Third Party Access and Refusal to Deal: How sector regulation and competition law meet each other.

CONTENTS

Introduction

In this paper, we will analyse further the issue of concurrence between competition and sector rules and the relation between parallel concepts within the two different legal frameworks. We will firstly examine Third Party Access in relation to essential facilities doctrine and refusal of access and we will identify the common points and objectives of these concepts and the extent to which they provide a context to each other's implementation. Second, we will focus on how Commission uses sector regulation and objectives as a context within the process of implementation of competition law in the energy sector and third, we will investigate how sector regulation in energy sector incorporates competition law principles and affirms in this way the hierarchical primacy of competition rules. Finally, we will observe how this hierarchical primacy is combined with the need for effectiveness and focus on other than competition objectives of sector regulation and we will result to a proposed framework that defines the relation between sector and competition rules in energy markets and the allocation of competence and powers between sector regulators and competition authorities.

TPA and Refusal of access

TPA in the Recent Energy Regulatory Framework

TPA: Scope and Content

Third Party Access[1] (TPA) right is defined as the legally enforceable right of economically independent undertakings to access and use,[2] in certain circumstances, various energy network facilities owned by other companies.[3] This TPA right is established by First,[4] Second[5] and Third[6] Internal Energy Package.

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[1] The term is usually used regarding energy market and specifically energy network facilities, such as gas and electricity interconnectors to other countries, gas storage facilities, Liquefied Natural Gas (LNG) importation facilities etc.

[2] 'Open and non-discriminatory access to the networks by those who do not own the physical network infrastructure' according to Ofgem, Third Party Access Exemptions available at http://www.ofgem.gov.uk/Markets/WhlMkts/CompandEff/TPAccess/Pages/TPAccess.aspx.

[3] A. Kotlowski, 'Third-party Access Rights in the Energy Sector: A Competition Law Perspective' (2007) 16 *Utilities Law Review* 101

[4] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ L 27, 30.1.1997) especially art. 24 and art. 7.5 'The system operator shall not discriminate between system users or classes of system users, particularly in favour of its subsidiaries or shareholders.'; Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (*OJ L 204 , 21.07.1998) especially art. 7.2* 'In any event, the transmission, storage and/or LNG undertaking shall not discriminate between system users or classes of system users, particularly in favour of its related undertakings.'.

[5] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (*OJ L 176, 15.7.2003) especially art. 3.2* 'Member States may introduce the implementation of long term planning, taking into account the possibility of third parties seeking access to the system.*', art. 14.3, art. 20* 'Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users.' *and art.. 23.2.a.;* Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (*OJ L 176, 15.7.2003),* especially art. 3.2, art. 18 'Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and LNG facilities based on publishedtariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users.', art. 19, art. 20, art. 21, art. 24 and 25.2.a; Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity (OJ L 176, 15.7.2003); Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks (OJ L 289, 3.11.2005).

[6] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009), especially art. 3.2, art. 12 (TSO tasks (f): 'ensuring non-discrimination as between system

According to EU, TPA right is a fundamental tool for opening the European energy market to competition and creating an open and non-discriminatory energy infrastructure.[7] A TPA right is granted to market players in gas and electricity production industry, in order to be able to use the network systems that belong to other companies, for the transportation, delivery and trade of their product; on the other hand, this right corresponds with a relevant duty to perform on behalf of the network operator. According to Commission, such rights are essential because when network owners or operators maintain strong relations to energy producers and suppliers (subsidiary companies or not), they usually avoid to grant access to third parties, especially in areas where they will be in competition with the TSO itself or its trading branch or an affiliated company.[8] Furthermore, without such right energy producers cannot reach the final (eligible) customer and cannot trade, as there is no alternative to an energy network. Therefore, without TPA competition in

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users orc lasses of system users, particularly in favour of its related undertakings'), art. 13 (ISO tasks: 'Each independent system operator shall be responsible for granting and managing third-party access'), art. (ITO tasks (c): 'granting and managing third-party access on a non-discriminatory basis between system users or classes of system users'), art. 16, art. 20 '*Member States shall ensure the implementation of a system of third party access to transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users.*', art. 25,art. 32 'Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users.'; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009), especially art. 3.2, art.13 (especially 1.b 'Each transmission, storage and/or LNG system operator shall … refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings'), art. 18 (same as art. 20 of 2009/72/EC), art. 19.3-4, art. 20.1-2, art. 25 (about DSO tasks, similar as art. 13), art. 32 'Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and LNG facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users.', art. 33, art. 34 and art. 41.6-8; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ L 211, 14.8.2009); Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ L 211, 14.8.2009)

[7] Directive 2003/54/EC, Recital (6): 'For competition to function, network access must be non-discriminatory, transparent and fairly priced.'; Directive 2009/72/EC, Recital (4): 'However, at present, there are obstacles to the sale of electricity on equal terms and without discrimination or disadvantages in the Community. In particular, non-discriminatory network access and an equally effective level of regulatory supervision in each Member State do not yet exist.'

[8] European Commission DG Competition Report on Energy Sector Inquiry 10.01.2007 SEC(2006) 1724.

downstream and overall energy markets cannot work effectively.[9] Moreover, the infrastructure related to TPA (energy networks) is not duplicable and is usually perceived –with few exemptions-[10] as a natural monopoly of companies that had official monopoly rights on energy market during the pre-liberalisation era[11] due to huge economic (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 (most European energy networks pass through densely populated areas) costs that may derive from an effort of establishment of parallel networks.[12]

According to art. 2 of Directive 2009/72/EC and 2 of Directive 2009/73/EC, TPA rights are not autonomous, as they are reserved only for 'eligible customers';[13] so the concept of 'eligibility' and of the underlying energy supply contract[14] limits and defines TPA rights.

TPA is distinguished between negotiated and regulated access. First Internal Energy Package introduced them as equal alternatives, however Second and Third Packages imposed regulated access granted by unbundled operators as the minimum TPA requirement –without forbidding of course a possible negotiated access-, due to the fact that competition was not developing fast in energy markets.[15]

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[9] TPA… 'is fundamental in facilitating greater competition and making energy markets work effectively' Ofgem, Third Party Access Exemptions.

[10] F. Graper and C. Schoser, 'Third Party Access' in C. Jones (eds.) *The Internal Energy Market: The Third Liberalisation Package* (Leuven: Claeys & Casteels, 2010), 29; A. Kotlowski, 'Third-party Access Rights in the Energy Sector', 102.

[11] F. Graper and C. Schoser, 'Third Party Access', 29; A. Kotlowski, 'Third-party Access Rights in the Energy Sector', 102.

[12] F. Graper and C. Schoser, 'Third Party Access', 30; A. Kotlowski, 'Third-party Access Rights in the Energy Sector', 102.

[13] According to art. 2.12 of Directive 2009/72/EC '"eligible customer" means a customer who is free to purchase electricity from the supplier of his choice within the meaning of Article 33'and according to art. 2.28 of Directive 2009/73/EC '"eligible customer" means a customer who is free to purchase gas from the supplier of his choice, within the meaning of Article 37'.

[14] A. Kotlowski, 'Access Rights to European Energy Networks- a Construction Site Revisited' in B. Delvaux, M. Hunt and K. Talus (eds), *EU Energy Law and Policy Issues - ELRF Collection*, 2nd ed. (Brussels: Euroconfidentiel 2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434296, 5.

[15] F. Graper and C. Schoser, 'Third Party Access', 29-30.

We have also to note that EU seems to favour ownership unbundling as a means to succeed effective TPA and open and non-discriminatory access to energy network infrastructure. According 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, which implies the appointment of the network owner as the system operator and its independence from any supply and production interests, is clearly an effective and stable way to solve the inherent conflict of interests and to ensure security of supply. '.[16]

According to Directive 2009/73/EC:

'Without effective separation of networks from activities of production and supply (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.'[17]

Therefore, we observe that the issue of ownership unbundling is strongly related to third party access according to the following rationale. In order to have a strong and competitive energy market, barriers of entrance to the market should be reduced, so that new competitors could enter and liberalise the downstream market. In order that access to the network is an essential prerequisite for this entrance and as the network constitutes a natural monopoly –in most cases-, access to the network should open for new entrants –under some conditions-. In order that effective access is granted to third parties, incentives to refuse access should be reduced. The strongest incentive to refuse is the usual relation between a network operator and an

[16] Recital 11.
[17] Recital 6.

affiliated competitor in downstream market. Therefore, if this relation ceases to exist or becomes weaker, third party access will become more effective and competition in downstream markets will be strengthened for the benefit of consumers. According to this argumentation, energy sector regulation in EU provides for both unbundling and TPA.

