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Strategic Underinvestment as an Abuse of Dominance under EU Competition Rules

Pietro MERLINO & Gianluca FAELLA¹

The latest frontier of the essential facility doctrine under EU competition law is the use of antitrust rules to impose on dominant firms a duty to invest in infrastructure development. While a genuine lack of capacity has traditionally been considered an objective justification for a refusal to grant access to an essential facility, the decisions issued by the Italian Competition Authority in Eni/TTPC and by the Commission in GDF Suez and Eni have questioned the dominant firms' freedom to decide whether, to what extent and under what conditions to invest in infrastructure development. In all the above-mentioned cases, the antitrust authorities were ultimately concerned with the dominant firms' alleged failure to make adequate investments in infrastructure development, as a consequence of the conflict of interest inherent in vertical integration. However, the objections raised by the Italian Competition Authority and by the Commission rest on profoundly different – and, to a certain extent, contradictory – grounds. Whereas the Eni-TTPC decision appears to have been heavily influenced by an extremely complex and peculiar set of facts, the GDF Suez and Eni decisions were based on the essential facility doctrine. The broad and flexible interpretation of this doctrine set forth by the Commission seems to have further lowered the threshold above which antitrust authorities may find abusive a refusal to grant access to an important facility. Furthermore, the Commission introduced a notion of strategic underinvestment based on the independent facility operator test, which seems extremely discretionary and difficult to apply.

1 INTRODUCTION

Under the controversial Essential Facility Doctrine (EFD), a dominant firm that holds an input indispensable to operate in a downstream market may be compelled to grant access to this input to rivals, unless its refusal is objectively justified. A broad application of the EFD can reduce incentives to invest and innovate, which would, in turn, hinder technological progress and soften facility-based competition. In *Bronner*, in order to prevent a proliferation of antitrust obligations

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Pietro Merlino assisted Eni in the *Eni* case before the Commission and in the *Eni/TTPC* case before the Italian Council of State. Gianluca Faella assisted Eni in the *Eni/TTPC* case before the Italian Council of State. This paper reflects only the authors' personal views.

to share assets with rivals, the European Court of Justice (ECJ) set forth strict conditions for the application of Article 102 TFEU to refusals to deal.¹ In particular, according to the ECJ, a refusal to deal is abusive if: (i) the input to which a competitor seeks access is indispensable to compete in the downstream market, (ii) the refusal leads to the elimination of competition in that same market, and (iii) the dominant firm's conduct is not objectively justified.

The General Court (GC), the Commission and some national competition authorities have however interpreted broadly and flexibly the requirements set forth by the *Bronner* judgment, so as to broaden the scope for antitrust intervention in cases where competitors need access to an important facility or product.² This is one of the main divergences between the EU and the US approaches to unilateral exclusionary conduct. In the US, in *Trinko*, the Supreme Court stated that 'compelling . . . firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law', and added that 'no court should impose a duty to deal that it cannot explain or adequately and reasonably supervise'.³ In the EU, the interventionist approach adopted in some cases by antitrust authorities and courts seem to reflect the emergence of a convenient facility doctrine,⁴ which cannot be easily reconciled with the *Bronner* ruling.

The latest frontier of the EFD under EU competition law is the use of antitrust rules to impose on dominant firms a duty to invest in infrastructure development, thereby facilitating competitors' entry and growth. While a genuine lack of capacity has traditionally been considered an objective justification for a refusal to grant access to an essential facility, certain important cases at the EU and national level have questioned the dominant firms' freedom to decide whether, to what extent and under what conditions to invest in infrastructure development. In 2006, in *Eni/TTPC*, the Italian Competition Authority (ICA) fined Eni S.p.A., the incumbent in the Italian gas sector, for interrupting the expansion of a pipeline used to import gas into Italy. The ICA decision was eventually upheld by the Italian Council of State in 2010, although the court drastically reduced the fine originally imposed by the ICA.⁵ At the EU level, in the *GDF Suez* and *Eni* cases, which originated from the Commission inquiry into the energy sector,⁶ the

¹ See Case C-7/97, *Bronner*, [1998] ECR I-7791, para. 41.

² See, in particular, decision of 24 March 2004, Case COMP/C-3/37.792, *Microsoft*; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601; *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ 2009 C 45/7.

³ *Verizon Communications Inc., Petitioner v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

⁴ See D. Ridyard, *Compulsory Access Under EC Competition Law – A New Doctrine of 'Convenient Facilities' and the Case for Price Regulation*, in *European Competition Law Review*, 2004, 669.

⁵ See Council of State, judgment of 20 December 2010, No. 9306.

⁶ See Communication from the Commission, *Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)* (COM(2006) 851 final).

Commission challenged the incumbents' alleged strategic underinvestment in the expansion of the capacity of gas transport infrastructures. In 2009 and 2010, the Commission issued two decisions whereby it accepted and rendered binding the commitments offered, respectively, by GDF Suez and Eni to close the proceedings without a finding of infringement.⁷

In all of the above-mentioned cases, the antitrust authorities were concerned with the dominant firms' alleged failure to make adequate investments in infrastructure development. However, the objections raised by the ICA in *Eni/TTPC* and those raised by the Commission in *Eni* and *GDF Suez* rest on profoundly different – and, to a certain extent, contradictory – theories of harm, to the detriment of legal certainty and consistency in the enforcement of EU antitrust law.

The inconsistency between the above-mentioned cases reflects the limitations of the case-by-case approach traditionally followed by the Commission and national competition authorities in the enforcement of the rules on abuse of dominance. Despite the efforts made by the Commission in revising the enforcement of Article 102 TFUE, antitrust authorities have not yet been able to develop and apply a consistent legal and economic framework to assess unilateral exclusionary behaviour. In this scenario, a company's incentive to offer commitments to avoid infringement decisions and the increasingly hefty fines associated with them – an incentive that is artificially increased by the anomalous combination, within the same authority, of the roles of prosecutor, judge and negotiator – often results in the adoption of hybrid decisions (i.e., commitment decisions), which do not actually contain a finding of infringement and, in the vast majority of cases, are not subjected to judicial review, but do establish legal principles that contribute to shaping the EU antitrust system.

