Competition Law and Sector Regulation in the European Energy Market after the Third Energy Package: Hierarchy and Efficiency

Michael Diathesopoulos, University of Cambridge
CHAPTER 1: INTRODUCTION

CHAPTER 2: COMPETITION LAW & SECTOR REGULATION AS TOOLS FOR ESTABLISHING ACCESS TO NETWORKS

2.A Access to Networks According to Competition Law
2.B Essential Facilities Doctrine under the spectrum of Incentives to Invest
2.C TPA and Refusal of Access
2.D Final Conclusions

CHAPTER 3: COMPETITION AND SECTOR-SPECIFIC RULES & OBJECTIVES AS A CONTEXT TO EACH OTHER

3.A Competition Law as a Context for Energy Sector Regulation
3.B. Sector Parameters as a Context for Recent Competition Law Cases
3.C Final Conclusions

CHAPTER 4: RELATION BETWEEN FUNDAMENTAL EU RULES, OWNERSHIP UNBUNDLING & STRUCTURAL ANTITRUST REMEDIES

4.B Art. 345 TFEU
4.C Fundamental Rights and Especially the Right to Property
4.D. Proportionality Principle
4.E Final Conclusions

CHAPTER 5: COMPETITION LAW AND SECTOR REGULATION: HIERARCHY AND EFFICIENCY

5.A The issue of Direct Application of Competition Rules in Sector Cases
5.B The Role of Sector Rules in the Energy Sector
5.C Final Conclusions

CHAPTER 6: GENERAL CONCLUSIONS

LIST OF SOURCES

A. Books, Reports, Articles & Papers
B. Case Law
C. National Competition Authorities Decisions
D. Commission Decisions
E. Commission Press Releases
F. Commission Notices & Staff Working Documents
G. Commission Proposals
H. EU Legislation
CHAPTER 1

INTRODUCTION

Since the late 1990s the EU has tried to liberalise European Energy Markets and establish an Internal Energy Market (“IEM”) based on the principles of free competition. The opening to competition is assumed to increase the efficiency of the Energy Sector and of the European Economy as a whole (Lowe, 2008, pp. 4-5). The aim of the liberalisation process was to abolish the National measures that maintained barriers to competition. The EU tried to achieve this objective by adopting frameworks of measures and provisions (Energy Packages) aimed at creating a Single IEM, increasing competition and efficiency of Energy Markets and ensuring security of supply. The goal of the First Energy Package (“FEP”: Directive 96/92/EC/ electricity; Directive 98/30/EC/ gas) was to gradually introduce free competition in the market, in order to achieve liberalisation, transparency, free access to the energy networks and security of supply.

The Second Energy Package (“SEP”: Directive 2003/54/EC/ electricity; Directive 2003/55/EC/ gas) was adopted in June 2003 following a criticism of the efficiency of the FEP. It was designed to enable further progress towards the objective of establishment of an open IEM. Its objectives were to include provisions on the separation of the energy transmission and distribution from production (unbundling) and the regulation of the access of third parties to energy network facilities (Third Party Access or “TPA”). With these provisions -along with the right to choose suppliers and the establishment of National Regulatory Authorities (“NRAs”) - the EU tried to increase competitiveness of the market and protect consumer interests.

revealed that SEP had not succeeded in resolving continuing problems characterising the Energy Market, such as high vertical integration and market concentration, low transparency and problematic Cross-border cooperation between Transmission System Operators (“TSOs”). For this reason, the EU adopted the Third Energy Package (“TEP”): Directive 2009/72/EC/ electricity; Directive 2009/73/EC/ gas; Regulation No 713/2009; Regulation No 714/2009; Regulation No 715/2009) in 2009. One of the main provisions of TEP was the more effective separation of transmission and production by a new unbundling regime, which included multiple options for the organisation of transmission. Ownership Unbundling (“OU”) is the default option; Independent System Operator (“ISO”) and Independent Transmission Operator (“ITO”) are the alternative options. The harmonisation and increase of the powers of NRAs, the establishment of the Agency for the Cooperation of Energy Regulators (“ACER”) and more effective Cross-border regulation and transparency measures were also integral to this Directive.

The Commission made a serious effort to enhance and accelerate the results of TEP -even before it came into force- by opening several investigations and imposing strict measures on energy undertakings. This was done on the grounds of its competence as enforcer of Competition Rules (“CRs”) of the (TFEU) Treaty and based on the results of ESI. In a number of antitrust cases, the Commission applied general CRs (Cameron, 2007, p. 564) and imposed severe structural remedies concerning, amongst others, OU, release of customers and the forced sharing of infrastructure to several undertakings.

According to the Commission, a joint application of Sector-Specific Rules (“SSRs”) and General Competition Law and the imposition of structural remedies, on the grounds of this joint application, constituted an adequate solution for the resolution of the remaining obstacles towards the Single IEM. This conclusion underlines the value that Competition Law, and especially
the relationship between Competition Law and structural remedies, has for
the Commission in this long-term process (Lowe, 2008).

Therefore, the European IEM is governed by a dualistic model that
involves two different frameworks - CRs and SSRs- with two different sets of
procedures, powers and competent Authorities.

Competition Law consists of general rules, directly included in EU
Treaties and designed to address all different kinds of industries. The
Commission has a central role within the application of Competition Law
because it is responsible for safeguarding the Treaties.

Sector Regulation consists of SSRs of inferior hierarchy in comparison
to the rules of Competition Law. They are however based on several TFEU’s
provisions, such as those concerning the Internal Market (especially Art. 4.2,
Art. 26 - former Art. 14 TEC, Art. 114 - former Art. 95 TEC and Art. 194, which
specifically concerns IEM) as well as Competition. SSRs are specifically
designed to address the Energy Market, while they have a general application
regarding all European Energy undertakings. Therefore, SSRs are
simultaneously more specific and more general than CRs, as the latter apply
on a case-by-case basis. Moreover, SSRs are designed to play an ex ante
regulatory role and to address a series of other objectives except free
competition (Kerf, Neto and Geradin, 2006, p.4).

On the other hand, Competition Law traditionally has an ex post
corrective role, but in recent energy cases it functioned in an ex ante quasi-
regulatory way. The key objective of Competition Law is to satisfy consumer
needs at reasonable and competitive prices, while distributing opportunities
for domestic and foreign private capital to experience a safe development in
the area (short-term or static competition; see Sidak and Teece, 2009, pp. 602-
603; Petit, 2004a, p. 353). Sector rules, however, seem more effective (Geradin,
2005, pp. 63-65) in the provision of incentives to invest, the long-term
assurance of network and production plant renewal and development (long-
term or dynamic competition; see Sidak and Teece, 2009, pp. 603-607).

Given the fact that: IEM policy has to serve multiple goals; Competition is a very important but multidimensional objective; and competition issues constitute an important aspect of the general problems of European Energy Markets, the research hypothesis is the following:

‘Competition and Sector Specific Frameworks have supplementary but not substitutable roles and objectives and both should use each other as context when applied in the IEM. The regulatory framework should be in principle provided by SSRs. CRs should be mostly used as an interpretative tool for the application of SSRs and their independent application should be limited to an extent defined by Sector Regulation’s failure’.

In order to test this hypothesis, the main research question is formulated as follows:

‘Which are the parameters that define, limit, guide and form the content and the extent of the role of Sector Regulation and Competition Law and the relation between these two frameworks within the process of the implementation of the IEM?’

or

‘Is it possible, and if so how, to use CRs and SSRs as a “blend” in order to establish an open to competition IEM?’

The main research question is analysed into the following specific questions:

1. Are the respective tools, approaches, concepts and systems of both Competition Law and Sector Regulation adequate and effective for the treatment of access to networks?
2. What are the parameters forming the context, content and scope of
application of both CRs and SSRs, and what is the relationship between them? To what extent do SSRs incorporate Competition Law objectives and to what extent does the application of Competition Law in recent energy cases use Sector parameters as context?

3. Is the imposition of structural remedies of Competition Law in recent energy cases, and the content of the relevant unbundling SSRs, compatible with the fundamental principles and rules of EU Law?

4. What is the exact hierarchical relationship between CRs and SSRs and how is this relationship influenced by their respective legal bases and their nature, role and character? Do CRs override SSRs as hierarchically superior or do SSRs override CRs as lex specialis?

5. Under which conditions and limitations and to what extent should Competition Law intervene in issues belonging to the competence of Sector Regulation?

The aim of this research is to provide a model for the role of Competition Law regarding the further liberalisation of the IEM after the TEP and for the definition of the relation between Competition Law and Sector Regulation frameworks and structures regarding the opening to competition of Energy Markets. The problem of the relationship between CRs and SSRs and systems is a common problem in many industries which go or have gone through liberalisation, like Telecommunications and Electronic Communications (Geradin and Sidak, 2005). Therefore, the research could provide a useful background for the study, assessment and future of regulation in such industries, especially focusing on dynamic efficiency as an orientating factor for future regulatory design. Moreover, the issues mentioned above refer both to the Central Regulation of Energy Markets on an EU level and to the respective regulatory efforts on a Member States’
The research will apply a doctrinal methodology, as it will concern the development and formulation of doctrinal parameters that will define a model of Sector Regulation (see the research question above) through the analysis of legal rules and case law. The type and the scope of the research will be mainly normative, as it will aim not only at presenting the facts in the field under research (regulation of the Energy Sector), but also at pointing out how the model of regulation can be improved. However, description and explanation of the current frameworks of Competition and Sector Regulation – as they stand and as they are applied – will be also a major part of the study, as the results of the description will provide the material for the formation of the model.

The methodology used will be based on the examination of the core provisions of the TEP on unbundling and TPA, along with the presentation of the key characteristics of a series of recent antitrust cases in the Energy Market launched by the Commission, characterised in part by severe structural remedies, similar to those provided by the recent Sector Regulation. These core provisions and these cases will provide the basic material for critical argumentation.

The first four key questions will be respectively treated in each chapter (Chapters 2 to 5). The fifth key question will be answered throughout all the chapters.

The limitations of the research are the following. First, the relationship between SSRs and Competition Law will be investigated only regarding the energy industry (although reference will be made to examples from other industries). Second, the focus will only be on Sector Regulation as defined under the framework of the recent TEP. Third, research concerning SSRs and CRs will be limited to specific issues related to TPA and unbundling. Fourth, only material referring to a series of recent antitrust energy cases concerning
market abuses will be used, leaving out other less recent-cases or cases that concerned mergers. Fifth, the dynamic competition concept will be used in relation to access to facilities but it will not be extensively analysed and justified in relation to network markets and in particular to Energy Sector.

The results of the analysis can be summarised (a comprehensive analysis will be presented in Chapter 6) as follows:

- although the Commission could practically abstain from implementing CRs, when sector-specific regulation exists, it would be impossible to accept that CRs are not applicable;
- Essential Facilities Doctrine (“EFD”) and Competition Law tools do not seem to provide a suitable framework to effectively treat the issue of balancing incentives to invest with open market concept and design solutions for the stable development of Energy Market infrastructure;
- structural remedies based on CRs abide by the proportionality principle, only when the market organisation and the regulatory supervision are proved inadequate to prevent anticompetitive practices;
- the Commission, in its recent decisions, did not seem to take into consideration the sector-specific context regarding, either the market environment and the particular sector factors of each case or the general objectives of Sector Regulation and the structure and content of present and forthcoming Energy Regulatory framework as a complete system of SSRs;
- although Competition Law has a hierarchical priority over SSRs in a way that it influences the scope and objectives of the latter, SSRs should have a priority regarding their implementation as *lex specialis* and constitute the context for any potential application of Competition Law;
- even if, in order to accelerate Energy Markets’ transformation before
the application of TEP, the Commission chooses to use Competition Law as a tool, its approach should however be guided by the respective scope and content of the new forthcoming sector-specific framework;

- regarding Competition and Sector Authorities on both an EU and National level, there is a need to establish an efficient model of clear allocation of duties between them, prioritising SSRs, and accept that, in both cases, authorities will take into consideration both Competition and Sector Specific parameters when they address issues that fall within the scope of both sets of rules.
CHAPTER 2

COMPETITION LAW & SECTOR REGULATION AS TOOLS FOR ESTABLISHING ACCESS TO NETWORKS

In this chapter, the Competition and Sector Specific Frameworks will be examined in relation to the issue of access to networks, an issue particularly important for Energy Markets. The analysis will focus on EFD and the general application of Refusal of Access (“RoA”) especially in the EU (Ch.2.A) as well as on the relation between these Competition Law concepts about access to facilities, investment incentives, and dynamic competition (Ch.2.B). It will also examine TPA as a Sector Specific framework and its relation to EFD and RoA (Ch.2.C). The scope of this chapter is to identify the common points and objectives of both frameworks and the extent to which they are able to provide an adequate solution for both static and dynamic competition.

2.A Access to Networks According to Competition Law

2.A.I Refusal of Access in general

Companies, at least in principle, have the right to exploit their assets and facilities in the most profitable way for them and to contract or not with anybody and under the conditions they choose. Refusal to deal therefore is not equated per se with abuse under Art. 102 TFEU (CFI, Bayer [2000]).

This freedom was recognised by ECJ in the Radio Telefis (Magill) case [1995] (para. 46), which noted that such refusal can be assumed as abusive only ‘in exceptional circumstances’ (para. 50). Hoffmann-La Roche (ECJ, [1979], para. 91) suggests that such refusal can be assumed as abusive only if it
hinders ‘the maintenance of the degree of competition still existing in the market or the growth of that competition’.

RoA to facilities is considered as abusive when the access is indispensable for operating on a neighbouring market, the refusal excludes effective competition on that neighbouring market and the refusal is not objectively justified and harms consumers (Doherty, 2001, p. 431; see also Commission Decisions Interim Measures: Sealink/B&I Holyhead [1992], para. 41; Sea Containers Ltd/Stena Sealink [1994], para. 66; Frankfurt Airport [1998], paras 86–88; Port of Rødby [1994], para. 15).

Therefore, this refusal can be assumed as an abuse under Art. 102 TFEU, only after a case-by-case analysis, based on the individual facts of each occasion, if these facts show that this refusal is able to influence the market and weaken competition (Kotlowski, 2009, pp. 17-18).

In these cases, RoA belongs to the broad category of exclusionary abuses (Commission DG Competition, 2005, para. 234).

RoA can be categorised according to whether access had been previously granted to the requesting provider or a competitor or is still granted to a competitor. According to this criterion (Kotlowski, 2009, p. 18), RoA can be put into three categories:

a) Discrimination where a relevant access is granted to one competitor but is refused to another party or is granted under conditions which disadvantage that party.

b) Withdrawal of access where a relevant access right had been previously granted to the party but is later withdrawn in order either to be offered to another competitor or to be refused to all other parties.

c) Essential facilities refusal where no relevant access right has
been ever granted to the requesting party or a competitor but where such access is essential for the party if it is to participate in the downstream market.

2.A.II Refusal of Access and Essential Facilities Doctrine

EFD is a concept of antitrust jurisprudence, according to which the owner or operator of a facility has to grant competing undertakings access to the facility, when the latter is essential for conducting a specific market activity, it is not duplicable and RoA may eliminate competition in the market and/or prevent the introduction of a new product.

According to United States v Terminal Railroad Association (1912), any monopolist who owns a facility which is necessary for other competitors, is obliged to grant a reasonable access to that facility if it is feasible to do so (Lipsky and Sidak, 1998, p. 1191). This case actually established the origins of EFD in the US, which has been applied to various industries, in both the US and the EU Courts, and facilities, such as sport facilities, telecommunication systems, ports, airports, pipelines, etc.

The Commission and ECJ seemed to follow an approach towards a wide application of EFD and use Competition Law tools as a means to provide easy access to new entrants in the markets.

Specifically, in Bronner case [1998], ECJ developed a set of three conditions (Opinion of Adv. Gen., para. 34; see also Geradin and O’Donoghue, 2004, pp. 7-8) that should be met, in order that an RoA would be viewed as anticompetitive:

a) the RoA to a facility must be likely to prevent any competition at all on the applicant’s market;

b) the access must be indispensable or essential for carrying out the applicant’s business; there is no alternative or substitute; and
c) the RoA must be denied without any objective justification.

(a) Prevention of Competition

The ECJ has developed a standard test, in order to affirm that a specific behaviour may prevent competition. According to this test (Commission Notice-Guidelines 2004, para. 23; ECJ, Société Technique Minière [1966], para. 7; see also ECJ, Kerpen & Kerpen [1983], paras 6-9):

‘it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states’.

In Stichting Sigarettenindustrie [1985], ECJ affirmed that, in order to prove anticompetitive behaviour, there is no condition that the practice has already influenced competition, but it is enough to prove that it can distort it. According to para. 51 of the judgment:

‘According to the Commission, article 85 of the treaty does not require that trade between member states should be restricted but merely that the distortion of competition should be likely to affect such trade… at least actually or potentially’.

(b) Essentiality and Market Definition

Monopoly is not necessary for a facility to be assumed as essential (Temple-Lang, 1994, pp. 437, 490, 513); however the company that refuses access to the facility has to maintain a dominant position in the provision of this essential facility (Temple-Lang, 1994, p. 475).

Market definition is a prerequisite for the fulfilment of the first condition of Bronner’s test and for the examination of whether or not the company holding the facility has a dominant position within the market (Nikolinakos, 2006, p. 81). Whether a facility is essential or not has to be
judged upon facts concerning the specific market and a specific market definition indicates which are essential to that defined market. Dominance is a concept related to specific markets and the definition of the relevant market has to simultaneously include all relevant substitutes and exclude non-substitutes (Asch, 1970, p. 551). If the facility is easily and without any substitutable, the “essentiality” does not exist and EFD cannot apply.

(i) Sealink/B&I – Holyhead

In the Commission Decision Sealink/B&I – Holyhead [1992] case, the term “essential facility” was used for the first time in EU jurisprudence, although there were relevant references in prior case law. Holyhead port was jointly used by Sealink Ferries and B&I, the former having ownership on the port. Although both companies had access to the port, B&I’s boats arrived when there were no trains in the port, in contrast with Sealink’s. The problem referred not to access itself but to its terms. When Sealink tried to impose a new timetable that would further disrupt B&I’s operations (Jones and Sufrin, 2008, pp. 540-541), the Commission imposed interim measures against Sealink, arguing that any disruption by Sealink constituted an abuse of dominant position (Nikolinakos, 2006, 75).

Geographical market definition surely was one of the most important aspects of the case. Holyhead’s location permitted crossing between Ireland and Wales in less time than other comparable crossings. As the port was used only by two competitors, Sealink offered itself a competitive advantage over B&I by forcing the latter to delay its operations. The Commission therefore assumed that there is a relevant market concerning short-time transportation from Ireland to Wales, and Holyhead was an essential facility.