Access to Networks according to Competition Law

Refusal of Access in Energy Market

On the other hand, the issue of access to network facilities falls into the spectrum of interest of competition law as well. Refusal to deal is not an abuse per se under art. 102 TFEU, as all companies participating in a free market –at least in principle- have the right to exploit their assets and facilities in the most profitable way for them and are free to contract –or not to contract- with anybody and under the conditions they choose; so, refusal to deal is not equated with abuse.[18] This freedom was recognised even by Magill case, which noted that such refusal can be assumed as abused only 'in exceptional circumstances'[19] and only if it hinders 'the maintenance of the degree of competition still existing in the market or the growth of that competition'.[20] According to an opinion,[21] the exclusive right to exploit intellectual property in the Magill case is analogous to an exclusive property right of the owner of the network in relation to this facility. Therefore, this refusal can be assumed as an abuse under art. 102 TFEU, only after a case-by-case analysis, based on

[18] Case T-41/96, *Bayer AG v Commission,* [2000] ECR II-3383 rec. 180.
[19] Joined Cases C-241/91 and C-242/91RTE and ITP Ltd. v Commission Re Television Programmes Sub nom Magill, [1995] ECR I-743 rec. 49.
[20] ibid rec. 6.
[21] A. Kotlowski, 'Access Rights to European Energy Networks', 17.

the individual facts of each occasion, if these facts show that this refusal is able to influence the market and weaken competition.[22]

In these cases, refusal to grant access (refusal to deal or refusal to supply) belongs to the broad category of competition infringements, which has to do with exclusionary abuses.[23] Refusal to deal is very important in energy markets, as it usually concerns energy transmission and distribution networks. Networks constitute the gateway to the market. As we have already analysed, 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. Refusal to supply (network foreclosure) may take several forms such as: margin squeeze (constructive refusal), inadequate capacity management,[24] capacity hoarding[25] and degradation,[26] long term capacity bookings by the incumbent shipper[27] and strategic limitation of investments[28] (strategic underinvestment). Moreover, refusal to deal and provide access 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[29] and Swedish electricity interconnectors[30] cases).

Apart from this categorisation between exploitative and exclusionary abuses, we can categorise refusal of access according to whether access had been

[22] ibid 17-18.

[23] For an analysis of exclusionary abuses look to European Commission, 'DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses' [2005] [234], available at http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf.

[24] RWE gas foreclosure (Case COMP/39.402) Commission Decision of 18 March 2009, para 30, available at <http://ec.europa.eu/competition/antitrust/cases/decisions/39402/en.pdf>

[25] RWE gas foreclosure

[26] ENI foreclosure (Case COMP 39.315)

[27] E.ON. and GDF cases. Commission (EC), Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/39.317 — E.ON gas, 22 January 2010; Commission (EC), 'Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/39.316—Gaz de France (gas market foreclosure)' [2009] OJ C156/14.

[28] ENI foreclosure (Case COMP 39.315)

[29] German electricity balancing market (Case 39.389) Commission decision of 26 November 2008 [2009] OJ C36/8

[30] Svenska Kraftnät (Case COMP 39.351)

previously granted to the requesting provider or a competitor or is still granted to a competitor. According to this criterion, refusal of access can be categorised into discrimination (a relevant access is granted to a competitor, however it is refused to another party or is granted under disadvantageous conditions), withdrawal of access (a relevant access right had been previously granted to the party, however it is now withdrawn, in order either to be offered to another competitor or to be refused to all other parties) and essential facilities refusal[31] (no relevant access right has been ever granted to the requesting party or a competitor, however such access is essential for the party, in order to participate in the downstream market).[32]

Refusal of access and Essential Facilities Doctrine

Refusal of access can be strongly related to essential facilities doctrine, which is an a concept of antitrust jurisprudence, according to which the owner or operator of a facility has to grant competing undertakings access to this facility, when this facility is essential for conducting a specific market activity and when this facility, however it is not duplicable and when this refusal of access may eliminate competition in the market and prevent the introduction of a new product.[33]

[31] However, according to our opinion, this use of 'essential facilities' term is too narrow. As we analysed in previous sections essential facilities doctrine is an antitrust law concept, which can characterise situations, where –under specific circumstances- forced sharing or forced continuation of sharing of facilities should be ordered. Under our previous analysis, the application of this doctrine is not excluded from the fact that other competitors have access or access had been previously granted. Actually, the latter (withdrawal from previous access agreement) is the case in Aspen Skiing.
[32] A. Kotlowski, 'Access Rights to European Energy Networks', 18.
[33] The 'essential facilities doctrine' concept has been already analysed in previous papers.

Specifically, in Bronner case,[34] ECJ developed a set of three conditions[35] that should be met, in order that such a refusal to deal would be viewed as anticompetitive:[36]

a) the refusal of access 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
c) the access must be denied without any objective justification.

In IMS case,[37] condition c) remains unchanged; condition a) is changed as the latter case also asked for an intention to exclude any competition on a secondary market and also added as possible consequence the prevention of emergence of a new product for which there is a potential consumer demand[38]; condition b) remained unchanged.

In Microsoft case,[39] the 'new product' requirement was abandoned and was substituted by the more flexible criterion of 'possible reduction of incentives to innovate in the whole industry'.[40]

In Magill case,[41] another criterion was also used[42] regarding the existence of two vertically related markets; the first one constitutes an input for the second own. This case required that the control of the first market (upstream) constitutes a bottleneck for access to the second market (downstream), so that

[34] We present it first as it formed a basic set of conditions, in order that this doctrine could apply; this set still forms the core of this doctrine in EU, although some other conditions were also added and withdrawn in previous or later cases.
[35] D. Geradin, 'Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court's Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?', 7-8.
[36] ECJ, 26 November 1998, Oscar Bronner v. Mediaprint, C-7/97, [1998] ECR I-7791;
[37] Commission Decision of 3 July 2001, NDC Health/IMS Health: Interim Measures, OJ L 49 of 28 February 2002, 18; D. Geradin, 'Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court's Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?', 9-10.
[38] As in Magill case as well.
[39] *Microsoft Re server software* Commission Decision COMP/C-3/37792 of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty, OJ 2004 C179/18.
[40] F. Leveque, 'Innovation, Leveraging and Essential Facilities Interoperability Licensing in the EU Microsoft Case' (2005) 28 (1) *World Competition* 71
[41] Joined Cases C-241/91 and C-242/91RTE and ITP Ltd. v Commission Re Television Programmes
[42] This case preceded Bronner, Microsoft and IMS.

if the controller of the first one refuses access to it, then the second one is almost automatically foreclosed for the party trying to enter it.[43]

Essential Facilities Doctrine in the Energy Sector

ECJ has developed a standard test, in order to affirm that a behaviour may prevent competition; according to this test "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".[44] In Stichitng Sigarettenindustrie, it was affirmed that –in order to prove anti-competitive behaviour- there is no condition that the practice has already influenced competition, but it is enough to prove that it can distort it.[45]

We have already discussed the requirement of two related markets and we concluded that this requirement either narrows significantly the scope of this doctrine or results to the hypothesis of a fictional primary market, which is neither a necessary nor a systematically justified prerequisite for the identification of a market abuse. According to our opinion, such requirement limits third party access to an unjustifiable extent and should be abandoned.[46] On the other hand, we do not agree with a broad application of essential facilities doctrine, but what we actually mean is that when owners forbid access to facilities, then we should focus on the effects of this refusal, in order

[43] This criterion is also followed by Bronner and IMS cases.

[44] Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.4.2004, 81 at par. 23. Look also to Kerpen & Kerpen, Case 319/82, [1983] ECR 4173.

[45] *Stichting Sigarettenindustrie et al.* v. *Commission*, Joined cases 240, 241, 242, 261, 262, 268 and 269/82 [1985] ECR 3831 at 51: '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, if not directly, then at least actually or potentially.'

[46] Look also to A. Kotlowski, 'Third-party Access Rights in the Energy Sector', 107, according to whom such requirement will not cover the access of TSOs active on a horizontally parallel transportation market. However, we disagree with the author's opinion that this requirement constitutes a weak point of the relevant competition law, which can be faced only by sector regulation, as we believe that this requirement is unjustified even under a strictly competition law examination of cases concerning third party access.

to define 'essentiality' and judge about the existence of a market abuse, no matter what is the number of the markets involved; according to our opinion a refusal can be abusive, even if we do not consider the operation of the facility as a distinct market, although this refusal could be also not judged as abusive, even when the two markets case is real indeed.

Regarding the 'new product' requirement, we tend to agree with the opinion[47] that such requirement should be abandoned at least considering energy markets, as this criterion seems to actually fit into cases concerning intangible assets and intellectual property rights, however it is not reasonable to expand it in cases, which concern physical facilities and different –than intellectual-property rights.

After these two notes above (about the two unjustified –according to our opinion- requirements), we think that essential facilities doctrine has -in principle- a significant scope of application regarding energy markets.

An inability to access the network results to a severe limitation of competition in the relevant supply market. Networks are indispensable and essential, in order to access these markets, as there is no alternative. They are clearly not only essential but they cannot even be duplicated. In order to establish a new network infrastructure in energy industry, a company 'would have to make exceptional organisational and financial efforts' and would be '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'.[48] As we have already mentioned, such effort is severely limited by a series of environmental, financial and social factor.

The possibly unjustified character of such refusal will be a matter of a case-by-case examination. However, we have to note that Third Internal Market Directives and the relevant Regulations provide a detailed legal framework

[47] ibid 107-108.

