



INTERNATIONAL
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SCHOOL OF SCIENCE & TECHNOLOGY

A thesis submitted for the degree of

Master of Science (MSc) in Energy Systems

**"The Third Party Access (TPA) in the frame of European
Energy Legislation"**

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THESSALONIKI – GREECE



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DISCLAIMER

This dissertation is submitted in part candidacy for the degree of Master of Science in Energy Systems, from the School of Science and Technology of the International Hellenic University, Thessaloniki, Greece. The views expressed in the dissertation are those of the author entirely and no endorsement of these views is implied by the said University or its staff.

This work has not been submitted either in whole or in part, for any other degree at this or any other university.

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Abstract

This dissertation was written as a part of the MSc in Energy Systems at the International Hellenic University and as the main subject of the dissertation is to present and analyze the current legal and regulatory energy market framework which allows to the Third Parties to access the energy market. The dissertation will deploy an analysis under the legal framework of the European Union and will focus on the electricity and natural gas direction of the energy market.

The introduction presents a short overview of the key issues to be analyzed and examined in this dissertation. Chapter one presents the regulatory scheme of the internal Electricity Market in the European Union, by introducing a historic review of the Energy Market and the efforts towards liberalization, while shortly presents the legislation acts which led us to the TPA right and the IEM as we know it in our days. The second chapter introduces us to a short analysis of the E-Directive, 2009/72/Ec, being followed by an analysis of Directive 2009/73/EC in Chapter 03. Both chapters will present an analysis on the Internal Energy Market Directives, which envisage the TPA right. Chapter 4 analyses- the Third Party Access Right (TPA right) and its concept and legal basis.

Since the Third Parties Access right is crucial for the European energy market, we will examine the concurrence between competition and sector rules and the circumstances under which economically independent energy operators have a legally enforceable right to access and use energy networks developed by other companies. The Chapter 4 also deals with the exceptions- in relation to essential facilities doctrine and refusal of access, as a concept of Competition Law. Within this chapter, a showcase of the current situation in the energy market, will take place in the light of the TPA right and the relevant EU Directives and we will identify the common points and objectives and the extent to which Greece provides a context leading to implementation of the TPA right and the principles of the EU energy directives for a liberalized energy market.

Finally, the last chapter presents the conclusions of this research and suggests possible amendments to create a concept, based on the provisions of the Energy Law and Competition Law, which could offer the best applicable framework leading to a liberalized and efficiently functioning energy market.

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LIST OF ABBREVIATIONS AND DEFINITIONS

Art.	Article
BOT	Build-Operate and Transfer
CO2	Carbon dioxide
DNM	Distribution Network Manager
DSO	Distribution System Operator
ETSO	European Transmission System Operators
EU	European Union
IEM	Internal Energy Market
IPP	Independent Power Producer
ISO	Independent System Operator
ITO	Independent Transmission Operator
LNG	Liquefied Natural Gas
LSO	LNG System Operator
LOS	Limited Open Service
MO	Market Operator
MS	Member States
NAR	National Regulatory Authority
OSMP	Operation Safety Maintenance Plan
PPA	Power Purchase Agreement
PTN	Public Transmission Network
PS	Public Services
PU	Public Utility
RI	Regulatory Institution
SO	System Operator
TNM	Transmission Network Manager

TPA Third Party Access

TSO Transmission System Operator

Introduction

For many decades the distribution of gas and electricity in Europe was preserved by national monopolies in each Member-State. The status of monopoly in the energy market was deployed by companies owned by public stakeholders (eg, municipalities, provinces or the central state government) and they were serving both as the transmitter and the supplier of energy. In order to liberalize the electricity and gas energy market from the monopolies which existed for years, the European Commission issued the EU Gas Directive and the EU Electricity Directive¹, creating the basic legal provisions for an independent internal energy market. But in order to successfully achieve the liberalization of the energy market, certain changes are required to be made. The basic one relates with the re-position of the energy infrastructure, leading to the creation of capable market forces that eventually, will lead to the liberalization of the market. This requires the access of third parties to the energy market and for that purpose, those parties should be able to use the existing networks in order to supply energy to the market. This process needs to be facilitated and regulated, and towards this direction the two directives were issued by the European Commission.

Under the above mentioned directives, each member state must introduce a system which will guarantee the access by third parties to the gas and electricity transmission and distribution networks, a process known as third-party access. The principles to rule the third- party access are grounded in the EU Competition Law. The doctrine of the essential facilities is the key one, and upon this the general provisions were developed. The doctrine describes the situation where a company with a dominant status within the energy market, performs its essential services by using a facility or an infrastructure for itself, without which the competitors are not able to provide their services to their customers, and the company refuses to give the right of access to that facility, by abusing its dominant economic position. In order to avoid such a situation, which in the past was the pioneer for the creation of the monopolies in the energy

¹ EU Directive 2003/54/EC on common rules for the internal market in electricity and repealing Directive 96/92/EC, OJEU L 176 of July 15 2003, and EU Directive 2003/55/EC on common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJEU L 176 of July 15 2003 have replaced the first directives which served as a springboard for the opening of the gas and electricity markets in the European Union.

market, the EU recognized the right of the third parties to access to the necessary networks in order to perform their function. And this was a right firstly recognized under the Commission Decision OJ L 015 of January 18 1994, for the Case C-7/97, Jur 1998, pI-7791.

Within the scope of this dissertation, we decided to set as the problem of research the TPA right, as well as, the legal provisions which govern this right. Therefore, we analyze the third parties access right in a separate chapter, followed by the analysis of the provisions of the two directives issued by the European Commission and which, until today, govern the function of the gas and electricity market within the EU. The research we took under the framework of this dissertation is topical, as shown by the extent of the problem and relate to the need and interests of the stakeholders of electricity and gas market, as well as the consumers' society. Therefore, the purposed of this research is to analyze the latest legislative framework governing the electricity and gas market, while focusing on the TPA right and presenting the exemptions of this right. The objectives to be deployed under this dissertation research are to present the main provisions of the legal regulation of the Internal EU Electricity and Gas market, to analyze the TPA right under the light of Directives 2009/72/EC and 2009/73/EC, to evaluate the effect of the TPA right in the energy market, as well as, to evaluate the existing measures in the context of the liberalization of the energy market, under the light of the TPA right.

The methodology we decided to apply, is the systemic analysis method by analyzing the legal regulation of the European energy market, established in several EU legal acts in the overall context of the latest package of energy measures, and by analyzing the main provisions related to the TPA right and the liberalization and harmonization process of the energy market. Additionally, we followed the document analysis method in order to obtain information in order to examine the existing literature, several press releases of the EU bodies and Member States, the legal acts adopted and other relevant documents by energy stakeholders, policy makers and academics. This method was applied in order to facilitate evaluating possible positive and negative effects while assessing the changes indicated by the legal packages for the internal energy market of gas and electricity.

Chapter 1

The regulatory scheme of the internal Electricity Market in the European Union

1. Introduction

Towards the harmonization and liberalization of the EU's internal energy market, three consecutive legislative packages of measures were adopted from 1996 to 2009. Those legislative packages were addressing the market access, the transparency, the regulation, the consumer protection while supporting interconnection and adequate levels of supply. Consequently to these measures, new gas and electricity suppliers were allowed to enter the internal markets of the Member States, while a new measure addressing the consumers was adopted. The industrial consumers from 1 July 2004 and domestic consumers from 1 July 2007 were free to choose their supplier regarding the electricity and gas market. In addition, these packages of legislative measures tried to address other EU policies relevant to the internal energy market, such as the security of the supply of electricity, gas and oil, as well as the development of trans-European networks for transporting electricity and gas.

1.1 An effort towards liberalization of the Internal EU Energy Market

At the early 1990s the Member States of the European Union, in the framework of a unified, common, internal Community market, they were trying to commit themselves progressively towards this direction. The first attempts for a common internal market occurred in the sector of telecommunications, whilst several steps were taken in the energy sector, as well. One of the first attempts to commit themselves in the direction of a common energy market was the adoption of Directive 96/92/EC, where the base for an internal electricity market lays to². It was not until 2001 that the EU decided to

² Christopher Brown, Manish Das & Ben Rayment, Sectoral Regimes

amend those first provisions, updating the regulatory scheme of the internal energy market. The EC decided to amend Directive 96/92/EC and introduce a new regulation on the conditions for access to the network for cross-border exchanges in electricity, introducing new genuine measures for the internal energy market, having the legal basis on Article 95 of the EC Treaty.

In order to achieve more fruitful outcomes, the second Electricity and Gas Directives, 2003/54/EC and 2003/55/EC, were enacted in 2003, contributing to the progress towards the harmonization of the national regulatory frameworks. These Directives were complemented by Regulations 1228/2003 for electricity and 1775/2005 for gas, which dealt with the integration of national markets and cross-border exchanges in electricity and natural gas³.

Directive 2003/54 was establishing a framework of common rules for the generation, transmission and distribution of electricity, in particular with regard to the access to the market. In addition, it provided the legal basis for the criteria and procedures applicable to calls for tenders, the granting of authorisations and the operation of systems. What was also introduced by Directive 2003/54 was the requirement that the electricity undertakings should keep separate internal accounts for each of their transmission and distribution activities, as they would be required to do if the activities in question were carried out by separate undertakings. This specific requirement was in accordance with the general legal EU provision against discrimination, cross-subsidisation and distortion of competition.