This article is structured as follows: section 2 analyses lack of capacity as an objective justification for refusals to grant access under the traditional approach to the EFD; section 3 discusses the *Eni-TTPC* case; section 4 provides an overview of the *GDF Suez* case; section 5 analyses the *Eni* case; section 6 sets forth certain considerations on the application of the EFD in *GDF Suez* and *Eni*; section 7 presents our conclusions.

2 THE LACK OF CAPACITY AS AN OBJECTIVE JUSTIFICATION

Pursuant to the traditional approach of the Commission and national competition authorities, the lack of available capacity on an essential infrastructure normally

⁷ Decisions of 29 September 2010, Case COMP/39.315, *Eni*; 3 December 2009, Case COMP/39.316, *Gaz de France*.

constitutes an objective justification for a refusal to grant access.⁸ EU competition rules do not compel dominant undertakings to build new infrastructures or expand the capacity of existing ones to allow market entry of new players.⁹ In the Notice on the application of the competition rules to access agreements in the telecommunications sector, the Commission included the existence of a ‘sufficient capacity available to provide access’ among those elements that must be taken into account to determine whether access should be imposed on dominant firms under competition rules.¹⁰ Likewise, in the Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, the Commission stated that ‘access may be denied if the facility is capacity constrained’.¹¹

However, in their decisional practice, competition authorities have often concluded that, owing to the specific circumstances of each case, a refusal to grant access was not justified by a genuine lack of capacity.¹² In particular, in some cases, the Commission considered that the congestion of the essential facility resulted from an inefficient use of the existing capacity or from the dominant firm’s unwillingness to consider organizational solutions capable of overcoming the alleged capacity constraints. According to the Commission, the dominant firm could grant access without incurring substantial costs, since the congestion problem could be addressed through relatively inexpensive organizational measures

⁸ See, e.g., R. O’Donoghue-A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford, 2006, 450; B. Doherty, *Just what are essential facilities?*, in *Common Market Law Review*, 2001, 397.

⁹ See European Commission, *Defining what is legitimate competition in the context of companies’ duties to supply competitors and to grant access to essential facilities*, in OECD Policy Roundtables, *The Essential Facilities Concept*, 1996, 99 («The owner of the essential facility cannot be obliged to invest in new capacity to provide facilities for more competitors»).

¹⁰ *Notice on the application of the competition rules to access agreements in the telecommunications sector, - framework, relevant markets and principles*, OJ 1998, C 265/02, para. 91(b).

¹¹ *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*, available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>, para. 234.

¹² For instance, in Italy, in *Aeroporti di Roma*, the company operating the Romē Fiumicino Airport – which had the exclusive right to provide handling services in the airport and held a de facto monopoly in the market for airline catering – had refused to grant access to the airport to a competitor that wished to provide airline catering services. The ICA considered that the refusal was not justified by the alleged congestion of the ramp areas, since the number of vehicles needed by the competitor to provide its services was extremely limited compared to the vehicles already authorized to circulate in those areas and the presence of additional providers entailed at most the need to better coordinate the various activities carried out therein. See Decision of 2 March 1995, No. 2854, Case A61, *De Montis Catering Roma/Aeroporti di Roma*, Bulletin No. 9/1995, para. 37. Similarly, in *Italpetroli*, the ICA ruled that the holder of a bunker fuel storage tank and pipeline in the Civitavecchia harbor had abused its dominant position by refusing to grant access to its infrastructure, which was essential to supply bunker fuel to ships berthed in the port. The ICA held that the various technical reasons put forward by the dominant firm could not justify its refusal to grant access. In particular, the ICA found that, contrary to the dominant firm’s contention, the facility concerned had sufficient capacity to store and deliver an additional operator’s bunker fuel, especially considering that, due to the proximity of the oil refinery of the company requesting access, the latter would mostly use the facility for transit purposes, rather than to store its bunker fuel for long periods. See Decision of 6 June 1996, No. 3953, Case A107, *Fina Italiana/Compagnia Italpetroli*, Bulletin No. 23/1996, para. 134.

and adjustments, or competitors requesting access were ready to bear the entire cost of the investment necessary to increase capacity.

In *Port of Rødby*,¹³ Stena, a Swedish ferry company, intended to operate a route between Denmark and Germany (Rødby-Puttgarden) already serviced by DSB, the Danish state-owned company which also operated the port of Rødby. The Danish Government refused to grant Stena access to the existing port facilities. The refusal was initially based on the ground that access of an additional player would have prevented the companies already operating in the port from expanding their activities. At a later stage, when the companies operating the route had in fact expanded their activities, the Danish Government argued that the existing port facilities were saturated and that, as a consequence, Stena's entry could not in any event lead to an increase in the number of sailings. The Danish Government also refused to authorize Stena to finance and build a new terminal in the immediate vicinity of the port, on the grounds that the ferry company had not demonstrated the existence of unmet demand and that such demand was unlikely to arise. The Commission held that the Danish Government's twofold refusal constituted an infringement of Article 90 EC (now Article 106 TFEU) read in conjunction with Article 86 EC (now Article 102 TFEU). With respect to the alleged saturation of the existing port facilities, it concluded that the increase in the activities of the ferry companies already present in the port demonstrated that, at least initially, the latter was not saturated. In any event, according to the Commission, there was no evidence that, subject to certain adjustments to the existing port facilities that Stena was prepared to finance, the existing facilities could not effectively allow Stena's entry.¹⁴

In *Stena Sealink*,¹⁵ the owner and operator of the port of Holyhead (Stena Sealink) did not allow Sea Containers access on a reasonable basis to the port facilities. Sea Container lodged a complaint with the Commission arguing that Stena Sealink had abused its dominant position by relying on its exclusive rights on the facility to protect its commercial interests as a ferry operator. The Commission noted that the dominant firm consistently had delayed and raised difficulties concerning its competitor's possible use of existing facilities, and had rejected the latter's proposal to operate from temporary facilities to be built at its own expenses. With respect to the congestion of the existing port facilities around certain specific time slots (which both parties acknowledged), the Commission noted that, in the management of the facilities and the definition of their development plans, Stena Sealink had not adequately taken into account the

¹³ Decision of 21 December 1993, *Port of Rødby*, OJ 1994 L 55/52.

