiLanguage=en>; ECJ, Case C-98/01 Commission v UK at 44; F. Säcker, 'The "deep" independent system operator - A German perspective on implementing an effective and efficient unbundling of TSOs.', 10.

PROPORTIONALITY PRINCIPLE

Content of the Principle

According to this principle each decision and measure has to be based on a fair balancing of interests involved and on a reasonable choice of necessary means.¹³⁴ ECJ has widely accepted that this principle has an important role within EU Law¹³⁵ and literature argues that it has a constitutional status within the EU Legal Structure¹³⁶ as well as regarding case law of ECtHR.¹³⁷ ECJ also accepts that measures restricting the freedom of capital movement have to abide by the principle of proportionality.¹³⁸ ECJ has developed a threefold test for examining whether a measure is proportionate.¹³⁹ The first part of this test is the test of effectiveness or suitability (whether the measure is an effective means to achieve the goals for which it is adopted), the second is the test of necessity and subsidiarity (whether the measure is the less restrictive means to achieve the goals –meaning that there are no less restrictive alternatives) and the third is the stricto sensu proportionality test (whether the measure is excessive in relation to the goals pursued and whether the interests harmed from the measure are less important than the goals).¹⁴⁰ Although this threefold test is not strictly applied by ECJ in all cases,¹⁴¹ it seems that it is preferred in cases

¹³⁴ Look to art. 5.3 Treaty Establishing the European Community: ‘Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.’; T. Tridimas, *The General Principles of EC Law* (Oxford: OUP 1999), 137; ECJ, 331/88 Fedesa [1990], par. 13: ‘*The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.*’

¹³⁵ J. Schwarze, *European Administrative Law*, (London: Sweet & Maxwell, 2006), 677; ECJ, 11/70 Internationale Handelsgesellschaft [1970].

¹³⁶ J. Jans, R. De Lange, S. Prechal and R. Widdershoven, *Europeanisation of Public Law* (Groningen: Europa Law Publishers, 2007), 146.

¹³⁷ P. Van Dijk and G. Van Hoof, *Theory and Practice of the European Convention on Human Rights* (Hague: Kluwer, 1998), 81.

¹³⁸ ECJ, 174/04 Commission v Italian Republic [2005], par. 35 and ECJ, 319/02 *Manninen* [2004], par. 29.

¹³⁹ M. Hunt, ‘Ownership Unbundling: the Main Legal Issues in a Controversial Debate’, 87.

¹⁴⁰ *ibid*, 87.

¹⁴¹ T. Tridimas, *The General Principles of EC Law*, 139; G. de Burca, *The principle of proportionality and its application in EC law*, YEL 1993, 105, 111; F. Jacobs, ‘Recent Developments in the Principle of Proportionality in European Community Law’, in E. Ellis (eds.), *The Principle of Proportionality in the Laws of Europe*, (Oxford: Hart Publishing, 1999), 1.

concerning property rights.¹⁴² According to the relevant literature, ECJ seems to frequently adopt a strict position regarding the fulfilment of proportionality, in cases regarding restrictions of key EU interests, such as the freedom of capital movement or goods circulation,¹⁴³ while in other cases it seems to adopt a much more lax position as it just examines whether the measure is ‘manifestly inappropriate’¹⁴⁴ or whether the measure is clearly disproportionate in relation to the interests harmed or the objectives pursued.¹⁴⁵ Such an approach is more common in cases involving the assessment of a complex economic situation, as ECJ has accepted that in such cases the EU Authorities may have a broad discretionary power.¹⁴⁶ We should note that ECtHR in relevant cases follows a similar attitude by recognising a wide margin of appreciation/discretion (appreciation doctrine) to the national authorities regarding their view about the necessity and the choice of the measure in question except if the latter is manifestly unreasonable.¹⁴⁷