The second Directive adopted in this second round of legislative measures was 2003/55/EC and it was related to the gas market. Directive 2003/55/EC provides the legal framework for the opening of national gas markets to competition and lays down the right of third parties to non-discriminatory access to transmission and distribution systems and to liquefied natural gas (LNG) facilities. Additionally, further provisions introduce the common minimum standards to ensure a high level of consumer protection (the right to change supplier, transparent contract conditions, general information, dispute settlement mechanisms, etc.). Also, this Directive includes

Child European Community Law of Competition 1071, 1072, (Peter Roth QC & Vivien Rose eds., 6th ed. 2008)

³ Everis & Mercados, “Energy Markets International, from Regional Markets to a Single European Market”, page 16 (2010)

provisions addressing directly the consumers, by providing measures which particular care to provide adequate protection of vulnerable consumers (for example, by taking the appropriate steps to avoid disconnection of the gas supply).

In addition, two regulations are included in these packages of measures, namely Regulation 1228/2003/EC and Regulation 1775/2005. The first regulation sets rules for cross-border exchanges of electricity. Specifically, this Regulation introduces a compensation mechanism for transit flows of electricity, harmonised principles on cross-border transmission charges and the allocation of available interconnection capacities between national transmission systems. The second regulation deals with the conditions for access to the natural gas transmission networks obliging gas transmission system operators to offer their services to all users on a non-discriminatory basis.

In 2003, within the general policy and legislative framework towards the liberalization of the Internal EU Energy Market, a European Regulators Group for Electricity and Gas was established under the Decision 2003/796/EC. This group was responsible for ensuring cooperation between national regulators and coherent application in all the Member States of the provisions of the internal market directives.

Furthermore, a second body was established with the scope to strengthen regulatory powers and to solve the gaps in cross-border pipeline projects' regulation; the Agency for the Cooperation of Energy Regulators (ACER). This Agency was established under Regulation EC/713/2009 as a new body to complement regulatory tasks at national level. What defers this body is the fact that, the Agency is an independent Community body with legal personality and administrative and financial autonomy. As a supervisory body with a general advisory role, the Agency shall make recommendations to the Commission regarding market regulation and issue non-binding "framework guidelines" about priorities to develop transmission infrastructure. Within the above mentioned framework, the Agency can also adopt individual binding decisions on cross-border issues, albeit in limited areas. Therefore, the ACER fulfils its targets by promoting the cooperation between national regulatory authorities at regional and Community level, monitoring progress in the implementation of the 10 year network development plans, monitoring the internal

markets in electricity and natural gas; in particular, the retail prices of electricity and gas, access to the network including access of electricity produced from renewable energy sources, and compliance with the consumers' rights.

Despite the effort which was made by the European Commission, by taking the next step towards the liberalization of the internal energy market with the adoption of Directive 2003/54/EC and Directive 2003/55/EC, still there were many unsolved issues which had to be faced. According to a report which was published by the European Commission five years after the amendment of the Directive 96/92/EC and two years after the adoption of the 2003/54/EC and 2003/55/ EC Directives, “the most important and persistent problem is the absence of integration between national markets. Key indicators in this respect are the absence of price convergence between the different EU countries and the low level of inter-community exchange. (...) In addition, many national markets show a high level of concentration in the industry, which impedes the development of an effective competition. (...) Another indicator of lack of competition is that the exercise by consumers of their right to change supplier is still limited in most member states and the choice of supplier from another member state is the exception”⁴.

Following the EC report on Energy Market in 2005, the European Commission launched an investigation into the operation of the electricity and gas markets, whose preliminary results published in February 2006, indicated that, “more and more strongly that a real breakthrough towards effective competition in the gas and electricity markets by 1st July 2007 will not be possible unless the root causes of the market malfunctioning are addressed. The market structure suffers from systemic conflict of interests resulting from the vertical integration, in many cases, of the supply, transport and distribution levels. This situation dates from the pre-liberalisation period and prevents the advantages of an efficient competitive market reaching the final consumer in a meaningful manner”⁵.

Despite the second warning bell and the general outcomes of the investigation, these problems which have been indicated have not produced an involution in the

⁴ “Issues Paper. COM (2005) 568”, 15 November 2005, European Commission.

⁵ “Sector Inquiry under Art. 17 Regulation 1/2003 on the gas and electricity markets”, 16 February 2006, European Commission.

liberalisation process in the EU. It could be said that, on the contrary, most experts were trying to advocate, along with several politicians, the further implementation of the liberalization of the energy market, by eliminating barriers detected that impede the development of an effective market, within the framework of the objectives of the so-called Lisbon Agenda. If this could be achieved, the European Union would be one of the most economically dynamic and energy secured regions in the world.

1.2 A second effort towards liberalization in the Internal EU Energy Market

The third package of legislative proposals seeking to further liberalise the internal market of electricity and gas, resolve structural failings, promote infrastructure was adopted in April of 2009. The provisions indicated by the second legislative package were amended and were detailed focused on dealing with investments, enhancing competitiveness and protecting consumers. The third package focused on the issues related to unbundling, regulatory oversight and cooperation, network cooperation, transparency and record keeping and finally, access to storage facilities and LNG terminals.

Within this framework, the Directives on electricity (2009/72/EC)⁶ and gas (2009/73/EC)⁷ were adopted and they introduced the legislative provisions which would regulate the transmission network ownership by ensuring a clear separation of supply and the production activities from network operation through three models of organisation: the full "ownership unbundling", the independent system operator (ISO - responsible for the maintenance of the networks, the assets remaining the property of the integrated company) or the independent transmission operator (ITO - a system of detailed rules ensuring the autonomy, independence and necessary investments in the transmission activity). In addition, the Directives provided the legal basis for the measures which would ensure more effective regulatory oversight from truly

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 (OL 2009 L 211, p. 55).

⁷ 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 (OL 2009 L 211, p. 94).

independent national energy regulators, while strengthening and harmonising the competences and the independence of national regulators so as to allow an effective and non-discriminatory access to the transmission networks;

The consumers' protection was also set as a goal, and both Directives introduced provisions in order to reinforce consumer protection and ensure the protection of vulnerable consumers. Under the light of the new directives the TPA right was also introduced, as we will see in a following chapter, a right which promotes the trade of electricity as a commodity and allows consumers and suppliers to access and use the network facilities owned by energy utilities and therefore offer electricity as a commodity while it allows the access to gas storages and liquefied natural gas (LNG) facilities and lay down rules concerning transparency and regular reporting about gas reserves.

Additionally, one of the measures which was adopted towards the liberalization and harmonization of the market and we have to include is Directive 2008/92/EC, with which the European Commission sought to improve the transparency of gas and electricity prices charged to industrial end-users by obliging Member States to ensure that these prices and the pricing systems used are communicated to Eurostat twice a year.

Finally, the new package of measures and legislation included three Regulations which were adopted by the European Parliament and Council and they were setting the framework for the structures of cooperation for the European Network Transmission Systems Operators (ENTSOs). Regulation EC/713/2009 of the European Parliament and of the Council of 13 July 2009⁸ establishes an Agency for the Cooperation of Energy Regulators, Regulation EC/714/2009 for electricity⁹ appoints the conditions for access to the network for cross-border exchanges in electricity, repealing Regulation (EC) No 1228/2003, and Regulation EC/715/2009

⁸ Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OL 2009 L 211, p. 1).

⁹ 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 (OL 2009 L 248, p. 38).

for gas¹⁰ provides the conditions for accessing to the natural gas transmission networks, which was repealing Regulation (EC) No 1775/2005 and it was later amended itself by Commission's Decision 2010/685/EU. The creation of a detailed network access rules and technical codes was achieved by the ENTSOs, together with the ACER, while the two organizational bodies were trying to ensure the coordination of the grid operation through the exchange of operational information and the development of common safety and emergency standards and procedures. The TSOs are also responsible for drafting a 10-year investment plan every two years.

1.3 The recent developments in the legislative framework of the Internal EU Energy Market.

Despite the fact that several packages of measures were introduced within the last decade, yet, the Internal EU Energy Market had to overpass some obstacles which were not allowing the total liberalization and harmonization of the market. Therefore, a new round of measures, legal provisions and actions were adopted in order to reassure a more effective way to achieve the targets set for the Energy Market.

Regulation (EU) 838/2010, issued by the European Commission provides the guidelines regarding the amount of compensation TSOs shall receive for costs incurred as a result of hosting cross-border flows of electricity on their networks. This regulation was followed by the Commission's legislative proposal on energy market integrity and transparency (COM (2010)726). The Commission was proposing the adoption of a regulation aimed to guarantee fair trading practices on European energy markets, to ensure that citizens, business and authorities have confidence in the integrity of wholesale energy markets. To that end, it is, for example, planned to improve market monitoring by empowering ACER with the competence to gather, review and hare data from wholesale energy markets¹¹. Based on COM (2010) 726,

¹⁰ 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 (OL 2009 L 309, p. 87).