(ii) Sea Containers v Stena Sealink
This second Commission’s case also refers to Holyhead port [1994]. Stena Link (formerly Sealink) was still the owner and operator of Holyhead. One subsidiary of Stena Link operated ferry services from the same port. Sea Containers was a competitor willing to provide faster ferry services than Stena Link on the same route. In order to achieve this, however, Sea Containers had to receive the permission of Stena Sealink. Stena Sealink initially refused to grant the permission until the Commission intervened and repeated its previous decision that Holyhead constitutes an essential facility for fast transportation between Wales and Ireland. Stena Sealink finally granted permission to Sea Containers (Nikolinakos, 2006, 76).

For the refusal on the part of Stena Sealink to be assumed an abuse of its position as an operator of the port, the Commission first concluded that Holyhead is an essential facility. The Commission argued that no other alternative British port existed which would maintain the transportation time, while building a convenient new port would be neither realistic nor cost-effective. (Evrard, 2004, pp. 9-10). The relevant market concerned the "central corridor" of ferry journeys between Great Britain and Ireland.

It could be argued that this definition of the market was too narrow and unjustified (Ridyard, 1996). The Commission did not examine any other ferry corridors between Great Britain and Ireland. Moreover, it is questionable whether the Commission investigated the existence of alternative ports even in the central corridor. Besides, fast ferry transportation is important only if the port of departure is near the arrival port and if the latter is near to destination urban centres.

If the Commission had considered these factors, the outcome could possibly change and Holyhead might not be assumed as “essential”. Therefore, the narrowness of the market definition led to Holyhead’s “essentiaality”.
(iii) European Night Services

European Night Services was the joint venture of the main railway companies of France, Netherlands, Germany and U.K. It was formed. Mother companies entered into joint ventures with railway paths through the Channel Tunnel, in order that ENS operates overnight passenger rail services through the Channel Tunnel. The Commission (Decision, European Night Services [1994]) assumed that this agreement violated Art. 81 TEC (new Art. 101 TFEU) and ordered that, after an eight-year exemption, mother companies should have to provide potential competitors with the same services. The Commission concluded that the Channel Tunnel constituted an essential facility, so operators could not refuse access to third parties (see also Commission Decision, Eurotunnel [1994]); the Commission asked Channel Tunnel operators to set aside some capacity for potential new entrants.)

The Commission defined the relevant market as follows (paras 17-29):

‘the market for the transport of business travellers, for whom scheduled air travel and high-speed rail travel are interchangeable modes of transport... and the market for the transport of leisure travellers, for whom substitute services may include economy-class air travel, train, coach and possibly private motor car...’

However, this definition contradicts the “essentiality” of the Channel Tunnel, given the number of alternatives and the fact that rail transportation constitutes a small portion of the overall volume of transportation.

CFI annulled the Commission’s decision and supported that the Commission did not make an adequate assessment of the restrictions of competition and that Channel Tunnel does not constitute an essential facility (CFI, European Night Services [1998], para. 209), especially regarding the small market share of European Night Services in the relevant market (see also...
AGCM Decision, *De Montis Catering Roma v Aeroporti di Roma* [1995]).

(iv) *Market Definition as a Prerequisite for Examining Essentiality*

The analysis above underlines the importance of market definition in relation to the examination of the “essentiality” of a facility. The latter not only cannot substitute market definition, (Glasl, 1994, p. 306) but is also a prerequisite for the application of EFD. The definition of both the geographic and product market have to take into consideration the existing, reasonable substitutes that may limit pricing in the market in question. Although a facility may look very important for related business because of its physical characteristics, it is crucial to firstly identify the relevant geographic market, in order to judge whether the facility’s physical characteristics are indeed essential or the facility may be replaceable. A wrong or artificial market definition will lead to wrong results regarding the application of EFD.

(c) The Criterion of the Two Related Markets

In the *Radio Telefis* case, the existence of two vertically-related markets (where the first one constitutes an input for the second one) was used as a criterion for the application of EFD. This case required that the control of the first market (upstream) constitutes a bottleneck for access to the second market (downstream). If the controller of the first one refuses access to it, then the second one is almost automatically foreclosed for a third party (this criterion was also followed by the *Bronner* and *IMS* [2004] ECJ cases).

The Commission identified two markets: (a) the market for weekly TV listings and (b) the downstream market for weekly TV guides. The first market, where broadcasters were assumed as dominant, was artificial market, in which they were dominant (Flynn, 1992, p. 53). The definition of the
downstream market was based on a potential demand. The Commission, therefore, firstly supposed that there is a primary market that does not exist and then defined a relevant ancillary market in a very narrow way. The Commission did so, in order to apply market leveraging as the methodological tool suitable for basing the application of EFD to the specific case (Hatzopoulos, 2006, p. 9; Jones and Sufrin, 2008, pp. 530-532).

In IMS case, ECJ also accepted as a criterion for EFD the possible prevention of the emergence of a new product for which there is a potential demand (para. 49; see also Geradin and O’Donoghue, 2004, pp. 8-10). In the Microsoft case (Commission Decision [2004]), however, the “new product” requirement was abandoned and was substituted with the more flexible criterion of “possible reduction of incentives to innovate in the whole industry” (Lévêque, 2005, p. 7).

According to Radio Telefis’ rationale, in order that EFD functions, it is necessary to assume that the ownership of an essential facility constitutes a separate market. That is how the market-leveraging argument can support the abusive character of RoA to an essential facility.

However, this approach is neither correct nor necessary. It is not correct because a market as a concept involves trade of goods and services and commercial activity. Just holding a facility is not a commercial activity. How could the ownership of an asset, which is not used by the owner for commercial reasons (TV listings in Radio Telefis, for example), be defined as a market? If so, then any asset ownership constitutes a monopoly on the relevant market of the ownership of that asset. It is questionable whether this fiction can be accepted.

It is not necessary because a much simpler rationale could justify why RoA is abusive: essential facilities constitute a necessary condition for a competitor to enter or stay in the market. If access is not provided, then an unsurpassable barrier is created and the ownership of the facility itself brings
the owner to a dominant position. Therefore, RoA itself can justify the identification of an abuse according to Art. 102 TFEU, without the need to hypothetically construct a market.

This paper suggests that when owners forbid access to facilities, the focus should be on the effects of this refusal, in order to define “essentiality” and judge on the existence of a market abuse, no matter how many markets are involved.

(d) Withdrawal of Access and Discrimination

In *Commercial Solvents* [1974], ECJ suggested a distinction between the termination of an existing contractual relation and a refusal to start dealing with a new party. The unjustified termination of a long previous dealing, in order to eliminate competition in the downstream market was considered abusive. However, the conditions under which this withdrawal was judged as abusive do not differ from these of a first time RoA. In *Verizon Communications v. Trinko (Trinko Case)* (2004), the US Supreme Court also accepted the same difference. Although a pre-existing voluntary sharing indicates that parties once found an economic reason for sharing, such withdrawal may not be abusive, if it is justified by objective reasons. Therefore, there is no reason to substantially distinguish between the two cases.

Competition Law faces anticompetitive discriminations regarding the entrance to the domestic market of undertakings from other MSs (see *Stichting Sigarettenindustrie*, para. 50). EFD can also cover discriminatory RoA. According to Art. 102(c) TFEU, ‘applying dissimilar conditions to equivalent transactions... thereby placing them at a competitive disadvantage’, may constitute an abuse of dominant position. When selective RoA is not justified by objective circumstances and restricts competition, it constitutes abusive
behaviour. Therefore, two out of three conditions suggested by the Bronner case have to be fulfilled.

This does not necessarily apply however to the third condition; essentiality. Can an unjustified and selective RoA to a facility be assumed as abusive discrimination, although the facility is not indispensable in carrying out the applicant’s business?

*Prima facie* the answer is positive.

According to Art. 102(c) TFEU, the application of dissimilar conditions to equivalent transactions constitutes discrimination, given that this discrimination places the third party at competitive disadvantage. If the latter can easily find an alternative, there will be no significant disadvantage and the competition will not be restricted. However, in some cases a facility could be assumed as not “essential” by the doctrine, although RoA could bring a competitive disadvantage. According to ECJ *IMS* case (para. 28), in order to assume a facility as essential or indispensable:

‘it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult… to create… the alternative products or services’.

A facility may not be essential, even if the alternative is offered under less advantageous terms. Furthermore, it is not enough that the duplication is difficult, but this difficulty has also to be unreasonable. Consequently, EFD may not be applied, because of the existence of an alternative, although this alternative will result in a competitive disadvantage to the third party. It appears that, regarding discrimination, EFD has a narrower scope than Art. 102 TFEU, although on many occasions their conditions overlap.

2.A.III Conclusions in relation to the Application of Essential Facilities
**Doctrine in the Energy Sector**

EFD and RoA may have, in principle, a significant scope of application especially regarding transmission and distribution networks. An inability to access them results in a severe limitation of competition in the relevant supply market. Networks constitute the “gateway” to the market and are indispensable and essential in order to access these markets. When the “gatekeeper” is a vertically integrated firm, it may have an incentive to use the network to distort competition in its favour on supply markets. Networks can neither be easily duplicated.

In order to establish a new network infrastructure in the energy industry, a company ‘would have to make exceptional organisational and financial efforts’ and would be (IMS, para. 29):

‘..obliged to offer terms which are such as to rule out any economic viability of business on a scale comparable to that of [an] undertaking which controls the protected structure’.

Networks are also usually perceived as a natural monopoly of companies that had official monopoly rights in the Energy Market during the pre-liberalisation era (Graper and Schoser, 2010, p. 29; Kotlowski, 2007, p. 102). The effort for establishing a new network has to address huge financial, - low growth rates of gas and electricity volumes do not offer an incentive to uptake the enormous cost of a new network -, environmental and social - because most European energy networks pass through densely populated areas - costs (Graper and Schoser, 2010, p. 30; Kotlowski, 2007, p. 102).

RoA (network foreclosure) may take several forms, as shown in the following Commission’s decisions: margin squeeze (constructive refusal), inadequate capacity management, capacity hoarding (RWE [2009]) and degradation (ENI [2010]), long term capacity bookings by the incumbent
shipper (E.ON gas [2010]; GDF-gas market foreclosure [2009]; see Ch.3.B.II.a) and strategic underinvestment (ENI [2010]; see Ch.3.B.II.b). Moreover, RoA to essential facilities may also be related to discrimination (exploitative abuse) between buyers, as the owner may distort competition in downstream markets and provide favourable access to a specific subsidiary (German electricity balancing market [2008]; Swedish electricity interconnectors [2010]; see Ch.3.B.II.d).

This paper has already discussed the requirement of two related markets and concluded that this requirement either narrows significantly the scope of this doctrine or results in the hypothesis of a fictional primary market, which is neither a necessary nor a systematically-justified prerequisite for the identification of a market abuse (Ch.2.A.II.c). Such a requirement limits TPA to an unjustifiable extent and should be abandoned. According to another opinion (Kotlowski, 2007, p. 107) such requirement will not cover the access of TSOs active on a horizontally-parallel transportation market. However, this analysis disagrees with that author’s opinion that this requirement constitutes a weak point in the relevant Competition Law per se, and can be faced only by SSRs, as this requirement is unjustified even under a strictly Competition Law examination of cases concerning TPA.

Regarding the “new product” requirement, this paper favours the opinion (Kotlowski, 2007, pp. 107-108) that such a requirement should be abandoned, at least considering Energy Markets, as this criterion actually fits into cases concerning intangible assets and intellectual property rights. It is not reasonable however to expand it in cases concerning physical facilities and property rights, other than intellectual ones.

The possibly unjustified character of a RoA will be a matter of a case-by-case examination. However, TEP provides a detailed legal framework about the exemptions from the duty to grant access and about the conditions, under which a network operator can refuse it.
2.B. Essential Facilities Doctrine under the spectrum of Incentives to Invest

One key issue regarding EFD has to do with the possible impact of granting access to competitors regarding the incentives provided to market players to invest on infrastructure and fixed assets.

This problem may be especially apparent in relation to industries involving infrastructure investments of high cost and risk. Energy belongs to this set of industries; however the same problem also concerns other similar industries.

2.B.1 Economic Impact of Forced Sharing of Facilities

There is extensive US literature on this issue as it arises in the telecommunications sector (see Hewitt Pate, 2006). However, EU jurisprudence also deals cautiously with this issue of the legal treatment of refusals to deal. Below are six correlated issues regarding the dangers of a wide application of EFD.

(a) Forced Sharing in Relation to Investment Decisions

Any investment is decided upon two factors, cost and benefit. The ratio of these two factors constitutes the key tool for investment and management decisions (Commission DG Regional Policy, 2002, p. 6).

Cost has not only a strict financial meaning, but has a broader meaning as it also comprises the risk factor of the investment (Commission DG Regional Policy, 2002, p. 38). Apart from the cost of the investment implementation and maintenance, the final investment cost has to be calculated upon the potential cost that may occur in future, because of the risk
of the partial or total failure of such investment, defined by the financial goals of the investor. Risk is directly related to the overall investment environment, which includes political and legal factors (Kotler and Armstrong, 2010, pp. 94-111).

The benefit factor is calculated on the grounds of final Return on Investment (“ROI”), which comprises overall net returns throughout the life cycle of the investment (Friedlob and Plewa, 1996, p. 45). High-cost investments are usually based on the stability and steady rate of ROI. Such investments usually require a high percentage to be covered by loans therefore the ROI has to be stable and secure to ensure that the relevant loan instalments will be repaid.

According to this rationale, the effects of the application of EFD actually constitute a barrier to such investments. First, returns on investment from such facilities are calculated on the grounds of the personal economic use of these facilities by the owner (by using it only for its own business functions or by, commercially, granting access to competitors for a financial return) (Commission DG Regional Policy, 2002, p. 24). Second, such facilities are assumed to have an overall positive result in relation to the investor’s/owner’s overall efficiency, productivity and profit, as this facility is anticipated to offer a competitive advantage to the owner (Porter, 1985, p. 97). ROI therefore can be calculated on the basis of either a direct economic exploitation by renting the facility, or indirect exploitation by calculating the cost savings or generally the final financial value/effect of the competitive advantage offered (Commission DG Regional Policy, 2002, p. 36).

The fact that the investor may not finally be the sole user of the facility reduces or eliminates the effect of this competitive advantage. As this advantage is reduced, ROI is also reduced. Furthermore, the potential for the intervention by Competition Authorities (“CAs”) or Sector Regulators against the investor’s financial objectives constitutes an important feature of the
general legal environment of the investment.

Regarding the energy industry, most investments on the network and production units not only involve high cost, but they are also based on a complex and broad structure of finance. This involves long-term loan finance, direct equity investment and guarantees for loans from third sources (Commission DG Regional Policy, 2002, pp. 83-85). Moreover, the risk is usually substantially important, while any profit anticipated is long-term. This means that energy infrastructure is not anticipated to be profitable in the short-term but to yield fruits after many years, when the unit will be fully productive or when the infrastructure (e.g. network) will be able to be interconnected with other infrastructures not yet in existence. For energy production, the time horizon of financial analysis is 30-35 years and for energy transport and distribution 25-30 years (Commission DG Regional Policy, 2002, pp. 83-85). For some components of energy transmission, the time horizon could be even longer (Commission DG Regional Policy, 2002, p. 134). Therefore, any disruption regarding the exclusive and free use of the facility may result in serious problems for the long-term finance and management plan of the facility project.

(b) Incentives to Invest and Innovation

The wide application of such obligation for forced sharing of the products of high-cost and high-risk investments may also hamper any incentive to innovate and upgrade existing facilities (Bergman, 2000, p. 59). This can be particularly apparent in the Energy Market. It would be difficult for market players to make high-risk investments related to new and risky energy technologies requiring substantial investment on R&D, if there is a potential that other market players could take a free ride (Korah, 2007, p. 130). Competitors would be able to offer cheaper services and achieve the reversal
of the competitive advantage, as the owner would be obliged to incorporate the innovation cost into its financial results and this cost would affect its profitability.

Similarly, as competitors could gain access to the facilities relatively easily, they may find no reason to invest in similar or better facilities as they currently share the benefits without sharing costs and risks related to the investment (Petit, 2004a, p. 354).

In the *Trinko* Case, the Supreme Court (Opinion, p. 7) explicitly recognised that forced sharing of essential facilities may have negative effects on investment incentives.

‘Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.’

These problems become greater when considering that intellectual property rights are closely related to innovation and emerging industries. Forced licensing constitutes a great disincentive for a company to uptake the risk, burden and cost of developing a new technology.

(c) Broad Social and Economic Dangers

Forced sharing of facilities may also affect the technological change of a rapidly-developing industry. As companies will not be eager to invest in new technologies, the whole market development will be held back. Forced sharing therefore may delay development of future technology or give a serious long-term technological advantage to foreign firms. (Hewitt Pate, 2006). The whole technological background of the total market is weakened and this may have serious long-term social and economic implications.

This argument is affirmed by evidence coming from the broadband

‘No company will invest billions of dollars to become a facilities-based broadband service provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others.’

(d) Obligation to Continue Sharing

One particular aspect of EFD and forced sharing has to do with forced continuation of pre-existing voluntary sharing. In the *Aspen Skiing* case, (1985) the Supreme Court ruled that Aspen Skiing Co. violated antitrust law because it terminated its cooperation with Highlands Skiing Corp. (with which they were co-exploiting a facility) due to a dispute over profit sharing. After termination, the latter was left to exploit only one of the four mountains and its profits were subsequently reduced). Although pre-existing voluntary sharing constitutes an indication that the parties once had an economic reason for sharing, this forced continuation of a previously voluntary agreement can lead to the same results as forced sharing in first place.

In the *Trinko* case, the Supreme Court based its different ruling on the grounds that the *Aspen* case was distinguished because of the existence of a pre-existing relationship and the fact that *Aspen* refused to provide access at the retail price (Opinion, p. 9). Although the second distinction is important, the first one actually affirms the *Aspen* ruling concerning the existence of an obligation to continue granting access to competitors. However, the Supreme Court actually referred only to the specific features of *Aspen* and did not generalise about pre-existing sharing.

The facts in the *Aspen* case show that the owner tried to exploit its favourable position for raising the access price by “punishing” the competitor
with unilateral termination of the cooperation. However, according to one opinion, the Aspen decision was economically unjustified regarding the necessity of judicial intervention (Carlton, 2001). Aspen has created a doctrine that forced continuation of voluntary sharing actually causes the same dangers as common forced sharing about reduction of incentives to invest, collusion and weakening of long-term competition, as it creates free-ride effects. Moreover, such a doctrine could create a further danger, as parties would not only be prevented from investing, but from voluntarily sharing facilities with competitors and cooperating with other market players.

This danger was highlighted in Olympia Equipment Leasing (1986), in which the Court of Appeals accepted that it is not rational to oblige a company to continue sharing, after it has already aided its competitor to enter the market, but has found that such cooperation was harming its own individual interests. According to this decision (para. 14):

‘The FCC… did not require Western Union to foster competition by subsidizing its competitors’ selling costs. If Western Union had known that by taking steps to promote competition it would be laying itself open to an antitrust suit that might jeopardize its shaky solvency… it probably would not have taken them.’

This disincentive may actually lead to reduced innovation (Hovenkamp, Janis and Lemley, 2006, p. 1), especially in emerging industries such as energy, as the development of such markets is widely based on joint R&D, sharing of costs and risks and collaboration between firms.