Regarding the effectiveness test, ECJ examines whether the measure is appropriate regarding the objectives pursued by the authority that imposed this measure.¹⁴⁸ In general, ECJ seems to accept that the measure is proportionate if it contributes to the achievement of the goals and does not proceed to a detailed examination of its effectiveness. This means that ECJ does not assess—and cannot assess, given its lack of expertise—the full effectiveness of the measure and does not examine if it was the best possible but simply examines whether it is useful regarding the aims pursued or

¹⁴² Look for example to ECJ, 280/93, *Germany v Council* [1994], par. 78 : ‘...the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (Case 265/87 *Schraeder v Hauptzollamt Gronau* [1989] ECR 2237, paragraph 15, Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 18, and *Kuehn*, cited above, paragraph 16).’

¹⁴³ T. Tridimas, *The General Principles of EC Law*, 138.

¹⁴⁴ ECJ, 350/96 *Clean Car Autoservice* [1998], par. 35.

¹⁴⁵ Look for example about this position to ECJ, Joined cases 453/03, 11/04, 12/04 and 194/04, *ABNA* [2005], par. 69.

¹⁴⁶ ECJ, 138/79, *Roquette* [1980]; 179/95, *Kingdom of Spain v EU Council* [1999]. A similar approach has also been adopted for issues concerning the common commercial or agricultural policy. Look to K. Talus and A. Johnston, ‘Comment on Pielow, Brunekreeft and Ehlers on ‘ownership unbundling’’, (2009) 20 *Journal of World Energy Law & Business*, 1, 5.

¹⁴⁷ ECtHR, *National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. The United Kingdom*, Judgement of 23-10-1997, 25 EHRR 127, AT 80-81; ECtHR, *Scollo v Italy*, Judgement of 28-09-1995, A 315 C, at 29; ECtHR, *Spadea and Scalabrino v. Italy*, , Judgement of 28-09-1995, A 315 B, at 28; ECtHR, *James and others v. The United Kingdom*, Judgement of 21-02-1986, A 098 B, at 46; ECtHR, *Mellacher and others v. Austria*, Judgement of 14-10-1988, A 169, at 45.

¹⁴⁸ ECJ, 350/96 *Clean Car Autoservice* [1998] par. 35, 309/02, *Radlberger Getränkegesellschaft mbH & Co.* [2004], par. 78.

whether it is evidently unsuitable.¹⁴⁹ Moreover, ECJ is reluctant to investigate the possible future results of the measures in question and mainly sticks to the facts and just examines whether it is so apparently unsuitable that this unsuitability can be understood in advance without any complex assessment process.¹⁵⁰

Regarding the test of necessity and subsidiarity, the literature¹⁵¹ argues that it constitutes the most important part of the ECJ's proportionality test. Necessity means whether the measure is actually necessary for the achievement of the goals¹⁵² and subsidiarity¹⁵³ means whether there are less harmful –but equivalent in effectiveness terms- means for this achievement.

Regarding *stricto sensu* proportionality test, it generally concerns the balancing of the interests involved, harmed or promoted by the measure in question.¹⁵⁴ The seriousness of the harm caused to some interests by the measure or the seriousness of the danger for the interests protected by the measure as well as the nature of these interests and aims, also play an important role.^{155 156}

Ownership Unbundling and Proportionality

Concerning the relation of the measure of ownership unbundling to proportionality requirement, we should firstly mention that ECJ seems reluctant to proceed to a detailed analysis of the complex matter of the measure's suitability, as it constitutes a

¹⁴⁹ ECJ, 434/04, Ahokainen and Leppik [2006], par. 39.

¹⁵⁰ ECJ, 43/72, Merkur [1973], par. 24 and joined Cases 133/93, 300/93 and 362/93, Crispoltoni [1994], par. 43.

¹⁵¹ T. Tridimas, *The General Principles of EC Law*, 143.

¹⁵² ECJ, Case C-491/01, *British American Tobacco* [2002] ECR, p. I-11453, at 122.

¹⁵³ Regarding this specific examination, subsidiarity has a relevant but more specific meaning than this concerning former art. 5 TEC, examined above.