¹⁴ *Ibid.* paras 14-15.

¹⁵ Decision of 21 December 1993, Case IV/34.689, *Sea Containers/Stena Sealink – interim measures*, OJ 1994 L 15/8.

interests and proposals of Sea Containers. According to the Commission, a non-vertically-integrated and profit-maximizing harbour authority would have considered whether the interests of existing and proposed users of the port could best be reconciled by a solution involving modest changes in the allocated slot times or in the harbour's development plans.¹⁶

In *Frankfurt Airport*,¹⁷ the airport operator attempted to justify its refusal to grant access to third parties wishing to provide handling services by arguing that the space available on the ramp was not sufficient to allow self-handling or to accommodate additional suppliers of ramp-handling services. The Commission rejected the capacity constraint argument because 'there [were] solutions which would [have] allow[ed] any lack of space to be overcome'.¹⁸ According to the Commission, the lack of space on the ramp was not an 'insurmountable' problem given that, in order to grant access, the incumbent could have: (i) added capacity by making adjustments to the existing infrastructure (the cost of which would have been passed on to airport users); (ii) closed a limited number of stands to make capacity available on the ramp; or (iii) avoided reducing the space available for parking, which had resulted from the relocation of certain activities and other adjustments it had recently implemented.¹⁹

In conclusion, based on the traditional approach, lack of capacity is, in principle, an objective justification for a refusal to grant access to an essential facility. Capacity constraints are not viewed as a factor capable of justifying a refusal to grant access only when they can be overcome through relatively inexpensive organizational measures or at rivals' expense. In these cases, competition authorities have been willing to intervene in order to tackle the ultimate source of foreclosure, i.e., the inefficient management of the existing infrastructure. The basic idea behind antitrust intervention in such circumstances is that the conflict of interest inherent in vertical integration may induce the vertically integrated dominant firm to depart from rational, profit-maximizing decisions that an operator only in charge of managing the infrastructure would have taken.

In *Frankfurt Airport*, the Commission noted that the dominant firm could have overcome the capacity constraint also by investing in the development of the facility. However, this was only one of the alternatives that the dominant firm had at its disposal to grant access to competitors. Therefore, the Commission did not go so far as to impose an antitrust obligation to engage in costly and risky

¹⁶ *Ibid.* para. 75.

¹⁷ Decision of 14 January 1998, Case IV/34.801, *FAG, Flughafen Frankfurt/Main AG*, OJ 1998 L 72/30.

¹⁸ *Ibid.* para. 86.

¹⁹ *Ibid.* paras 86-87.

investments to create conditions more favourable to competitors' entry and growth.

To the contrary, the decisions discussed in the following paragraphs impose on dominant companies obligations that go beyond a duty to grant access to existing facilities at non-discriminatory conditions and to manage them efficiently in order to avoid artificial capacity constraints, since they appear to establish an antitrust duty to invest in infrastructure development under certain conditions.

3 THE *ENI-TTPC* SAGA

The origins of the *Eni-TTPC* case lie in the interruption of the expansion project of the TTPC pipeline, which allows the import of Algerian gas into Italy. During the first half of 2002, Trans Tunisian Pipeline Company Limited (TTPC), a wholly-owned subsidiary of Eni, launched a project to increase transport capacity on the TTPC pipeline by 6.5 billion m³/year. The expansion of the TTPC pipeline was one of the measures devised by Eni to put an end to an abuse ascertained by the ICA in 2002.²⁰

In March 2003, TTPC signed ship-or-pay contracts with seven operators, which covered TTPC's entire additional capacity.²¹ Such contracts would have entered into force only if, by 30 June 2003, a number of conditions precedent would have been fulfilled.²² As these conditions were not satisfied within the agreed term, TTPC granted an extension. At the expiry of the new deadline (30 October 2003), the conditions precedent had still not been satisfied. TTPC then informed the shippers of its intention not to grant further time extensions and to consider the contracts terminated. This effectively meant that TTPC would not proceed with the expansion project.

At the time of this decision, the market scenario was characterized by: (i) a forecasted growth in the demand of natural gas for the period 2004–2014 that appeared to be much lower than what had been previously estimated; and (ii) an expected increase in the amount of gas imported into the Italian market as a result of the construction of two additional LNG regasification terminals, which were expected to become operational in 2008. It appeared highly likely that such a

²⁰ Decision of 21 November 2002, No. 11421, Case A329, *Blugas-Snam*, Bulletin No. 47/2002.

²¹ Under ship-or-pay contracts, shippers pay a monthly fee related to their allocated capacity even if they do not actually use the transport service.