[48] IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG. Re brick structure (Case C-418/01) [2004] ECR I-5039 at 29.

about the exemptions from the duty to grant access and about the conditions, under which a network operator can refuse it.

Essential Facilities Doctrine in relation to Withdrawal of Access and Discrimination

Moreover, we already noted that according to an approach essential facilities doctrine is assumed as a distinct case of refusal of access, different from withdrawal of access and discrimination.

We do not agree with such distinction. Regarding withdrawal of access, we refer to Aspen Skiing case;[49] Supreme Court ruled that Aspen Ski Co. violated antitrust law because it terminated its cooperation with Highlands Skiing Corp. (with which they used to co-exploit a facility) due to dispute over profit sharing (so after termination the latter was left to exploit only one of the four mountains and its profits were subsequently reduced). In this case, the owner tried to exploit its favourable position for raising the access price by 'punishing' the competitor with unilateral termination of the cooperation. This was a case, where essential facilities doctrine and its criteria were applied, in order to force the owner to renew the access.

In Trinko case, Supreme Court refused to judge as abusive a refusal to a party asking for access for the first time; it based its different ruling on the grounds that Aspen case was distinguished because of the existence of a pre-existing relationship.[50] So, Supreme Court seemed to accept a difference between the case of a pre-existing relationship and a request for access from a party, with which the owner has never dealt again. ECJ seems to accept this argument; in Commercial Solvents[51] ECJ seemed to suggest a distinction between the termination of an existing contractual relation and a refusal to start dealing

[49] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).
[50] *'The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.' Verizon Communications Inc. v. Trinko, Llp,* 9.
[51] *Commercial Solvents v Commission* (Joined Cases 6 and 7/73) [1974] ECR 223.

with a new party. It based the abuse on the unjustified termination of a long previous dealing, in order to eliminate competition in the downstream market.

Although both cases seem to accept withdrawal as a different form of abuse, the conditions under which the withdrawal was judged as abusive in Commercial Solvents do not differ from these of essential facilities doctrine (unjustified refusal, essentiality of the raw material, elimination of competition). Regarding Trinko, Supreme Court anyhow narrowed the scope of essential facilities doctrine for a number of much more substantial reasons.[52] The reasons for which such a withdrawal could be abusive are not different from these concerning a refusal in the first place, although it is true that pre-existing voluntary sharing constitutes an indication that parties once found an economic reason for sharing; on the other hand such withdrawal may not be abusive, if it is justified by objective reasons. Therefore, we do not think that there is any reason to distinguish between the two cases or to apply forced sharing more broadly in withdrawal cases.

Regarding discrimination, we believe that the same as above apply. According to art. 102 (c) TFEU 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage' may constitute an abuse of dominant position. Therefore, when selective refusal of access –a refusal to one party, although access is granted to other parties- is not justified by objective circumstances, this constitutes discrimination. If this discrimination may restrict competition in the market, this constitutes an abusive and anti-competitive behaviour. Competition Law also faces discriminations regarding the entrance to the domestic market of undertakings from other Member-States, which restrict competition between

[52] Look especially to our analysis in the paper about incentives to invest.

these states.[53] However, we believe that essential facilities doctrine as analysed in previous papers,[54] can also cover discriminatory refusal of access.

As we observe, in order that such refusal can be assumed as abusive, it has to restrict competition and be unjustified. Therefore, two out of three conditions suggested by Bronner case have to be fulfilled.

This does not apply necessarily, however, regarding the third condition: 'essentiality'; in other words, there is the question 'Whether an unjustified and selective refusal of access to a facility can be assumed as abusive discrimination, although the facility is not indispensable for carrying out the applicant's business (meaning that it is duplicable or that there are alternatives)?'.

Prima facie the answer is positive. According to art. 102 TFEU (c), just the application of dissimilar conditions to equivalent transactions (given that the cases are equivalent indeed) constitutes discrimination, no matter whether the party can transact business with a different counterparty. This means that if for example a TSO refuses access to one specific supplier –although it grants access to others-, this could be abusive even if the supplier can find an alternative network facility. On the other hand, according to the same article, this discrimination has to place third party at competitive disadvantage. If the third party can easily find an alternative, there will be no significant disadvantage. Moreover, if there is such an easy alternative, the competition will not be restricted. Therefore, generally speaking, conditions of 102 TFEU seem to fit with essential facilities doctrine's basic conditions. However, we should admit that in many cases a facility could be assumed as not 'essential' by the doctrine, although refusal of access to them could bring a competitive

[53] Look to Stichting Sigarettenindustrie case, especially at 50 for an example of such a restrictive discrimination.

[54] Diathesopoulos, Michael D., Essential Facilities Doctrine in Relation to Incentives to Invest (December 29, 2010). Available at SSRN: http://ssrn.com/abstract=;

disadvantage. According to IMS,[55] 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 for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services'. So, a facility may not be essential, even if the alternative -existing- is offered under less advantageous terms. Furthermore, it is not enough that the duplication is difficult –in order to apply essential facilities doctrine-, but this difficulty has also to be unreasonable. All these mean that essential facilities doctrine may not be applied, because of the existence of an alternative, although this alternative will result to a competitive disadvantage for the third party. Finally, it seems that regarding discrimination, essential facilities doctrine has a narrower and stricter scope than 102 TFEU, although in many occasions the conditions of art. 102 and of the doctrine overlap.

We can conclude that essential facilities doctrine offers a developed conceptual basis and context[56] of terms, conditions for the examination of refusal of access cases under a competition law point of view.

The Relation between TPA and Refusal of Access

According to the previous analysis, third party access and refusal of access – which is largely related to essential facilities doctrine- concepts, treat the same objective regarding energy markets: the liberalisation of access to networks and gas and electricity infrastructure facilities. TPA treats the issue from a

[55] IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG. Re brick structure at 28. Look also to 29, cited above.
[56] P. Evans, Liberalizing Global Trade in Energy Services (Washington DC: AEI, 2002), 45.

sector specific point of view, while essential facilities doctrine –to the extent it is applied under the scope of 102 TFEU- treats it from a competition law aspect. Moreover, TPA –as sector specific- refers to secondary EU legislation[57], while essential facilities doctrine applies, on the grounds of primary (Treaty) legislation. As the previous analysis showed, both TPA and essential facilities doctrine seem to face the same aspects of the access problem: withdrawal of previous TPA rights, refusal in the first place and discriminatory refusal. TPA approach, as expressed in Internal Energy Packages, is much more detailed, focused and specialised than essential facilities and competition law approach, which are designed for a much broader application to a general set of industries.

However, essential facilities doctrine's scope of application is under question; even if we accept that certain conditions –such as the existence of two markets- do not have to apply, the doctrine cannot cover the whole set of aspects that the general refusal to deal concept –of article 102 TFEU- can cover. On the other hand, essential facilities doctrine offers to refusal to deal concept a valuable theoretical framework for the definition of abusive behaviours –although this framework is mostly indicative and not restrictive-. So, the real issue has to do with the relation between TPA as a form of sector-specific secondary, technical and specialised approach and refusal of access as a competition law and general approach.

All our remarks regarding the concurrence of sector specific regulation and competition law (presented in another paper)[58] apply here as well. What we have to note here is that both approaches are simultaneously broader and narrower to each other. TPA's mission is to secure access for energy supplies

[57] A. Kotlowski, 'Access Rights to European Energy Networks', 17.

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

to the networks and build the whole specific –for the market-, 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 set of rules that have a very specific objective: to promote the opening of gas and electricity market, during this transitory stage of post-liberalisation and development of open competition. The mission of refusal to deal is narrower,[59] as it does not include the necessary framework and tools to regulate the access and define its terms; its role is just to examine which cases constitute abusive refusal and discourage or stop this behaviour, its scope of application is based on a case-by-case analysis –in comparison to the general for any case scope of regulation- and on a mostly ex post intervention –in comparison to ex ante intervention of regulation-[60] and its framework by its own nature cannot incorporate and take into consideration other objectives, such as security of supply and investment incentives. However, refusal to deal 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 promoting the market development factor);[61] although it is not as flexible as regulation regarding the technicalities and the different objectives it can take into consideration, its flexibility lies in the fact of its diachronic role and scope of application.

Our opinion is that TPA sector regulation and refusal of access concept are complementary to each other. TPA is designed to impose the general duty to grant access and regulate its terms and conditions; refusal of access is

[59] We could actually note that competition law provisions are so general that their application results 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.

[60] Although, as we observed during the analysis of some recent competition law cases, refusal of access is largely used by Commission as a quasi ex ante intervention.

[61] L. Hancher, A. De Hauteclocque, 'Manufacturing the EU Energy Markets: The Current Dynamics of Regulatory Practice' (2010), 13.

designed, in order to face distortions of competition and offer a tool of severe 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.[62] However, competition law may offer a deep intellectual framework for the design and application of TPA and relevant sector specific regulation;[63] especially essential facilities doctrine and its basic set of conditions can provide a fundamental background in relation to key objectives and parameters of third party access.