¹⁵⁴ T. Tridimas, 'Proportionality in Community law: Searching for the Appropriate Standard of Scrutiny', in E. Ellis (eds.), *The Principle of Proportionality in the Laws of Europe*, (Oxford:Hart Publishing, 1999), 65, 68.

¹⁵⁵ The 'rule of reason' as developed in *Cassis de Dijon* case (ECJ, 120/78 *Rewe Zentral* [1979] about the freedom of movement of goods), according to which a proportionality test has to be applied, in order to examine whether the regulation's effects are justified by the nature of the regulation's goals, actually incorporates the element of a *stricto sensu* proportionality test. Look also to F. Ortino, *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (Oxford: Hart Publishing, 2004), 470.

¹⁵⁶ However we should note that ECJ does not seem to frequently focus on a *stricto sensu* proportionality test, probably because of the political character of a decision balancing independent interests. Jans 2000, p. 241; G. de Burca, *The principle of proportionality and its application in EC law*, 107; J. Jans, 'Proportionality Revisited', (2000) 27 *Legal Issues of European Integration*, 239, 241.

key part of EU's Energy Policy.¹⁵⁷ Therefore, this issue has a highly political character and ECJ -if it is called to assess ownership unbundling from the perspective of proportionality- is likely to just evaluate whether it is "manifestly inappropriate" or not rather than involving in an economic and technical investigation of an EU's political decision. Moreover, as recent Commission's decisions on structural remedies –on the grounds of antitrust law- leading to unbundling seem to constitute an integrated part of such policy and relate to issues concerning political assessment of energy policy priorities and long-term European economic planning on internal energy market, ECJ –if called to examine these remedies- is not likely to be involved in a complex economic review of these measures.

Concerning suitability, effectiveness and necessity of ownership unbundling in economic terms, as a means to improve competition in wholesale and retail markets and the general opening of European energy market, we have to admit that there exist a lot of arguments¹⁵⁸ and counter-arguments.¹⁵⁹ We will not proceed to an analysis of these economic arguments,¹⁶⁰ however we observe that actually ownership

¹⁵⁷ K. Talus and A. Johnston, "Comment on Pielow, Brunekreeft and Ehlers on 'ownership unbundling'" (2009) 20 *Journal of World Energy Law & Business*, 1, 5; M. Hunt, 'Ownership Unbundling: the Main Legal Issues in a Controversial Debate', 89.

¹⁵⁸ Look for example to F. Lévêque, *Do not dissipate too much energy with ownership unbundling* 20th September 2007, available at <http://www.energypolicyblog.com/2007/09/20/do-not-dissipate-too-much-energy-with-ownership-unbundling/>; P. Joskow, *Transmission Policy in the United States*, (2005) 13 *Utilities Policy*, 95; T. Léautier, *Transmission Constraints and Imperfect Markets for Power*, (2001) 19 *Journal of Regulatory Economics*, 27.; Moffatt Associates, *Five Key Arguments for Ownership Unbundling*, available at http://www.moffatt-associates.com/energy_services/measuring_economic_impact/documents/appendix_c.pdf; Sheffield Energy & Resources Information Services (SERIS), *The Advantages Of Full Ownership Unbundling In Gas Transportation And Supply: How The European Commission Got It Wrong About the UK*, June 2006 available at http://www.seris.co.uk/SERIS_reply_to_OFGEM.pdf; Ernst & Young, Department of Trade and Industry, 'The Case for Liberalisation', 9, 14, 36, 39, 78, 79, 90, available at <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/files/file28401.pdf>; P. Lowe, I. Pucinskaite, W. Webster and P. Lindberg, 'Effective unbundling of energy transmission networks: lessons from the Energy Sector Inquiry', 29-32. ERGEG, 'Third Legislative Package Input Paper 1: Unbundling', 5 June 2007, 9.; C. Held, 'Ownership Unbundling and Independent System Operator – New Regulatory Approaches to the European Electricity and Gas Markets' 2nd Conference on Energy Economics and Technology (TU Dresden, 13 April 2007).