(e) Collusion

Another possible danger of EFD concerns collusion, with similar costs and risks for all competitors using the facility under harmonised conditions
The higher the ratio between the access cost and risk, and total operation cost, the stronger the chance of collusion (Petit, 2004a, p.355). As the costs of competitors will be similar, they will have limited freedom and motives for competitive pricing and collusion, and market sharing will constitute easy solution for locking in profits. Moreover, the possibility of collusion will be strengthened by the fact that competitors using the facilities will be vulnerable to any decisions of the owners and by the fact that observance of collusive agreements and practices will be easily monitored by the parties of the agreement (Petit, 2004a, pp. 355-356; Commission, 2004, para. 49).

The *Trinko* case accepts and highlights the danger of collusion created by the application of EFD (Opinion, p. 8). This possibility becomes even stronger in the Energy Market, as it usually has oligopolistic characteristics, which make collusion tempting and easy for competitors (Petit, 2004a, p. 355; Commission, 2004, para. 50).

(f) Complexity of the Application of EFD and Potential Dangers

Deciding whether or not a forced sharing should be ordered involves a series of questions and an extended analysis of the total social and economic benefit of the suggested solution. Even if a Court is willing to order sharing, it will also have to order the terms under which this sharing will be implemented. According to *Trinko* (Opinion, p. 8):

‘Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing -a role for which they are ill-suited.’

This was an additional reason why the Supreme Court was unwilling to order sharing of the facility. It should be questioned whether EU authorities and
Courts show the same caution before ordering a grant of access and seriously consider the difficulties of their task, the whole context of each decision and the severity of any possible negative effects which may derive from an ill-considered decision.

2.B.II Between a Static and a Dynamic Model for Competition

(a) The Dynamic Aspect of Competition

Despite the above (see Ch.2.B.I), it is true that any unjustified refusal for access to essential facilities from the owner may also severely harm competition, as it will exclude competitive players from the market. The establishment of such a permanent competitive advantage for the owner will also reduce any incentives to invest as the owner will have no motive to invest if its market share is secure. The lack of access to the facility will constitute a great barrier either to the entrance to the market by other competitors or the increase of their shares. This lack of incentive will hinder innovation, as will forced sharing. Both forced sharing and RoA to essential facilities may therefore bring the same results and finally harm competition and the market.

The answer to this “dead end” is to accept that a proper balance has to be kept regarding the access of competitors to such facilities. This balance differs from free and unlimited grant of access to competitors to any kind of essential or even useful asset, and from the maintenance of competition contortions due to refusals of access. As analysed above (see Ch.2.A.I and Ch.2.B.I), both extreme solutions include a given social and economic cost as well as a benefit. What CAs or Sector Regulators (or Courts) have to do is to find the profit-maximising and cost-minimising point between these two extreme solutions. According to one opinion (Areeda, 1990, p.841):
‘You will not find any case that provides a consistent rationale for the doctrine that explores the social costs and benefits of the administration costs of requiring the creator of an asset to share it with a rival’.

This fact could be presented otherwise. CAs have a choice between actively intervening in the market to ensure that access will be granted to competitors or tolerating the monopoly of facilities’ owners. Both views promote competition; however each has a different focus. The first one promotes short-term static consumer welfare, while the second one focuses on long-term dynamic consumer welfare (Petit, 2004a, pp. 353-354).

In the first instance, CAs grant access to try to offer better prices and services. In the second, CAs could tolerate a temporary monopoly on facilities, in order to offer extra incentives for innovation and investment and thus it has to tolerate extra pricing by the facilities’ owners. Competition may remain strong under both choices; the difference concerns the particular aspect of competition that is strengthened. Under the static model, competition mainly focuses on gaining market share by competitive pricing; under the dynamic model, market players try to strengthen their position by creating the most effective and modern facilities (Van den Berg and Camesasca, 2001, p. 36).

It could be argued that the second solution may be more promising as in the long term, technological innovation will bring lower cost and therefore lower prices (see Schumpeter, 1942, pp. 87-105). However, it could also be suggested that this argument does not consider that the concentration of essential facilities within the hands of a few owners will provide motives for high prices and high profit ratio. Moreover, this argument is criticised as not taking into account many factors inside the firms (Sidak and Teece, 2009, pp. 598-599). Therefore, investment incentives are not always strongly related to
the market structure.

However, the value of dynamic competition, as a concept calling for the consideration of the long-term consumer welfare and of the changing nature of the markets, remains strong (Sidak and Teece, 2009, pp.603 and 631). The dual—static and dynamic—approach towards competition is related to the Kaldor-Hicks efficiency concept. According to this concept, an outcome is more efficient if it produces a “total surplus” for the actors of the market, meaning both market players and consumers. The benefit of the favoured parties can theoretically compensate those that are made worse off. Under a dynamic model for competition, long-term interests of consumers, deriving from the overall development of the market, may compensate the loss inflicted by higher present prices. (Van den Bergh and Camesasca, 2006, pp. 29-31; Jones and Sufrin, 2008, pp. 13-16).

(b) US Approach

In the Data General case (1994), the US Court of Appeal accepted the possibility that temporary distortions of free competition regarding exclusive use of IP rights may promote long-term market development and innovation of the market. The Supreme Court in the Trinko case seemed to accept this approach. For this reason, according to Petit (2004a, p. 355), the approach of the Supreme Court in the Trinko case is called “schumpeterian”. Moreover, the Supreme Court underlined that EFD can only be exceptionally applied in a few cases and pointed out the existence of a willingness to ‘achieve an anticompetitive end’ (Syllabus, b). On the other hand United States v Microsoft Corp (2001) stated that the context is only of relevant importance to the extent that it helps us understand the likely effect of the monopolist’s conduct. According to Trinko (Syllabus, c):
‘Traditional antitrust principles do not justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue.’

Also according to *Trinko*, in order that EFD can be applied to any case, it should be clear that the positive benefits of sharing outweigh negative effects on incentives to invest and that sharing should be implemented in a way that promotes the general interest (Hewitt Pate, 2006). This paper agrees with that approach and accepts (see Ch.2.B.II.a) that any such decision should be based on the balance between the positive and negative effects of each solution.

(c) EU Approach

On the other hand, EU antitrust law does not give serious consideration to the second approach concerning long-term competition.

In the Commission’s *Magill* [2001] and ECJ’s *IMS* Decisions (Geradin and O’ Donoghue, 2004, pp. 9-10) cases, neither ECJ nor the Commission focused on the issue of incentives to invest as a counter-argument for the application of EFD; in contrast, both these cases focused on the exclusion of competitors in the secondary market (Geradin and O’ Donoghue, 2004, pp. 7-8).

Even in *Radio Telefís (Magill)* ECJ case there were some concerns about the effects of forced sharing on investments. Advocate General Gulmann (Opinion 1994, para. 13 note 10) accepted the danger of reduction of incentives to invest, caused by a wide application of EFD - especially regarding IP rights:-

‘…to a certain extent copyright law... also serves to promote competition... copyright represented an incentive for the investment of intellectual and economic resources and thus helped to promote
technical development in the interests of society.’

In Commission Decision GVG [2003], the scope of EFD was even more expanded; the decision does not refer to non duplicable assets, as it was not seriously examined whether the competitor could establish its own network. Therefore, GVG highlights an even more reduced focus on incentives to invest. These cases lead to the argument that the EU’s approach towards issues about essential facilities is mechanic and does not take into consideration the whole spectrum of issues related to this concept (Ridyard, 2004; Petit, 2004a, p. 352).

This paper suggests that this approach was at least incomplete, especially in contrast with the American approach. The Commission seemed to understand only the static aspect of the problem. The fact that the EU extends this approach to intellectual property and to possibly duplicable facilities constitutes a strong indication of such unilateralism.

In the Bronner case, however, ECJ seemed to take into consideration the approach concerning investment incentives. Advocate General Jacobs especially highlights the importance of these incentives, suggesting that a balancing of free competition and investment motives is necessary and that temporary exclusive rights on essential facilities could possibly be tolerated for the sake of innovation (Opinion, para. 62):

‘... particular care is required where the goods or services or facilities to which access is demanded represent the fruit of substantial investment. That may be true in particular in relation to refusal to license intellectual property rights. Where such exclusive rights are granted for a limited period that in itself involves a balancing of the interest in free competition with that of providing an incentive for research and development and for creativity’.

Moreover, the Advocate General tried to justify the opposite ruling in Radio Telefis on the grounds of special circumstances that changed the outcome of
the balancing procedure (para. 63).

The Radio Telefis and Bronner cases are quite different in their philosophy towards the balancing of conflicting aspects competition (long term and short term) of competition. Bronner limited the scope of EFD and suggests two additional conditions which influence the outcome of the balancing between these conflicting objectives; duplicability and indispensability of the facility. According to these two criteria, the ECJ reached a different decision in Bronner, without however rejecting the rationale of Radio Telefis (Opinion, para. 63).

However, the Bronner case introduces an option for limiting the previous practice of automatic grant of access, especially apparent in GVG case, by basing such access on objective criteria. This can justify intervention into economic freedom of the facilities’ owners and for treating such access as being a necessary measure instead of being the standard rule.

Whether the EU starts to treat EFD as an exception to the rule instead of an equally-standing solution and whether it follows the recent US turn towards avoidance of forced sharing of facilities, it is important that the EU starts to give serious consideration to both aspects and all factors of this issue and implement a cautious analysis about the long- and short-term social and economic effects of such decision instead of proceeding to impetuous grants of access.

(d) Investment Ladders and Access Holidays

The EU, in order to address the conflict between the effort for open markets and the need for investments and innovation especially regarding developing markets, tried to implement a new methodology called “ladder of investment” (Cave, 2006, p. 223; Bronckers and Larouche, 2005, 1034; Cave and Vogelsang, 2003, p. 717). The main idea of this methodology is that a
facilities-based competition and open market can indeed be achieved in such industries, however gradually, as new entrants will be able to develop their own clientele, know-how of the market and infrastructure. Initially, new entrants are granted access to essential facilities and they are able to enter the market with low investments. However, the level of their access gradually changes. They are called to invest themselves in innovation and create their own infrastructure and their access to ready facilities is gradually limited or becomes expensive. In this way, new entrants can benefit from the infrastructure of established players and enhance retail competition. However free-ride effects are assumed to be limited, as this benefit is just temporary and investors will have to “climb the ladder of investment” and increase their effort for innovation, in order to become autonomous.

On the other hand, initial facilities’ owners are not threatened too much as their competitors’ access will not be permanent. Access is limited to the necessary extent, in order to promote innovation and open the market and the negative effects of EFD seem to be reduced under this rationalisation.

However, there are some concerns that this methodology lacks economic foundation (Bourreau, Doğan and Manant, 2009). It is also mentioned that the methodology is based on the presumption that regulators are able to successfully manage and form competition in developing markets, while the system may need continuous regulatory support. It is also possible that most new entrants will never be transformed to facilities-based competitors but will remain simple service providers totally dependent on facilities of others (Oldale and Padilla, 2004, p. 75-76; Renda, 2010, p. 23). Besides, if the terms of access under the different steps should be too favourable for the entrant, the market will face the same dangers as under a forced sharing approach (Nenova, 2007, p. 67). Finally, results from the application of this method to the telecommunications market in the US showed that the methodology was unsuccessful and did not manage to either
increase investments or help new entrants establish a permanent presence in the market (Crandall, 2006).

“Access holidays” are another tool aimed at combining incentives to invest with opening of markets to competition. This tool refers to a temporary period, during which a new facility remains free of access regulation, which is not avoided but delayed. After this period of freedom, facility owners are obliged to grant access to competitors. This methodology allows owners to compensate their investment cost during this free period and extract satisfactory profits. Investors may voluntarily share the facility with competitors and freely negotiate the price, while it is possible for them to secure the length of access holidays in advance. This methodology is assumed as profit maximising for the investor –providing serious incentives for innovation–, while it does not lead to permanent monopolies and allows gradual opening of the market to free competition (Gans and King, 2003, p. 168-176; Kitch, 1977).

The difficulties of this methodology particularly concern the issue of the calculation of the risk and the length of holidays by the regulators, while the whole implementation of such plan should be closely monitored by authorities, in order to prevent any extremities and abuses of this freedom.

2.B.III Conclusions

Finally, the conclusion should be reached is that there is no perfect solution that will create a free, developing and open market characterised by competitive pricing with the ability to attract new investments. Such results could only be achieved through carefully planned solutions consisting of different competition and sector-specific tools, including investment motives - particularly for innovation and pioneer technologies- such as “investment ladders” and “access holidays”. These solutions could offer a long-term social
benefit as well as incentives for cooperation between competitors and joint R&D, interoperability provisions, data exchange between users of the facilities, support of financial viability of new investments, provision of access to networks for new entrants under specific and detailed terms and an access pricing policy.

This policy will be able to combine fair allocation and sharing of maintenance and development cost and risk of the facility between all users (in order to face free-riding effects), reasonable profit for the initial investor/owner (in order to create incentives for innovation) and incentives for new users to gradually withdraw from the facility and create their own infrastructure. This mixed solution should be designed and implemented at a Regional or State level, in order to take into consideration particular features of any individual market, enable effective monitoring of its application and results, allow for flexibility and adjustments, where necessary, and permit reasonable and efficient definition of access terms and pricing.

2.C TPA and Refusal of Access

2.C.I TPA in the Recent Energy Regulatory Framework

(a) TPA: Scope and Content

TPA right is defined as the legally enforceable right of economically independent undertakings to access and use (‘Open and non-discriminatory access to the networks by those who do not own the physical network infrastructure’ according to Ofgem, 2010), in certain circumstances, various energy network facilities owned by other companies (Kotlowski, 2007, p. 101). This TPA right is established by FEP (Directive 96/92/EC Arts 24 and 7.5; Directive 98/30/EC Art. 7.2), SEP (Directive 2003/54/EC Arts 3.2, 14.3, 20 and
According to the EU, TPA right is a fundamental tool for opening the European Energy Market to competition and creating an open and non-discriminatory energy infrastructure (Directive 2003/54/EC Recital 6; Directive 2009/72/EC Recital 4). A TPA right is granted to market players in the gas and electricity production industry in order to give them access to the network systems that belong to other companies, for the transportation, delivery and trade of their product. This right corresponds with a relevant duty to perform on behalf of the network operator. According to the Commission, such rights are essential because when network owners or operators maintain strong relations with energy producers and suppliers (subsidiary companies or not), they usually avoid granting access to third parties, especially in areas where they will be in competition with the TSO itself, its trading branch or an affiliated company (Commission DG Competition, 2007). Without such right, energy producers cannot reach the final customer and cannot trade, as there is no alternative to an energy network. ‘TPA... is fundamental in facilitating greater competition and making Energy Markets work effectively’ according to Ofgem (2010). Moreover, the infrastructure subject to TPA (energy networks) is not easily duplicable as already mentioned (see Ch.2.A.III).

According to Art. 2 of Directive 2009/72/EC and Art. 2 of Directive 2009/73/EC, TPA rights are not autonomous as they are reserved only for “eligible customers”. According to Directive 2009/72/EC Art. 2(12) and 2009/73/EC Art. 2(28) ”eligible customer” is a customer who is free to purchase electricity/gas from the supplier of his choice’. Therefore the concept of “eligibility” and of the underlying energy supply contract
(Kotlowski, 2009, p. 5) limits and defines TPA rights.

TPA is distinguished between negotiated and regulated access. The FEP introduced them as equal alternatives. However SEP and TEP imposed regulated access granted by unbundled operators as the minimum TPA requirement, without forbidding a possible negotiated access, due to the fact that competition was not developing quickly in Energy Markets (Graper and Schoser, 2010, pp. 29-30).

(b) TPA and Unbundling

The EU favours OU as a means to succeed effective TPA and open and non-discriminatory access to energy network infrastructure. According to the Recital 11 to Directive 2009/72/EC:

‘Only the removal of the incentive for vertically integrated undertakings to discriminate against competitors as regards network access and investment can ensure effective unbundling. Ownership unbundling… is clearly an effective and stable way to solve the inherent conflict of interests and to ensure security of supply.’

According to Recital 6 of Directive 2009/73/EC:

‘Without… (effective unbundling), there is a risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks.’

In order to have a competitive Energy Market, barriers of entrance to the market should be reduced, so that new competitors could enter and liberalise the downstream market. As access to the network is an essential prerequisite for this entrance and as the network constitutes a natural monopoly, access to the network should open for new entrants. The strongest incentive to refuse access is a relationship between a network operator and an affiliated undertaking in the downstream market. Therefore, if this relationship ceases
to exist or becomes weaker, TPA will become more effective and competition in downstream markets will be strengthened for the benefit of consumers. Therefore, the issue of OU is strongly related to TPA.

2.C.II The Relation between TPA and Refusal of Access

The concepts of TPA and RoA have the same objective regarding Energy Markets: the liberalisation of access to networks and gas and electricity infrastructure facilities. TPA tackles the issue from a sector-specific point of view, while RoA views it from a Competition Law aspect. Moreover, TPA refers to secondary EU legislation (Kotlowski, 2009, p. 17), while EFD applies on the grounds of primary (Treaty) legislation. Both TPA and EFD seem to face the same aspects of the access problem: withdrawal of previous TPA rights, refusal in the first place and discriminatory refusal.

However, EFD’s scope of application is under question. The doctrine cannot cover the whole set of aspects that the general RoA concept of Art. 102 TFEU can cover. On the other hand, EFD offers to the RoA concept a valuable theoretical framework for the definition of abusive behaviours, although this framework is mostly indicative and not restrictive. The real issue has to do with the relation between TPA as a form of sector-specific secondary, technical and specialised approach and RoA as an approach of Competition Law and of general scope.

Both TPA and RoA are simultaneously broader and narrower than each other. TPA’s mission is to secure access for energy supplies to the networks and build the whole specific, however general, as it refers to a non pre-defined and open set of cases, and detailed framework of rules that will regulate and define this access with respect to some other objectives, such as security of supply and incentives to invest. On the other hand, TPA refers to a tailor-made, detailed, focused and specialised set of rules that have a very
specific objective: to promote the opening of the gas and electricity market during this transitory stage of post-liberalisation and development of open competition. The mission of RoA is narrower as it does not include the necessary framework and tools to regulate the access and define its terms. Its role is just to determine which cases constitute abusive refusal and discourage or stop this behaviour. Its scope of application is based on a case-by-case analysis and on mostly *ex post* intervention (in comparison to *ex ante* intervention of regulation) and its framework by its own nature cannot incorporate and take into consideration other objectives, such as security of supply and investment incentives (see below Ch.5.A.I).

However, RoA is also broader, as it can refer to an unlimited set of industries and can also be valuable after the liberalisation period, as it functions mostly as a corrective tool and less as a factor in promoting the market development (Hancher and de Hauteclocque, 2010, p. 13). Although it is not as flexible as regulation regarding the technicalities and the different objectives it can take into consideration, its flexibility lies in its open scope of application. Competition Law provisions are so general that their application tends to be narrow regarding the lack of sector-specific tools and framework that will enable their use for an extended intervention in order to open the market.