²² The conditions precedent were as follows: a) approval of the contract by the Tunisian authorities; b) provision of an adequate bank guarantee; c) issuance of an authorization by the Italian Ministry of Economic Development enabling the shipper to import gas into Italy; d) notification of the agreement between the shipper and the company managing the submarine pipeline connecting Tunisia and Italy for the transport of gas on this pipeline; and e) contemporaneous entry into force of shipping contracts capable of covering the whole additional capacity.

market scenario would have resulted in an over-supply of gas in the 2008–2014 timeframe. In turn, this over-supply would have forced Eni to pay the onerous take-or-pay penalties provided for by long-term gas supply agreements, pursuant to which, in the event the contractual minimum volumes are not met, the buyer pays also for a portion of the gas volumes that it does not take. In this scenario, the envisaged expansion of the TTPC pipeline would have certainly increased the likelihood of the aforementioned over-supply and thus of Eni incurring significant take-or-pay penalties.

In December 2003, Eni therefore withdrew the measures submitted to put an end to the infringement established by the ICA in 2002, including the expansion of the TTPC pipeline, and offered alternative measures shortly thereafter. However, the latter were not considered adequate by the ICA. In October 2004, the ICA thus found that Eni had unduly delayed the implementation of the measures originally submitted and imposed a EUR 4.5 million fine for failure to comply with the 2002 infringement decision.²³

In 2006, in *Eni-TTPC*, the ICA held that the interruption of the expansion of the TTPC pipeline also amounted to a stand-alone abuse of dominant position. The ICA recognized that the TTPC pipeline did not constitute an essential facility and that, thus, Eni was not under an obligation to grant access or, *a fortiori*, to expand it in order to facilitate competitors' entry. Nonetheless, the ICA held that Eni had committed an abuse in that it had carried out 'a number of actions and omissions [...] through its subsidiary TTPC' in order to undermine 'the success of the ship-or-pay contracts between TTPC and the shippers by relying on the non-fulfilment of certain conditions precedent'. According to the ICA, the abuse consisted of Eni's interference with the conduct of its subsidiary with a view to undermining the realization of the expansion project. This interference purportedly 'led to TTPC's decision to consider the shipping contracts legally rescinded'.²⁴ The ICA held that the contested infringement was very serious and imposed a EUR 290 million fine, which remains to date the highest fine ever imposed on a single company in Italy.

In 2007, the Regional Administrative Court of Latium (TAR) partially annulled the *Eni-TTPC* decision.²⁵ The TAR upheld the ICA's finding of abuse, but annulled the part of the decision relating to the fine. Upon further appeal, in 2010, the Council of State (i.e., Italy's supreme administrative court), while confirming the ICA's finding of abuse, accepted Eni's arguments as to the erroneous determination of the amount of the fine on the ground that, through

²³ Decision of 7 October 2004, No. 13644, Case A329B, *Blugas-Snam*, Bulletin No. 41/2004.

²⁴ Decision of 15 February 2006, No. 15174, Case A358, *Eni-Trans Tunisian Pipeline*, Bulletin No. 5/2006, para. 185.

²⁵ TAR, judgment of 30 March 2007, No. 2798.

the contested conduct, Eni had sought to defend its legitimate economic interests rather than pursuing an exclusionary strategy. It thus reduced the fine from EUR 290 million to about EUR 20 million.

3.1 THE ICA'S THEORY OF ABUSE

The theory of abuse embraced by the ICA in *Eni/TTPC* is probably one of the most obscure and controversial in the Italian antitrust landscape. Considering the interruption of a voluntary expansion project as an abuse impinges on the delicate issue of whether and to what extent a dominant firm can be required to share its assets with its competitors. An assessment of the contested conduct under the traditional principles on access to essential facilities would have raised substantial doubts. Did the TTPC pipeline truly constitute an essential facility? If so, is an obligation not only to grant access but to even make costly and risky investments to increase available capacity, to the benefit of actual or potential competitors, conceivable at all under competition rules?

Indeed, an attempt by the ICA to ground its theory of harm on the EFD would have probably failed from the outset given the difficulty of qualifying the TTPC pipeline as an essential facility. Several infrastructures could have been used as an alternative to the TTPC pipeline to import gas into Italy. Moreover, the Italian gas markets were characterized by a number of large firms – including multinational energy companies – that appeared capable of developing alternative infrastructures and, as a matter of fact, had already undertaken, or were about to undertake, concrete initiatives in that direction.²⁶

Probably aware of the difficulty in framing the case as an abusive refusal to grant access to an essential facility, the ICA did not rely on the EFD. It recognized that the TTPC pipeline did not constitute an essential facility and that, therefore, there was no obligation to grant access, let alone an obligation to complete the expansion project. According to the ICA, Eni's special responsibility as a dominant firm did not give rise to 'an obligation for the Eni group to expand the Tunisian pipeline, but rather an obligation for Eni not to adopt a conduct which, in directing the behaviour of TTPC, would have induced the latter to behave contrary to the commitments . . . taken, with the sole purpose of protecting/strengthening the dominant position of the parent company in the

²⁶ Several projects for new LNG terminals and pipelines were launched at that time and in subsequent years. Only the LNG terminal of Rovigo (whose capacity was entirely allocated to competitors) has been subsequently completed, while other projects were either abandoned or delayed (although some of them are still under way). The realization of these other projects has been obviously impacted by the economic crisis and the dramatic reduction of Italian natural gas demand forecasts.