¹⁵⁹ Look for example to F. Bolle and Y. Breitmoser, '*On the Allocative Efficiency of Ownership Unbundling*', (2006) European University Viadrina Frankfurt (Oder) Department of Business Administration and Economics Discussion Paper No. 255, available at <http://ideas.repec.org/p/zbw/euvwdp/255.html>; R. Michaels, 'Vertical Integration and the Restructuring of the U.S. Electricity Industry', (2006) 572 *Policy Analysis*, 1; C. Growitsch and M. Stronzik, *Ownership Unbundling of Gas Transmission Networks – Theoretical Background and Empirical Evidence* (Paper submitted to the first annual conference of the journal *Competition and Regulation in Network Industries*) (18.11.2008), available at <http://crni.epfl.ch/papers/growitsch.pdf>; S. Bühler, A. Schmutzler and M. Benz (2004), *Infrastructure quality in deregulated industries: is there an underinvestment problem?*, (2004) 22 *International Journal of Industrial Organization*, 253.

¹⁶⁰ D. Mulder and V. Shestalova, *Costs and benefits of vertical separation of the energy distribution industry: the Dutch case* (2005) available at

unbundling seems to receive the support of various groups of interests and political and market players in EU,¹⁶¹ but also to face strong reaction.¹⁶² Although some aspects of these reactions have a strong political character, there is a strong debate about the conditions under which ownership unbundling can be economically efficient and whether it is necessary indeed¹⁶³ for the opening of the European Markets. On the other hand, EU Authorities and especially Commission adopted a strong position in favour of ownership unbundling's suitability and necessity, seeming to have been seriously influenced by the poor results of the previous EU's efforts.¹⁶⁴

Therefore, the issue of ownership unbundling's efficiency –efficiency is a prerequisite for necessity (if a measure is not efficient it can neither be necessary)- is still debated, however there are strong scientific indications that it may have positive results regarding the opening of markets –although, it is not clear whether it is the most efficient measure available-. Nevertheless, all this debate is a matter of specialised economic analysis, which is not possible to be assessed by a Court, but its purpose is mostly to provide authorities with scientific material, in order to design their policy and is also based on an examination of unbundling in comparison to other forms of market organisation and of the set of conditions under which it can actually work-, which cannot negate the relative efficiency of the measure in general. On these grounds, it is clear that ownership unbundling can be viewed as an 'effective measure' –or at least not apparently unsuitable- under the spectrum of a judicial examination.

http://www.wip.tuberlin.de/typo3/fileadmin/documents/infraday/2005/papers/mulder_shestalova_Costs_and_benefits_of_Vertical_Separation.pdf; B. Baarsma, M. Nooij, W. Koster, C. Weijden, 'Divide and rule. The economic and legal implications of the proposed ownership unbundling of distribution and supply companies in the Dutch electricity sector', (2007) 35 *Energy Policy*, Vol.35, 1785; M. Pollitt, *The arguments for and against ownership unbundling of energy transmission networks*, (2007) Working Paper, ESRC Electricity Policy Research Group, University of Cambridge, available at <http://www.eprg.group.cam.ac.uk/wp-content/uploads/2008/11/eprg0714.pdf>

¹⁶¹ Look to K. Talus and A. Johnston, 'Comment on Pielow, Brunekreeft and Ehlers on 'ownership unbundling'', 3, who refer to a number of energy market actors that support ownership unbundling and especially to note 11, where they mention a list of supporting Member States.

¹⁶² S. Taylor, 'Will the energy gambit work?' 27.9.2007, available at <http://www.europeanvoice.com/article/imported/will-the-energy-gambit-work-/58331.aspx>

¹⁶³ Look for example about the necessity of ownership unbundling to J. Pielow, G. Brunekreeft and E. Ehlers, 'Legal and economic aspects of ownership unbundling in the EU', 103-104; J. Pielow and E. Ehlers, 'Ownership unbundling and constitutional conflict: a typical German debate?', 10. Look also to M. Hunt, 'Ownership Unbundling: the Main Legal Issues in a Controversial Debate', 88-89, who expresses serious doubts about the efficiency of ownership unbundling concerning enhancement of competition and security of supply.