**2.C.III Conclusions**

This paper is of the opinion that the TPA SSRs and the RoA concept are complementary to each other. TPA is designed to impose the general duty to grant access and regulate its terms and conditions; RoA is designed to deal with distortions of competition and offer a tool of complete intervention in some specific cases. Generally, TPA framework seems more suitable for broad application regarding access to energy infrastructure and networks
issues due to its specific and detailed content. However, Competition Law may offer a deep intellectual framework for the design and application of TPA and relevant SSRs (Kotlowski, 2009, p. 27); Especially EFD and its basic set of conditions can provide a fundamental background in relation to key objectives and parameters of TPA.

2. D Final Conclusions

The whole conversation regarding combination of incentives to invest and opening of the market is based on the assumption that Competition Law is the correct framework to resolve such issues. However, this balancing procedure involves a number of extremely complex and technical issues, frequently having two-sided effects. Competition Law has neither the luxury nor the ability to address such issues. Although largely unheeded, at least concerning the EU, one of the most important points of Trinko (Opinion, p. 8) underlines this fact.

Antitrust tools do not seem sufficient to achieve the careful balance suggested above (see Ch.2.B.II.a). Moreover, EFD was not developed to address such issues. Neither CAs nor the Courts have the necessary knowledge and experience to conduct such planning and analysis. It is uncertain whether CRs are suitable for designing and transforming the market (Hancher and de Hauteclocque, 2010, p. 12) or for providing incentives for innovation (Kerf, Neto and Geradin, 2006, p. 5). Rather, CRs are designed to protect the competitive character of a given and usually mature, market structure, to fill gaps of SSRs and deal with issues not covered by the technical approach of the latter, such as collusion (Kerf, Neto and Geradin, 2006, p. 4). SSRs, on the other hand, are designed to make the market more functional, even by imposing new duties (Geradin, 2005, p. 65). The latter, therefore, is the suitable framework for ensuring incentives to
invest and combine them with an effort for the gradual opening of the market.

Regardless of whether the decision was correct or not, the Aspen Skiing case shows that this doctrine provided a given solution when applied to a case involving firstly leisure infrastructure based on mountains and secondly the unilateral termination of a cooperation after a pressure to increase access prices. The context of this case has no relation to the complex and extremely technical context of a developing Energy Market (involving issues such as access pricing, congestion management etc). Furthermore, the Court evaluated a given situation involving an individual relationship between two former partners. This is very different from trying to apply such a rationale to a whole market and to a generally defined and open set of individual cases in a way that actually turns this solution to an ex ante intervention, as a result of unconsidered and automatic application (see Ch.2.B.II.c). Therefore, the problem does not concern EFD itself but its simplistic and extremely broad expansion to a general set of cases as a tool to open a number of entire markets. This expansion is irrelevant to the actual meaning and mission of EFD.

Of course, Competition Law could also apply to a limited set of specific situations, where abusive exploitation of essential facilities is apparent. For example, it is possible to have a clear antitrust case (O’Donoghue and Padilla, 2006, p. 450; Commission DG Competition, 2005) when a company intentionally creates congestion in the network in order to continue its dominance in downstream markets, as in GDF and E.ON. cases (see Ch.3.B.II.a). However, in general, EFD and Competition Law do not seem to provide the correct framework fully to address the issue of balancing incentives to invest with the open market concept and thus to design solutions for the stable development of Energy Market infrastructure.

CHAPTER 3
COMPETITION AND SECTOR SPECIFIC RULES &
OBJECTIVES AS A CONTEXT TO EACH OTHER

In this chapter, it will be examined whether (and to what extent) Competition and Sector Specific sets of rules and objectives function as a framework to each other. On one hand, the thesis will investigate whether SSRs incorporate Competition objectives and rules into its framework (Ch.3.A); on the other, how Competition Law, when independently applied to energy cases, takes into consideration Sector Specific parameters (Ch.3.B). This will help in understanding how the concurrence of CRs and SSRs actually functions.

3.A Competition Law as a Context for Energy Sector Regulation

In order to examine the extent to which Competition and Sector Specific frameworks function as a context to each other, the thesis examines recent EU Energy Regulation incorporates Competition principles into its structure. Before, proceeding to this analysis, the framework of the TEP will be briefly presented.

3.A.I From Energy Sector Inquiry to the Third Energy Package

(a) Commission’s Position

According to the Commission, the major problems affecting the operation of Energy Markets (as indicated by the ESI) could be addressed by the concurrent application of SSRs and of CRs and the relevant Competition Law quasi-regulatory structural remedies (Jones, 2010, pp. 7-8; Cameron,
This conclusion underlined the value that Competition Law, and especially the relation between Competition Law and structural remedies, has for the Commission, concerning the long-term goal of the IEM (Lowe, 2008).

These conclusions preceded TEP and directed the content of this new regulatory framework, while they also widely influenced the Commission’s subsequent Decisions and Investigations on several Competition Law cases in the Energy Market. Based on ESI, the Commission defined the objectives of the new Sector Regulation, as shown in its Proposals (Commission Proposals 2007a, b, c, d, e).

(b) Key Provisions of the Third Energy Package

TEP was adopted by the European Parliament and the Council (in June 2009) and will be transposed by the MSs until the end of 2011. However, there are longer deadlines for several issues, such as unbundling, which expire in 2012, and for some issues in 2013. It includes two Directives on the IEM in electricity (Directive 2009/72/EC) and gas (Directive 2009/73/EC) respectively. It also includes a Regulation establishing ACER (Regulation No 713/2009) and two Regulations on conditions for access to the network for Cross-border exchanges in electricity (Regulation No 714/2009) and to the natural gas transmission networks respectively (Regulation No 715/2009).

Concerning OU in transmission, the Commission suggested it was one of the most important means of resolving problems in the Energy Sector related to vertically integrated firms (Cabau, 2010, pp. 90-94). This would mean 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 as the best possible solution, which would also lead to the dissolution of big “national

However, reaction, especially from the Energy Sector and the Council, which also criticised the economic effectiveness of OU (Hunt, 2008, pp. 65-69), resulted in the introduction of two alternatives.

The first is the solution of the ISO (Directive 2009/72/EC Arts 13, 14; Directive 2009/73/EC Arts 14, 15). This solution provides that vertically-integrated firms can retain ownership of the network infrastructure; however the management of the network will be assigned to an independent third party, a separate legal entity: the ISO. Investments on the network will be accomplished, not only by the owner’s funding but also by the ISO’s management.

The second alternative is the ITO model (Directive 2009/72/EC Arts 17 to 23; Directive 2009/73/EC Arts 17 to 23), according to which a company may still own both supply and transmission systems, however the transmission system is operated by a legally separate but integrated second company. Investments are still generally managed by the owner, but in order to exclude discrimination against competitors, one prerequisite is the existence of a compliance officer, who is assigned to monitor a specific programme of relevant measures against market abuse. This third option is even less radical than OU from ISO solution and generally resembles legal unbundling.

Furthermore, TEP provided for an alternative fourth choice for MSs. This option that may be referred as ITO+ or unbundling a la carte as MSs may keep their own system, provided it already existed in 2009, concerned a vertically-integrated transmission system and it included provisions that ensure a higher independence status for the operation of the system than that of ITO (Cabau, 2010, pp. 103-104). TEP also provides for unbundling of distribution system operators, however neither did the Commission propose, nor did TEP adopt OU as an unbundling form for distribution (Jones/ revised and updated by Cabau, p. 183; Directive 2009/72/EC Art. 26 and Directive
Moreover, TEP included the so-called “Gazprom Clause”, according to which companies from non-MSs have to apply the relevant unbundling rules in their country, before taking over European undertakings (Cabau, 2010, pp. 118-120). It also included a “level playing field clause”, which allows countries that implement full unbundling to block acquisitions from highly vertically integrated energy firms (Cabau, 2010, pp. 104-109).

TEP also replaces the European Regulators Group for Electricity and Gas (“ERGEG”) by the ACER (Ermacora, 2010, pp. 257-260). The former was an advisory body for the Commission. The latter’s role is to support the NRAs and to coordinate their operations; to decide on some technical issues and the regulatory regime concerning the infrastructure; to develop and monitor the non-binding framework guidelines, which set the standards for the various network codes; to prepare the network codes and to develop the rules of procedure of ENTSOs (Hancher and de Hauteclercq, 2010, pp. 4-6). ACER also has an advisory role, as on its own initiative or upon request it may give opinions and recommendations to EU institutions and will inform the Commission and the European Parliament on all issues falling within its competence. TEP establishes a new system of relations between ACER and NRAs, as the latter has to cooperate with the former, report to it and comply with its legally-binding decisions. The former (the Board of which consists of representatives of the latter) has to provide framework for cooperation for NRAs, assist them in sharing good practices, implement a peer review of their decisions and take the final decision, in case of disagreement between NRAs.

Another issue that the TEP addresses is the cooperation between National TSOs. European Networks of Transmission System Operators for Gas/Electricity (“ENTSO-E” and “ENTSO-G”) are a new form of cooperation of TSOs in Electricity and Gas Sectors (Regulation No 714/2009 Art. 5(2); Regulation No 715/2009 Art. 5(2); Regulation No 713/2009.) They are official
bodies assigned to develop a 10-year network development plan for the EU, develop European network codes, based on the framework guidelines developed by ACER, and generally organise and supervise network management, planning and access conditions across borders and cooperation between TSOs both on Regional and European levels (Ermacora, 2010, pp. 267-269) ENTSOs, regarding the implementation of the network codes and of the development plans will be monitored by ACER.

Moreover, the TEP provides for a new system of powers and competencies regarding NRAs. The independence of NRAs from politics and industry is underlined (Hancher and Larouche, 2010, p. 18) and now the goal of the NRAs is to promote competition, environmental sustainability and security in the IEM and to strengthen cooperation regarding Cross-border issues, by implementing decisions of the Commission and ACER. NRAs (and not a centralised European Authority) apply SSRs (in principle), contrary to the Competition Law field, where the rules are applied by NCAs, National Courts and the Commission as well.

The organisation and establishment of Sector Regulation has also been changed. Non-binding framework guidelines and binding network codes are adopted, in order to regulate a series of issues of the Energy Market, such as TPA, capacity allocation, congestion management, transparency, balancing, harmonisation of tariff structures, energy efficiency, network connection, interoperability, data exchange, energy trading, emergencies, network security and reliability (Directive 2009/72/EC Art. 8; Directive 2009/73/EC Art. 8). Framework guidelines and network codes are based on the annual priorities that the Commission sets. Codes have to follow the guidelines, while guidelines set the general framework of principles, which the latter implement in detail. The main aim of framework guidelines is the opening markets to effective competition and making them functional, while the main objectives of the codes are the promotion of cooperation between TSOs,
effective Cross-border access to networks and a combination of National and Regional specificities with general European goals (Ermacora, 2010, pp. 269-271; Graper and Schoser, 2010, pp. 496-497 and 506-513).

Therefore, the TEP establishes a new system of allocation of powers and duties and of decision making, regarding Sector Regulation in Energy Markets. The roles of NRAs, TSOs, ENTSOs, ACER, the Commission and MSs are interrelated and all together form the relevant regulatory framework and the gradual regulatory convergence. Cooperation between all these different factors is a prerequisite for the success of this new system (Hancher and de Hauteclouque, 2010, p.3).

Regarding retail markets, the TEP includes many provisions that focus mainly on consumers’ protection. There should be no charges for changing supplier within three weeks, while the consumer should have access to an extended set of information. Moreover, smart metering systems, which allow the active participation of the consumers in the market, should be introduced and they should be widely applied till 2020. Additional rules for the protection of vulnerable customers are also included.

Finally, TEP includes several derogations, concerning isolated markets, small isolated systems, emergent markets where gas has recently been introduced and take-or-pay contracts (regarding TPA).

3.A.II Case-Study

The Directive 2009/72/EC (mentioned in this sub-chapter as “Directive”) will be used as a case-study for underlining the key role that the EU reserves for Competition Law in relation to the regulation of Energy Markets and its primacy in relation to Sector Regulation as well as showing that SSRs do actually take into serious consideration the objectives and principles of Competition Law. Besides, Directive 2009/73/EC about gas largely shares
many common characteristics and provisions, and for the scope of this study there is no point to expand the examination to it.

The importance of securing competition is emphasized even by the Directive’s Recital, especially in relation to TPA (Recital 8; Recital 37; Recital 57). The fair competition objective is also underlined (Recital 20) in relation to long-term contracts and exclusivity clauses (see Commission Decisions *Long Term Electricity Contracts France/EDF* [2010] and *Distugas* [2007]). Competition is also defined as a key objective of Energy Regulators (Recital 37 and Art. 36 (g) and authorisation procedure (Recital 47). Moreover, the Directive highlights the upper hierarchical position of Competition Law as according to Recital 37 (see also Directive 2009/73/EC Recital 33):

‘Those provisions (about the duties and powers of energy regulators) should be without prejudice to both the Commission’s powers concerning the application of competition rules including the examination of mergers with a Community dimension, and the rules on the internal market such as the free movement of capital.’

According to Recital 61 (see also Art. 37.j), NRAs have the duty to report to the Commission and CAs any cases of competition infringements.

SSRs are designed to specify and provide for the general and applied implementation of Competition Law in Energy Markets (Art. 1 Directive 2009/72/EC). Although SSRs also have as their objective the provision of incentives to invest and the promotion of market and network development, Competition Law provisions and objectives are defined as an upper limit to the freedom of SSRs to regulate the market for the benefit of these other objectives (Art. 3.14). ITOs (Art. 17.c.i), TSOs (Art. 18.5) and DSOs (Art. 26.3) have to fulfil their duties with respect to Competition Law principles and objectives.

As a result, the National Competition Authorities (‘NCAs’) have an
important role in Energy Markets; an active role (see also Art. 40.1) parallel to that of Sector Regulators, having to cooperate with the latter and consult and inform them regarding several issues of Energy Market (Art. 13.6, 36, 37.1.j,k,o). CAs have extended rights of intervention into the Energy Market. Similarly, NRAs and other Sector Regulators also have the power and duty to actively secure competition by conducting investigations concerning competition effectiveness (Art. 37.4.b) and thus by cooperating at European and Regional level (Art. 38.2.a).

3.A.III Conclusions

All the above prove the key role of Competition Law as an element of the context and as an orientating factor of Energy SSRs. Competition Law provides a fundamental conceptual background for the implementation of SSRs and specific objectives that form the core of the regulation’s goals and mission. Competition principles not only constitute a priority of Sector Regulation, and not only influence – to a great extent – the actual content of SSRs, but also set the binding limits for the regulation’s scope and freedom of intervention, in order to develop the Energy Markets. What is not supported here, however, is the premise that all the other objectives of Sector Regulation such as security of supply, universal service and development of capacity are assumed as inferior. What is important is that way in which these objectives are pursued has to comply with the general Competition principles and the sector’s general goals have to abide by the general and long-term EU Treaties’ objectives, and opening of the markets to free competition.

These conclusions are also underlined by other sets of rules of the Energy Market, such as Emission Trading Scheme Directives (Directive 2009/29/EC and Directive 2003/87/EC). Avoidance of distortions of competition are defined as one of the key parameters of this scheme
(Directive 2003/87/EC Recital 7 and Art. 24.1; Directive 2009/29/EC Recitals 16, 17, 19, 23, Arts 10.c.3 and 24.1), as the objective is to harmonise the MSs’ schemes, in order to secure equal competition within the EU (Directive 2009/29/EC Recital 28). These rules also explicitly provide that the implementation of state aid Treaty rules (Arts 107 and 108 TFEU, former Arts 87 and 88 TEC respectively) is not affected by the scheme (Directive 2003/87/EC Recital 23), while the “without prejudice to the Treaty” provision is also apparent (Directive 2009/29/EC, Arts 9.1, 28.5 and 29.2).

3.B Sector Parameters as a Context for Recent Competition Law Cases

The research proceeds to a reverse analysis in comparison to Ch.3.A. A series of recent competition cases of the Energy Sector will be examined, in order to investigate whether the Commission has taken into consideration the set of SSRs, structure and priorities as a context and how the findings of these cases have influenced the relevant developments of Energy Regulation.

These cases were dealt with by the Commission, under its authorities regarding the protection of free competition and especially enforcing CRs and specifically Arts 101 and 102 TFEU (ex 81 and 82 EC respectively). They generally coincided with the whole process towards the TEP. It is apparent that they were related to it and affected by the overall process towards the establishment of an efficient IEM. The cases refer to a wide range of abuses, such as foreclosure of markets by long-term contracts, foreclosure of networks and RoA to facilities, discrimination between National and Cross-border energy transactions, market manipulation and market sharing.

3.B.I Structural Remedies as a Result of Commitments
All of these cases were resolved by commitments that included structural quasi-regulatory remedies (ranging from release of capacity to divestiture of assets – unbundling - and from prohibition of contracts of extended duration to division of National networks). The Commission increasingly seeks to close Competition Law cases under investigation by means of binding commitments offered by the investigated companies, pursuant to Art. 9 of EU Regulation 1/2003. According to this Art., the company may offer commitments to remedy competition concerns identified by the Commission. If these commitments are accepted, the case can be closed without the adoption of an infringement decision and the imposition of fines. Commitments may be behavioural and structural but they cannot involve payment of money or fines.

The method allows (Georgiev, 2007, p. 1005) an end rapidly to be brought to the conflict between the undertakings and the Commission, without the need to prove abuse and with a low risk of an appeal against the decision and its remedies. It also enhances the flexibility of the application of Competition Law, as it enables an open set of variable and far-reaching remedies.

However, the wide application of the method reduces legal certainty, which is crucial in a Sector under liberalisation such as Energy (Hancher and de Hauteclercque, 2010, p.12). Moreover, there is the problem that undertakings may frequently offer disproportionate commitments, in order to avoid the (excessive) fines to which they might be subject under the alternative, “ordinary” procedure (Wils, 2006, p. 355). These problems should be taken into consideration when reviewing Competition Law as a framework for pursuing objectives falling in the area of SSRs.

3.B.II Four Issues
The cases mentioned below, are presented as examples and do not claim to be exhaustive on the issue of the degree to which recent competition cases in the Energy Sector integrate Sector Specific parameters. However, their examination provides some conclusions on this matter. The research focuses on four key issues addressed by the Commission in these cases: Long-Term Capacity Agreements; Strategic Underinvestment; Market Manipulation; and Open Markets and Discrimination.

(a) Long-Term Capacity Agreements

Regarding the issue of long-term capacity contracts, the Commission seemed to adopt a similar position to that followed in the *Distrigas* case [2007] (see also Bundeskartellamt Decision *E.ON/Ruhrgas* [2006]), on the issue of long-term downstream supply contracts.