¹¹ Jonas Teusch and Balazs Mellar, "Energy Policy : General Principles", 03/2011, retrieved in August 25 at http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.13.1.pdf?noframes=1

after following the official legislative procedure, Regulation 1227/2011 was adopted by the European Parliament and the Council, regarding the wholesale energy market integrity and transparency.

1.4 General Conclusions

Nonetheless, still no general agreement has been achieved on the liberalisation model this sector should follow, and this occurs mainly because of the discussion of whether the liberalisation is an end in itself, or a mean for - basically- lower energy prices. And we should take into consideration that the entrenched national interests are another obstacle which has to be dealt with. It is now clear that due to the complexity of the energy sector and the resilience of the incumbents' market power, the liberalisation process has been currently placed at a crossroad. Despite the fact that there is undoubtedly a progressing process in the electricity sector and the gas sector, the challenges to be surpassed by the Member States are still pending from an EU perspective. And for this reason, it is commonly accepted that the EU should mainly focus on conditions aiming at implementing an effective liberalisation process, rather than on a formal liberalisation approach. Definitely, the asymmetries between non-sector regulations in the European states and among companies are the main reasons for the creation of an uneven playing field, contrary to the European vision of an internal competitive energy market.

Chapter 2

Presentation and Analysis of the Electricity Directive 2009/72/EC

2.1 Introduction

Within the European Union, the liberalization of the electricity market has concentrated on opening both the electricity generation and commercialization markets, granting all by formally emphasizing and promoting the consumers' right to (gradually) choose their supplier, and more accurately by defining the rules of the market on the hypothesis that it would then operate competitively. The non discriminatory right of access to the network by third parties (TPA right) became absolutely essential, but maintaining obligations of public service and consumer protection. But due to the fact that in many European countries the state (on a central, regional or local administration level) either was or is owner of some companies or the main company in the sector of energy production, transmission or distribution, creates conflicts of interests between regulatory and ownership functions when it comes to companies which were privatized.

Although the aim of all these efforts was the result of an effective liberalization process, it seems that there was not paid enough attention to defining the term "independent" for the electricity sector institutions neither was clear which powers were given to them in order to operate competitively. The function of and independent Electricity Market is mainly influenced by the relation between the MS and the European Commission, as there is in some cases double jurisdiction on electricity regulation. In this case, the matters are being solved under the light of two principles. The first principle is the prevalence of community over national regulations and the second principle (the so-called subsidiary principle) refers to the process for creating an EU electricity market, based on setting up a minimum regulatory framework that all countries must comply with, beyond which there may be notable differences in the level of effective liberalization in each country.

The Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC provides the legal framework upon which the MS are called to implement common rules for the generation, transmission,

distribution and supply of electricity, with a view to improving and integrating competitive electricity markets in the EU. The purpose of the Directive is to promote competition through the access of a non-discriminatory, transparent and fairly priced network access. The Directive also introduces provisions addressing to the consumers and their protection by laying down universal service obligations and the rights while clarifying the necessary competition requirements. In addition, Directive 2009/72/EC sets the rules relating to the organisation and functioning of the electricity sector, open access to the market, the criteria and procedures applicable to calls for tenders and the granting of authorisations and the operation of systems.

2.2 Article 9; setting the rules for independency of the system

According to Art. 9§1 of the Directive, full ownership unbundling is required, by setting the rule that the owner of a transmission system undertakes the role of transmission system operator, the tasks of which are listed in Article 12. Article 9 §8 states that where, on 3 September 2009, the transmission system belongs to a vertically integrated undertaking (defined as where the same person is entitled to exercise control over either transmission and/or distribution and generation and/or supply), the MS may choose not to apply the full ownership unbundling requirements of Article 9 §1 and may, instead, either designate an independent system operator or comply with the provisions of Chapter V, regarding the role of an independent transmission operator.

The independent system operator must have the independence from generation and/or supply required by Article 9§1, to have the resources to undertake the tasks in Art. 12 and shall be responsible for granting and managing third party access, including the collection of access charges, congestion charges and payments under the ITC. Additionally, the ITO, must be independently operating, maintaining and developing the transmission system, ensuring the long-term ability of the system to meet reasonable demand through investment planning. Also, when developing the system, the ITO must do the planning, construction and commissioning of the new

infrastructure. For this purpose, the independent system operator shall act as a transmission system operator in accordance with Chapter IV¹².

According to paragraph §9, where on the 3rd of September 2009 the transmission system belongs to a vertically integrated undertaking and there are arrangements which guarantee more effective independence than the ITO of Chapter V, the Member State may choose not to apply the full ownership unbundling requirements of Art. 9§1. Thus, if the arrangements as at 3 September pass the criterion of Art. 9§9, the Directive permits these arrangements to continue.

2.3 Article 12; the role of the TSOs

The Article 12 presents the duties of the TSO, by setting out their responsibilities, with the most interesting, regarding the TPA right, the points (e), (f) and (g). According to these points, the TSOs are obliged to provide sufficient information to the operators of other systems, in order to facilitate the efficient operation, the development and the interoperability of the interconnected system. The next two points, indirectly serve as a reference to the TPA right, given the fact that they request non-discrimination between the system users of the classes of the system users and the distribution of information to the system users in order to have efficient access to the system. Based upon Art. 12, we could say that the TPA right finds two more provision which favour the effective application and practice of this right.

2.4 Article 14; ensuring an independently functioning transmission system

In order to reassure that the functioning system works independently, the Art. 14 sets the criteria under which the unbundling of the transmission system can be efficient. These provisions are being applied when the MS have chosen for the reasons referred in Art. 9, to appoint an ISO according to Art. 13. In such a case, the TSO has to be acting independently and the criteria set for this are related to the managerial personnel of the company, their professional interests and the last one is related to the transmission system owner and the request to conduct a compliance programme which proves that the system operates in a non- discriminatory base.

¹² Chapter IV includes the Article 12, defining the tasks of the transmission system operator.

2.5 Chapter V; clarifying the role of the ITO

Under Chapter V, the independent transmission operator must fulfil certain requirements for independence from the vertically integrated undertaking of which it is part and be equipped with all resources necessary for carrying out the activity of electricity transmission. The list of tasks listed in Art.12 include representation of the TSO to third parties, representation of the TSO within ENTSO-E, granting and managing third party access, collection of transmission system related charges, operation, maintenance and development of a secure, efficient and economic transmission system, investment planning, joint ventures, to facilitate regional markets or liberalisation and all corporate services, including legal, accountancy and IT.

2.6 Article 32; introducing the TPA right.

Under the Article 32, the E- Directive introduces the right of Third Party Access to the transmission and distribution electricity system, trying to proceed with the so widely sought liberalization of the IEM. According to paragraph 1,

“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. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37 and that those tariffs, and the methodologies — where only methodologies are approved — are published prior to their entry into force”.

As we can see, this paragraph makes a direct reference to the TPA right, requesting from the MS to provide the necessary requirements in order to reassure that third parties could have access to the transmission and distribution systems of electricity. What makes it different from the relative article of the Gas Directive is that, whilst it enables the practice of the TPA right, yet it clarifies that this will be under the published tariffs. The Directive in this part,

took under consideration the different support schemes under which the electricity market functions, and given the fact that the feed-in – tariff system is one of the most common one, we can understand why there was this paragraph structured this way. Apart from the publication of tariffs, the Directive request that not only the tariffs, but the methodologies as well upon which the tariffs have been calculated, to be approved prior their entry into force. This is clearly related to the TPA right, if we consider that the access to the transmission and distribution system can sometimes be obstructed due to overpricing over the services provided.

The second paragraph of Art. 32 offers the legal basis upon which an exemption to the TPA right can be build. The provision introduces the justification of low capacity, as an excuse to the access refusal of third parties to the transmission or the distribution system. But in order to accept the refusal the system operator must meet the technical and economic criteria referred in Art.3. Also, the NRA has the duty to ensure that relevant information have been provided on behalf of the operator, justifying the refusal of access.

2.7 Article 35; the rules governing the function of the NRAs

Whereas under article 23 of Directive 2003/54/EC Member States, were given the choice to designate “one or more competent bodies” with the function of regulatory authorities, under the Art. 35 §1 of Directive 2009/72/EC, they are obliged to designate “a single national regulatory authority at national level”. Article 35 §1, creates an impact on those MS, which have established other forms of structures in the area of energy. Whereas the first paragraph of Art. 35 establishes the basic principle governing the scheme of the NRA, paragraphs 2 and 3 constitute forms of exceptions to paragraph 1.

2.8 Article 37; the powers of the NRAs

The Article 37 refers to the powers to be granted to the National Regulatory Authorities by requiring from the MS under the light of the paragraph 4, “*to ensure that national energy regulators are granted the powers enabling them to perform the*

duties referred to in paragraph 1, 3 and 6 in an efficient and expeditious manner". For this purpose, article 37 § 4 of Directive 2009/72/EC establishes a minimum set of powers¹³. The set of powers to be given to the NRAs, are divided into investigation powers, decision-making and enforcement powers. By using these powers, the NRAs will "promote effective competition and ensure the proper functioning of the market". But it remains a question whether these powers are restricted to monopoly areas of the electricity market or whether they extend to competitive areas as well. In such a case where these powers extend to competitive areas as well, the question is how the national energy regulators and national competition authorities relate to each other and how the cooperation between these authorities can effectively be construed, given the fact that each EU MS has a different national energy regulatory framework.