Conclusions about the Relation between Sector and Competition Rules

This conclusion also means that sector specific regulation has to take into consideration the general competition law principles and objectives; TPA and sector specific regulation have to promote the opening of electricity markets to competition and reduction of discrimination and abuses (and so it does). On the other hand, sector regulation cannot constitute an excuse for companies, in order to avoid their general obligations, according to competition law. This was underlined by Stichting Sigarettenindustrie (Dutch Cigarette Industry Foundation) case.[64] According to this case[65] even when state sector regulation limits competition in a market, undertakings continue to be obliged to avoid any behaviour that may further limit competition;[66]

[62] Look also to our analysis of incentives to invest paper, where we provide a comprehensive explanation for this opinion.
[63] A. Kotlowski, 'Access Rights to European Energy Networks', 27.
[64] *Stichting Sigarettenindustrie et al.* v. *Commission*, Joined cases 240, 241, 242, 261, 262, 268 and 269/82 [1985] ECR 3831.
[65] ibid at 96: 'Finally , with regard to the applicable legislation , the commission stated that that legislation restricted the parties ' freedom of action to a certain extent but did not eliminate it , and that it took that fact into account in setting the amount of the fines . there is no reason to interfere with its assessment on this issue'.
[66] This presupposes that competition has not been already eliminated by state's intervention. If the competition has been already eliminated, undertakings' behaviour plays no restrictive role. Look to Commission and French Republic v. Ladbroke Racing [1997] ECR I-6265

moreover, when competition is already limited, undertakings are even more strictly obliged to avoid anti-competitive behaviour.[67] In Deutsche Telekom case,[68] although the NRA had approved the firm's tariffs, Commission applied art. 82, ruling that the competition rules may apply in any case where the sector specific rules do not preclude the undertakings from engaging in autonomous anticompetitive conduct and thus establishing a truly parallel system of dealing with such cases –even in the opposite way from this applied by the NRA-.[69]

In Deutsche Telekom,[70] the company was actually accused for margin squeeze as it was charging competitors for using its network much more than the prices it was charging end-users; the result was that competitors were facing a serious competitive disadvantage.[71] The company defended itself by using the argument that its access tariffs were approved by the local regulator, RegTP;[72] as there was such approval, Deutsche Telekom was not responsible for any competition law infringement, while Commission should turn against Germany,[73] as this was the state, the legislation of which created or enabled the competition distortion.[74] This argument was rejected by Commission, which based this decision on a similar rationale as that of Stichting Sigarettenindustrie case. As Deutsche Telekom continued to have a relevant commercial discretion about the formation of its tariffs –despite the intervention of Reg TP- it was able to structure its tariffs, in a way that could stop the margin squeeze.[75] However, Deutsche Telekom seemed to find the

67 I. Van Bael, Competition law of the European Community (Hague: Kluwer, 2005), 68.
[68] Commission Decision of 21 May 2003, Deutsche Telekom AG, OJ L 263 of 14 October 2003
[69] ibid, para 54.
[70] It was the first case, where the Commission applied competition law principles to a margin squeeze in the telecommunications sector. D. Geradin, 'The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector' (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=671804, 26-27.
[71] ibid, para. 102.
[72] CFI, Case T-271/03 Deutsche Telekom AG v Commission [2008] ECR II-477, at 257.
[73] According to art. 226 TEC.
[74] Commission Decision of 21 May 2003, Deutsche Telekom AG, para. 53.
[75] Look to Case T-271/03 Deutsche Telekom AG v Commission [2008] at 264-265.

intervention of RegTP convenient and tried to 'fortify' its position behind the cover of regulation. As it was ruled in Stichting Sigarettenindustrie case, the fact that state regulation limits competition does not mean that undertakings are dismissed from their duties, according to general competition law; on the other hand, this means that their duties to preserve competition get even stronger, in order to equilibrate the limitation of competition due to regulation. Moreover, in Deutsche Telekom case, sector regulation did not actually limit competition, but just enabled this limitation by approving restrictive tariffs; therefore, it 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). CFI affirmed the Commission's decision.[76]

It seems that in Deutsche Telekom case, Commission did not take into consideration the fact that there was a set of sector specific rules regarding the behaviour in question. This was a totally different treatment than that of U.S. Supreme Court in Trinko case. Geradin has suggested serious reasons that justify this different attitude. The most important of them –according to our opinion- are the detailed character of American regulation in comparison to the relevant regulatory framework of Deutsche Telekom case, the inexpedience of RegTP regarding dealing with margin squeeze problems and the key fact of the hierarchy of norms.[77]

We believe that this last reason is very important regarding the relation between EU Competition Law and Sector Regulation. Although in U.S. sector specific and competition rules are legally equal, under EU law, sector regulation is included in secondary legal sources, i.e. directives and regulations, while competition law is part of the Treaties. It is, therefore, possible for the Commission to practically abstain from implementing

[76] Case T-271/03 Deutsche Telekom AG v Commission [2008] ECR II-477.
[77] D. Geradin, 'Limiting the Scope of Article 82 of the EC Treaty', 26-27.

competition rules, when sector specific regulation exists; it would be however impossible to accept that competition rules are not applicable in such cases[78].

Sector Parametres as a Context for Recent Competition Law Cases

However, at this point and before expanding further regarding the concurrence of sector and competition rules in the market, we should focus on whether in recent competition decisions of energy sector Commission has taken into consideration the set of sector rules, structure and priorities as a context and how the findings of these cases have influenced the relevant developments of sector energy regulation. This will help us understand how the concurrence of competition and sector rules actually functions, at least regarding the competition enforcers' aspect and to what extent sector specific parameters influence the Commission's independent intervention and Commission's priorities influenced sector rules.

Long Term Capacity Agreements

Regarding the issue of long-term capacity contracts, Commission seemed to adopt a relevant position to that followed in Distrigaz and E.ON Ruhrgas cases, about long-term downstream supply contracts.[79] GDF Suez and E.ON. gas foreclosure cases suggest that the Commission seems to apply the Distrigaz-model[80] in energy networks, imposing the duty that operators have

[78] ibid 26-27.
[79] Distrigaz (Case COMP/37.966); E.ON Ruhrgas (Bundeskartellamt, B8-113/03).
[80] Distrigaz Case established the so-called foreclosure model for long-term contracts. In principle long-term contracts do not violate art. 102 TFEU (82 EC), however especially in the energy sector, due to the recent liberalisation and the prior existence of monopolies, such contracts may constitute barriers against new competitors. So, the specific circumstances of each case show whether these contracts violate art. 102. In cases about long-term contracts and customer foreclosure, the 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 above rationale and approach were replicated in Long-term contracts France Case

to limit their capacity reserves for an incumbent undertakings.[81] We see that Commission developed a parallel view on the issue of access to networks to that on access to customers.

However, we should note that issues about capacity management fall within the scope of sector regulation (according to both Third[82] and Second Energy Packages)[83] and the competence of NRAs[84].

However, none of these energy packages intervenes into the issue of long-term transportation contracts.[85] As we observe, Commission, however, decided to intervene by using competition rules to an issue that is clearly not regulated by sector rules. We could suppose 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 EU (because if this issue was intended to remain unregulated, then Commission clearly neglected an important choice of sector regulation). In other words, we should investigate whether long-term capacity contracts constitute an acceptable practice by sector regulation.

First, long-term contracts do not oppose competition per se but under some specific circumstances (look to the Distrigaz model as presented above).[86] Second, energy sector regulation seems to accept long-term capacity contracts

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(EDF). Besides, in this case Commission accepts a standard rule, according to which 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; these standards were widely accepted in the EDF case as well. Look also to Scottish Nuclear (Case IV/33.473) Commission Decision of 30 April 1991 [1991] OJ L178/31, para 40; Commission (EC), 'Guidelines on Vertical Restraints' [2000] OJ C291/1 n 116, para 4. Look also to the Art. 48 Dir. 2009/73/EC (n 7) (Third Package), about derogations concerning take-or-pay contracts in gas sector.

[81] Look for an analysis of these cases to Progress.1.

[82] Look for example to Directive 2009/72/EC, art. 12, 13, 17, 37.

[83] U. Scholz and S. Purps, 'The Application of EC Competition Law in the Energy Sector' (2010) 1 Journal of European Competition Law & Practice 37, 49.

[84] Directive 2009/72/EC, art. 37.b 'ensuring compliance of transmission and distribution systemoperators and, where relevant, system owners, as well as ofany electricity undertakings, with their obligations under thisDirective and other relevant Community legislation, including as regards cross-border issues'.

[85] U. Scholz and S. Purps, 'The Application of EC Competition Law in the Energy Sector', 49.