¹⁶⁴ Commission, 'DG Competition Report on Energy Sector inquiry' (10 January 2007) COMP SEC (2006) 1724, 6, 8, 10, 12, 13; Commission, MEMO/07/61 'Competition: Commissioner Kroes presents results of energy sector inquiry to Energy Council', 15.2.2007, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/61>

However, according to our opinion this is not the case regarding necessity requirement. Apart from the different views about whether there are other means equally or more effective but less intrusive than unbundling¹⁶⁵, the Third Energy Package itself has created alternatives to full ownership unbundling model. ISO model provides for just a transfer of management and not of ownership,¹⁶⁶ while the ITO model provides that the legally separate operator can be vertically integrated.¹⁶⁷ ¹⁶⁸ These models¹⁶⁹ -and especially the second one- are apparently less drastic and intrusive than full ownership unbundling, but they are officially included in the Third Energy Package as totally legitimate alternatives. So, one could wonder: *‘Why full ownership unbundling is necessary, if EU itself admits that some less drastic means can be so effective that they are proposed as alternatives?’* and *‘How can ownership unbundling be conceptually assumed as necessary, if we accept that there can be alternatives?’*.

According to our opinion, it is clear that the inclusion of alternatives into the Third Energy Package weakens the arguments about the necessity of ownership unbundling. On these grounds, ownership unbundling appears as a model solution and as the most desirable measure –because it seems to have the most drastic results-, however the rest solutions appear as adequate enough to provide the positive results pursued by EU, at least for an interim period until a renewed regulation of energy markets –a Fourth Energy Package-. In terms of necessity, this argument can actually undermine the position of ownership unbundling. Although this may not be important regarding the application of the Third Energy Package, as Member States may legitimately stick to the model solution and not opt for a less drastic alternative, it may have a great importance regarding the structural remedies imposed by the Commission in competition law cases of the energy market.¹⁷⁰ An affected by such measures

¹⁶⁵ Look for example to M. Hunt, ‘Ownership Unbundling: the Main Legal Issues in a Controversial Debate’, 88 and to A. Kotlowski, ‘Third-party Access Rights in the Energy Sector: A Competition Law Perspective’, 9 who argue that there may exist some less strict but effective alternatives and to K. Talus and A. Johnston, ‘Comment on Pielow, Brunekreeft and Ehlers on ‘ownership unbundling’’, 7 who argue that recent competition law cases seem to affirm that vertical integration creates severe problems to energy markets and that drastic measures are necessary.

¹⁶⁶ Electricity Directive 2009/72/EC art. 13, 14; Gas Directive 2009/73/EC art. 14, 15.

¹⁶⁷ Electricity Directive 2009/72/EC art. 17–23; Gas Directive 2009/73/EC art. 17–23.

¹⁶⁸ We do not mention ITO+ model, as it concerns an a la carte regulation and it is not clear to which parameters it refers.

¹⁶⁹ ISO model is criticised as of similar severity to ownership unbundling. M. Hunt, ‘Ownership Unbundling: the Main Legal Issues in a Controversial Debate’, 88 text to note 158.