2.9 General Conclusions

In general, the Directive 2009/72/EC, is one of the most important efforts of the EU towards liberalization of the electricity market. The Directive promotes measures which will lead to more separation between production/supply activities and network (transmission & distribution) activities, either with full unbundling or with transmission activities carried out by an independent operator of the transmission system. The transmission system operator shall be responsible for the long-term ability of the system to meet reasonable demands for the transmission with due regard to the environment.

The effort towards liberalization is also supported by the provisions of the Directive which require from the MS to have independent electricity regulators for electricity and gas. They shall ensure competitive, secure and environmentally sustainable internal markets in electricity and gas and shall not take instructions from the government. Among others they shall help to achieve the development of systems that are in line with general energy policy objectives, energy efficiency as well as the integration of large and small-scale production of electricity from renewable energy sources and distributed generation. The regulator shall also facilitate access to the

¹³ Directive 2003/54/EC uses the term "minimum set of competences", see Recital (15) of Directive 2003/54/EC.

network for new generation capacity and remove barriers of electricity from renewable energy sources.

Additionally, the Directive introduces legislation towards harmonization of technical standards, access to networks and others, while requests for increased cooperation among transmission operators with the creation of organisations for electricity and gas transmission operators.

One of the most important features is the establishment of a new European “Agency for the Cooperation of Energy Regulators”, with competence to oversee the application in practice of the legislation introduced by the Directive 2009/72/EC.

Furthermore, the Directive sets the consumers’ protection to another level, by requesting from each country to ensure that there are adequate safeguards to protect vulnerable customers, including the non-disconnection of electricity in "critical times". It shall also provide benefits in social security systems to ensure the necessary electricity and gas supply to vulnerable customers, or provide for support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty.

The regulations of access to gas transmission networks and to networks for cross-border exchange of electricity have been in force since 3rd of September 2009 and is was expected that the MS will have them applied by the latest, 3rd of March 2011, except for unbundling (independence) of transmission system operators and for regulation of owners and operators of the transmission system from countries outside the EU. The unbundling must be applied by 3rd of March 2011 and the regulation of third country owners by 3rd of March 2013. By March 3rd, 2013 the EU Commission shall submit a report on the implementation of the directives' chapters on unbundling. Where appropriate, the EU Commission shall submit new proposals to ensure fully effective independence of transmission system operators by 3 March 2014.

Chapter 3

Presentation and Analysis of the Gas Directive 2009/73/EC

3.1 Introduction

In order to further clarify and ensure a secure way towards the liberalization of the internal Energy Market of Gas, the European Commission adopted Directive 2009/73/EC¹⁴, providing some key points for the Member States to take under consideration, as far as the regulation of the Gas Market is concerned. The Directive states some criteria which must be developed by a Member State (or an NRA, if there's any designated to do so) that should be used to determine whether storage facilities need to offer third party access at all. But despite the good will of the EC, it should be stated that the Gas Directive does not set any rules with regard to the publication itself. As such, the criteria and the applicable access regime can either be published in national law or e.g. via a Ministerial Decree. One NRA considers that where the Member State has exercised its right not to allow for the TPA right, the requirement to “define and publish criteria” applies to the question as to whether there is a need to offer TPA or not, although in any event that Member State has defined and published its criteria as to the choice of access regime through public consultation documents.

The Gas Directive of 2009 has led to significant amendments have been made to the first Gas Directive and to the second Gas Regulation with regard to third-party access to storage. Briefly, Article 15 of the Gas Directive requires storage system operators (SSOs) to be at least legally and operationally unbundled, while Article 33 of the Gas Directive requires Member States to define and publish criteria according to which the access regime may be determined. In addition, Art. 15, 17, 19, 20 and 22 of the Gas Regulation set legally binding standards for third-party access services, capacity allocation and congestion management, and transparency concerning storage facilities.

¹⁴ 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 (OL 2009 L 211, p.94

This chapter will make a short presentation and an analysis of the most important and interesting articles of the Gas Directive 2009/73/EC.

3.2 Presentation and Analysis of the key provisions

3.2.1 Article 9; introducing the unbundling of the natural gas activities

What could be set as the main feature appearing on the Directive 2009/73EC is the procedure of unbundling of natural gas transmission activities from production or supply activities (Art. 9 part 1), not through application of rules on legal and functional unbundling of activities, as it was priority established by Directive 2003/55/EC, but rather, by choosing the method of ownership unbundling. This means that the same company cannot produce natural gas or supply it to the consumers, and at the same time by the right of ownership or otherwise control the main gas network for transmission of natural gas.

According to the Resolution of July 10th, 2007, adopted by the European Parliament, regarding the prospects for the internal gas and electricity market, noted that “transmission ownership unbundling to be the most effective tool to promote investments in infrastructures in a non-discriminatory way, fair access to the grid for new entrants and transparency in the market”¹⁵.

In order to reassure the effective application of the regulation and measures introduced under the light of Directive 2009/73/EC, it was requested that the EU member states must ensure that laws and other regulations for the implementation of come into force from 3 March 2011 and the provisions on ownership unbundling, from 3 March 2012.

¹⁵ European Parliament resolution of 10 July 2007 on prospects for the internal gas and electricity market (O C 175 E, 2008 7 10, p. 206).

Due regard to the objective criteria set in Art. 9 part 8 of Directive 2009/73/EC, a member state can choose one of the alternatives to the ownership unbundling model, taking the decision either to designate an independent system operator, according to Art. 14 of Directive 2009/73/EC, or to designate an independent transmission operator, according to chapter IV of the same Directive.

According to Art. 2, point 20, “vertically integrated undertaking means a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas.”

At the same Article it is stated that, ownership of transmission system operators is unbundled in 12 member states, among them United Kingdom, Spain and Sweden. Out of the 12 MB, 8 of them ¹⁶ submitted alternative proposals, despite the fact that ownership unbundling model does not bind mandatory those member states which had vertically integrated company running the transmission system on 3 September 2009.

3.2.2 Article 14 and Chapter IV; suggesting two different models of unbundling

The main feature of the model of Independent System Operator’s (ISO) is that it introduces the unbundling of the infrastructure ownership and infrastructure management. According to this model, the companies which are active in the production or supply of natural gas would retain the ownership of natural gas networks but would lose the control of their management. Practically, companies quite often are not managed by their owners but the company directors who in essence aim at the purposes set by the owners (shareholders). In this case, such interconnection of owners and managers of the natural gas companies is forbidden. It

¹⁶ The MB which submitted alternative proposals are Austria, Bulgaria, Greece, Latvia, Luxembourg, Slovakia, Germany and France.

constitutes the main disadvantage of the model. Coming down to the model of Independent Transmission Operator (ITO), vertically integrated companies would retain the ownership of natural gas networks but would be managed by and would have to entrust the networks' management entirely to an independent transmission operator.

3.2.3 The main provisions of Article 33

According to paragraph 1 of Article 33 of the Gas Directive, if it is *technically and/or economically necessary for providing efficient access to the system for the supply of customers*, Member States must decide whether an nTPA and/or rTPA will be in place for the organisation of access to storage facilities and line pack. Following paragraph 2, NRAs (where Member States have been indicated so) or Member States, shall define and publish criteria according to which the access regime applicable to storage facilities and line pack may be determined. These two paragraphs introduce the possibility to adapt the applicable access regime to storage facilities when market circumstances change due to e.g. market integration. The first possible access regime is the one where the access is negotiated. In the framework of this regime, Member States or, where Member States have so provided, NRAs shall take the necessary measures for natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system to be able to negotiate access to storage facilities and line pack. What is important within this regime is that the contracts for access to storage, line pack and other ancillary services shall be negotiated with the relevant storage system operator or natural gas undertakings, according to Art. 33, §3 of the Gas Directive.

The second regime is the one where the access is being regulated by the authorities, where MS have so provided or the MS themselves. In the framework of this regime, according to Art. 33, § 4, the necessary measures have to be taken in order to give natural gas undertakings. Additionally, in the framework of this regime, the eligible customers either inside or outside the territory covered by the interconnected system have the right to access to storage, line pack and other ancillary services, on the basis

of published tariffs and/or other terms and obligations for use of that storage and line pack.

3.2.4 Article 39; strengthening independency

One of the most important features of Directive 2009/73/EC is being introduced under the provisions of Art. 39, part 4 and part 5 of the Directive. This Article sets the criteria and the objectives to be achieved by the national Regulatory Institutions, by defining their duties and powers, while providing the conditions for cooperation of the European Regulatory Institutions of the energy sector, both at regional and EU level. The part 4 and 5 of this Article defines as duty of the each MB to ensure that the Regulatory Authority in each state will be able to legally distinct its duties, conferred upon it by legislation, and that it can function independently from any other private or public entity. Additionally, the staff and the persons to be managerially responsible must act independently, away from any market interests and that they will not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks appointed to them. Also, the MS must reassure that the National Regulatory Authorities will be able to take autonomous decisions, independently from any political body, and they should have a separate annual budget allocation, with autonomy in the implementation of it and that they will have the adequate human and financial resources to carry out their duties. Finally, article 39 sets the conditions governing the term of service of the Regulatory Authority's top management and the rules governing the function of the members of the board of the regulatory authority.