The *Distrigas* case established the so-called foreclosure model for long-term contracts. In principle, long-term contracts do not violate Art. 102 TFEU (formerly 82 EC). However, under specific circumstances, long-term contracts may bind large consumers and forbid them to change suppliers for an extended period, thus refusing access to a significant part of the market for that period. These contracts may impede market access to other competitors, create a barrier for new entrants and lead to an abuse according to Art. 102 TFEU, given that the undertaking under question has a strong position in the market. The relevant investigation lies in the following main issues: duration of the contract, market position of the company, exclusivity of the contractual relation or quantity forcing, market coverage by these long-term agreements and efficiencies. The market coverage factor should be assessed more strictly in highly-concentrated markets under liberalisation (de Hauteclerc, 2008, p. 102).
The Commission accepted a standard rule that the duration of long-term contracts with large consumers should not surpass five years and long-term contracts should not occupy more than 70% of the total supply of the company (see also Commission Decision *Scottish Nuclear* [1991], para. 40; Commission Notice-Guidelines 2000, para. 4; Directive 2009/73/EC Art. 48 about derogations concerning take-or-pay contracts in the Gas Sector.) This rationale and approach were replicated in the *Long Term Electricity Contracts France/EDF* Case (Commission Decision [2010]; Commission Notice 2009b).

The *GDF* (Commission Decision [2009]; Commission Notice 2009a; Commission Press Release 2009b) and *E.ON. Gas* (Commission Decision [2010]; Commission Notice 2010) foreclosure cases suggest that the Commission applies the *Distrigas*-model to energy networks, imposing the duty that operators have to limit their capacity reserves for incumbent undertakings. The Commission developed a parallel view on the issue of access to networks to that of access to customers.

Issues about capacity management fall within the scope of Sector Regulation according to both TEP (*e.g.* Directive 2009/72/EC Arts 12, 13, 17, 37) and SEP (Scholz and Purps, 2010, p. 49) and the competence of NRAs (Directive 2009/72/EC Art. 37.b).

However, none of the energy packages intervened in the issue of long-term transportation contracts (Scholz and Purps, 2010, p. 49). The Commission, however, decided to intervene by applying CRs to an issue that is clearly not regulated by SSRs. It could be supposed that this was a weak point of Sector Regulation, which Competition Law could cover. However, this argument should be based on the assumption that this non-intervention was not an intended choice of the EU (because if this issue was intended to remain unregulated, then the Commission clearly neglected an important choice of Sector Regulation). What should be investigated is whether long-term capacity contracts constitute an acceptable practice by Sector Regulation.
First, long-term contracts do not oppose competition *per se* but only under some specific circumstances (Hancher, 2009, p. 2). Second, Energy Sector Regulation accepts long-term capacity contracts in a series of provisions. Regarding gas in particular, the Commission accepts such long-term upstream contracts as related to gas import contracts, in order to facilitate security of supply (Scholz and Purps, 2010, p. 49; Commission Staff Working Document 2009, pp. 27-28). Moreover, Art. 27 of the Directive 2003/55/EC and Art. 48(1) and Art. 35(1) Directive 2009/73/EC accept the possibility of denying access to third parties, in order to facilitate the fulfilment of contractual obligations under take-or-pay clauses (agreements in which buyers have to pay a certain amount even if they do not acquire certain minimum quantities of gas) of long-term gas import contracts, when the undertaking faces economic difficulties regarding the fulfilment of its duties.

Furthermore, Energy SSRs include detailed provisions in order to secure that long-term capacity contracts will not result in an unjustified market foreclosure (see for example Directive 2009/73/EC, Arts 33.1, 3, 4, 41.1.j,k,m,n,r,s and u, 41.3.a,b and e, Art. 41.5.a,b,e,f and g, and 41.6,9,10). The Gas Sector Regulation explicitly describes the factors that should be taken into consideration regarding the approval of derogations: these factors concern competition issues as well as Sector economic and market parameters (see Directive 2009/73/EC Art. 48.3). The issue of long-term capacity contracts is related to some important objectives of Sector Policy and regulation and has to do with efficiency of the relevant regulatory framework. This systematic observance of Sector Regulation shows that there is an important structural difference between long-term supply and long-term capacity agreements (Scholz and Purps, 2010, p. 49) and an unconsidered expansion of *Distrigas* model and the relevant concepts of Competition Law regarding exclusivity clauses and market foreclosure would neglect some truly important parameters of the sector context.
In the *GDF* gas market foreclosure case the Commission considered that it was abusive for a firm to reserve its own pipeline capacity for its sole use, and established the principle that it is abusive for the dominant shipper to reserve capacity in its pipelines for a long period; an approach that was replicated in the *E.ON.* case.

It is apparent that this principle is too binding for undertakings and imposes severe restrictions on the management of their own network, restrictions that do not take into consideration Sector Specific factors. Long-term capacity contracts seem to be intentionally left unregulated by SSRs and this may be the result of the systematic analysis of the whole framework of provisions of Sector Regulation. As regulation chose not to intervene into these contracts, this also applies to the issue of mere reservation of capacity for individual use of the undertakings themselves. The Commission seemed not to give serious consideration to this context by preferring a strict Competition Law approach about foreclosure, which was not proved to be combined with efficiency issues.

(b) Strategic Underinvestment

Regarding the issue of strategic underinvestment, the Commission accepted in the *ENI* and *GDF*) cases – where the undertakings did not expand import gas facilities to fully meet demand – that the behaviour of the companies constituted an abuse of competition on the grounds of market foreclosure and refusal to supply (see also AGCM Decision *ENI Trans Tunisian Pipeline* case [2006], upheld in principle by Tribunale Amministrativo Regionale del Lazio Decision, Case no. 3582/2006 [2006]). The Commission, therefore, imposes on undertakings holding infrastructure a duty to invest on the expansion and development of their facilities in order that the latter will be able to cover actual demand. This duty derives from the general concept of forced sharing.
of facilities and constitutes an expanded version of EFD; owners of facilities not only have to grant access to their facilities to third parties, but also have to spend resources in order to further facilitate and enlarge this access. The Commission therefore moved from forced sharing to forced investment as a solution for energy infrastructure. It could be argued that this version of EFD takes into consideration the important issue of incentives to invest and tries to resolve it.

However, this paper disagrees with such an argument. As already analysed (Ch.2.B.I), forced sharing and a wide application of EFD creates a disincentive to investment and innovation for both long-term and short-term (in this case in the form of collusion, Petit, 2004a, p. 355) competition (for further analysis see Bergman, 2000; Korah, 2007; Hewitt Pate, 2006; Hallman and McClain, 1999; Hovenkamp, Janis and Lemley, 2006). This danger may be even greater regarding forced investment. The owner of a facility will not only be obliged to grant access to competitors, without securing its own profits and investment, but will also have a future and permanent duty to continue investing and expanding the facility. This largely discourages investment, as it turns competitive advantage to disadvantage, it wrongly and disproportionately allocates the investment risk and cost, it provides no incentive to third parties to invest for the creation of their own infrastructure and consequently the development of the overall market, it upgrades the free-riding effect as the free-riders will be also allowed to demand developments from the owner, and finally makes a decision of investment on infrastructure unreasonable. Furthermore, such an approach totally neglects the correct argument of Supreme Court in Trinko case.

If the Commission or NCAs are able to order forced investments they become something even more than central planners (see Ch.2.B.I.f); they become autonomous and supreme entrepreneurial decision makers for the energy industry. CRs become tools of long-term market restructuring and
voluntary investment decisions are replaced by forced spending on infrastructure development; a spending that highly resembles taxation.

In a free economy no company is obliged to invest (for a general analysis on negative freedom not to invest see Scholz and Pumps, 2010, p. 48). However, even if such a duty is accepted under specific circumstances it is very difficult to apply, as a rational investment decision should be based on a cautious hypothesis about risk and cost and should be clearly related to specific anticipations about market evolution. A criterion about underinvestment could consider whether the investment degree is justifiable by the company’s financial status. This criterion is rather partial and general and can only be based to a comparative methodology vis-à-vis relevant undertakings. However, this comparison should be made between similar cases using similar undertakings and similar market conditions and therefore may be difficult to apply.

Therefore, regarding strategic underinvestment, the Commission seemed to neglect again the sector-specific context and the particularities of the industry and its intervention seemed presumptuous and unrelated to sector general objectives, other than those related to free competition.

(c) Market Manipulation

E.ON. proceeded to withdraw generation capacity that was profitable, although not profit maximising. The withdrawal led to a significant increase in spot prices, which also affected forward prices. An increase in price directly compensated for the loss of profit caused by this withdrawal, which in turn increased profits for the remaining generation plants. The Commission concluded (German Wholesale Electricity Market case [2008]) that this was a case of clear market manipulation. E.ON. committed to a large divestiture of generation capacity (Commission Press Release 2008). According to the
Commission, limiting production generators can force recourse to more expensive plants in the merit order and thereby can lead to a manipulation of market outcomes to the prejudice of the consumers.

The fact that E.ON.’s withdrawal was assumed to be abusive, because it did not produce as much as it could, may seem difficult to understand. It could be argued that the limitation of production resulted in unfair pricing, because the undertaking limited generation to a profit-maximising level.

The ECJ has stated (United Brands v Commission [1978], para. 250), with regard to unfair pricing, that ‘charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse’. Moreover, according to the ECJ (para. 252):

‘…whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products…’

Thus, the ECJ accepted a benchmarking methodology for the investigation of unfair pricing, but also leaves an open character to the methodological tools that may be used for this investigation. It is difficult, therefore, to understand how E.ON.’s behaviour could be defined as unfair pricing, because the difference between costs and price for each generation plant was not excessive and the competing products could not be compared, as they functioned under a different cost.

According to this rationale, the abusive outcome of the withdrawal is justified by three factors: the current dominant position of the operator, the size of the withdrawal and the elasticity of market demand. Thus, the very structure of the market is the parameter according to which a production limitation may be abusive. The equilibrium price when all plants in the market are operating at their full rating is equal to the marginal opportunity
cost of consumption. As the demand is inelastic, the production not abundant, with each source offering a specific production under a specific price and other sources unable to reduce prices in order to cover the deficit, any reduction in any source will inevitably move the demand curve, thus raising the cost. As it is a firm with market power, E.ON was able, by the nature of its assets, to withdraw (even profitable) generation capacity to raise prices and thus could increase price by reducing output. If E.ON had no market power, it would take prices as a given and would produce up to the point where price equals marginal cost. E.ON had the advantage of being able to act opposite to the market, i.e. by increasing price when the reduction was low until the price reaches a limit, when it could increase output again (Brennan, 2008, p. 352).

In conclusion, the characterisation of a limitation of production as abusive is an issue that should be decided after taking into consideration the defining parameters and the structure of the market in each case. The Commission seemed to have taken into consideration these factors in this specific case. However, it is questionable whether the general approach of CRs is the most suitable context, in which to consider these factors and apply a policy for the treatment of profit-maximising production limitations. Also, such decisions also bear the element of central production planning, which is rather a field of SSRs.

(d) Open Market and Discrimination

The final examination here will be of the Commission’s approach towards the Swedish Interconnectors case and the extent to which it took sector context into consideration in a case that concerned discrimination of consumers and segregation of the internal market. The Commission judged that TSO’s choice to reserve domestically produced electricity for domestic consumption as an
abuse of the dominant position of the TSO on the Swedish electricity transmission market, by discriminating between domestic and export electricity transmission services thus reducing net consumer welfare and distorting generation and network investments signals (Commission Press Release 2009a).

The TSO argued that the restraints it imposed were necessary for the management of electricity congestion within the National distribution network and to balance the price difference created due to the fact that most of production takes place in the north while most of consumption takes place in the south of the country. What SvK actually tried was to keep Sweden as one price zone (Kivipuro, 2008, p. 109). The approach of SvK was a natural result of traditionally electricity networks being created to serve the needs of a given National supply Market, while they also belonged to a vertically integrated – and usually public – undertaking. The common case was that these networks were mainly orientated towards the country’s border and that just a few interconnectors linked the National network with those of neighbouring countries (Scholz and Purps, 2010, p. 43). It is rational, therefore, to anticipate that a National TSO will give a priority to the congestion management and the security of supply of the part of the network that constituted the old National Market. It is also easy to understand why the National TSO tried to keep the country as one single price zone, because of apparent political, social and economic National factors.

The Commission faced a conflict between its goals of an open IEM and geographical factors and local circumstances. In this case, the market definition was not wrong, as the Commission correctly recognized the Swedish market as the geographically-relevant market (para. 18), while also recognising the existence of a second geographic market relating to Cross-border transmission (para. 20). The fact that the Commission focused only on this second market and not on the possible effects on the first market suggests
that the Commission’s approach was one-sided as it apparently neglected these local sector factors and geographical parameters in order to apply CRs as in a common discrimination case.

Moreover, in this case, the need for a unified approach to National and Cross-border congestion management constitutes a major point and the discrimination between National and Cross-border transactions are seen as opposing the establishment of a consolidated European Transmission Network. The case also underlines the need for coordination among the different European policy levels in order to establish a Single IEM.

The Commission used Art. 102 TFEU, in order to ask for more structural remedies, ie the subdivision of the Swedish network into two or more bidding zones and the abolition of the curtailing of trading capacity. However, the Commission assessed the issue of abuse on behalf of the TSO, without referring to the SSRs’ framework, while it left out any efficiency issues – which are of great concern in Sector Regulation (see Geradin, 2006, pp. 35-37)–, in order to identify discrimination against Cross-border transactions. In this way, the Commission interferes in the role of the Sector Regulator and EU Competition Law functions independently and as a substitute for Sector Regulation.

3.B.III The Issue of Ownership Unbundling as a Remedy Imposed by Competition Law

The cases mentioned above (see Ch.3.B.III.a-d) were presented as examples to demonstrate the tendency of the Commission to neglect sector factors and focus solely on the strict application of CRs and on the open-market objectives, regardless of the sector-specific context and circumstances of each energy case.

It would seem, however, that the most apparent example has to do
with the application of OU, forced divestiture of assets and networks and other relevant structural remedies (e.g. the forced subdivision of Swedish electricity network) as Competition Law measures and tools in, amongst others, most of the previously-mentioned (Ch.2.A.III and Ch.3.B.II) energy cases (e.g. German electricity wholesale market, German electricity balancing market, RWE, ENI).

However, these remedies, as imposed by the Commission as Competition Law remedies, lead to obligatory and binding solutions with serious long-term effects for the undertakings – e.g. full OU, although such remedies were not available as an option in existing SSRs (SEP) and are included as just the default option, and not as an obligatory measure-in the TEP, which will be applied in a few years. In other words, in the above cases Commission actually implemented SSRs –or rather remedies that fit in sector-specific regulation- by means of and under cover of Competition Law.

It will be reiterated that this sui generis approach will eventually lead to two parallel systems, methodologies, frameworks, procedures and sets of rules and remedies within the IEM (see below Ch.5.B.II). This situation will not provide legal certainty but will create confusion, risk and inconsistencies affecting investment decisions, Sector Regulators’ approaches, network players’ (e.g. TSOs’) practices and MSs’ policies. This fact will not help either the promotion of the objective of market development or the goal of open market.

3.B.IV Conclusions

The Commission, correctly assuming that networks constitute essential facilities for Energy Markets, repeats the wide application of EFD (although this is criticised as automatic and mechanic; see Ch.2.B.II.c), as it did in relation to communications, transports and other sectors. This promotes easy
access of competitors by using Competition Law tools and especially by often choosing unbundling as a means to provide this access.

However, as already analysed, EFD is largely criticised in that it may drastically reduce incentives to invest, hamper innovation and finally harm long-term competition (Ch.2.B.I). It has also been shown (Ch.2.B.I.a) that in developing industries such as Energy (which involve high development costs, long-term cost recovery and high risk), a wide application of forced sharing of facilities becomes even more dangerous. A false dilemma between open markets (based on access) and a developing market (based on incentives to invest) is presented. This dilemma can be translated into a conflict between long-term and short-term competition (see Ch.2.B.II.a). However, previous analysis showed that both solutions offer a specific benefit, but also carry serious dangers and cost (Ch.2.A and Ch.2.B.I). Therefore, it is a false dilemma, as the main danger hides in the unilateral focus on one of these approaches. The correct solution concerns the combination of the two concepts and the balance of cost and benefit in the most efficient and (socially and economically) profitable way. Such solution involves a cautious analysis of the whole context of the case and the market and careful management and regulation of competition.

The Commission’s practice regarding Energy Markets also ignores the inherent dangers of its own practice. This is highlighted by the fact that the Commission’s approach is implemented by the use of a permanent and severe measure such as unbundling (more severe than forced sharing). This approach points out the dangers (regarding dynamic competition) of the combination of EFD and unbundling.

3.C Final Conclusions
SSRs extensively incorporate CRs and Competition objectives as well as other (Sector Specific) objectives. The Sector Specific framework applies without prejudice to the rules of the EU Treaties – Competition Law being a key part thereof – and is generally designed, in order to serve a broad variety of objectives related to the IEM.

On the other hand, the Commission – although played an important role in designing the TEP - did not seem to take into consideration the market environment and the particular sector factors of each case or the content of SSRs in its recent decisions.
CHAPTER 4

RELATION BETWEEN FUNDAMENTAL EU RULES,
OWNERSHIP UNBUNDLING & STRUCTURAL ANTITRUST
REMEDIES

This chapter will examine the issue of OU and forced structural (divestiture) remedies (see also Ch.3.B.III) referring to transmission networks (RWE, ENI, GDF foreclosure and German electricity balancing market cases) and to generation capacity (German electricity wholesale market case) imposed in a series of recent Competition Law cases of the Energy Market resolved by the commitments procedure (see Ch.3.B.I) and the possible existence of a series of legal obstacles to such remedies. The reason for this analysis is the investigation of compatibility of the relevant Competition and Sector Specific solutions with General EU Treaty’s rules (other than these referring to competition) and fundamental rights.

OU and divestiture of assets as an antitrust remedy share a common basis in that they lead to the transfer of corporate assets to a third party. For this reason, the legality of these remedies will be examined in the same way as the legal enforceability of OU (Pielow, Brunekreeft and Ehlers, 2009, pp. 96 and 109).

However, 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 CRs in specific cases where the 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. Regarding TEP, unbundling constitutes a SSR, intended for a general and not pre-specified group of undertakings. Second, in the context of
TEP, OU is established as the basic and default solution for transmission. However a number of alternatives exist. In the antitrust cases, divestiture was imposed as an obligatory remedy.

Literature suggests that there may be a series of legal objections against OU: (a) the issue of compatibility with the free movement of capital and the freedom of establishment (Hunt, 2008, p. 73; examined below in Ch.4.A); (b) Art. 345 TFEU (former Art. 295 EC) (Pielow, Brunekreeft and Ehlers, 2009, p. 111; Pielow and Ehlers, 2008, pp. 1 and 13; Hunt, 2008, p. 71; Lowe, Pucinskaite, Webster and Lindberg, 2007, p. 33; examined below in Ch.4.B); (c) the issue of ownership and other fundamental rights under the ECHR and EU Law (Pielow, Brunekreeft and Ehlers, 2009, p. 109; Pielow and Ehlers, 2008, p. 18; Hunt, 2008, p. 73; Lowe, Pucinskaite, Webster and Lindberg, 2007, p. 33; examined below in Ch.4.C); and (d) the issue of proportionality, which is linked with all the restrictions of the above freedoms (examined below in Ch.4.D). The issue of the EU’s competences (Pielow, Brunekreeft and Ehlers, 2009, p. 102; Pielow and Ehlers, 2008, p. 9; Hunt, 2008, p. 70), although indicated by the literature will not be examined in this thesis, as it does not refer to the character of the measures but to the procedure of their adoption.