¹⁷⁰ Art. 7 Regulation No 1/2003 “the Commission, when finding that there is an infringement of art 81 or of art 82 EC, may impose on the relevant undertakings any behavioural or structural remedies which

company can argue that such strict structural remedy was not necessary, as the pursued objective could have been achieved by other measures, similar to those included in the Third Energy Package. It can also argue that it is unproportionate and unequal, after taking into consideration that the other companies that will fall in the spectrum of the provisions of the third energy package about transmission may skip ownership unbundling. Therefore, Commission will have to prove –if these remedies are under judicial examination- that these specific cases have some specific elements that require an even harsher solution than the general provisions of the Third Energy Package –which was designed, in order to improve competition in energy markets-; this seems quite difficult.¹⁷¹

Concerning *stricto sensu* proportionality, although there is also criticism about the severity of the effects of ownership unbundling on many different rights of high EU's interests, in comparison to the goals pursued¹⁷², we accept the opinion that neither this measure is too heavy –after taking into consideration that unbundling affects only the transmission activities of the undertaking and does not interfere with the other aspects of its business, such as production, that it does not generally bind the undertaking too severely, as the latter has many relevant business fields still available and its primary activity is not affected¹⁷³ and that the undertaking has the possibility to sell its assets under unbundling, meaning that it is able to earn profit from such divestiture, a profit that will weaken the negative impact of unbundling- nor the objectives pursued – establishment of internal energy market, opening to competition and energy security- are of reduced importance¹⁷⁴ in relation to the interests harmed.

are proportionate to the infringement committed and necessary to bring the infringement effectively to an end”.

¹⁷¹ According to an opinion, it is questionable whether art. 7 Regulation No 1/2003 provides authorization to Commission to impose such heavy structural remedies. to J. Pielow, G. Brunekreeft and E. Ehlers, ‘Legal and economic aspects of ownership unbundling in the EU’, 109. On the other hand, in such case Commission could argue that such structural remedy can be more effective but less strict as well than a very heavy fine.

¹⁷² M. Hunt, ‘Ownership Unbundling: the Main Legal Issues in a Controversial Debate’, 89; J. Pielow and E. Ehlers, ‘Ownership unbundling and constitutional conflict: a typical German debate?’, 23-24.

¹⁷³ Look to K. Talus and A. Johnston, ‘Comment on J. Pielow, Brunekreeft and Ehlers on ‘ownership unbundling’’, 6-7 who also refer to a number of relevant ECtHR decisions, according to which proportionality condition was fulfilled.

¹⁷⁴ The objective of the internal energy market is established by TFEU (art. 194) and the objective of the open to competition internal market is established by art. 3, 32, 40, 101, 102, 106, 107, 119, 120 TFEU (look also to TFEU’s preamble ‘RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition.’)

Conclusions

Finally, we conclude that despite of the current debate about the value of ownership unbundling as a model that will enhance competition, a legal examination of the issue would probably result to the fact that this measure –in general- does not violate the proportionality principle, after considering the importance of the goals pursued and the internal market’s problems that led EU to adopt a stricter approach towards the organisation of transmission. This argument is also supported by the practice of ECJ to accept a wide discretion to EU legislator,¹⁷⁵ the technical nature of the assesment of the effectiveness of unbundling and the high importance of ownership unbundling for the Commission.¹⁷⁶ On the other hand, we focus on necessity aspect especially regarding structural remedies imposed in competition cases, as a result of the existence of alternatives to unbundling in the Third Energy Package, which will be generally applied in all relevant undertakings. Although such remedies are in accordance with the general energy policy of the Commission, the problem is so apparent that puts the legitimacy of such measures under serious question.

FINAL CONCLUSIONS

After the previous analysis, we can draw the conclusion that in general ownership unbundling does not seem to violate the key EU rules and fundamental rights proposed by the literature as possible obstacles to that measure. Specifically, the measure –as well as the ISO model- falls within the competence of EU, does not violate the principles of non-discrimination, subsidiarity and proportionality and does not constitute an unjustified restriction of either the freedoms of capital movement and establishment or the fundamental rules about rights to property, freedom to pursue an economic activity and freedom of association. The Third Energy Package includes a series of provisions that balance the radical character of the measure with the rules mentioned above¹⁷⁷ and emphasise national initiatives. On the other hand, we can still recognise some problematic points regarding this framework. The first

¹⁷⁵ M. Hunt, ‘Ownership Unbundling: the Main Legal Issues in a Controversial Debate’, 89.