[86] Commission (EC), 'Antitrust: Commission increases competition in the Belgian gas market – frequently asked questions' MEMO/07/407

in a series of provisions. Especially regarding gas, Commission seems to accept such long-term upstream contracts as related to gas import contracts, in order to facilitate security of supply.[87] Moreover, Art. 27 Directive 2003/55/EC and Art. 48.1[88] and 35.1[89] Directive 2009/73/EC accept the possibility to deny access to third parties, in order to facilitate the fulfilment of contractual obligations under take-or-pay clauses[90] of long-term gas import contracts, when theundertaking faces economic difficulties regarding the fulfilment of its duties. Furthermore, energy sector regulation does include detailed provisions, in order to secure that long-term capacity contracts will not result to an unjustified market foreclosure.[91] Besides, the gas sector regulation explicitly describes the factors that should be taken into consideration regarding the approval of derogations; these factors do not only concern competition issues but sector economic and market parametres as

[87] Commission, 'Commission Staff working document: Accompanying document to the Proposal for a Regulation of the European Parliament and of the council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC in security of gas supply' COM (2009) 363, 16 July 2009 SEC(2009) 978 final, 27–28; U. Scholz and S. Purps, 'The Application of EC Competition Law in the Energy Sector', 49.

[88] 'If a natural gas undertaking encounters, or considers it would encounter, serious economic and financial difficulties because of its take-or-pay commitments accepted in one or more gas-purchase contracts, it may send an application for a temporary derogation from Article 32 to the Member State concerned or the designated competent authority. Applications shall, in accordance with the choice of Member States, be presented on a case-by-case basis either before or after refusal of access to the system. Member States may also give the natural gas undertaking the choice of presenting an application either before or after refusal of access to the system. Where a natural gas undertaking has refused access, the application shall be presented without delay. The applications shall be accompanied by all relevant information on the nature and extent of the problem and on the efforts undertaken by the natural gas undertaking to solve the problem. If alternative solutions are not reasonably available, and taking into account paragraph 3, the Member State or the designated competent authority may decide to grant a derogation.'

[89] 'Natural gas undertakings may refuse access to the system on the basis of lack of capacity or where the access to the system would prevent them from carrying out the public service obligations referred to in Article 3(2) which are assigned to them or on the basis of serious economic and financial difficulties with take-or-pay contracts having regard to the criteria and procedures set out in Article 48 and the alternative chosen by the Member State in accordance with paragraph 1 of that Article. Duly substantiated reasons shall be given for any such a refusal.'

[90] An agreement in which buyers have to pay a certain amount even if they do not acquire certain minimum quantities of gas.

[91] Look for example to Directive 2009/73/EC, art. 33.1,3,4, art. 41.1.(j),(k),(m),(n),(r),(s),(u), 41.3.(a),(b),(e), art. 41.5 (a),(b),(e),(f),(g), 41.6,9,10.

well.[92] We observe that the issue of long-term capacity contracts is highly related to some important objectives of sector policy and regulation and has to do with efficiency of the relevant regulatory framework. Therefore, this systematic observance of sector regulation shows that there is an important structural difference between long-term supply and long-term capacity agreements[93] and an unconsidered expansion of Distrigaz model and the relevant concepts of competition law regarding exclusivity clauses and market foreclosure would neglect some truly important parametres of the sector context.

In Gaz de France (gas market foreclosure)[94] the Commission considered that it was abusive for a firm to reserve its own pipeline capacity for itself, even if the capacity was used (no capacity hoarding) 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 E.ON. case. It is apparent –from the analysis above- 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. As we observed above, long-term capacity contracts seem to be left

[92] Directive 2009/73/EC, art. 48.3 'When deciding on the derogations referred to in paragraph 1, the Member State, or the designated competent authority, and the Commission shall take into account, in particular, the following criteria:
(a) the objective of achieving a competitive gas market;
(b) the need to fulfil public-service obligations and to ensure security of supply;
(c) the position of the natural gas undertaking in the gas market and the actual state of competition in that market;
(d) the seriousness of the economic and financial difficulties encountered by natural gas undertakings and transmission undertakings or eligible customers;
(e) the dates of signature and terms of the contract or contracts in question, including the extent to which they allow for market changes;
(f) the efforts made to find a solution to the problem;
(g) the extent to which, when accepting the take-or-pay commitments in question, the undertaking could reasonably have foreseen, having regard to the provisions of this Directive, that serious difficulties were likely to arise;
(h) the level of connection of the system with other systems and the degree of interoperability of those systems; and
(i) the effects the granting of a derogation would have on the correct application of this Directive as regards the smooth functioning of the internal market in natural gas. '

[93] U. Scholz and S. Purps, 'The Application of EC Competition Law in the Energy Sector', 49.

[94] Commission (EC), 'Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/39.316—Gaz de France (gas market foreclosure)' [2009] OJ C156/14

unregulated by sector rules intentionally and this argument derives from the systematic analysis of the whole framework of provisions of sector regulation. As regulation chose not to intervene into these contracts, we can understand that this also applies to the issue of mere reservation of capacity for individual use of the undertakings themselves. Commission seemed not to take in serious consideration this context by preferring a strict competition law approach about foreclosure, which was not proved to be combined with efficiency issues.

Strategic Underinvestment

Regarding the issue of strategic underinvestment, Commission accepted in ENI[95] and GDF cases –where the undertakings did not expand import gas facilities to fully meet demand- that the relevant behaviour of the companies constituted an abuse of competition on the grounds of market foreclosure and refusal to supply. Therefore, Commission imposes to 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 a –severely- expanded version of essential facilities doctrine; owners of facilities not only have to grant access to their facilities to third parties, but also have to spend sources, in order to facilitate and enlarge this access even more. So, it seems that Commission moved from forced sharing to forced investment as a solution for energy infrastructure. Somebody could argue that this version of essential facilities doctrine may also take into consideration the important issue of incentives to invest and tries to resolve it. However, we

[95] We refer to both ENI foreclosure case (Case COMP 39.315) and ENI Trans Tunisian Pipeline case, Decision of 15 February 2006 of the Autorita` Garante della Concorrenza e del Mercato, Bolletino de l'AGCM no. 5/2006, A358; upheld in principle by the Decision of 29 November 2006 of the Tribunale Amministrativo Regionale del Lazio, case no. 3582/2006

disagree with such an argument. As we have analytically described in the relevant paper,[96] forced sharing and a wide application of essential facilities doctrine –and other similar concepts- create serious dangers for incentives to invest and innovation but for long-term and short-term[97] competition as well.[98] We can easily understand that this danger will be even greter regarding forced investment. A danger that the owner of a facility, not only will be obliged to grant access to competitors, without securing its own profits and the cover of its investment, but will also have a future and permanent duty to continue investing and expanding the facility, largely discourages investment, as it turns competitive advantage to disadvantage, it wrongly allocates unproportionally the investment risk and cost, it provides no motive to third parties to invest for the creation of their own infrastructure –and the development of the overall market as well-, 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 trully unreasonable. Furthermore, such an approach totally neglects the correct argument of Supreme Court in Trinko case that:

'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.'[99]

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[96] Look to Diathesopoulos, Michael D., Essential Facilities Doctrine in Relation to Incentives to Invest (December 29, 2010). Available at SSRN: http://ssrn.com/abstract=.

[97] In the form of collusion. N. Petit, 'Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US Supreme Court Ruling in the Trinko Case', 13 *Utilities Law Review* (2004) 6, 8 and note 32.

[98] For a further analysis look to M. Bergman, 'The Bronner Case: A Turning Point for the Essential Facilities Doctrine?', (2000) 21 *European Competition Law Review* 59.; V. Korah, 'Competition Law and Intellectual Property Rights', in Vinod Dhall (eds), *Competition Law Today: Concepts, Issues, and the Law in Practice* (Oxford, 2007), 130.; N. Petit, 'Circumscribing the Scope of EC Competition Law in Network Industries? A Comparative Approach to the US Supreme Court Ruling in the Trinko Case', 13 *Utilities Law Review* (2004) 6, 11.; R. Hewitt Pate, 'Refusals to Deal and Essential Facilities', available at http://www.justice.gov/atr/public/hearings/single_firm/docs/218649.html; G. Hallman and C. McClain, 'Real Options Applications for Telecommunications Deregulation*' in J..Alleman and* E. Noam (eds.), *The New Investment Theory of Real Options and Its Implication for Telecommunications Economics* (Norweld Mass: Kluwer Academic Publishers, 1999), 141; H. Hovenkamp, M. Janis and M. Lemley, 'Unilateral Refusals to License' (2006) 2 *Journal of Competition Law and Economics* 1.

[99] *Verizon Communications Inc. v. Trinko, Llp* , 8.

If Commission or other Competition Authorities are able to order forced investments they totally turn to something even more than central planners; to autonomous and supreme entrepreneurial decision makers for the energy industry. Competition rules turn to tools of long-term market restructuring and voluntary investment decisions are replaced by forced spending on infrastructure development; a spending that highly resembles taxation. Of course, in a free economy it is difficult to accept that a company is obliged to invest.[100] However, even if we accept such a duty –under specific circumstances- it is very difficult to apply it, 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.

We agree with the opinion that sector rules about investment are far more suitable for addressing the issue of investment incentives –as we have already analysed in the relevant paper-[101] and that a wide application of forced investment may result to exaggeration –as Competition Authorities will not be able to judge correctly about which investments are truly necessary and will be proved profitable-.[102] Besides, investment is more likely to be promoted by incentives and motives and by the formation of a general, stable, ex ante predefined and legally certain environment,[103] which is however able to address in a flexible way the investors' concerns and of a framework of rules, which integrate the technical issues and the particularities of the market

[100] We will not proceed to an analysis of issues of negative freedom not to invest and issues of economic freedom and of compatibility of forced investment to important Treaty rights and provisions, as they do not fit to our analysis. For more analysis on these issues look to U. Scholz and S. Purps, 'The Application of EC Competition Law in the Energy Sector', 48.