4.A.I Content of the Freedoms and Relation between them

Freedom of capital movement (Art. 63.1 TFEU/ former 56 EC) and freedom of establishment (Art. 49 TFEU/ former 43 EC) constitute two major principles of EU Law. Both freedoms focus on the freedom of a person to invest in other MSs. Although the first freedom refers to a broad category of capital movements (see Directive 88/361/EEC Annex I; ECJ cases, *Fidium Finanz*
the concept of the right of establishment involves the actual pursuit of an economic activity through a fixed establishment in another MS for an indefinite period (ECJ, *Factortame* [1991], para. 20). According to an opinion expressed by Advocate General Alber [1999] in ECJ, *Baars* case [2000] (para. 26) these two freedoms can be distinguished the issue of whether the investor starts becoming involved in the undertaking in question, rather than just investing in the undertaking’s capital/definite influence criterion (Hunt, 2008, p. 79). Recent ECJ case law (*Lasertec* [2007] and *Holbock* [2007] cited in Hunt, 2008, p. 80) has also taken into consideration the purpose of the legislation, when trying to determine the freedom within which this legislation falls (legal purpose criterion).

Recent literature and case law accept that both principles can apply simultaneously to most cases, except for those where it is clear that the situation in question has a definite influence on the undertaking (Opinion of Adv. Gen. in ECJ, *Maria Geurts* [2007] cited in Hunt, 2008, p. 81). Generally, concerning investment in the energy infrastructure, each restriction to the freedom of establishment will also constitute a restriction to the capital movement, as capital movement is a condition to investing in an energy asset, taking control of it and exploiting it. However, not all restrictions upon 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. It is irrelevant to this study whether a situation is related to one or other freedom or both, although according to Art. 63 TFEU, freedom of capital movement also concerns non EU nationals (ECJ, *Sanz de Lera* [1995]).
4.A.II Acceptable Restrictions upon the Freedoms

Usually, as OU 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 in 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. 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 (Factortame) and refers to the right to purchase, exploit and transfer real and personal property (ECJ, Commission v Italy [1988]). OU therefore 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 of specific assets and investments.

However, EU Law accepts that restrictions to both freedoms may be justified under specific circumstances. Arts 51 and 52 TFEU (former 45 and 46 TEC) provide a number of reasons for derogations from the rule of 49 TFEU. Art. 65 TFEU (former Art. 58 TEC) provides reasons for derogation from the rule of Art. 63 TFEU. A combined study of Arts 51, 52 and 65 TFEU shows that issues relating 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, the ECJ has also accepted (Commission v Italy [2005], para. 37) that the freedom of capital movement can be restricted on the grounds of “strengthening the competitive structure of the ... (energy) market ...”. The need to open the Energy Market is recognised as sufficient justification for limitations of the freedoms of establishment and capital movement (Hunt,
2008, pp. 86-87). In a series of other cases, ECJ has also accepted that issues of the public interest affected by energy policy can justify a limitation of these freedoms (Campus Oil Ltd [1984], especially paras 32-51 about energy security). In Commission v France [2002], (para. 47) and Commission v Belgium [2002] (para. 46), the ECJ accepted that:

‘the safeguarding of supplies of petroleum products in the event of a crisis, falls undeniably within the ambit of a legitimate public interest... The same reasoning applies to obstacles to the free movement of capital…’

Therefore, EU jurisprudence accept that energy policy – concerning either the issue of energy security or opening to competition – has sufficient justification to 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.

4.A.III Principle of Non-Discrimination

Both Treaties and ECJ case law (see Second Skimmed-Milk Powder Case [1978] and Hartley 2004, p. 383 for discrimination between different categories of farmers; Prais [1976] for minority discrimination; Airola [1975] for sexual discrimination; Moulins Pont à Mousson [1977] for trade discrimination; Centros [1999] for discrimination due to the National law of establishment) accept the existence of a principle of non discrimination in EU law. A number of provisions in the Treaties manifest the principle of equality. Arts 18-25 TFEU generally prohibit discrimination, while other Treaty Arts provide for non-discrimination in particular fields (see e.g. Arts 40.2 and 45.2 TFEU). Art. 49 TFEU explicitly provides for non-discrimination based on nationality
regarding establishment, while Art. 55 TFEU (former 294 TEC) prohibits discrimination based on nationality regarding the participation in companies’ capital. ECJ traditionally accepts that non-discrimination belongs to a series of general principles of EU Law, inspired by MSs’ Constitutional traditions (Internationale Handelsgesellschaft [1970]). The protection of Art. 49 TFEU is explicitly expanded on companies according to Art. 54 TFEU (former 48 TEC).

According to established ECJ case law the general non-discrimination principle is one of these general principles of community law. Similar situations shall not be treated differently unless differentiation is objectively justified (Ruckdeschel [1977]) and different situations shall not be treated in the same way (Racke [1984]; Moulins Pont à Mousson, paras 16-17).

Analysis is required of whether OU does indeed create discrimination against specific undertakings. OU, as imposed by the TEP as a general measure of European Energy Law, addresses all energy undertakings throughout the EU. The latter henceforth constitute a non-predefined group, specified according to general and uniform rules no matter where their establishment is and who their shareholders are.

However, according to one opinion (Hunt, 2008, p. 86), although OU is an indistinctly applicable measure, it may result in discriminatory results, as private undertakings may be in a worse position in comparison to public undertakings in other MSs. The reason for this discrimination concerns Art. 345 TFEU – which will be examined later – and the protection of property rights according to MSs’ ownership rules.

It could also be argued that discrimination may be caused by the character of OU as a measure within the TEP. As explained (Ch.3.A.I.b), although OU is the standard solution of the TEP, there is also provision for a number of more favourable and less strict alternatives. A company active in MS X, which applies full OU, would be in a less favourable position than another company active in MS Z, which applies a more lax unbundling
system, such as the ITO model.

The level playing field clause may offer some protection to the first company, in case that undertakings controlling generation or supply activities in one MS try to exercise direct or indirect control over a TSO from another MS that has opted for full OU (Commission Staff Working Paper 2010). However, this provision does not put the company from State X in the same position as the second company. It just secures equal rights to companies entering the same market.

Although these arguments provide a basis for criticism for the possible results of the application of OU, they cannot negate the non-discriminatory character of the measure at least in principle, as they actually concern possible future results.

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 OU with this principle will be examined separately (Ch. 4.D.II).

4.B Art. 345 TFEU

4.B.I Content of the Provision

According to Art. 345 TFEU (former 295 TEC) ‘[t]he Treaties shall in no way prejudice the rules in MSs governing the system of property ownership.’ That means that MSs are free to regulate ownership rights, according to their National policy and goals and the EU cannot interfere. The ECJ, however, submits that this right of the MSs does not mean that this regulation can oppose the EU’s fundamental policies, goals and principles (Margarethe Ospelt [2003], para. 24; Fearon [1984], para. 7; Commission v Germany [2007], para. 37; Commission v Spain [2003], para. 67; Commission v France [2002], para. 44; ECJ,
On the other hand, the EU can take measures that affect property rights, if these measures are designed to serve fundamental EU goals (Pielow and Ehlers, 2008, pp. 13-14, name internal market as one objective to justify such measures; Talus and Johnston, 2009, p. 4 note that it is rational to expect that to some extent property law will be unified, on the grounds of economic unification and the establishment of the internal market). Improvement of competition in the European Energy Market certainly is an issue that falls within the key objectives of the 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 is opposed to specific fundamental EU principles (Hunt, 2008, p. 72).

4.B.II Ownership Unbundling and Publicly Held Undertakings in relation to 345 TFEU

One could argue that according to OU, public undertakings will have to privatise their own utilities; therefore OU violates Art. 345 TFEU. However, this is not true. It would be enough to apply measures that guarantee effective separation of each activity from the other (Pielow and Ehlers, 2008, p. 14; Hunt, 2008, p. 72). 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 function as distinct entities (Cabau, 2010, pp. 142-143). Therefore, MSs are still free to choose the model for organisation of the transmission or generation market – either public or private- (Talus and Johnston, 2009, p. 4).

Moreover, according to TEP OU is designed to apply to both public
and private undertakings. Therefore, there is no discrimination issue in principle (Hunt, 2008, p. 72; Cabau, 2010, p. 141). A problem can however refer to Cross-border competition between private undertakings from MSs that have applied full privatisation and public undertakings from MSs that have retained public control on generation and transmission. The private company from the first MS would be possibly have a problem in entering the market of the second MS, as the local public competitors in the latter could have a competitive advantage due to the coordination of their activities and their synergies (Hunt, 2008, p. 73; Pielow and Ehlers, 2008, p. 15).

However, the total separation of the public undertakings as mentioned above could provide the solution to the problem of discrimination. General CRs (e.g. Art. 101 TFEU on concerted practices), SSRs concerning TPA and Certification Procedures and the active role of NRAs, can further prevent this danger (Cabau, 2010, pp. 142-143).

4.B.III Conclusions

OU does not violate Art. 345 TFEU. However, regarding non-discrimination, in practice it is likely that effective separation of activities in MSs where both generation and transmission will be publicly held will be a difficult task and there should be effort for preventing discriminatory effects.

4.C Fundamental Rights and Especially the Right to Property

This sub-chapter will examine the compatibility of OU with some fundamental EU rights and with an emphasis on the right to property.
Art. 1 of the 1st Protocol of the European Convention of Human Rights (ECHR) recognises property as a fundamental human right. No deprivation of property can be ordered, unless there are reasons of justified public interest and subject to the conditions provided for by law and by the general principles of international law. According to ECtHR decision *Iatridis v Greece* (1997) property covers any kind of interests and rights that constitute assets (para. 54). Property is also recognised as a fundamental right by the Art. 17 of the Charter of Fundamental Rights of the European Union (“CFREU”). CFREU recognises that nobody can be deprived of it except if there are reasons of public interest and the person is fairly compensated (Art. 17.1). According to Art. 6 of old TEU, the EU recognises the rights included in the CFREU (ECHR binds all the States that ratify it while the CFREU refers to the institutions and bodies of the EU and to the MSs only when they implement EU law, according to Art. 51.1 of CFREU) and accepts as general principles of European Law all freedoms protected by the ECHR and deriving from the common Constitutional traditions of MSs.

Moreover, especially after the recent Lisbon Treaty (Protocol 2007), the path towards the official accession of the EU to ECHR opened and the details concerning this procedure were defined (see Arts 218.6.a.ii and 218.8 TFEU, as well as Art. 67 TFEU concerning the position of fundamental rights within EU’s structure). Therefore, this official accession is probably now only a matter of time (Council of Europe, 2010; Reding, 2010).

Furthermore, the Constitutions of all MSs include relevant provisions regarding the protection of property rights and property is also recognised as a National fundamental right (Pielow and Ehlers, 2008, p. 19). Therefore, property is a protected right under EU Law and the ECJ will examine any possible harm caused by EU measures to property rights, mostly guided by
ECHR and National Constitutions (Pielow and Ehlers, 2008, p. 21; see also ECJ cases Connolly [2001], para. 37 and Roquette Frères [2002] para. 25). The recent Kadi [2008] Decision of ECJ (overruling CFI’s Kadi [2005] decision) affirmed ECJ’s role to ‘ensure the… full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law’ (para. 326). According to this case, this review ‘must be considered to be the expression, in a community based on the rule of law, of a Constitutional guarantee stemming from the EC Treaty as an autonomous legal system’ (para. 316). The commitment of EU to fundamental rights has to be strong as ‘[M]easures which are incompatible with the observance of human rights . . . are not acceptable in the Community’ (Kadi Opinion Advoc. Gen., para. 31; see also Eugen Schmidberger [2003], para. 73; Kremzow [1997], para. 14; ERT [1991], para. 41).

4.C.II Possible Violations of Fundamental Rights

OU 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 (see ECtHR, James v United Kingdom 1986). The property of energy companies is also protected by ECHR, as they have a legal personality and property as a concept is totally compatible with either a legal or a natural personality (Pielow, Brunekreeft and Ehlers, 2009, p.110 express doubt about whether this right can also be recognised for totally public undertakings). Not only does OU constitute a deprivation that may violate protection of property but the ISO model – requiring transfer of management of specific assets to an independent third party – also falls within the spectrum of this right (Pielow, Brunekreeft and Ehlers, 2009, p. 111; Pielow and Ehlers, 2008, p. 12 and note 57; Säcker, 2008, p. 10). Although
under the ISO model the assets are not legally transferred, the relationship of
the owner to the asset is severely weakened, as the owner loses the power of
administration of the asset (ECJ, Hauer [1979], para. 19) and the exercise of
substantial ownership rights is fairly limited (Säcker, 2008, p. 10).

Apart from the right of ownership, OU may also violate the
occupational freedom (Säcker, 2008, pp. 10-11) and/or the freedom to pursue
an economic activity (Talus and Johnston, 2009, p. 5 mention that this freedom
is related to the right to property, also citing ECJ case Nold [1974]) and the
right to property of the shareholders, as far as their rights in the undertaking
are concerned, while the ISO model can also violate the freedom of
association for the shareholders (Säcker, 2008, pp. 10-11).

4.C.III Conditions for Justified Limitations or Deprivations of Property

However, OU as a measure of the TEP does not actually unjustifiably violate
the freedoms noted above (Ch.4.C.II) and especially the right to property.
First, Art. 1, 1st Protocol ECHR explicitly recognises that a person can be
legitimately deprived of its property for reasons of public interest (Grgiae,
Mataga, Longar and Vilfan, 2007, p.13). Art. 17.1 CFREU also repeats this
provision, while ECtHR accepts that fundamental rights have to be balanced
with the general social interests (Soering v United Kingdom 1989, para 89).
According to EU Law, the right to property is not established as inviolable
and forced transfer of assets can be legitimate under specific circumstances.
The ECJ recognises that all rights related to property have to be interpreted
according to the social function and role of property (Nold, para. 14;
Praduroux and Talus, 2008). It also recognises that specific limitations on
property could be acceptable if they are based on reasons of public interest
and if they are justified by the general EU objectives (Hunt, 2008, p. 73). This
conclusion is also affirmed by the Constitutional traditions of MSs (Hauer,
para. 20 also accepting the social function of property).

OU is related to the opening of the Energy Market to free competition and to the establishment of an IEM; both of these objectives fall within the spectrum of the EU’s key objectives and certainly are issues of high public and community interest (see Arts 3, 4.2, 170.1 and 194, and Title VII, Ch.1 TFEU). Fundamental rights, such as the right to property, cannot impair the establishment and the function of a competitive Energy Market (ECJ, Von Deetzen v Hauptzollamt Oldenburg [1991], para. 28). Therefore, it is possible that certain limitations to the right to property can be imposed, in order that these objectives are fulfilled.

To deem such limitations as acceptable, the limitations should not be so extensive as to harm the substance of the right to property, i.e. a limitation cannot result to an absolute negation of the person’s property rights (Nold, para. 14; Pielow, Brunekreeft and Ehlers, 2009, pp. 107-108). In the 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 this.

On the other hand, OU is indeed a measure that results in the full divestiture of the asset. This does not mean that the substance of the property right has to be harmed, as compensation (Art. 17(1) of the CFREU refers to ‘fair compensation’). Compensation, although not provided for by the TEP, can derive from the transfer of the assets under OU to a third party; the TEP does not ask for a confiscation or for a forced donation of the undertakings’ assets but it just prohibits simultaneous ownership 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 market price (Pielow and Ehlers, 2008, p. 26 refer to ‘full value measured at the market price’) to another company one type of these assets. It could be argued, however, that a forced sale of assets also constitutes a violation of the right to disposal and that it is difficult to
achieve a fair price, as OU 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 the event that the relevant measure is related to some important objectives of public interest, such as an economic reform (Talus and Johnston, 2009, p. 6 cite the ECtHR case James v United Kingdom) and while under special circumstances the compensation requirement can be omitted (ECtHR, Pressos Compañía Naviera v Belgium 1995), it is concluded here that the provisions of the TEP about OU are imperfect regarding the lack of a compensation scheme for the undertakings.

Another key requirement for such a divestiture to be accepted as legitimate has to do with the principle of proportionality, which will be examined in Ch.4.D. Concerning all the other aspects of the issue of the right to property, OU 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.

4.C.IV Other Freedoms & Rights

Regarding the other rights mentioned above (Ch.4.C.II), this paper has the same opinion concerning property rights.

First, unlike property, freedom of economic activity is not an absolute right and it can be limited for reasons of public interest (Nold). Second, the substance of this right is not harmed (ECJ, Spain and Finland v European Parliament and Council [2004]) 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 secondary one (Talus and Johnston, 2009, pp. 5-6). Regarding freedom association, reference is made to the analysis (Ch.4.A.II) about the freedom of capital movement
Regarding the shareholders’ property rights, the proportionality requirement also has to be fulfilled regarding the limitation of all these rights.

4.D Proportionality Principle

4.D.I Content of the Principle

According to this principle, each decision and measure has to be based on a fair balancing of the interests involved and on a reasonable choice of necessary means (TEC Art. 5.3; T. Tridimas, 1999b, p. 137; ECJ, Fedesa [1990], para. 13). ECJ has widely accepted that this principle has an important role within EU law (Schwarze, 2006, p. 677; Internationale Handelegesellschaft) and literature argues that it has a Constitutional status within the EU legal structure (Jans, De Lange, Prechal and Widdershoven, 2007, p. 146) and within the case law of ECtHR (Van Dijk and Van Hoof, 1998, p. 81). ECJ also accepts that measures restricting the freedom of capital movement have to abide by the principle of proportionality (Commission v Italy [2005], para. 35 and Manninen [2004], para. 29).

ECJ has developed a threefold test for examining whether a measure is proportionate (Hunt, 2008, p.87). The first part 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 meaning 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 (Van Dijk and Van Hoof, 1998, p.
Although this test is not strictly applied by ECJ in all cases (Tridimas, 1999b, p. 139; de Búrca, 1993, p. 111; Jacobs, 1999, p. 1), it is preferred in cases concerning property rights (see Germany v Council [1994], para. 78; Schraeder [1989], para. 15; Wachauf [1989]; Kühn [1992], para. 16).

According to the relevant literature, ECJ frequently adopts a strict position regarding the fulfilment of proportionality, in cases on restrictions of key EU interests, such as the freedom of capital movement or goods circulation. In other cases adopts a laxer position as it just examines whether the measure is ‘manifestly inappropriate’ (Clean Car Autoservice [1998], para. 35) or whether the measure is clearly disproportionate in relation to the interests harmed or the objectives pursued (ABNA [2005], para. 69).