3.2.5 Article 41; the Duties and Powers of the Regulatory Institution

The Article 41 of Directive 2009/73/EC provides the legal regulation which expands the duties and powers of the Regulatory Institution. The Regulatory Institution has the duties of fixing or approving, in accordance with transparent criteria, the transmission or distribution tariffs or their methodologies, while ensuring the

compliance with set duties by all natural gas companies. Also the RI must ensure that the methodologies used to calculate or establish the terms and conditions for connection and access to national networks will be published sufficiently, at least in advance of their entry into force. This provision also manages the rules for publishing the rules governing the balancing services, cross-border infrastructures, including the procedures for the allocation of capacity and congestion management.

Furthermore, Art. 41, sets the rule of ensuring that there is no cross-subsidizing of natural gas transmission, allocation, keeping and supplying activities, while undertaking monitoring duties established under the light of Directive 2009/73/EC. Also, at least once per year the RI must issue recommendations on compliance of supply prices to the set requirements.

In order to fulfil the above mentioned duties, the RI are given the power to issue binding decisions on natural gas undertaking, to demand that transmission, storage, liquid natural gas and distribution system operators, where appropriate, will change the conditions, including tariffs and methodologies, in order to make them proportional and non-discriminatory. Also the RI has the power to carry out inspection of activities at natural gas markets and to decide upon and impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market, as well as, to require any information from natural gas undertakings. Additionally, the RI has the power to conduct studies and issue guidelines on dispute settlement, when the party complaining on the operator's activities related with its duties, submits a complaint to the regulatory institution in capacity of the disputed settlement institution.

3.2.6 Annex 1; introducing measures for the consumers' protection

One of the most important features of Directive 2009/73/EC is the introduction of provisions for strengthening the protection of consumer rights and the legal interests through development of a competitive gas market. In order to further clarify the measures, Annex 1 on Measures of consumer protection is attached to the Directive 2009/73/EC. The Annex establishes some additional consumer protection measures, in order to strengthen the consumers' protection. Namely, in the Annex 1, we are being introduced to the right to terminate contract with the gas supplier free of charge and choose another supplier in three weeks, the right to receive a compensation and

return the money in case the quality of services, including imprecise or late bills, does not correspond to the quality agreed upon in the contract, the right to receive without charge the data on factual gas consumption and prices and the right to receive the final closure bill not later than in 6 weeks after the change of supplier.

In addition, the MS are obliged to establish joint information centres in order to provide the necessary information to the consumers, informing them on their rights, the legal support in case of disputes and the current provisions of legislation which are in force¹⁷.

¹⁷ All disputes between the suppliers of natural gas services' supplier and consumers should be settled fairly and promptly, no later than in 3 months, with provision, where warranted, for a system of reimbursement and/or compensation. Out-of court dispute settlement procedures should be in line with the principles set out in Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.

Chapter 4

The Third Parties Access Right; analyzing the TPA right under the light of Electricity and Gas Directives

4.1 Introduction

Over a decade ago, the EU recognized and stated what was expressed through the Lisbon strategy that, well functioning energy markets, which guarantee secure energy supplies at competitive and affordable prices, are crucial for achieving growth and consumer welfare in the European Union¹⁸. These objectives, in order to be achieved, it was obvious that a big decision had to be taken. Therefore, the EU decided to open up its gas and electricity markets to the competition and to create a single European Internal Energy Market¹⁹. In order to achieve the goal which was set, the European Commission decided to introduce through the provisions of two adopted Directives, what is known as the Third Part Access right (TPA right). What the second Directives require, is that regulated third party access. The legal provisions upon which the TPA right is granted and the exemptions of it, will be presented and analysed in this chapter.

4.2 Regulating the EU Internal Energy Market towards liberalization

The creation of a single European Internal Energy Market, which would be open to competitiveness, was a process which was not an easy one. Several oppositions were expressed in previous attempts towards liberalization of the internal market of telecommunications, in the early 1990s, leading, after several rejected attempts to a compromise in 1996, which set a primal base for the access of the third parties to the national networks.

¹⁸ “Lisbon European Council, Presidency conclusions, 24 March 2000”, Press release Nr. 00/1/00, in 24 March 2000.

¹⁹ Ehlers, E. “The Amsterdam and Berlin Fora and the Forum Process in European Energy Policy”, In M. Roggenkamp, U. Hammer (eds), *European Energy Law Report*, Antwerp-Oxford: Energy & Law Series Volume 4, Intersentia, Ch. 6 , (2007)

Despite the fact that there were several attempts to issue directives under the legal scheme provided by the European Community Treaty, and especially articles art. 81 EC²⁰ and art. 82 EC²¹, any legal problems concerning the access to the networks resulted directly from the inner of the energy sector. The operations of the systems for transmitting and distributing the energy were not independently working, nor fairly.

The system of the energy sector was favouring their own integrated supply affiliates, a fact which inevitably led to discrimination tactics between the affiliates of the existing energy system and independent third parties, which wished to enter the energy market sector. This was a challenge that had to be tackled and the EU tried through its institutions to take and implement the necessary measures. Most of the initiatives and measures were taken by the European Commission, which tried to further open the energy market and to provide access to the third parties, in order to achieve a competitive market. Of course, some of the Member States opposed fiercely to the proposals for unbundling and ownership separation of the networks and the suppliers, a step which was taken by the EC towards the liberalization of the EU energy market.

The most common term we come across in the literature regarding the liberalization of the EU energy market, is the notion of “unbundling”, a notion which is often used to mark further directions of liberalization of internal energy markets and the strategy of raising competitiveness. This term could be a short conception of what has been with the practice by the Court of Justice²². This doctrine is also known as the essential facilities doctrine²³, which aims at the enlargement of the prohibition of discrimination in order to encompass the privileged treatment of connected parties to the detriment of consumers, which limit or prohibit the access to facilities necessary to

²⁰ Article 81 EC (renumbered as article 101 EU), prohibits cartels and other agreements that could disrupt free competition in the European Economic Area's internal market.

²¹ Article 82 EC (renumbered as article 102 EU) aims at preventing undertakings which hold a dominant position in a market from abusing that position. Its core role is the regulation of monopolies, which restrict competition in private industry and produce worse outcomes for consumers and society.

²² GLASL, D. “Essential Facilities Doctrine in EC Anti-trust Law: A Contribution to the Current Debate”, *European Competition Law Review* 15: 306-314, (1994)

²³ TEMPLE LANG, J. “The principle of essential facilities in European Community competition law – the position since Bronner”, *Journal of Network Industries* 1: 375-380. (2000)

exercise certain economic activities²⁴. A broader concept of the unbundling is the right of the Third Party Access.

In order to reassure that in certain circumstances, financially independent stakeholders operating within the energy sector will have the right to access and use several energy facilities, was a right which had to be legally enforceable and therefore, the European Union tried to secure it by setting a strong legal base for what is described as the Third- Party Access right (TPA right)²⁵.

The EU envisaged this right through the Internal Energy Market Directives EC 2003/54 of 26 June 2003²⁶ concerning common rules for the internal market in electricity and 2003/55 of 26 June 2003²⁷ concerning common rules for the internal market in natural gas, both issued by the European Council. These two directives, acknowledged the existence of two defined and separated markets, which were interconnected, where the energy undertakings operate at the primary market of network operation activities; the transmission and distribution process. These processes involve infrastructure and energy inputs which require physical management, while creating a market of “supply activities”, such as the sale of energy to customers, activities which have created internal monopolies in the energy market for all those years.

According to the EU Competition Law, these monopolies should be eliminated, in order to reassure a liberalized Internal Energy Market. And this could be promoted by

²⁴ However, it is important to remark that these are two different institutes. Unbundling of the transmission from the remainder of the energy supply chain is exactly the result of inappropriate regulations aimed to ensure network access. This is, primarily, a structural reorganization of the network infrastructure, including facilities for the storage of natural gas.

²⁵ Christophe W. Jones, “EU Energy Law”, p. 41, vol. 1, 2nd Edition, 2006.

²⁶ Council Directive (EC) 2003/54 of 26 June 2003 concerning common rules for the internal market in electricity: OJ 2003 L176/37 (‘E-Directive’).

²⁷ Council Directive (EC) 2003/55 of 26 June 2003 concerning common rules for the internal market in natural gas: OJ 2003 L176/57 (‘G-Directive’).

securing the right to the Third Parties to access those networks, and act as independent stakeholders for the energy transmission and distribution²⁸.

4.3 Securing the TPA right through legal provisions

The attempt to secure and promote the TPA right was introduced through the EC 2003/54 and EC 2003/55 Directives (later amended by Directives 2009/72/EC and 2009/73/EC), which, yet, do not provide a clear definition of this right, but the underlying concept is depicted in the text of them. This right is granted to gas and electricity producers, energy suppliers and their customers, allowing them to make use of, and have their energy traded and transported through, electricity grids and gas pipelines that are owned or controlled by other companies.