[101] Diathesopoulos, Michael D., Essential Facilities Doctrine in Relation to Incentives to Invest (December 29, 2010). Available at SSRN: http://ssrn.com/abstract=; L. Hancher, P. Larouche, 'The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest'(2010), 17; M. Kerf, I. Neto, D. Geradin, 'Antitrust v. Secotr Specific Regulation in Telecom: What works best?', (2006), 5.; N. Petit, 'The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion?' [2005] 11 <http://ssrn.com/abstract=527403.

[102] Look to U. Scholz and S. Purps, 'The Application of EC Competition Law in the Energy Sector', 48, notes 84 and 85 and the defendant's argument in ENI Trans Tunisian Pipeline case, that further investments were not necessary.

[103] U. Scholz and S. Purps, 'The Application of EC Competition Law in the Energy Sector', 48.

rather than by ex post interventions based on required market behaviour and obligatory methodologies.

Therefore, regarding strategic underinvestment, 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-.

Open Market and Discrimination

We will finally examine Commission's approach towards 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.[104] 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.[105] 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.[106] The approach of SvK was a natural result of the fact that traditionally electricity networks were created in order to serve the needs of a given national supply market, while they also

[104] Svenska Kraftnät (Case COMP 39.351);Commission (EC), 'Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/B-1/39.351—Swedish Interconnectors' [2009] OJ C239/4.

[105] Commission (EC), 'Antitrust: Commission opens proceedings against Swedish electricity Transmission System Operator concerning limiting interconnector capacity for electricity exports', MEMO/09/191, 23 April 2009.

[106] A. Kivipuro, 'The Nordic Electricity Market and the Regulation of the TSOs – is there need for more harmonised Regulatory Set-up' in B. Delvaux, M. Hunt, K. Talus (eds.) EU Energy Law and Policy Issues (Brussels, 2008), 109.

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.[107] Therefore, it is rational to anticipate that a national TSO even within the united internal market, 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. Besides, it is also easy to inderstand why the national TSO tried to keep the country as one single price zone, on the grounds of apparent political, social and economic national factors. In this case, Commission faced a conflict between its goals about an open internal market and geographical factors and local circumstances. In this case, the market definition was not wrong, as the Commission correctly regognised Swedish market as the geographic relevant market,[108] however it also recognised the existence of a second geographic market relating to cross-border transmission.[109] However the fact that the Commission focused only on this second market and not on the possible effects on the first market makes us to think that Commission's approach was one-sided as it apparently neglected these local sector factors and geographical parametres of the case –regarding the price difference between north and south Sweden-, in order to apply competition rules as in a common discrimination case.

These three cases were presented as examples and we do not claim that we exhausted the issue of the degree to which recent competition cases in energy

[107] U. Scholz and S. Purps, 'The Application of EC Competition Law in the Energy Sector', 43.
[108] Commission Decision of 14.4.2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case 39351 – Swedish Interconnectors) at 18.
[109] ibid at 20 '…the Commission also considered the existence of a separate market relating only to the transmission of electricity involving a "cross-border flow" within the meaning of Article 2(1) of Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity. The geographic scope of such an activity was deemed to be limited to the transport of electricity on one specific interconnector line.'

sector integrate sector specific parameters. However, these examples demonstrate an attitude of the Commission to neglect sector factors and focus solely on the strict application of competition rules and on the open-market objectives, no matter what are the sector specific context and circumstances of each energy case.

The Issue of Ownership Unbundling as a Remedy Imposed by Competition Law

However, we believe that the most apparent example of such an attitude has to do with the application of ownership unbundling and forced divestiture of assets and networks and other relevant structural remedies (eg the forced subdivision of Swedish electricity network) as competition law measures and tools in most of the previously mentioned –and other cases not mentioned here- energy cases (eg German electricity wholesale market (Case COMP 30.388), German electricity balancing market (Case 39.389) Commission decision of 26 November 2008 [2009] OJ C36/8, RWE gas foreclosure (Case COMP/39.402) Commission Decision of 18 March 2009 [2009] OJ C133/8., ENI foreclosure (Case COMP 39.315).

These remedies, as imposed by the Commission as competition law remedies in these cases- lead to obligatory and totally binding solutions with severe long-term effects for the undertakings –eg full ownership unbundling- although such remedies are not available as an option in existing sector regulation (Second Package) and are included as just the default option –and not as an obligatory measure- in the Third Package, which is not yet applied and is going to be applied in a few years. In other words, in the above cases Commission actually implemented sector specific rules –or better we should say remedies that fit in sector specific regulation- by competition law means and under the cover of competition law. We will not analyse why

Commission chose this approach[110] and we will just repeat our previous conclusion that this –sui-generis according to our opinion and as we explained in the relevant paper-[111] approach will eventually lead –especially when the Third Package comes into force- to two parallel systems, methodologies, frameworks, procedures and sets of rules and remedies within the Internal Market; this situation will not provide legal certainty and will create confusion, risk and inconsistencies regarding investment decisions, Sector Regulators' approaches, network players (eg TSOs) practices and Member States policies. This situation –according to our opinion- is going to help with the promotion of neither the objective of market development nor the goal of open market.

Conclusions

What we should keep from the presentation of these three cases and of the issue of unbundling as a remedy of competition law is that Commission in its recent decision did not seem to take into consideration the sector specific context either regarding the market environment and the particular sector factors of each case or concerning the general objectives of sector regulation and the structure and content of present and forthcoming –although Commission played an important role in designing the Third Energy

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

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

Package- energy regulatory framework as a complete system of sector specific rules.

Competition Law and Sector Regulation: Hierarchy and Efficiency

Competition Law as a Context for Energy Sector Regulation

At this point, -after presenting whether Commission used sector parametres as a context for its decisions- we will proceed to a reverse analysis, regarding how recent sector specific EU energy regulation incorporates competition principles into its structure.

Regarding energy market, we will use as an example 2009/72/EC Directive about electricity, in order to underline the key role that EU reserves for competition law, regarding the regulation of energy markets and competition law's primacy in relation to sector regulation and in order to show that sector specific rules do actually take into serious consideration competition law objectives and principles.

The importance of securing competition is revealed even by the Directive's Recital, especially in relation to TPA.[112] The fair competition objective is also underlined in relation to[113] long-term contracts and exclusivity clauses.[114]

[112] Directive 2009/72/EC, Recital 8 'In order to secure competition and the supply of electricity at the most competitive price, Member States and national regulatory authorities should facilitate cross-border access for new suppliers of electricity…'; Recital 37 'There is a need for enhancement of competition and security of supply through facilitated integration of new power plants into the electricity network in all Member States, in particular encouraging new market entrants. '; Recital 57 'Promoting fair competition and easy access for different suppliers and fostering capacity for new electricity generation should be of the utmost importance for Member States in order to allow consumers to take full advantage of the opportunities of a liberalised internal market in electricity.'

[113] Look also to Long-term electricity contracts in France (Case COMP/39.386)/ EDF case and Distrigaz (Case COMP/37.966) Commission Decision of 11 October 2007 [2007] OJ C9/5.

[114] Recital 20 'In order to develop competition in the internal market in electricity, large non-household customers should be able to choose their suppliers ... Such customers should be protected against exclusivity clauses the effect of which is to exclude competing or complementary offers'.

Competition is also defined as a key objective of Energy Regulators[115] and authorisation procedure.[116] Moreover, the Directive highlights the upper hierarchical position of competition law as according to Recital 37:

'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. '[117]

According to Recital 61, NRAs have the duty to report to Commission and Competition Authorities any cases of competition infringements.[118]

Besides, sector regulation seems to be designed, in order to specify and provide for the general and applied competition law implementation in energy markets.[119] On the other hand, although this sector regulation has also as objective the provision of incentives to invest and the promotion of market and entwork development, Competition Law provisions and objectives are defined as an upper limit to the freedom of sector rules to regulate the market for the benefit of these other objectives.[120] ITOs,[121] TSOs[122] and DSOs[123] have to fulfill their duties with respect competition law principles and objectives.

[115] Recital 37 'Energy regulators should also be granted the power to decide… on appropriate measures ensuring customer benefits through the promotion of effective competition necessary for the proper functioning of the internal market in electricity'. Look also to art. 36.(g).
[116] Recital 47.
[117] Look also to 2009/73/EC (Natural Gas Directive), Recital 33.
[118] Look also to art. 37.(j).
[119] Art. 1.
[120] Art. 3.14 'Member States may decide not to apply the provisions of Articles 7, 8, (both about investments and the development of energy production) 32 (TPA) and/or 34 (Direct Lines) insofar as their application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community. The interests of the Community include, inter alia, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.'
[121] Art. 17.c.(i)
[122] Art. 18.5.
[123] Art. 26.3.