Italian market for wholesale supply of natural gas'.²⁷ On appeal, the TAR confirmed that the alleged abusive behaviour did not lie in a refusal to grant access to an essential facility, but rather in 'the specific conduct of the applicant, which interfered with the behaviour of its subsidiary TTPC, thereby obtaining the "termination" of the contracts already concluded'.²⁸ According to the TAR, this behaviour was unlawful because it reflected an exclusionary strategy implemented by Eni with a view to maintaining or strengthening its position on the downstream market.²⁹

The Council of State held that Eni's arguments alleging a violation of the EFD principles were not relevant, since the ICA had not considered the Tunisian pipeline to be an essential facility. Rather, the ICA had contested the failure to fulfil the commitment to expand a non-essential facility, which TTPC had voluntarily taken.³⁰ Next, the Council of State briefly analysed the main evidentiary elements on which the ICA's theory of harm was based, and concluded that Eni and TTPC gave a rigid interpretation of the conditions precedent provided for by the agreements entered into with the shippers: while formally compliant with the above-mentioned agreements, this behaviour was, from a substantive point of view, incompatible with the principle of good faith and the special responsibility that rests on dominant undertakings, according to which Eni/TTPC should have granted further time extensions for the fulfilment of the conditions precedent.³¹

According to the Council of State, the abuse did not result from the mere exercise of influence by the parent company over its subsidiary's behaviour. In itself, this influence was considered neutral from an antitrust perspective. Instead, the abuse laid in Eni's use of its control over its subsidiary to induce the latter to reconsider prior business decisions and commitments already taken,³² thus leading TTPC to forego the additional gas transport revenues it would have obtained through the expansion of the pipeline with a view to protecting Eni's interests in the downstream market.

The Council of State added that, although Eni believed that it was acting to protect its own legitimate economic interests, the decision to discontinue the expansion of the TTPC pipeline was not objectively justified. According to the Court, a defensive conduct would have been justified only in case of an actual risk, while Eni's behaviour was based on a subjective assessment of a hypothetical future

²⁷ Decision of 15 February 2006, No. 15174, Case A358, *Eni-Trans Tunisian Pipeline*, Bulletin No. 5/2006, para. 187.

²⁸ TAR Lazio, judgment of 30 March 2007, No. 2798, para. 2.2.2.

²⁹ *Ibid.* para. 2.3.2.

³⁰ Council of State, judgment of 20 December 2010, No. 9306, para. 11.

³¹ *Ibid.* para. 13.5.4.

³² *Ibid.* para. 12.1.

scenario.³³ The forecasted over-supply and the ensuing risk of incurring the take-or-pay penalties were not concrete enough and there was no certainty that they would materialize in the future. Moreover, even if a scenario of over-supply were to materialize, Eni could have relied on the specific legal remedies provided by the Italian legislation implementing the EU natural gas liberalization directives. Indeed, Eni could have applied for the derogation to third-party access obligations envisaged by Articles 24 and 26 of Legislative Decree No. 164/2000, pursuant to which the incumbent can exceptionally request that third parties' access to the national gas transmission system be denied in case it faces serious economic and financial difficulties related to take-or-pay agreements entered into before the entry into force of Directive 98/30/EC (the first EU natural gas liberalization directive). According to the Court, TTPC would also not have been harmed by the possible over-supply and Eni's subsequent application for the derogation set forth by Articles 24 and 26 of Legislative Decree No. 164/2000, because the ship-or-pay contracts would have ensured that the shippers would have paid the transport tariff for the entire capacity allocated to them even if they had not used it wholly or partly.³⁴

3.2 THE UNCERTAIN ELEMENTS OF ENI AND TTPC'S ALLEGED ABUSE

The ruling of the Council of State did not dispel the serious doubts raised by the ICA's theory of abuse. First of all, the ruling endorsed the ICA's decision to punish the interruption of an infrastructure expansion even though the conditions set forth by the case law on the EFD were not met. The Council of State did not delve any further into Eni's arguments in this respect on the ground that the ICA had not based its case on the EFD. However, the Council of State did not answer the question as to whether it is possible to rely on the specific set of circumstances of the case at hand to impose an obligation to grant access to non-essential facilities or to make onerous investments aimed at granting such an access, thus eluding the stringent requirements established by EU case law to prevent an excessive proliferation of antitrust obligations to share assets with rivals. If a firm is not under an obligation to invest, it should not be compelled to complete an expansion project.

Even setting aside the issue of the application of the EFD principles, the ICA's theory of abuse, based on the unlawful influence of the parent company on its subsidiary's commercial conduct, remains questionable. As no provisions imposed a functional separation between Eni and TTPC, the influence of the former on the

³³ *Ibid.* para. 13.1.

³⁴ *Ibid.* paras 13.1 and 13.4.

latter was not challengeable as such. Furthermore, according to the EU case law, a parent company may be held liable for the conduct of a subsidiary only when: (i) the subsidiary committed an antitrust infringement, and (ii) the latter can be attributed also to the parent company, in particular by virtue of the exercise of a decisive influence over the subsidiary's behaviour.³⁵ Given that both the exercise of parental influence over the subsidiary and the interruption of the expansion project were not, as such, incompatible with Article 102 TFEU, the 'unlawful interference' theory introduced by the ICA implies that a dominant undertaking may face antitrust liability for having induced one of its subsidiaries to engage in admittedly legitimate conduct. In other words, lawful interference in a lawful behaviour may amount to an abuse.

Both the ICA and the Council of State held that the interference of the parent company was unlawful because it induced the subsidiary to reconsider prior business decisions and contractual commitments. Eni's influence led the subsidiary to forgo additional profits with a view to protecting the parent company's position in a distinct market. However, the expansion project was not independently undertaken by TTPC, but rather was promoted by Eni as a measure aimed at bringing a previous antitrust infringement to an end. As a consequence, one could argue that Eni had the right to alter this decision in the event the underlying circumstances had changed. If anything, Eni could only have been held liable for its failure to implement the measure it had offered.

Moreover, the argument that the expansion project would have certainly turned out to be profitable for TTPC is not persuasive. The pipeline enhancement would have required a significant investment that could have been recouped only in the long-term. Thus, the decision to proceed with the project had to take into account a large number of variables, which rendered any estimate of the profitability of the investment extremely complex and uncertain. The risks and uncertainties surrounding the implementation of the project, heightened by the possible over-supply, were not excluded by the ship-or-pay clauses. The Council of State considered that, owing to the ship-or-pay clauses, TTPC would have been able to claim the payment of transport services even if the shippers had been refused access to the Italian gas network pursuant to the derogation provided for by Articles 24 and 26 of Legislative Decree No. 164/2000. However, such a claim would have likely led to lengthy and uncertain litigation.³⁶ In any event, even the

³⁵ See, e.g., Case C-286/98 P *Stora Kopparbergs Bergslags AB/Commission* [2000] ECR I-9925; Case T-309/94 *KNP v. Commission* [1998] ECR II-1007; Case T-196/06 *Edison/Commission* [2011] ECR II-3149.