¹⁷⁶ J. Pielow and E. Ehlers, ‘Ownership unbundling and constitutional conflict: a typical German debate?’, 21.

¹⁷⁷ F. Säcker, ‘The “deep” independent system operator - A German perspective on implementing an effective and efficient unbundling of TSOs.’, 11.

one has to do with possible inequalities that may arise during the implementation of the framework between undertakings from Member States with a different organisation of the market structure. This problem, although it does not directly concern the framework but future problems that may occur, should be addressed by a better development of the level playing field clause. Nevertheless, it is rational that during the transitional phase established by the Third Energy Package –as we believe that as the consolidation of the market and the opening to competition will proceed, it will be substituted by a new framework- and its multiple structural models, such problems should be expected –besides, at this time, there are much more important problems regarding the internal energy market-. The second point of criticism refers to the compensation for the potential losses of the undertakings due to ownership unbundling. We believe that this problem can be addressed by a supplementary compensation scheme for undertakings that face problems concerning the transfer of their assets to third parties and by granting specific exemptions or time extensions for the fulfilment of unbundling requirements to cases where there is an apparent relevant problem.¹⁷⁸

Therefore, ownership unbundling as a general measure of sector regulation –although radical and strict- seems to be a promising solution for the establishment of an open to competition internal energy market, which does not fall outside the rules of legitimacy of EU legal structure and its radical character seems necessary in relation to the important difficulties that EU faces concerning energy markets. Moreover, it is affirmed that the principles and the fundamental rights included in the EU legal structure have the adequate flexibility¹⁷⁹ –regarding their conditions, content and interpretation-, so that they do not constitute a serious problem for the development of a framework of structural measures and of a radical policy in the energy market.

However, we do recognise a problem regarding ownership unbundling as a structural remedy used by Commission, on the grounds of competition law enforcement. This problem primarily refers to the proportionality principle and concerns the aspect of necessity of the measure. First, the necessity of the measure has to be justified case-by-case –Commission has to prove in any case that all less strict measures are less

¹⁷⁸ We could imagine a case-by-case temporary derogation relevant to this –concerning third party access- granted by art. 48 Dir. 2009/73/EC about undertakings' financial difficulties due to take-or-pay contracts.

¹⁷⁹ K. Talus and A. Johnston, 'Comment on Pielow, Brunekreeft and Ehlers on 'ownership unbundling'', 2-3.

adequate-; this is a difficult task to achieve, if we take into consideration the particularities of each case and the recent generalised tendency of the Commission to apply such measures to energy cases. Second, this justification is even more difficult, given that the sector rules about unbundling that are going to be applied shortly provide for less strict alternatives and for a comprehensive sector regulation structure. This justification will become more questionable in future cases, which will be addressed during the simultaneous application of the less strict and more flexible provisions of the sector regulation. This is an additional problem for the dualistic model of rules and authorities –competition law and sector regulation-¹⁸⁰ that concern the internal energy market.¹⁸¹ We can just conclude that such structural interventions based on competition rules will abide by the principle of proportionality, only in cases where the less strict market organisation model –perhaps ISO or ITO- along with poor regulatory supervision will allow the continuation of high vertical integration and anticompetitive practices, so that an even harsher measure could be assumed as the only adequate measure and the intervention of the Commission could be justified as proportionate.

¹⁸⁰ Look to the paper Diathesopoulos, Michael D., Competition Law and Sector Specific Rules in European Energy Sector: A Comparison to Trinko, Recent Commission's Antitrust Decisions and a Look to the Future (July 14, 2010). Available at SSRN: <http://ssrn.com/abstract=1639926> and Diathesopoulos, Michael D., From Energy Sector Inquiry to Recent Antitrust Decisions in European Energy Markets: Competition Law as a Means to Implement Sector Regulation (July 14, 2010). Available at SSRN: <http://ssrn.com/abstract=1639883>.

¹⁸¹ Look also to D. Geradin, 'The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector', 52, 61; D. Geradin, 'Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court's Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?', 27.