As a result of the above, the national competition authorities acquire an important role in energy markets; an active role[124] parallel to that of sector regualators, which have to cooperate with the latter and consult and inform them regarding several issues of energy market.[125] Competition authorities have extended rights of intervention into the enrgy market. On the other hand, NRAs and other Sector Regulators also have the power and duty to actively secure competition by conducting investigations concerning competition effectiveness[126] and by cooperating at european and regional level for this reason.[127]

All the above prove the key role of competition law as an element of the context and as an orientating factor of energy sector regulation. Competition law provides a fundamental conceptual background for the implementation of sector regulation and specific objectives that form the core of regulation's goals and mission. Competition principles not only constitute a priority of sector regulation, not only influence –to a great extent- the actual content of the sector rules but also set the binding limits for the regulation's scope and freedom of intervention, in order to develop the energy markets. In this way, the hierarchical primacy of competition rules and principles is affirmed and this affirmation is the background, on which the technical and sector-specific character of regulation is based. We will not support, however, that all the other objectives of sector regulation such as security of supply and development of capacity are assumed as inferior. The way in which these objectives are pursued has to comply with the general competition principles and the sectoral general goals have to abide by the general and long-term EU Treaties objectives and opening of the markets to free competition is vey important among them.

[124] Look also to art. 40.1.
[125] Art. 13.6, art. 36, art. 37.1(j), (k), (o)
[126] Art. 37.4.(b).
[127] Art. 38.2.(a).

The above conclusions are also underlined by other sets of rules of energy market, such as Emmission Trading Scheme Directives.[128] Avoidance of distortions of competition are defined as one of the key paremetres of this scheme[129], as the objective is to harmonise the member-states schemes, in order to secure equal competition within EU.[130] These rules also explicitly provide that the implementation of state aid Treaty rules (art. 107 and 108 TFEU, former art. 87 and 88 TEC respectively) is not affected by the scheme[131], while the 'without prejudice to the Treaty'[132] provision is also apparent.[133]

The issue of Direct Application of Competition Rules in Sector Cases

Therefore, no matter if the energy sector is regulated by EU law, it is also open to the enforcement of competition rules. [134] This has been apparent even since the first generation sector specific directives, which pointed out that they are not going to substitute competition rules;[135] however they did not

[128] Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community OJ L 140, 5.6.2009.; Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC OJ L 275, 23.10.2003.

[129] Directive 2003/87/EC Recital 7 and art. 24.1, Directive 2009/29/EC Recital 16, 17, 19, 23, art. 10c.3 and 24.1.

[130] Directive 2009/29/EC, Recital 28 'In order to ensure equal conditions of competition within the Community, the use of credits for emission reductions outside the Community to be used by operators within the Community scheme should be harmonised.'.

[131] Directive 2003/87/EC, Recital 23 'Without prejudice to the application of Articles 87 and 88 of the Treaty, where activities are covered by the Community scheme, Member States may consider the implications of regulatory, fiscal or other policies that pursue the same objectives.'; [131] Directive 2009/29/EC, Recital 18 'This Directive does not prejudice the outcome of any future State aid procedures that may be undertaken in accordance with Articles 87 and 88 of the Treaty.' and 49 'The application of this Directive is without prejudice to Articles 87 and 88 of the Treaty.'

[132] This provision means that any rule related to it, will not be applied against the scope and the content of relevant Treaty rules.

[133] Directive 2009/29/EC, art. 9.1, 28.5 and 29.2.

[134] D. Geradin, 'The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector' (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=671804, 127.

[135] Recital 3 of Directive 96/92 of the European Parliament and of the Council of 19 December 1996 concerning Common Rules for the Internal Market in Electricity, OJ L 27 of 30 January 1997, 20-29; Recital 6 of Directive 98/30 of the European Parliament and of the Council of 22 June 1998 concerning Common Rules for the Internal Market in Natural Gas, OJ L 245 of 4 September 1998, 1-12; Recital 41 of Directive 97/67, of the European Parliament and the Council of 15 December 1997 on Common

define the extent to which the latter would be directly applied. In some cases, Commission seemed to accept the priority of sector regulation.[136] However, competition rules remained a valuable reserve for Commission, in case that sector regulation does not achieve results in specific situations. This may be attributed to the fact that Commission itself can launch antitrust procedures, thus is able to directly deal with problems. This was quite apparent regarding energy sector, as we observed that while in U.S. after the Telecommunications Act 1996 antitrust proceedings –regarding this sector- were put aside, in EU after the liberalisation competition law gained priority in the energy sector.[137] The difference however is that in European energy sector, liberalisation has not been concluded and it is doubtful when it will be completed.[138] We can suppose that Commission uses competition rules, in order to accelerate the transformation of energy market and prepare it for the Third Package. Therefore, we observe that in energy sector competition rules are not limited to their traditional ex post corrective role but result to an on-going process of 'trial-and-error', which reaches the limits of an ex ante quasi-regulatory role,[139] in order to supplement the inadequacies of sector regulation.[140]

The Role of Sector Rules in the Energy Sector

Rules for the Development of the Internal Market of Community Postal Services and the Improvement of Quality of Service, OJ L 15 of 21 January 1998, 14-25; Recital 26 of Directive 97/33 of the European Parliament and of the Council of 30 June 1997 on Interconnection in Telecommunications with regard to ensuring Universal Service and Interoperability through the Application of the Principles of Open Network Provision (ONP), OJ L 199 of 26 July 1997, 32-52.

[136] Commission Decision of 30 April 2003, O2 UK Ltd./T-Mobile UK Ltd., OJ L 200 of 7 August 2003, 59.

[137] D. Geradin, G. Sidak, 'European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications' in S. Majumdar, I. Vogelsang, M. Cave, (eds.), Handbook of Telecommunications Economics, vol. 2, Technology Evolution and the Internet, (Elsevier, 2005), 536-537, 543.

[138] Look also to Sector Inquiry 2007 findings.

[139] N. Petit, 'The Proliferation of National Regulatory Authorities Alongside Competition Authorities: a Source of Jurisdictional Confusion', 3.However, this practice is criticised from an economic point of view, as obliges Commission to focus on market structure and not on market design. L. Hancher, A. De Hauteclocque, 10-13

[140] ibid 13.

We result to the following question: 'Given that Commission uses competition rules, in order to promote sector regulatory objectives, what is the role of the sector rules in energy sector'?

The Limits of Intervention of Competition Rules

In order to answer this question, we should firstly define what the limits of Competition rules' intervention into the sector should be and in which cases these rules should be applied instead of or parallel to sector rules.

At first, we should note that –as we observed from the above analysis- energy sector regulation tends to adopt competition law objectives and goals as key parametres for its role. Competition rules do have an autonomous role –not as adopted elements of sector regulation- regarding cases, which refer to competition law issues (meaning cases that fall in the common scope of both sector and competition rules). These are cases that concern margin squeezes, binding of consumers, third party access, monopolistic behaviour of market participants and generally exclusionary and/or exploitative practices and agreements. These cases usually may also involve issues of investment development and security of supply.

We agree with the opinion that the kind of rules, which are going to be implemented in such cases depend on the efficiency of sector regulation in any given case.[141] 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 competition rules, then sector rules should have a priority,[142] as sector regulation seems to be more detailed, and technically specific and is

[141] D. Geradin, 'The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector', 59-60.

[142] Commission Decision No 2003/570/EC of 30 April 2003, *O2 UK Ltd./T-Mobile UK Ltd.*, O.J. L 59/2003.

based on a more spherical and complete framework regarding sector-specific issues, while the parallel character and the concurrence of both sets of rules, which try to regulate the same issues may lead to confusion. We believe that this is the main case in energy cases –at least after the recent analytical regulatory framework, because sector rules seem to largely adopt and incorporate competition principles. We could, therefore, argue that regarding competition aspects of energy sector, regulation is specific (lex specialis) in relation to the general competition rules (lex generalis) and as to the extent to which they cover the same issues, the 'Lex specialis derogat legi generali' principle suggests that sector rules should be normally applied.[143]

On the other hand, there is also the case that the conditions above (effective framework, effective enforcement and non-violation of competition principles) are not fulfilled and the regulatory remedy is not effective. Regarding energy sector, this may mainly happen in relation to the second condition, regarding NRAs' actual performance ('lazy' or 'captured' regulator case). We have already observed that Third Energy Package explicitly provides[144] that NRAs have a duty of observance of EC competition rules when dealing with competition issues within their jurisdiction.[145] In such cases, competition rules may be effective, in order to complement the inadequacies of sector regulation's actual implementation. Besides, when NRAs are reluctant to apply sector rules correctly –regarding competition

[143] We should note that this general practice is apparent in any legal issue and in most jurisdictions, regarding the application of Constitutional rules. Constitution may provide for the protection of some rights and common objectives, however specific laws come to specify these general provisions. In these cases, the rules, which are actually directly applied, are these of the laws, while constitutional provisions are only indirectly applied, as they are incorporated into common legislation. On the other hand, constitutional provisions' primacy is not questioned, as common legislation has to abide by them and in case that it does not, then constitutional provisions are directly applied, as the common legislation is judicially interpreted/adapted, in order to comply with constitution. Therefore, we can observe a clear parallelism to the model of priority between competition and sector rules, we presented above. We will not expand this comment further, as it requires a deep analysis, which does not fit in the scope of our research.