³⁶ The impossibility to access the national gas network would have effectively prevented the shippers from using the transport services for reasons not related to their behavior, but to an initiative of TTPC's parent company. In such circumstances, in order not to pay for the transport service, the shippers could have tried to rely on a number of remedies provided by Italian law, such as the

ship-or-pay contracts would not have hedged TTPC from the risk of insolvency of the shippers, in case they had been denied access to the Italian market after having entered into long term take-or-pay contracts.

As both TTPC's decision to interrupt the expansion project and Eni's influence on its subsidiary were lawful, the abuse identified by the ICA ultimately hinges on the alleged existence of an exclusionary strategy aimed at preserving or strengthening the incumbent's position on the downstream supply markets. However, the existence of an exclusionary intent cannot per se constitute an infringement of Article 102 TFEU, but only a factor relevant to the assessment of a dominant firm's conduct,³⁷ or, at most, a constituent element of a broader abusive behaviour.³⁸

In any event, the Council of State ruled that there was no exclusionary strategy. In the part of the ruling concerning the fine imposed by the ICA, the Council of State held that the contested conduct was 'objectively exclusionary', but was not intentional because Eni was 'subjectively convinced to act in order to protect its own economic interests' and 'did not intentionally pursue the exclusion of its competitors'.³⁹ The acknowledgement of 'a defensive aim related to the contractual commitments taken in the context of the take-or-pay contracts', as opposed to the exclusionary intent asserted by the ICA, induced the Council of State to downgrade the abuse from 'very serious' to 'serious' and, thus, to reduce the fine originally imposed by the ICA by over 90%. However, this finding should have led to a more radical conclusion: once the existence of an exclusionary intent had been ruled out, the entire theory of abuse put forward by the ICA should have collapsed.

The grounds on which the Council of State held that no objective justification existed are also questionable. According to the Council of State, Eni should have waited for the forecasted over-supply to materialize before acting to defend its own interests. Once the situation of over-supply had become a reality, Eni could have asked for a derogation from the obligation of third-party access to the Italian transport system pursuant to Articles 24 and 26 of Legislative Decree No. 164/2000. Assuming Eni had obtained such derogation, TTPC could have recouped the investments made by requiring the payment of transport services pursuant to the ship-or-pay clauses, even if the shippers would not have shipped

non-fulfillment of a tacit condition precedent, the extinction of the obligation due to impossibility, or the equitable reduction of penalty payments pursuant to Article 1384 of the Italian Civil Code.

³⁷ Guidance, para. 20.

³⁸ See Case C-62/86 *Akzo Chemie BV v. Commission* [1991] ECR I-3359.

³⁹ Council of State, judgment of 20 December 2010, No. 9306, para. 20.2.

any gas over the TTPC pipeline due to the impossibility of having access to the Italian gas network.⁴⁰

However, the chances of successfully relying on the tools indicated by the Council of State were slim (if any). The derogation envisaged by Articles 24 and 26 of Legislative Decree No. 164/2000 is an exceptional instrument, which is based on an uncertain and laborious procedure whose outcome would certainly have been influenced by the political will not to raise entry barriers in the recently liberalized gas sector (and, in fact, a similar derogation has never even been requested in the EU, let alone granted). Moreover, as noted above, it is at least questionable to assume that, had Eni obtained such derogation, TTPC would have been effectively able to collect the transport fees provided for by the ship-or-pay contracts.

In any event, even assuming that the routes envisaged by the Council of State were actually practicable, the court's reasoning leads to a paradox. In order to legitimately protect their economic interests in a scenario characterized by over-supply, Eni and TTPC should have put in place a series of initiatives that would have harmed the shippers far more than the interruption of the expansion project. In fact, not only would the shippers have lost the possibility to market Algerian gas in Italy, but they would also have had to pay, on the one hand, the onerous penalties provided for by the take-or-pay contracts entered into with the gas supplier and, on the other, the transport fees provided for by ship-or-pay agreements entered into with TTPC and with the company operating the submarine pipeline TMPC, which connects Tunisia to Italy.

In conclusion, while it drastically reduced the amount of the fine, the ruling of the Council of State confirmed that the interruption of an investment project may amount to an abuse. However, it did not clarify the shaky and unprecedented theory of abuse put forward by the ICA. As the administrative court recognized that the incumbent did not implement an exclusionary strategy, but only intended to defend its legitimate economic interests, Eni's alleged abuse amounted ultimately to lawful interference in lawful conduct in order to pursue a lawful objective.

4 THE *GDF SUEZ* CASE

Unlike the ICA in *Eni-TTPC*, the Commission has applied the EFD to cases of alleged strategic underinvestment in the gas sector. In 2008, the Commission opened proceedings against Gaz de France Suez SA (GDF Suez), the incumbent in the French gas import and supply markets, which also controls the largest gas

⁴⁰ *Ibid.* paras 13.1 and 13.4.

transmission network in France through its subsidiaries GRTgaz and Elengy. The Commission was concerned that GDF Suez might have prevented or reduced competition in the downstream supply markets by foreclosing access to import capacity through a number of practices, including strategic underinvestment.⁴¹

The Commission identified not only the markets for the supply of gas in the north and south balancing zones of the GRTgaz network, but also a market for gas import capacity, which encompassed the overall capacity of all the existing gas import infrastructures in each balancing zone, including interconnection capacity between the two zones. According to the Commission, GDF Suez held a dominant position in the gas import and supply markets. In particular, as to gas import capacity, the Commission noted that all the main pipeline entry points into France and the interconnectors between the north and south zones of the GRTgaz network were owned and operated by GRTgaz, while Elengy owned and operated the LNG terminals in service or about to become operational in France. Furthermore, GDF Suez was the main holder of capacity across the above-mentioned entry and interconnection points and LNG terminals.