Such an approach is more common in cases involving the assessment of a complex economic situation, as ECJ has accepted that in such cases that the EU Authorities may have a broad discretionary power (Roquette Frères [1980]; Spain v EU Council [1999]; see also, for a similar approach regarding issues of the common commercial or agricultural policy, Talus and Johnston, 2009, p. 5). In relevant cases, the ECtHR follows a similar approach by recognising a wide margin of appreciation or 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 (National & Provincial Building Society and others v The United Kingdom 1997, paras 80-81; Sollo v Italy 1995, para. 29; Spadea and Scalabrino v Italy 1995, para. 28; James and others v The United Kingdom 1986, para. 46; Mellacher and others v Austria 1988, para. 45).

Regarding the effectiveness test, the ECJ examines whether the measure is appropriate regarding the objectives pursued by the Authority which imposed this measure (Clean Car Autoservice, para. 35; Radlberger Getränkegesellschaft mb [2004], para. 78). In general, ECJ accepts 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. It simply examines whether the measure is useful to the aims pursued or whether it is evidently unsuitable without any complex assessment process (Ahokainen and Leppik [2006], para. 39; Merkur [1973], para. 24; Crispoltoni [1994], para. 43).

Regarding the test of necessity and subsidiarity, the literature (Tridimas, 1999b, p. 143) 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 goals (British American Tobacco [2002], para. 122) and subsidiarity means whether there are less harmful, but equally effective, means to achieve this.

Regarding the stricto sensu proportionality test, it generally concerns the balancing of the interests involved, harmed or promoted by the measure in question (see Tridimas, 1999a, p. 68). 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. The “rule of reason” as developed in the Cassis de Dijon case [1979], 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 (Ortino, 2004, p. 470). However, the 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; de Búrca, 1993, p. 107).
4.D.II Ownership Unbundling and Proportionality

ECJ seems reluctant to proceed to a detailed analysis of the complex matter of the OU’s suitability, as it constitutes a key part of EU’s Energy Policy (Talus and Johnston, 2009, pp. 1 and 5; Hunt, 2008, p. 89). Therefore, this issue has a highly political character and if ECJ is called to assess OU from the perspective of proportionality, it is likely to just evaluate whether it is “manifestly inappropriate” or not rather than getting involved 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 IEM, 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 the necessity of OU in economic terms, as a means to improve competition in wholesale and retail markets and the general opening of European Energy Market, there exist a lot of arguments (Lévêque, 2007; Joskow, 2005; Léautier, 2001; Moffatt Associates, 2007; SERIS, 2006; Ernst & Young, 2006, pp. 9, 14, 36, 39, 78, 79 and 90; Lowe, Pucinskaite, Webster and Lindberg, 2007; ERGEG, 2007; Held 2007) and counter-arguments (Bolle and Breitmoser, 2006; Michaels, 2006; Growitsch and Stronzik, 2008; Bühler, Schmutzler and Benz, 2004). These economic arguments will not be analysed here (see Mulder and Shestalova, 2005; Baarsma, Nooij, Koster and Weijden, 2007; Pollitt, 2008), however it is observed that OU receives the support of various interest groups and political and market players in the EU (Talus and Johnston, 2009, p. 3 refer to a number of Energy Market actors that support OU and especially at note 11 they mention a list of supporting MSs). It also faces strong reaction
(Taylor, 2007). Although some aspects of these reactions have a strong political character, there is a strong debate about the conditions under which OU can be economically efficient and whether it is indeed necessary for the opening of the European Markets (Pielow, Brunekreeft and Ehlers, 2009, p. 104; Pielow and Ehlers, 2008, p. 10; Hunt, 2008, pp.88-89, expresses serious doubts about the efficiency of OU concerning enhancement of competition and security of supply). On the other hand, the EU Authorities and especially the Commission adopted a strong position in favour of OU’s suitability and necessity, seeming to have been seriously influenced by the poor results of the previous EU’s efforts (Commission DG Competition, 2007; Commission Press Release 2007).

Therefore, the issue of OU’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, this debate is a matter of specialised economic analysis, which is not possible to be assessed by a Court. However, the relative efficiency of the measure in general cannot be negated. On this basis, it is clear that OU can be viewed as an “effective measure” (or at least not apparently unsuitable) under the spectrum of a judicial examination.

However, 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 unbundling (Hunt, 2008, p. 88 and Kotlowski, 2007, p. 9 argue that there may exist some less strict but effective alternatives, while Talus and Johnston, 2009, p. 7 argue that recent Competition Law cases seem to affirm that vertical integration creates severe problems for Energy Markets and that drastic measures are necessary), the TEP itself has created alternatives to the full OU model. The ISO model provides for a transfer of
management only and not of ownership Electricity (Directive 2009/72/EC Arts 13, 14; Directive 2009/73/EC Arts 14, 15), while the ITO model (Directive 2009/72/EC Arts 17–23; Directive 2009/73/EC Arts 17–23) provides that the legally separate operator can be vertically integrated. These models – and especially the second one, as ISO is often criticised as being of similar severity to OU (Hunt, 2008, p. 88 and especially n. 158) – are apparently less drastic and intrusive than full OU, but they are officially included in the TEP as totally legitimate alternatives. Therefore, the following question can be raised: Why full OU is necessary, if EU itself admits that some less drastic means can be so effective that they are proposed as alternatives?

It is clear that the inclusion of alternatives in the TEP weakens the arguments about the necessity of OU. On these grounds, and because it seems to have the most drastic result, OU appears as a model solution and as the most desirable measure; however, the other solutions appear adequate enough to provide the positive results pursued by EU, at least for an interim period until a renewed regulation of Energy Markets appears, in a Fourth Energy Package. In terms of necessity, this argument can actually undermine the position of OU. Although this may not be important regarding the application of the TEP, as MSs may legitimately stick to the model solution and not opt for a less drastic alternative, it may be vital in the case of the structural remedies imposed by the Commission in Competition Law cases concerning the Energy Market (Regulation No 1/2003 Art. 7).

A company affected by such measures can argue that such a strict structural remedy was not necessary, as the pursued objective could have been achieved by other measures, similar to those included in the TEP. Such a company could also argue that it is disproportionate and unequal, after taking into account that the other companies which will fall within the ambit of the provisions of the TEP concerning transmission may avoid full OU if their MS so chooses when implementing the legislation. Therefore, if these remedies
come under judicial examination, the Commission will have to prove that these cases have some specific elements that require an even harsher solution than the general provisions of the TEP; this may be quite difficult. According to Pielow, Brunekreeft and Ehlers (2009, p. 109), it is questionable whether Art. 7 of Regulation No 1/2003 provides authorisation to the Commission to impose such heavy structural remedies. On the other hand, the Commission could argue that such structural remedies can be more effective but also less strict than a very heavy fine.

Concerning *stricto sensu* proportionality, although there is also criticism about the severity of the effects of OU on many different rights of high EU’s interests, in comparison to the goals pursued (Hunt, 2008, p. 89; Pielow and Ehlers, 2008, pp. 23-24), it is accepted here that this measure is not 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. Neither does it bind the undertaking too severely, as the latter has many relevant business fields still available and its primary activity is not affected (Talus and Johnston, 2009, pp. 6-7 refer to a number of relevant ECtHR decisions, according to which the proportionality condition was fulfilled). Further, 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. Finally, the objectives pursued – i.e. the establishment of the IEM, opening to competition and energy security – are of reduced importance in relation to the interests harmed (for the objective of the IEM see TFEU Art. 194 and for the objective of the open to competition IEM see TFEU Art. 3, 32, 40, 101, 102, 106, 107, 119, 120 and Preamble).
4.D.III Conclusions

Despite the current debate about the value of OU as a model that will enhance competition, a legal examination of the issue would probably result in the conclusion that, in general, this measure does not violate the proportionality principle, after considering the importance of the goals pursued and the IEM’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 adopt a wide discretion of the EU legislator (Hunt, 2008, p. 89), the technical nature of the assessment of the effectiveness of unbundling and the high importance of OU for the Commission (Pielow and Ehlers, 2008, p. 21). On the other hand, this paper focuses on the necessity aspect, especially regarding structural remedies imposed in competition cases, as a result of the existence of alternatives to unbundling in the TEP, 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.

4.E Final Conclusions

4.E.I. Regarding Ownership Unbundling as a Measure of Sector Regulation

In conclusion, OU does not seem in principle 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 the 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 TEP includes a series of provisions that balance the radical character of the measure with these principles and freedoms (Säcker, 2008, p. 11) and emphasise National initiatives. On the other hand, there are still some problematic points regarding this framework.

The first issue concerns possible inequalities that may arise during the implementation of the framework between undertakings from MSs 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 TEP (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.

The second point of criticism refers to the compensation for the potential losses of the undertakings due to OU. 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; for example, a case-by-case temporary derogation relevant to this concerning TPA granted by Art. 48 Dir. 2009/73/EC vis-à-vis undertakings’ financial difficulties due to take-or-pay contracts.

4.E.II. Regarding Structural Remedies of Competition Law

However, regarding structural remedies used by the Commission, on the grounds of CRs, there are problems of legitimacy, primarily referring to proportionality and especially the necessity of the measures.
First, there is the difficult task to justify the necessity of the measure case-by-case. Second, this justification will become more difficult in future cases, after 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 that concern the IEM (Geradin, 2005, pp. 52 and 61; 2004, p. 27).

Such structural interventions abide by the principle of proportionality, only in cases where a less strict (than OU) market organisation model – perhaps ISO or ITO – and poor regulatory supervision allow the continuation of high vertical integration and anticompetitive practices. Therefore, an even harsher measure could be necessary and the intervention of the Commission could be justified as proportionate.
CHAPTER 5

COMPETITION LAW AND SECTOR REGULATION:
HIERARCHY AND EFFICIENCY

This chapter will analyse further the issue of concurrence between CRs and SSRs and the relation between parallel concepts within these two different legal frameworks. It will underline the hierarchical superiority of CRs and their independent scope of application (Ch.5.A). It will also define the character of SSRs as *lex specialis*, it will observe how the CRs’ hierarchical superiority should be combined with the need for effectiveness and focus on other than Competition objectives of Sector Regulation and will result in a proposed framework for the relation between SRs and CRs in Energy Markets and the allocation of competence and powers between Sector Regulators and CAs (Ch.5.B).

5.A The Issue of Direct Application of Competition Rules in Sector Cases

5.A.I Hierarchy

Under EU law, SSRs are included in secondary legal sources – i.e. Directives and Regulations – (see Ch.3.A.I.b) while Competition Law is part of the Treaties. Therefore, the EU CRs are hierarchically superior to SSRs (as secondary EU legislation) and this fact has some implications regarding the applicable rules in Energy Market cases.

First, it is possible for the Commission practically to abstain from implementing CRs when SSRs exist. It would be however impossible to accept that CRs are not applicable in such cases (Geradin and O’ Donoghue,
Second, whether or not the Energy Sector is regulated by EU secondary law, it is also subject to the application of CRs (Geradin, 2005, p. 59).

This has been apparent since the first generation sector-specific Directives, which underlined that they do not substitute CRs (see for example Directive 96/92/EC Recital 3; Directive 98/30/EC Recital 6; Directive 97/67/EC Recital 41; Directive 97/33/EC Recital 26). However they did not define the extent to which the latter would be directly applied. In some cases, the Commission seemed to accept the priority of SSRs (Commission Decision, O2 UK Limited [2003], para. 59).

However, CRs remain a valuable reserve for the Commission, in the event that SSRs do not achieve the required results in specific situations (see above Ch.4.E.II and below Ch.5A.II). This may be attributed to the Commission itself being able to launch antitrust procedures and, thus being able to directly deal with problems. This was quite apparent regarding the Energy Sector (see Ch.3.B Preface) in comparison to US Telecommunications Sector. While in the US after the Telecommunications Act 1996 antitrust proceedings were put aside, in the EU after liberalisation, Competition Law gained priority in the Energy Sector (Geradin and Sidak, 2005, pp. 536-537 and 543). The difference however is that in the European Energy Sector, liberalisation has not been yet completed (Commission DG Competition, 2007).

It can be assumed that the Commission uses CRs in order to accelerate the transformation of the Energy Market and prepare it for the TEP. Therefore, it is observed that in the Energy Sector CRs are not limited to their traditional ex post corrective role, but are part of an on-going process of “trial-and-error” which reaches the limits of an ex ante quasi-regulatory role, in order to supplement the inadequacies of SSRs (Petit, 2004b, p. 3; Hancher and de Hauteclerque, 2010, pp. 10-13; see above Ch.2.C.II). This practice is
criticised from an economic point of view, as it obliges the Commission to focus on market structure and not on market design (Hancher and de Hautecluque, 2010, p. 13).

5.A.II Supplementary but Independent Application

The fact that SSRs cannot constitute an excuse for companies to avoid their general obligations under Competition Law was underlined by the Stichting Sigarettenindustrie case (see also Ch.2.A.II Preface and Ch.2.A.II.d). This case ruled that even when State SSRs limit competition in a domestic market, undertakings continue to be obliged to avoid any behaviour that may further limit competition (especially para. 96). This presupposes that competition has not been already eliminated by the State’s intervention. If the competition has already been eliminated, undertakings’ behaviour plays no restrictive role (see also CFI, Ladbrooke [1997]).

Moreover, when competition is already limited, undertakings are even more strictly obliged to avoid anticompetitive behaviour (Van Bael, 2005, p. 68). In the Deutsche Telekom Commission Decision [2003], although the NRA had approved the firm’s tariffs, the Commission applied Art. 82 TEC (now 102 TFEU), ruling that CRs may apply in any case where SSRs do not preclude the undertakings from engaging in autonomous anticompetitive conduct. This established a parallel system of dealing with such cases in the opposite way from that applied by the NRA (para. 54).

Deutsche Telekom was the first case where the Commission applied Competition Law principles to a margin squeeze in the telecommunications sector (Geradin, 2005, pp. 26-27). The company was accused of margin squeeze as it was charging competitors for using its network at a much higher rate than it was charging end-users, leaving competitors facing a serious competitive disadvantage (para. 102). The company defended itself by using
the argument that its access tariffs were approved by the local regulator, RegTP (see CFI, *Deutsche Telekom* [2008], para. 257) and as there was such approval, Deutsche Telekom was not responsible for any Competition Law infringement, and the Commission should look to Germany (according to Art. 226 TEC/ now 258 TFEU), as the State whose created or enabled the competition distortion.

This argument was rejected by the Commission, which based this decision on a similar rationale to that of the *Stichting Sigarettenindustrie* case. As Deutsche Telekom continued to have some relevant commercial discretion about the formation of its tariffs (despite the intervention of RegTP) it was able to structure its tariffs, in a way that could stop the margin squeeze (CFI, *Deutsche Telekom*, paras 264-265). However, Deutsche Telekom seemed to find the intervention of RegTP convenient and tried to “fortify” its position behind the cover of regulation. As it was ruled in the *Stichting Sigarettenindustrie* case, the fact that State Regulation limits competition does not mean that undertakings are dismissed from their duties. It does, however, mean that their duties to preserve competition become even stronger in order to equilibrate the limitation of competition due to Regulation. Moreover, in the *Deutsche Telekom* case, SSRs did not actually limit competition, but just enabled this limitation by approving restrictive tariffs. It was therefore clearly was a matter of choice for Deutsche Telekom to impose different tariffs (it is highly questionable whether RegTP would not approve lower tariffs and the rational answer is negative). The CFI upheld the Commission’s decision and ECJ also rejected Deutsche Telekom’s appeal (*Deutsche Telekom* [2010]).

According to ECJ even when the conduct of a NRA may be regarded as having encouraged a dominant company to act in an anticompetitive way, this cannot absolve a company from its responsibilities under EU Competition Law (paras 81, 84, 85). The NRA’s decisions cannot affect the power of the
Commission to find infringements of the EU CRs (para. 90). ECJ also offered a valuable interpretation for the role of CRs in relation to SSRs (para. 92):

‘[competition rules] supplement... by an *ex post* review, the legislative framework adopted by the Union legislature for *ex ante* regulation of the telecommunications markets’.

In the *Deutsche Telekom* case, the Commission, CFI and ECJ did not take into consideration the fact that there was a set of SSRs regarding the behaviour in question. This was a totally different attitude than that of the US Supreme Court in the *Trinko* case. Geradin and O’ Donoghue (2004, pp. 26-27) have suggested various reasons which justify this different attitude. Most important are the detailed character of American regulation in comparison to the relevant regulatory framework of the *Deutsche Telekom* case, the inexpedience of RegTP in dealing with margin squeeze problems and the key factor of the hierarchy of norms (by contrast, in the US sector-specific and CRs are legally equal). This last reason regarding the relation between EU Competition Law and Sector Regulation is very important.

5.B The Role of Sector Rules in the Energy Sector

The following question needs to be asked: Given that the Commission uses CRs in order to promote Sector Regulatory objectives, what is the role of SSRs in the Energy Sector?

5.B.1 The Limits of Intervention of Competition Rules

In order to answer this question, the limits of CRs’ intervention into the sector need to be defined as well as in which cases these rules should be applied instead of or parallel to SSRs.
First, as observed (Ch.3.A.II), Energy Sector Regulation tends to adopt Competition Law objectives and goals as key parameters for its role. CRs do have an autonomous role (rather than as adopted elements of SSRs) in cases which refer to Competition Law issues (meaning cases that fall in the common scope of both SSRs and CRs). These are cases that concern margin squeezes, binding of consumers, TPA, monopolistic behaviour of market participants and generally exclusionary and/or exploitative practices and agreements (see Ch.3.B.II). These cases usually may also involve issues of investment development and security of supply.

This paper agrees with the opinion that the kind of rules which will be implemented in such cases depends upon the efficiency of SSRs in any given case (Geradin, 2005, pp. 59-60). If there is a sector-specific remedy which is able to effectively protect a competitive market structure in the industry, which has also been effectively and correctly enforced by the NRA and which does not violate general CRs, then SSRs should have a priority (Commission Decision, O2 UK Limited). SSRs are more detailed and technically specific, and are based on a more spherical and complete framework regarding sector-specific issues.

The parallel character and the concurrence of both sets of rules, which try to regulate the same issues, may lead to confusion. This is the main case in energy cases, at least after the recent analytical regulatory framework, because SSRs seem to largely adopt and incorporate Competition principles.

It could, therefore, be argued that, regarding competition aspects of Energy Sector, SSRs are specific (lex specialis) in relation to the general CRs (lex generalis) and to the extent to which they cover the same issues, the ‘Lex specialis derogate legi generali’ principle suggests that SSRs should be normally applied.

Alternatively, it can also be argued that in some cases the regulatory remedy is not effective. In the Energy Sector, this may mainly apply to
effective enforcement, regarding NRAs’ actual performance (“inert” or “captured” regulator case according to Geradin and O’Donoghue, 2004, p. 27). As already observed (Ch. 3.A.II) the TEP explicitly provides (Directive 2009/72/EC Recital 37 and Art. 36 and 37) that NRAs have a duty of observance of EC CRs when dealing with competition issues within their jurisdiction (this rule was also affirmed in prior cases by ECJ, such as ATAB [1977], para. 31).