[144] Look for example to Directive 2009/72/EC, Recital 37 and art. 36 and 37.

[145] However, this rule was also affirmed in prior cases –irrelevant to energy industry- by ECJ. Look for example to Case 13/77, *SA GB – Inno – BM v. Association des détaillants en tabac (ATAB)*, [1977] E.C.R. 2115, at para. 31.

issues-, they actually do not apply competition rules –as they are incorporated into sector rules-; so competition rules are violated and although they are lex generalis, they are directly applied, as lex specialis does not actually cover their scope. In Deutsche Telekom case, the national regulator did not provide for margin squeeze prevention and Commission intervened by applying general competition rules;[146] this is a good example of the second case, we described above. On the other hand, as defendants in this case argued,[147] there is an alternative solution for NRAs, which do not apply competition rules. This is the decision of Commission to launch infringement proceedings against NRA itself (meaning against the Member State), according to art. 258 TFEU (former 226 TEC).[148]

However, as we already mentioned, sector regulation also provides –except competition issues- for the protection of other objectives of great importance, such as investment incentives and capacity development. As we have already analysed especially regarding the issue of refusal of access (mainly about essential facilities doctrine) and incentives to invest,[149] competition law's conceptual framework and tools, are neither able nor designed to address such issues. Furthermore, competition rules 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 sector rules. So, the question is which set of rules should prevail, in case that sector rules give to the regulator a freedom of setting the parameters for the development of the market and a lax attitude regarding competition law issues is adopted, in order to facilitate the development of the market and

[146] D. Geradin, 'The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector', 60-61.
[147] Commission Decision of 21 May 2003, Deutsche Telekom AG at 53.
[148] N. Petit, 'The Proliferation of National Regulatory Authorities Alongside Competition Authorities: a Source of Jurisdictional Confusion', (2004) 2 *GCLC Working Paper Series*, 31. The author presents it as the ultimate solution.
[149] Look to Progress 2.b.

investments. This would be a case where there could be a conflict between sector and competition rules. Regarding energy market, EU seems to have resolved the question in favour of competition rules according to Directive 2009/72/EC art. 3.14 and Directive 2009/73/EC art. 3.10, which 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 (sector rules) that may relatively restrict to a certain extent short-term competition for the benefit of the overall development of the market but that these restrictions cannot be so extreme that will be totally contrary to the objective of free competition.[150] This approach affirms the hierarchical priority of competition rules as primary legislation, however it also balances it with the nature of competition rules as a general instrument, which should be respected by any framework of secondary legislation, however cannot replace the latter. Competition law should impose strict limits to sector rules; however these limits should leave an adequate free field to sector rules, in order to allow for flexible policies, which are necessary for the development of the market and enhancement of consumer welfare in the long term.[151]

The Allocation of Powers between Competition and Sector Regulatory Authorities

We underline that all the above concern the issue of concurrence between competition and sector rules and not the issue of concurrence of authorities between NRAs and Competition authorities (and Commission itself of course). These issues although similar are different, because in the second case the problem is who applies the rules and not which the applicable rules are. Regarding this issue, the argument of 'lex specialis' cannot apply;

[150] Directive 2009/72/EC art. 3.14 '…as the development of trade would not be affected to such an extent as would be contrary to the interests oft he Community'.
[151] D. Geradin, 'The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector', 64.

however, we could argue that no matter what the applicable legal framework is, NRAs and generally Regulatory Authorities seem to be better informed and more experienced regarding sector-specific issues than Competition Authorities. Furthermore, there is a danger that if both authorities are competent regarding an actual case, we will result to inconsistent or contrasting remedies.[152] We also agree with the opinion that sector regulators should have a priority to intervene into such cases, except the cases of 'lazy' regulators. A launch of proceedings under competition law would be helpful, in case of an inert NRA, so as to activate it and then transfer the proceedings to it, in order to continue them under sector specific rules,[153] as happened in telecommunications sector.[154]

On the other hand, there is 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 competition and sector regulation authorities are competent). Although, the solution that 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, if we take into consideration that Third Energy Package –as we mentioned above- provides for broad field of concurrence of powers and consultation/cooperation between both kinds of authorities. According to our opinion there are two solutions for the problem: either competition issues should pass to the exclusive authority of one authority[155] (either by defining

[152] N. Petit, 'The Proliferation of National Regulatory Authorities Alongside Competition Authorities: a Source of Jurisdictional Confusion', (2004) 2 *GCLC Working Paper Series*.
[153] D. Geradin, 'Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court's Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom?', 27-28; D. Geradin, 'The Concurrent Application of Competition Law and Regulation', 60-61.
[154] Commission Press Release, IP/02/1852 of 11 December 2002, 'Price decreases of up to 40% lead Commission to close telecom leased line inquiry'; Commission Press Release, IP/98/707 of 27 July 1998, 'Commission concentrates on nine cases of mobile telephony prices'.
[155] N. Petit, 'The Proliferation of National Regulatory Authorities Alongside Competition

NRAs as the only competent authority for competition law issues within the sector or by incorporating NRA into NCA[156]) or a flexible but complete scheme of cooperation between these authorities should be established;[157] 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 and guidelines of efficient cooperation between NRAs and NCAs concerning the issues about which they have to consult each other.[158]

Conclusions about the Framework of Application of Competition and Sector Rules

As we observe in energy cases, the key issue is who enforces the rules and not which rules are enforced. This is due to the fact that each authority seems to apply the rules, which fall mainly within its powers; regulators seem to base their decisions on sector rules –which are related to competition rules-, while competition authorities –including Commission- seem to be based on competition rules. Therefore, it seems that in any case, one set of rules –regarding the enforcing authority- forms the core of the argumentation, while a second forms the context. Of course, sector rules actually refer to competition rules –thus obliging the authority to take into consideration the latter-, while competition rules are autonomous– thus not referring to sector rules-. No matter which authority will be competent regarding competition issues, it is clear that the authority that will implement competition rules

Authorities: a Source of Jurisdictional Confusion', 30-31. The author, however, notes that this is not the perfect solution about the elimination of the danger of multiple proceedings.

[156] Although this is not compatible with the provisions of Third Energy Package.

[157] According to our opinion this scheme is not defined by Third Energy Package, which is too general regarding this specific issue.

[158] Although there should be the problem that this solution may lead to time consuming procedures.

should take into serious consideration the context of sector regulation and related objectives.

Therefore, if Commission chooses to use competition law as a tool, in order to accelerate energy markets' transformation, before the application of Third Energy Package, it should, however, base its approach on the respective scope and content of the new forthcoming sector-specific framework. Any intervention, which will be irrelevant to this approach, may result to unjust and inconsistent results (as the relevant cases would be resolved in a different -and maybe more convenient for the undertakings- way after the implementation of the new sector specific regulatory framework) that may hinder the implementation of Third Energy Package.

Finally, regarding our question about the scope of application of sector rules in energy market, given the concurrent application of competition rules, our answer is the following. Sector rules are designed to intervene on an ex ante and general basis through the imposition of detailed and adjustable remedies (or the adoption of guidelines),[159], in order to make the market more functional, even by imposing new duties[160] and to constitute the suitable framework for ensuring the objectives –and combine 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. Their scope and content has to generally comply with competition –and other Treaties' principles- rules, without, however, neglecting all their other goals. They should have a priority regarding their implementation –in comparison to competition rules- as lex specialis, which, however, incorporates competition principles into its

[159] N. Petit, 'The Proliferation of National Regulatory Authorities Alongside Competition Authorities: a Source of Jurisdictional Confusion', 2.

[160] D. Geradin, 'The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector', 63-64.

structure and should constitute an essential part of the context on which any interventions of Competition Authorities should be based.

Final Conclusions

Finally, we observed that TPA (as a concept of energy sector regulation) and refusal of access (as a concept of competition law) share a similar scope and set of objectives. However, TPA –and generally sector regulation- seem to adopt other sector specific objectives as well. Energy Sector Regulation in general, seems to adopt and incorporate into its structure the key competition law principles and objectives; on the other hand Commission in recent competition law cases of the energy sector does not seem to take into serious consideration the sector specific context of the energy market and industry. Of course competition rules have an hierarchical priority over sector rules, however this hierarchy has to be combined with efficiency –mainly provided by sector rules-, in order to construct a complete framework of treatment of energy market. In case that the actual way in which competition rules are applied to the market is not satisfactory or contravene basic competition principles, then competition rules should directly be implemented. However, regarding all the other cases, these is the need to establish an efficient model of clear allocation of duties between regulatory and competition authorities, to give a priority to sector specific rules as lex specialis and to accept that either competition or regulatory authorities should take into serious consideration both competition and sector specific parametres as a context, when they address issues that fall within the scope of both sets of rules.