In case the MS intend to designate only ISOs or ITOs on their territory in any event must also transpose the provisions on ownership unbundling into their national law. This is a rule to be followed by the companies, given the fact that they cannot prevent a vertically integrated undertaking owning a transmission system from complying with the requirements of ownership unbundling, according to Article 9 §11 of the Electricity and Gas Directives.

Additionally, according to Article 9 of the IEM Directives, the supplier in the first Member State cannot directly or indirectly exercise control or any right within the meaning of Article 9 of the Electricity and Gas Directives over a TSO from a Member State that has opted for ownership unbundling Article 9§12 Electricity and Gas Directives.

Furthermore, Art. 43 of the E-Directive and Art. 47 of the G-Directive allow the MS to adopt measures in order to ensure a level playing field, provided that these measures are transparent, non-discriminatory, proportionate and compatible with the Treaty on the functioning of the European Union, and provided they are notified to and approved by the Commission in advance. “This will require a prior assessment on

²⁸ Kroes, N. “Towards an Efficient and Integrated European Energy Market – First Findings and Next Steps”, Conference ‘Energy Sector Inquiry – Public Presentation of the Preliminary Findings’, Brussels, 16.02.2006, (2006) Retrieved in September 21st, 2012 from http://www.gov-news.org/gov/eu/news/neelie_kroes_member_european_commission_charge/67828.html

a case-by-case basis, in which the distortion of the level playing field — or the risk of such distortion — must be demonstrated, as well as compliance with the other conditions of the clause”²⁹.

4.3.1 Article 32 of the Directive 2009/72/EC

Namely, the article 32 of the Directive 2009/72/EC (electricity Directive) establishes the obligation of Member States to implement a system of Third-party access (TPA) to the transmission and distribution systems, but the article 2 of the Directive which sets out the definitions under the scope of the Directive, no further definition of this right is provided or developed within the text of the IEM Directives.

The article 32 reads as follows:

1. 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. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37 and that those tariffs, and the methodologies — where only methodologies are approved — are published prior to their entry into force³⁰.
2. The transmission or distribution system operator may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3, and based on objective and technically and economically justified criteria. The regulatory authorities where Member States have so provided or Member States shall ensure that those criteria are consistently applied and that the system user who has been refused

²⁹ Commission Staff Working Paper, Interpretative note on Directive 2009/72/EC Concerning common rules for the Internal Market in Electricity and Directive 2009/73/EC concerning common rules for the Internal Market in natural Gas, Brussels, 22 January 2010

³⁰ Article 32 of the Council Directive (EC) 2003/54 of 26 June 2003 concerning common rules for the internal market in electricity: OJ 2003 L176/37 (‘E-Directive’).

access can make use of a dispute settlement procedure. The regulatory authorities shall also ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information.

Where the attention should be drawn at this article is not only to the lack of definition of the TPA right, but also several contradictions and First of all, it's the Member states who should ensure the implementation of a system of third party access, and no further guidance is given towards this direction. Secondly, despite the fact that the system applies to the transmission and distribution systems, according to art. 2§3 "*transmission means the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply*", and "*distribution*" means the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply, according to paragraph 5 of the same article. So, when it comes to the electricity consumers and suppliers, according to Art. 32 §1, when they act as third parties, they have the right to access whatever transmission and distribution networks are necessary for them to receive the contracted electricity supplies from their chosen commercial partner³¹.

Another interesting feature of the IEM directives and the TPA right is that, the system upon and within which the TPA right must be secured is based on published tariffs, which are also applicable to all eligible customers which according to article 2 § 12 comprises customers who are free to purchase electricity from the supplier of their own choice within the meaning of article 33 §1³².

³¹ Kotlowsky, Alexander, "Direct Access to European Electricity Transmission Networks", Article Vol 17. Issue 3 - Access to European Transmission Network, University of Oxford, Faculty of Law, p. 85.

³² Article 33 of the Council Directive (EC) 2003/54 of 26 June 2003 concerning common rules for the internal market in electricity: OJ 2003 L176/37 ('E-Directive').

The only way to secure this right and regulate the implementation of such a system, is stated in articles 35, 36 and 37, which determines the duties and powers of the regulatory authority, who according to the Directive 2009/72/EC is in charge of approving such tariffs and methodologies, and also introduces the feature of prior approval for the tariffs and methodologies underlying the calculation of themselves.

By setting the article 32, the EC wishes to reassure that that a third-party alien to the network will have the right to access and use the relative infrastructures owned or built by another company, whereas the owner of the network cannot prevent the third-party to access his network, but leaves the implementation process to the hands of the MS. This means that the MS of the EU have to adjust their national legislation, in order to harmonize with the provisions of the IME Directives.

Where as according to the regulatory scheme provided under the light of the IME Directives, the TPA right is recognized solely, in principle there are two different forms of TPA; the regulated Third Party Access and the negotiated Third Party Access. The regulated Third Party Access assumes that bilateral contracts between market subjects for energy retail on condition of regulated prices and there is a regulatory authority that designates prices in non-liberalized segments, where as in the Negotiated Third Party Access the access provided to the networks is submitted on condition of negotiated prices³³.

4.3.2 The TPA right under the light of the Gas Directive

The TPA right was also introduced by the provisions of the Gas Directive, which more detailed presented the general framework within which the TPA right will be practiced. According to Article 2§4 of the Gas Directive, in order to reassure the unbundling and the liberalization of the Gas Market, a Transmission System Operator is:

1. responsible for operating, ensuring the maintenance of, and, if necessary,

³³ Kotlowski Aleksander, "Third-party Access Rights in the Energy Sector: A Competition Law Perspective", *Utilities Law Review* 2007, Vol. 16, No. 3, p. 101-109 and Adamec M., Indráková M., Karajica M., "The European Electricity Market and Cross-Border Transmission", *Acta Polytechnica* Vol. 48 No 3/2008, Czech Technical University Publishing House, p. 20

2. developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transportation of gas.

A direct refer to the TPA right is made in Art. 14 §4 of the G- Directive which reads the following:

“Each independent system operator shall be responsible for granting and managing third-party access, including the collection of access charges and congestion charges, for operating, maintaining and developing the transmission system, as well as for ensuring the long-term ability of the system to meet reasonable demand through investment planning. When developing the transmission system the independent system operator shall be responsible for planning (including authorisation procedure), construction and commissioning of the new infrastructure. For this purpose, the independent system operator shall act as a transmission system operator in accordance with this Chapter. The transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning”.

In addition, the TPA right, according to the provisions of the G- Directive, is a right which is being managed by the ITO, according to Art. 17 §2 , point c, which appoints the ITO the power of *“granting and managing third-party access on a non-discriminatory basis between system users or classes of system users”*.

One other Article which sets rules which allow the practice of the TPA right is Art. 15 of the Gas Directive. According to this, the SSOs which are part of a vertically integrated undertaking, must be legally and functionally unbundled from other activities not related to transmission, distribution, and storage. A fully ownership unbundled SSO (which is at the same time the owner of the storage facility) is compliant, irrespective of whether it is the same company as the fully ownership unbundled TSO or a separate one. According to paragraph 1 of the Article, the unbundling obligation only applies to operators of those storage facilities that are technically and/or economically necessary for providing efficient access to the system

for the supply of customers pursuant to Article 33 of the Gas Directive. Therefore, the obligation to unbundle legally and functionally does not apply to those operators of storage facilities that have no obligation under the Gas Directive to grant TPA either on a negotiated or on a regulated basis³⁴.

Coming down to a most direct refer of the TPA right, the Art. 32 of Directive 2009/73/EC, under the title “Third Party Access”, provides the general guidelines and the legal framework which will govern the Transmission and Distribution system and the LNG facilities in the MS. The first paragraph of the Article states that:

“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. Member States shall ensure that those tariffs, or the methodologies underlying their calculation are approved prior to their entry into force in accordance with Article 41 by a regulatory authority referred to in Article 39(1) and that those tariffs — and the methodologies, where only methodologies are approved — are published prior to their entry into force.”

But despite the fact that the Article requests from the MS to ensure the implementation of the system which will grant the right of access to third parties, yet the Article does not set a certain way of ensuring this access nor it describes the details of the right of the access for the third parties and what should this access include. Yet, in the following Art. 33, the Directive provides a general framework for the storage access, leaving to the MS and the Regulatory Authorities of them to set the criteria which would secure the access to the storage facilities.

³⁴ Commission Staff Working Paper, Interpretative note on Directive 2009/72/EC Concerning common rules for the Internal Market in Electricity and Directive 2009/73/EC concerning common rules for the Internal Market in natural Gas, Brussels, 22 January 2010.

“Member States shall take the necessary measures to ensure that natural gas undertakings and eligible customers, wherever they are located, are able to obtain access to upstream pipeline networks, including facilities supplying technical services incidental to such access, in accordance with this Article, except for the parts of such networks and facilities which are used for local production operations at the site of a field where the gas is produced. The measures shall be notified to the Commission in accordance with the provisions of Article 54”.