In such cases, CRs may be effective in order to complement the inadequacies of SSRs’ actual implementation. When NRAs are reluctant to apply SSRs correctly they do neither apply CRs –as they are incorporated into SSRs-. Therefore, CRs are violated and although they are lex generalis, they are directly applied, as lex specialis does not cover their scope. In the Deutsche Telekom case, the National Regulator did not provide for margin squeeze prevention and the Commission intervened by applying general CRs (Geradin, 2005, pp. 60-61). On the other hand, as the defendants in this case argued (Commission Decision, Deutsche Telekom, para. 53), there is an alternative solution for NRAs who do not apply CRs. This is the decision of the Commission to launch infringement proceedings against NRA itself (meaning against the MS), according to Art. 258 TFEU/ former 226 TEC (Petit, 2004b, pp. 25-29).

However, SSRs also provide for the protection of other important objectives, such as investment incentives and capacity development (see Ch.2.B.II.d). As already analysed (see Ch.2.D), especially regarding the issue of RoA and incentives to invest, Competition Law’s conceptual framework and tools are neither able nor designed to address such issues. Furthermore, CRs are mainly assumed to pursue the relatively short-term objective of fair competition, instead of the long-term objective of the developed market in which competition will be also stronger due to innovation; the latter seems to fit better within the scope of SSRs (see Ch.2.B.II.a; Ch. 2.C.II; and Ch.2.D).
The question, therefore, is which set of rules should prevail in the event that SSRs give the regulator the freedom to set the parameters for the development of the market, resulting in a lax attitude regarding Competition Law issues, in order to facilitate the development of the market and investments. This would be an example of a conflict between Sector and Competition rules. In the case of the Energy Market, the EU has resolved the question in favour of CRs. According to the Directive 2009/72/EC Art. 3(14) and the Directive 2009/73/EC Art. 3(10), they are set as the limit of NRAs’ competence to provide for the development of the market.

However, this fact does not mean that NRAs cannot take some measures that may relatively restrict, to a certain extent, short-term competition for the benefit of the overall development of the market. These restrictions, however, cannot be so extreme that they will be totally contrary to the objective of free competition (Directive 2009/72/EC Art. 3.14).

This approach affirms the hierarchical priority of CRs as primary legislation (Ch.5.A.I) but also balances it with the nature of CRs as a general instrument, which cannot replace a sector-specific framework. The limits imposed by Competition Law should leave an adequate free field for flexible policies, which are necessary for the long-term development of the market and enhancement of consumer welfare (Geradin, 2005, p. 64).

5.B.II The Allocation of Powers between Competition and Sector Regulatory Authorities

It is emphasised that all the above (Ch. 5.B.I) concern the issue of concurrence between CRs and SSRs and not the issue of concurrence of powers between NRAs and NCAs (and the Commission itself). These issues, although similar, are different, because in the second case the problem is who applies the rules and not what the applicable rules are.
The argument of “lex specialis” (see Ch.5.B.I) cannot apply but it could be argued that no matter what the applicable legal framework is Regulatory Authorities seem to be better informed and more experienced on Sector Specific issues than CAs (see Ch.2.B.I.f). Furthermore, there is a danger that if both Authorities are competent regarding an actual case, this will result in inconsistent or contrasting remedies (Petit, 2004b, p. 10). It is agreed in this paper that Sector Regulators should have a priority to intervene into such cases, except the cases of “lazy” regulators (see Ch.5.B.I). A launch of proceedings under Competition Law would be helpful, in the case of an inert NRA, in order to activate it and then transfer back the proceedings for continuing under SSRs (Geradin and O’Donoghue, 2004, pp. 27-28; 2005, pp. 60-61), as happened in the Telecommunications Sector (Commission Press Releases 1998 and 2002; see Ch.5.A.II).

There is, however, the issue of allocation of competence at a National level, which is very important, as it is directly related to the development of a secure legal environment for investors (danger of inconsistent approaches or remedies when both CAs and Sector Regulators are competent). While, the solution that the Commission should intervene only when NRAs are inert, seems satisfactory, it does not resolve the problem of power allocation between NRAs and NCAs, which becomes even stronger, considering that the TEP provides for broad field of concurrence of powers and consultation/cooperation between both kinds of authorities.

There are two solutions to the problem. The first is that competition issues should pass to one exclusive Authority (Petit, 2004b, p. 29), either by defining NRAs as the only competent Authority for Competition Law issues within the sector or by incorporating NRAs into NCAs (although this is not compatible with the provisions of TEP). Alternatively a flexible but complete scheme of cooperation between these authorities should be established. This scheme should explicitly define to which extent NRAs will be competent to
address competition issues and in which cases the competence should pass to NCAs and should also present a model of and guidelines for efficient cooperation between NRAs and NCAs in joint consultations.

5.C Final Conclusions

CRs have a hierarchical superiority over SSRs, albeit this hierarchy has to be combined with the efficiency mainly provided by SSRs. Moreover, the character of SSRs as *lex specialis* and the fact that SSRs incorporate CRs and objectives, gives them a functional priority. This functional priority is defined and limited by general Competition rules and SSRs’ application has to use Competition Law as an interpretative tool. However, CRs also function as a reserve framework and their applicability cannot be excluded in general, due to their hierarchical status. Their hierarchical priority turns to direct application, in cases of inert regulators or when SSRs are not suitable or suitably applied for the fulfilment of CRs’ scope.

This model should be also reflected in the allocation of duties and powers between CAs and Sector Regulators. However, duplication of competent authorities for the regulation of Energy Market may create legal uncertainty and problems of efficiency in the application of the TEP (see also Ch.3.B.I and Ch.5.B.III). A comprehensive framework for the coordination between these authorities or for the merge of their powers could be a solution for efficient supervision and regulation of the IEM.
CHAPTER 6

GENERAL CONCLUSIONS

Regarding the first research question about the suitability of Sector and Competition frameworks for the treatment of access to networks, this paper supports (see Kerf, Neto and Geradin, 2006, pp. 4-5; Petit, 2004b, p. 11) that SSRs about investment are in principle far more suitable for addressing the issue of investment incentives and that a wide application of forced investment may result in exaggeration as CAs will not be able to correctly judge which investments are truly necessary and will be proved profitable (Scholz and Purps, 2010, p. 48 nn. 84 and 85; see also the defendant’s arguments in AGCM, ENI Trans Tunisian).

Besides, investment is more likely to be promoted by incentives and by the formation of a general, stable, ex ante defined and legally certain environment (Scholz and Pumps, 2010, p. 48), able to flexibly address the investors’ concerns and of a framework of rules integrating the technical issues and the particularities of the market rather than by ex post interventions based on required market behaviour and obligatory methodologies.

As far as the second research question is concerned, the following conclusions were reached on the compatibility of OU and structural Competition Law remedies with General EU Law principles and fundamental rights. OU as a general measure of Sector Regulation, although radical and strict, may be a promising solution for the establishment of an open to competition IEM, which does not fall outside the rules of legitimacy of EU legal structure. Its radical character seems necessary in relation to the important difficulties that EU faces concerning Energy Markets. Moreover, the principles and the fundamental rights included in the EU legal structure
have the adequate flexibility (Talus and Johnston, 2009, pp. 2-3) regarding their conditions, content and interpretation. They do not constitute a serious problem for the development of a framework of structural measures of Sector Regulation and of a radical policy in the Energy Market. However, Competition Law structural remedies will only abide by the proportionality principle, in case that the model of market organisation and the quality of regulatory supervision are proved inadequate to prevent anticompetitive practices.

The third research question focused on how Sector and Competition frameworks in energy cases are related and use each other as a context. The research conclusions are the following. TPA (as a concept of Energy Sector Regulation) and RoA (as a concept of Competition Law) share similar scope and objectives. Energy SSRs in general incorporate the key Competition Law principles and objectives. However, TPA also adopts other sector-specific objectives. On the other hand, Commission in recent Competition Law cases in the Energy Sector does not give serious consideration to the sector-specific context of the Energy Market and industry.

With regard to the fourth question about the priority between SRs and CRs the following conclusions were reached. No framework can exclude the other and both frameworks should be combined but each one should have a distinct role. Competition Law has a hierarchical priority and as a result its application cannot be excluded in general. SSRs should have a functional priority as *lex specialis*. SSRs are designed to intervene on an *ex ante* and general basis through the imposition of detailed and adjustable remedies or the adoption of guidelines (Petit, 2004b, p. 2), in order to make the market more functional. This may even involve imposing new duties (Geradin, 2005, pp. 63-64) and constituting the suitable framework for ensuring the objectives, combining them to the possible extent, of incentives to invest, market development, innovation, environmental protection and security of supply,
by also taking care of a gradual opening of the market to competition. The content and scope of SSRs should comply with CRs and Competition principles and use Competition Law as an interpretative framework, without, however, neglecting all their other goals.

Competition Law can be still implemented in case of ineffective (or ineffective application of the) Sector Regulation, but SSRs should constitute an essential part of the context on which any interventions of CAs should be based.

Regarding the fifth research question about the scope and limits of the application of CRs in the Energy Market, this study answers as follows. As observed in energy cases, the key issue is who enforces the rules rather than which rules are enforced. Each Authority applies the rules which fall mainly within its powers; regulators seem to base their decisions on SSRs while CAs, including the Commission, seem to favour CRs. Therefore, one set of rules forms the core of the argument, while a second forms the context. SSRs frequently refer to CRs and Competition principles, thus obliging the Authority to take into consideration the latter, while CRs are autonomous. No matter which Authority will be competent regarding Competition issues, it is clear that the Authority that will implement CRs must take into consideration the context of SSRs and related objectives.

Therefore, if the Commission chooses to use Competition Law as a tool to accelerate Energy Markets’ transformation before the application of the TEP, it should, however, base its approach on the respective scope and content of the new forthcoming sector-specific framework. Any different intervention, may result in unjust and inconsistent results (as the relevant cases would be resolved in a different –perhaps more convenient for the undertakings- way, after the implementation of the new sector-specific regulatory framework) that may hinder the implementation of TEP.

In the event that the actual way in which CRs are applied to the market
is not satisfactory or contravenes basic Competition principles, then Competition rules should be implemented directly. In all the other cases, there is the need to establish an efficient model of clear allocation of duties between Regulatory and CAs, to give a priority to SSRs as *lex specialis* and to accept that either Competition or Regulatory Authorities should give serious consideration to both Competition and Sector Specific parameters as a context, when they address issues that fall within the scope of both sets of rules.

According to the conclusions above, the hypothesis presented in the Introduction is affirmed.

Furthermore, these conclusions present the basic parameters of the model that this research introduces for the organisation of the Regulation of the IEM. Under this model, the hierarchical primacy of CRs is affirmed by their –in principle- application through SSRs and their function as a (part of the) background of Sector Regulation. However, the latter will provide the basic tools and framework for the regulation of the IEM, as they should be designed and applied, in order to enhance efficiency of the market, achieve a various set of objectives and serve long-term Competition principles.

Of course, this research cannot succeed in establishing a complete model for the regulation of the IEM and the relation of Competition and Sector frameworks within it. Moreover, a series of important issues were just briefly introduced for the scope of this research but may need a further analysis. Taking into consideration the research limitations presented in the Introduction, the following issues are suggested for future research. First, it would be valuable to proceed to a more analytical examination of the concept of dynamic competition in relation to Energy Regulation and of its application to the design of a future relevant regulatory framework. Second, the present research underlined the importance of a deep research regarding a detailed model for the coordination and allocation of powers between CAs and Sector
Regulators according to the TEP and the evaluation of the practical application and of the overall efficiency of the seemingly ambitious but complex relevant framework it introduces. Third, another issue worth of further study concerns the treatment of cases where OU or forced divestiture cause severe financial problems to undertakings or face difficulties due to lack of demand for relevant assets; these cases should be examined under the proportionality principle. Fourth, it would be interesting that a similar study about the combined application of Sector Specific and Competition frameworks and their integration to a single model would be repeated in relation to other European network industries and the results would be compared to those referring to energy after the TEP or that the model suggested for EU would be compared to those of other jurisdictions. Fifth, a series of other issues related to the Energy Sector Regulation – except TPA and unbundling – such as the protection of consumers, universal services, security of supply, renewables and the strategy for low carbon and sustainability could be also examined, especially under the framework of dynamic competition and dynamic efficiency.

Finally, the ongoing implementation of the TEP and its application by MSs, as well as the investigation of its results and of the possibility for the preparation of a subsequent Energy Package, will provide material for a more practical and complete examination of the issues addressed in this research and will indicate the actual importance of the research conclusions.
LIST OF SOURCES

A. Books, Reports, Articles & Papers

* The form “(Author Year a or b):” is used before references of multiple works of the same author/body and of the same year, in order to distinguish them. The same format is used in the in-text citations.

** Where an electronic version has been used, the conventional version (where it exists), as well as the URL of the electronic version, are both mentioned.

*** URLs were checked and last accessed on 1/5/2011.


- Kivipuro, A. 2008. The Nordic Electricity Market and the Regulation of the TSOs – is there need for more harmonised Regulatory Set-up In: B. Delvaux,


B. Case Law

CFI

* Called as “European General Court” as of 1/12/2009.


- Case T-315/01 Kadi v Council and Commission [2005] ECR II-3649

- Case T-271/03 Deutsche Telekom v Commission [2008] ECR II-477

ECJ and Opinions of General Advocates

* Judgements are listed according to their chronological order; Opinions follow the relevant Judgement.

** The year of the delivery of an Opinion may differ from the year of the delivery of the relevant Judgement.

- Case C-56/65 Société Technique Minière v Maschinenbau Ulm GmbH [1966] ECR 235


- Case C-4/73 Nold and others v Commission [1974] ECR 491

- Case C-21/74 Airola v Commission [1975] ECR 221
- Case C-130/75 Vivien Prais v Council [1976] ECR 1589
- Joined Cases C-117/76 & C-16/77 Ruckdeschel and others [1977] ECR 1753
- Joined Cases C-124/76 & C-20/77 Moulins & Huileries de Pont-à-Mousson and others v Office national interprofessionnel des céréales [1977] ECR 1795
- Case C-85/76 Hoffmann-La Roche v Commission [1979] ECR 461
- Case C-120/78 Rewe-Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon Case) [1979] ECR 649
- Case C-44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727
- Case C-72/83 Campus Oil and others v Minister for Industry and Energy and others [1984] ECR 2727
- Case C-182/83 Fearon v Irish Land Commission [1984] ECR 3677
- Case C-283/83 Racke v Hauptzollamt Mainz [1984] ECR 3791
- Joined Cases C-240/82, C-241/82, C-242/82, C-261/82, C-262/82, C-268/82 & C-269/82 Stichting Sigarettenindustrie and others v Commission [1985] ECR 3831
- Case C-63/86 Commission v Italy [1988] ECR 29
- Case C-265/87 Schräder v Hauptzollamt Gronau [1989] ECR 2237
- Case C-5/88 Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609
- Case C-331/88 Fedesa and others [1990] ECR I-4023
- Case C-221/89 Factortame and others [1991] ECR I-3905
- Case C-44/89 Von Deetzen v Hauptzollamt Oldenburg [1991] ECR I-5119
- Joined Cases C-133/93, C-300/93 & C-362/93 Crispoltoni and others [1994] ECR I-4863
- Case C-299/95 Kremzow v Republik Österreich [1997] ECR I-2629
- Case C-7/97 Oscar Bronner v Mediaprint and others [1998] ECR I-7791
- Case C-7/97 Oscar Bronner v Mediaprint and others Opinion of Advocate General Jacobs [1998] ECR I-7791

123
- Case C-212/97 Centros v Erhvervs- og Selskabsstyrelsen [1999] ECR I-1459
- Case C-302/97 Konle v Austria [1999] ECR I-3099
- Case C-179/95 Spain v Council [1999] ECR I-6475
- Case C-94/00 Roquette Frères [2002] ECR I-9011
- Case C-491/01 British American Tobacco and others [2002] ECR I-11453
- Case C-463/00 Commission v Spain [2003] ECR I-4581
- Case C-98/01 Commission v UK [2003] ECR I-4641
- Case C-300/01 Salzmann [2003] ECR I-4899
- Case C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Austria [2003] ECR I-5659
- Case C-452-01 Margarethe Ospelt and Schlössle Weissenberg Familienstiftung [2003] ECR I-9743
- Case C-418/01 IMS Health v NDC Health [2004] ECR I-5039
- Case C-319/02 Manninen [2004] ECR I-7477
- Case C-309/02 Radberger Getränkegesellschaft and Spitz v Land Baden-Württemberg [2004] ECR I-11763

- Case C-174/04 Commission v Italy [2005] ECR I-4933

- Joined Cases C-453/03, C-11/04, C-12/04 & C-194/04 ABNA and others [2005] ECR I-10423

- Case C-434/04 Ahokainen and Leppik [2006] ECR I-9171

- Case C-452/04 Fidium Finanz v Bundesanstalt für Finanzdienstleistungsaufsicht [2006] ECR I-9521

- Case C-492/04 Lasertec Gesellschaft für Stanzformen v Finanzamt Emmendingen [2007] ECR I-3775

- Case C-157/05 Holbock v Finanzamt Salzburg-Land [2007] ECR I-4051

- Case C-503/04 Commission v Germany [2007] ECR I-6153

- Case C-464/05 Maria Geurts and Dennis Vogten v Belgium and others [2007] ECR I-9325

- Case C-464/05 Maria Geurts and Dennis Vogten v Belgium and others Opinion of Advocate General Kokott [2007] ECR I-9325


- Case C-280/08 P Deutsche Telekom v Commission and others [2010] ECR I-0000

ECtHR

- James and others v United Kingdom (1986) 8 EHHR 123
- Mellacher and others v Austria (1988) 12 EHHR 391
- Soering v United Kingdom (1989) 11 EHRR 439
- Pressos Compania Naviera v Belgium (1995) 21 EHRR 301
- Spadea and Scalabrino v Italy (1995) 21 EHRR 482
- Scollo v Italy (1995) 22 EHRR 514
- National & Provincial Building Society and others v United Kingdom (1997) 25 EHRR 127
- Iatridis v Greece (2000) 30 EHRR 97

US Courts

- United States v. Terminal Railroad Association 224 U.S. 383 (1912)
- Olympia Equipment Leasing v. Western Union Telegraph 797 F.2d 370 (7th Cir. 1986)
- Data General v. Grumman System Support 36 F3d 1147 (1st Cir. 1994)
- United States v. Microsoft 253 F.3d 34, 59 (D.C. Cir. 2001)
C. National Competition Authorities Decisions

Bundeskartellamt (German National Competition Authority)


AGCM (Italian National Competition Authority)


D. Commission Decisions


- Case COMP/37.792 Microsoft Decision [2004] OJ 2004 C179/18


E. Commission Press Releases


F. Commission Notices & Staff Working Documents


G. Commission Proposals


H. EU Legislation