In its assessment, the Commission relied on the EFD. According to the Commission, import capacity was ‘an essential input’ and ‘an objective requirement’ for supplying gas in France.⁴² Furthermore, because of technical, legal, and economic barriers, it was impossible – or at least extremely difficult – for a shipper, acting alone or in cooperation with others, to duplicate GDF Suez’s infrastructure or at least to create import capacities that could trigger effective competition in the downstream supply markets.⁴³

The alleged exclusionary strategy was implemented through three different practices: (i) long-term reservation of transport capacity; (ii) the determination of the capacity of a new LNG terminal and the procedures for allocating long-term capacity therein; and (iii) underinvestment at an existing LNG terminal.

Regarding the first conduct, the Commission found that the vast majority of the transportation capacity at the main entry points into the national gas transmission network had been reserved on a long-term basis to the supply branch of the GDF Suez group.

⁴¹ Decision of 3 December 2009, Case COMP/39.316, *Gaz de France*. On the *GDF Suez* case, see M. D. Diathesopoulos, *From Energy Sector Inquiry to Recent Antitrust Decisions in European Energy Markets: Competition Law as a Means to Implement Sector Regulation*, 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639883; A. De Hauteclocque-K. Talus, *Capacity to Compete: Recent Trends in Access Regimes in Electricity and Natural Gas Networks*, 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1769917; K. Talus, *Just What is the Scope of the Essential Facilities Doctrine in the Energy Sector? Third Party Access-Friendly Interpretation in the EU v. Contractual Freedom in the US*, in *Common Market Law Review*, 2011, 1571.

⁴² Decision of 3 December 2009, Case COMP/39.316, *Gaz de France*, para. 26.

⁴³ *Ibid.* para. 27.

With regard to the second conduct, the Commission held that, despite genuine requests from a number of third-party shippers, GDF Suez did not conduct an open, transparent, and non-discriminatory procedure – such as an open season procedure – to allocate capacity at the new Fos Cavaou LNG terminal on a long-term basis.⁴⁴ Likewise, while the terminal was being built, the incumbent had not explored the possibility of increasing its capacity in order to facilitate competitors' access, notwithstanding that third-party shippers had submitted genuine proposals to co-finance the construction of the LNG terminal.⁴⁵

Finally, the Commission found that, following an open season procedure, GDF Suez strategically refrained from investing in the development of additional import capacity at the Montoir de Bretagne LNG terminal. The Commission pointed out that the dominant player refrained from investing in infrastructure development despite certain financial analyses concluding that, given the firm capacity requests received in the open season procedure, the creation of additional capacity would have been sufficiently profitable.⁴⁶ The strategic underinvestment prevented another shipper, which had submitted a capacity request in the open season procedure, from reserving capacity on a long-term basis, and hindered competitors' access to the infrastructure for several years.⁴⁷

Based on the above, the Commission concluded that the contested conduct prevented new entrants from gaining access to import capacity, thus hindering the development of competition in the French downstream gas supply markets. GDF Suez proposed a number of commitments aimed at removing the competition concerns raised by the Commission. First, it agreed to release certain amounts of its overall reserved long-term entry capacity into France in favour of third parties. The incumbent also undertook to reduce its reserved capacity to less than 50% by 1 October 2014. In order to comply with the 50% ceiling, the firm committed either to release existing capacity or to create additional one.⁴⁸ In December 2009, the Commission issued a decision that made the commitments offered by GDF Suez legally binding, thus closing the proceedings without a finding of infringement.

⁴⁴ *Ibid.* para. 32.

⁴⁵ *Ibid.* para. 33.

⁴⁶ *Ibid.* para. 39.

⁴⁷ *Ibid.* para. 37.

⁴⁸ *Ibid.* paras 42–50.

5 THE ENI CASE BEFORE THE COMMISSION

In 2010, in *Eni*, the Commission confirmed that strategic underinvestment in additional import capacity can be regarded as a refusal to deal under the EFD.⁴⁹ The incumbent was accused of having hindered the access of third-party shippers to import capacity on the TAG, TENP, and Transigas pipelines to protect its position on the Italian downstream gas supply markets. The alleged exclusionary strategy was implemented through three distinct practices: (i) capacity hoarding; (ii) capacity degradation to the detriment of third-party shippers; and (iii) strategic limitation of investment in the expansion of transport capacity.

Capacity hoarding consisted in not offering to third-party shippers the existing primary and secondary capacity available on the pipelines concerned.⁵⁰ Capacity degradation was a form of constructive refusal to deal, carried out through actions aimed at rendering less valuable for third-party shippers the capacity actually offered to them.⁵¹ Finally, strategic underinvestment in the expansion of transport capacity resulted from the investment decisions adopted by Eni in its capacity as jointly controlling shareholder of the various TSOs operating the pipelines at issue. According to the Commission, the investment decisions were not based on an estimation of the profitability of the expansion projects for the TSOs, i.e., on the existence of long-term capacity demand from third-party shippers. They were instead influenced by Eni's conflict of interest as a vertically integrated operator with a dominant position in the downstream markets for the sale of natural gas in Italy. In the Commission's view, any incentives to invest in new capacity to gain additional profits through the supply of transport services to rivals were outweighed by the much greater reduction of profits in the sale of gas

⁴⁹ Decision of 29 September 2010, Case COMP/39.315, *Eni*. On the *Eni* case, see F. Maier-Rigaud-F. Manca- U. Von Koppenfels, *Strategic Underinvestment and Gas Network Foreclosure – the ENI Case*, in *Competition Policy Newsletter*, 2011, 18, available also at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1903788.