Directive 2009/73/EC excludes from the definition those portions of storages that serve a function as part of production operations. This means that the producers may need to resort to portions of storages for their exclusive use in order to smooth production swings. The second paragraph of Art. 33 makes an effort to clarify the right of access provided previously:

“The access referred to in paragraph 1 shall be provided in a manner determined by the Member State in accordance with the relevant legal instruments. Member States shall apply the objectives of fair and open access, achieving a competitive market in natural gas and avoiding any abuse of a dominant position, taking into account security and regularity of supplies, capacity which is or can reasonably be made available and environmental protection.”

And the paragraph continues by setting four matters to be taken in account when granting the right of access to third parties, and these matters include incompatibility of technical specifications which cannot reasonably be overcome, cases where difficulties cannot reasonably be overcome and could prejudice the efficient, current and planned future production of hydrocarbons, including that from fields of marginal economic viability, whilst securing the needs of the owner or operator of the upstream pipeline network for the transport and processing of gas and the interests of all other users of the upstream pipeline network or relevant processing or handling facilities who may be affected and finally allows under the fourth point, it states that in case there is need to apply the national laws and administrative procedures, in

conformity with Community law, for the grant of authorisation for production or upstream development.

Given the fact that a general policy of the European Union is to stimulate the domestic production, the exclusive use of storage for production operations can be justified up to the point it enables or improves the production process. But it lays to the MS to ensure that the use of storage for production operations will not be abused by the producers, due to their de facto priority access to storages. And therefore, this power which is given to the MS is one of the reasons which, in some cases, acts as an obstacle to the TPA right and the liberalization of the energy market itself.

4.4 General exemptions for the TPA right.

Despite the fact that the European legislation offers several provisions, as we have seen in the previous analysis, for granting the right of access to third parties, in order to enable a well functioned Energy Market, it also grants the right for an exemption for this right. Therefore, owners or interconnectors, LNG import terminals and storage facilities might be exempted from being required to offer access to third parties. The right of the application of exemptions is given in order to provide the development of such facilities in a competitive market, where the facilities are not required to be stringently monitored. In such cases, several issues for which there was special regulation, such as the setting of tariffs, are not required to be agreed between the relevant energy stakeholder and the regulator.

Whilst the EU offers the right to apply an exemption to the TPA right, each request for exemption is being examined on a case by case basis, in order to verify if the criteria set for the application of an exemption are met. Therefore, both IEM Directives include provisions which could serve as the legal basis of justifying an exemption.

Under the provisions of the Art. 26 §4 of the E- Directive, the smaller DSOs which serve less than 100.000 connected customers can be a case where an exemption could be applied. An exemption can be applied by the MS in case the DSOs are serving small isolated systems. In such a case, the EU legislation takes into account the capacity of such a small system and its function and therefore offers the right of

exemption of the TPA right. Yet, there is no further clarification of the term “connected customers”, but we could assume that it refers to the number of connections (probably, by household) and not to isolated numbers of customers or users. It has to be noted that, even Interpretative note on the IEM Directives doesn’t offer a clarification to such an exemption. Thus, the interpretative note offers an example of application in practice by presenting two scenarios regarding the application of exemptions, proving that a case by case examination has to be undertaken each time an application for an exemption appears.

The G- Directive also offers the right to apply for an exemption, regarding the access to the systems functioning in the internal market. According to Art. 35 §1 :

“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.”

As we can notice, the Article states that refusal of access might be applied, but it requires from the MS to provide substantiated reasons for such a case. Yet, the article does not specify or give examples of such reasons neither does it set any criteria for granting the right of exemption.

Following the first paragraph, in the same framework, the second paragraph of Art. 35 reads:

Member States may take the measures necessary to ensure that the natural gas undertaking refusing access to the system on the basis of lack of capacity or a lack of connection makes the necessary enhancements as far as it is economic to do so or when a potential

customer is willing to pay for them. In circumstances where Member States apply Article 4(4), Member States shall take such measures.

Again, in the second paragraph, there is not specification of the measures which the Directive requires from the MS to take, but there is only a reference to the cases under which those measures can be taken, namely, in case of lack of capacity or lack of connection.

As we can see in both Directives, Articles providing the basis for the application of an exemption to the TPA right do exist, but yet, there is further analysis or explanation of the criteria to be met. Also, as we can see, there are differences to the approach of the TPA right between the two directives. Those arise due the differences that do exist between the electricity and the gas market. One of the most important differences, connected to the TPA right, regards the storage of these two types of energy. Obviously, gas supplies can be stored more easily and for a longer period of time, compare to the energy produced by electricity. Additionally, another related difference regards the monitoring and reporting requirements of these two types of energy³⁵.

Given the different rules governing the TPA right in the electricity and gas market, it is then laid upon the MS to secure the TPA right and provide the necessary conditions in order for one to obtain it. For instance, one of the major obstacles to the completion of the internal market

³⁵ Cameron D. Peter, *Legal Aspects of EU energy Regulation*, 2000, p. 12

4.5 The application of the main provisions of the IEM Directive and the TPA right and in Greece

4.5.1 Short introduction to the Greek Energy Market

In May 2000, Greece still hadn't decided what access system it was going to adopt; neither had it expressed what mechanism it is going to establish for access to storage. And with regard to public service obligations no condition has yet been established. With the privatisation of distribution, this activity will be separated from DEPA³⁶, the transport company in charge of the separation of activities. Since 1999, the Energy Regulation Authority³⁷ has been operating, which has jurisdiction and monitors over gas and electricity activity. We have been noticing that a gradual opening up of the market has been established. On February 19, 2001, barring the non-connected islands, consumers who consume over 100GWh a year acceded to the market, including those who produce their own electricity³⁸.

The electricity market reform in Greece started in 2001 and is still developing slowly. This is the outcome of a monopoly which was based on the persisting dominance of the incumbent company and the specificities of the electricity sector of Greece, which is heavily dependent on indigenous lignite-firing generation, while being located in the periphery of the EU internal electricity and gas markets. Achieving a state of competition through enhancing electricity trade in the region is limited, as the establishment of an internal market in South East Europe also progresses slowly. Development of competition through gas-firing generation by new entrants has been the priority adopted by State and Regulator's policies. However, the gas supply market in Greece and in the region still lacks behind.

³⁶ Official DEPA webpage: <http://www.depa.gr/>

³⁷ Official RAE webpage: http://www.rae.gr/site/categories_new/about_rae.csp

³⁸ The Regulatory Authority, along with the Ministry of Development, will also decide what other consumers are eligible.

Greece is making an effort to open its market gradually, while trying to keep in line with the limits established by the IEM Directives.

As requested by the provisions of the IEM Directives, the MS should have applied the legislation introduced in the Directives by March 2011. Greece has been trying to comply with the European legislation, regarding the IEM, but still there are many issues to be solved if we want to speak for a liberalized Greek energy Market.

Regarding the TPA right, with regard to network access, there is an established mechanism of regulated TPA. This means that the transport network still belongs to PPC, but a new company will be responsible for operating the system, as well as for the maintenance and development of the transport network and for connections with other systems. Access to the distribution network also requires payment of a public tariff. Here, the owner and the operator of the system are the same entity, PPC, which is also responsible for the operation, exploitation, maintenance and development of the network. PPC will continue to be vertically integrated, but the system operator will be separate company that will be responsible for the running and administration of the system. Integrated electricity companies are be obliged to hold separate accounts for activities not related to electricity. As public service obligations the law contemplates: security in supply, consumer protection and protection of the environment, and supply to clients subject to tariffs.

4.5.2 The TPA right in the Greek Gas Market

In Greece, when it comes to the Gas Market, the owner and the operator of the Natural Gas System (ESFA), the Hellenic National Natural Gas System is DESFA, the Hellenic Gas Transmission System Operator S.A. ESFA includes the transmission system (pipelines etc.) as well as the liquefied natural gas terminal (LNG)³⁹ and additional facilities and infrastructure services related to the transmission system.

³⁹ LNG facility means each facility used for the importation, offloading and re-gasification of LNG and includes ancillary services, temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system but it does not include any part of LNG terminals exclusively used for storage (article 2 no. 11 of the Law 3428/2005 as well as article 2 no. 11 of the Directive 2009/73).

As a user of ESFA is concerned every person that has the right to conclude contracts for the use of ESFA, inter alia the eligible customers for the amounts of natural gas that they are supplied with, as well as the importers or suppliers of natural gas. Greek Law no. 3428/2005 on the liberalisation of the natural gas market does not distinguish between different types of users and the provisions on the third party access apply to all users except when special provisions are issued. Yet, as we have seen in a previous Chapter, 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, 15/07/2003) declares that measures should be taken in order to ensure transparent and non - discriminatory tariffs for access to transportation which should be applicable to all users on a non- discriminatory basis. Where a storage facility, linepack⁴⁰ or ancillary service operates in a sufficiently competitive market, access could be allowed on the basis of transparent and non-discriminatory market-based mechanisms⁴¹. But, when it comes to Greece, this is not the case though for the Greek LNG facilities since no competition exists and no exemption from the regulated third party access is issued.

In order to change the current situation within the Greek Gas Market, the implementation of the right of Third Party Access to ESFA is a prerequisite for the development of competition in a liberalised natural gas market⁴². By “Access”, as we have also seen in the analysis of the G-Directive, we mean the right to use the system without a fee, which it was usually required by the occasional operator. Given the fact that the networks of the natural gas constitute an essential facility, free access to the system is an expression of the essential facilities doctrine, especially when it comes to Greece. One could argue that parallel networks could be build up, but, due to environmental, technical and financial reasons there are not such incentives which would allow such a case. This has ended up to a physical monopoly, where no competition can be established while competition is aimed and achievable on the markets which import, produce or supply gas.

⁴⁰ According to article 2 no. 15 of the Directive, "linepack" means the storage of gas by compression in gas transmission and distribution systems, but excluding facilities reserved for transmission system operators carrying out their functions.

⁴¹ See recital 22 of the G-Directive.

⁴² European Court of Justice, Case C-439/06 Citiworks, 2008 I-03913, 38 και 40.

Greece tried to tackle this physical monopoly, by adopting the model of regulated access⁴³ to the systems. This means that in Greece, the system which has been adopted is based on regulated tariffs published by DESFA prior to their entry into force, according to the provisions of the G- Directive. This determination can be very complicated within the alternative model of negotiated access, especially when a vertically integrated undertaking has a monopoly on the market. This is the case in Greece, where the state owned undertaking Public Gas Corporation S.A. (DEPA) is active. The model of regulated access base its function upon the principle of non-discrimination of system- users, trying to protect the weaker player against the monopoly of the stronger, I this case, DEPA.

The desirable result of the regulated access to the system is the avoidance of anticompetitive charges for the access and use of ESFA as well as the avoidance of discrimination for the benefit of certain users and in particular of the natural gas undertakings which are related with DESFA. This principle should be taken into consideration when it comes to the interpretation of the provisions of national law and assessing each transaction between third parties and the dominating undertaking like DESFA.

According to the Law that implemented the Directive into the national legal framework, DESFA has several obligations in the liberalised natural gas market. The right of free access to ESFA is reflected in DESFA's obligation to provide free access to everyone who asks for it according to the terms and conditions adopted by European and national law⁴⁴. Since it holds the role of the owner and operator of a natural monopoly is significant. Therefore, the dominant position in the market is secured and offers DESFA the possibility to abuse it within the meaning of the

⁴³ Main aim of this model is the solution to the problems caused during the determination of the access terms and conditions and in particular the access tariffs and not the restriction of the parties' contractual freedom, although this cannot be avoided to a certain degree.

⁴⁴ The European legislator provides in article 18 of the Directive that 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. Member states are obliged according to the same provision to ensure that these tariffs, or the methodologies underlying their calculation, shall be approved prior to their entry into force by the national regulatory authority and that these tariffs - and the methodologies, where only methodologies are approved - are published prior to their entry into force.

antitrust rules set in article 102 of the Treaty on the Functioning of the European Union and article 2 of the Greek Law no. 703/1977 on competition.

Coming down to the exercise of the TPA right in Greece, the Greek legislator issued in article 8 par. 2 of the Law DESFA's obligation to provide access to DESFA to all users in the most cost efficient, transparent and direct way and for the period they desire without threatening the security and ordinary operation of the system. For this purpose it concludes transport contracts, LNG facility use contracts and storage facility use contracts with the users, based on model contracts that are prepared and published by DESFA in its internet site, after being approved by RAE.

The TPA right is subject to restrictions that permit the denial of its exercise by the user. The refusal of access though applies only as an exception and only in cases exclusively mentioned in the Law due to the negative consequences that it can have an effect on the liberalisation of the natural gas market and the development of competition. In this context, article 3 of the Ministerial Decision Δ1/1227/2007 correctly provides that the refusal of access and use of the system is only permitted when the reasons prescribed in article 8 par. 8 a) of the Law 3428/2005 are present.

According to this last provision DESFA can refuse access only on the basis of lack of capacity, as it shall be defined in the Code of Operation of the System, or if providing access will eventually prevent DESFA from carrying out its public service obligations. The refusal must be justified in each specific case, while the interested party and RAE have to be informed.

4.5.3 The TPA right in the Greek Electricity Market

Greece embarked quite lately on electricity market liberalisation in February 2001 according to the provisions of the Law 2773/1999. The legal framework was revised after the provisions of Directive 2003/54/EC, in order to comply with the European legal framework and to incentivise private investment and competition. The new electricity law established a mandatory pool system and a capacity assurance mechanism. But full market opening, in the dimension of customers, applies since July 2007. Six years after the start of liberalisation, PPC S.A., still holds a highly dominant position in both the electricity generation and power supply markets.

When it comes to the TPA right exercised in the electricity market, it was adopted since the beginning of market liberalisation. The Minister of Development, following opinion by RAE, decides on the connection and usage tariffs regulatory scheme.

Additionally, the Distribution Network tariffs are also regulated by decision of the Minister following binding opinion by RAE. However, the tariffs for access to medium or low voltage systems have not been adopted yet.

According to the Law, the HTSO is responsible for ensuring TPA of generators, suppliers and eligible customers under equal and non-discriminatory rules that are included in the Transmission System (and the Network) Operation Code(s). According to these provisions, upon application of the interested party, the HTSO shall prepare and submit a connection offer, which includes the design of the proposed connection and the budget. HTSO is obliged to select the most cost-effective and technically acceptable design of new connections.

Due to the exclusive ownership of the networks by PPC, TPA becomes practically effective through tripartite contracts between PPC, HTSO and the applicant of connection. The HTSO has limited capabilities and responsibilities as regards new connections, since these are constructed by PPC. This distribution of responsibilities has resulted in significant problems and delays during the construction of new connections. In order to overcome such problems, with the provisions of Law 3175/2003, the HTSO acquired similar rights as those entrusted to PPC and has the right to proceed with any expropriation that is eventually necessary for the construction of network installations

As we see, in Greece, further revisions of the existing legislation are currently under consideration in order to further address the abovementioned issues and to comply fully with EU legislation. Additionally, the Greek Energy Market, still lacks

Chapter 5

Conclusions

The TPA right constitutes a regulatory instrument of unbundling which was foreseen in the 2nd generation of energy regulations, namely Directive 2003/54/EC on electricity and Directive 2003/55/EC on gas, where it was emphasized that unbundling did not represent a compulsory instrument. The more stringent regime was introduced by the 3rd generation of energy regulation, aimed to further liberalize this sector, Directive 2009/72/EC on electricity, and Directive 2009/73/EC on gas. The two Directives of 2003 had foreseen several methods of unbundling in a gradual order, while the third package of measures contains the alternative models, among which, the TPA right is secured and promoted, but still the provisions referring to it reflect the compromise between the member states. It could be said that the TPA right is an instrument of regulation which, in its essence represents structural reorganization within the IEM.

Whilst the European Commission has set as a goal through the E- and G- Directives to prevent the situation that any energy subject who produces or distributes the electricity, wherever in the EU it operates, can own, control as a linked stakeholder, or operates the transmission system in any MS, in the legislative process based on mutual balancing of interests of MS and institutions of the EU. In addition to the full structural unbundling the new legislative framework introduced by the IEM Directives opened the way for the whole range of similar instruments which promote and lead towards liberalization and harmonization of the market.

These other goals, goals of a social nature, call for a continuous process of regulation. Contradictory opinions are expressed on the ownership unbundling model, which promotes and secures the TPA right. Its supporters think that ownership unbundling will increase the investments to infrastructure. Opponents claim that most of the new member states of the EU are dependent on the sole external supplier of natural gas, have no technical possibilities to receive supplies of natural gas from alternative sources, thus ownership unbundling is meaningless.

The TPA is an important element when organizing access to the existing energy infrastructure system of Europe, as it sets out the necessary base towards the liberalization and the opening of the European Union's Internal Energy Market and therefore it seeks to promote competition which is one of the main goals of the IEM Directives. As we have seen in the above analysis, the TPA right corresponds to the obligation to contract and a duty to perform on the side of the undertaking in control of the energy transmission and distribution system. This right is promoted in order to secure that the independent enterprises or legal persons that operate in the energy sector have a legal enforceable right to access and use energy network facilities which are owned by other companies. From the legal point of view, the TPA right is not a stand-alone, autonomous right but it is related to and results from an underlying energy supply contract. Despite the fact that the article 32 of the Directive refer to the TPA, yet no further guidance is provided to the Member States in order to secure the implementation of this right. The IEM Directives provide that the TPA right is applicable exclusively to supply contracts with 'eligible customers', that is, a strictly specified group of customers to whom the IEM Directives guarantee the right to purchase energy from the supplier of their choice.

Summing up, we could say that the TPA right is a significant tool for ensuring competition, given the fact that it allows the establishment of transport capacity, increases efficient operation and capacity of the system and therefore, tackles the monopoly of the energy transport industry, it provides access to the transportation network, which is a precondition for competition and serves as a key instrument in the perspective of the liberalization of the European Energy Market. Bu we cannot also argue that, the TPA right, is also a controversial concept, since it limits the owners' rights and private parties contractual freedom.

It is left upon the MS to decide if they will further proceed with full access on a TPA right basis, and it is on their hands that the liberalization process of the internal EU Energy Market lays on.

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<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>
- 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
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0055:0093:EN:PDF>