⁵⁰ In particular, the transmission system operators (TSOs), controlled by ENI solely or jointly with other operators, would not have offered the entire existing available capacity, would have not introduced mechanisms aimed at increasing efficiency in capacity management and allocation and thus at reducing congestion, and would have voluntarily understated the capacity that was available for competitors (hoarding of primary capacity). Moreover, Eni would not have offered all of the capacity it had reserved, but was not utilizing, to other operators in the secondary market and would have inefficiently used its reserved capacity (hoarding of secondary capacity).

⁵¹ In particular, the TSOs would have voluntarily delayed the allocation of capacity resulting from previous expansions, offered this capacity on a short-term basis even though it would have been possible to offer it on a long-term basis, organized separate and uncoordinated sales of capacity on complementary pipelines, and sold capacity as interruptible, which is less valuable for the shippers, rather than as firm (degradation of primary capacity). In addition, Eni would have carried out separate and uncoordinated sales of capacity on complementary pipelines and put in place further practices in the sale of secondary capacity, which made it more difficult for shippers to organize and plan their activities (degradation of secondary capacity).

in Italy, which Eni would have suffered as a result of an increased availability of competitors' gas in the Italian downstream gas supply markets. Accordingly, the decisions pertaining to pipeline enhancements were based on Eni's needs and interests as a gas supplier,⁵² rather than on the existence of significant long-term demand of transport capacity from third-party shippers.

Unlike the ICA's *Eni-TTPC* decision, which did not specify the boundaries of the market to which transport services offered on the TTPC pipeline belonged, the Commission defined not only the relevant downstream markets (wholesale supply of gas and supplies to power plants, large industrial customers, and small customers), but also the upstream market for the import of gas into Italy, and noted that all the infrastructures that could be used to this end were controlled, solely or jointly, by Eni.⁵³ However, in the period covered by the investigation, an additional infrastructure – the LNG regasification terminal of Rovigo, built and managed by third parties – was inaugurated (September 2008) and became fully operational (September 2009). This terminal provided significant additional import capacity, which was entirely reserved to competitors.

The Commission identified a single relevant market for the import of gas into Italy, which encompassed all the infrastructures that could be used to import gas into the national territory. Eni was found to be dominant both in the upstream market, by virtue of its sole or joint control over the above-mentioned infrastructures, and in the downstream markets for natural gas supply to power plants and large industrial consumers, as a result of its substantial portfolio of long-term import contracts, its gas production activities, and the high barriers to entry in the Italian markets.

In contrast to the ICA's approach in the *Eni-TTPC* case, the Commission explicitly applied the EFD. Based on the principles developed by the ECJ's case law,⁵⁴ the Commission identified three conditions for a finding of an abusive refusal to grant access: (i) the refusal relates to a product or service that is indispensable to the exercising of a particular activity in a downstream market; (ii) the refusal is likely to lead to the elimination or the prevention of the development of 'effective competition' on the downstream market, thus resulting in consumer harm;⁵⁵ and (iii) there is no objective justification.

In the case at hand, according to the Commission, the aforementioned conditions were met: (i) access to the import infrastructures controlled by Eni was

⁵² Decision of 29 September 2010, Case COMP/39.315, *Eni*, para. 57.

⁵³ These were: (i) the TTPC/TMPC pipelines (Algerian gas); (ii) the Greenstream pipeline (Libyan gas); (iii) the TENP/Transitgas pipelines (gas originating from Northern Europe); (iv) the TAG pipeline (Russian gas); and (v) the LNG terminal of Panigaglia.

⁵⁴ See Case C-7/97 *Bronner* [1998] ECR I-7791; Case C-418/01 *IMS Health* [2004] ECR I-5039.

⁵⁵ Decision of 29 September 2010, Case COMP/39.315, *Eni*, para. 40.

indispensable to compete in the markets for the sale of gas in Italy; (ii) there were technical, legal and economic obstacles capable of making it ‘impossible, or at least unreasonably difficult . . . to duplicate Eni’s system of transport infrastructure (i.e., to create an infrastructure system capable of providing an input on a volume comparable to Eni’s system or, at the very least, of a volume sufficient to exert an effective competitive constraint on the latter)’;⁵⁶ and (iii) Eni had (implicitly) refused access despite significant short- and long-term capacity demand from third-party shippers.⁵⁷

The Commission identified ‘effective competition’ as a situation of structural over-supply in the Italian downstream gas supply markets resulting from an increase of the gas imported by third-party shippers. According to the Commission, only this structural over-supply would have triggered an effective ‘gas to gas competition’ and a price decrease in the Italian gas supply markets.

During the proceedings, Eni committed to divesting its interests in the TSOs that owned or managed the TAG, TENP and Transigas pipelines. The Commission closed the investigation in September 2010 by adopting a decision that rendered binding the commitments offered by Eni, without a finding of infringement.

6 THE DOUBTS RAISED BY THE APPLICATION OF THE EFD IN *GDF SUEZ AND ENI*

The application of the EFD in *GDF Suez* and *Eni* raises a number of doubts. Three main aspects deserve careful consideration: (i) the decision to consider the overall set of transport infrastructures as a single essential facility; (ii) the interpretation of the condition of elimination of competition; and (iii) the extension of the principles on refusal to deal to strategic underinvestment.

6.1 THE CHARACTERIZATION OF THE OVERALL SET OF GAS IMPORT INFRASTRUCTURES AS A SINGLE ESSENTIAL FACILITY

In order to apply the EFD in *GDF Suez* and *Eni*, the Commission had to consider the overall set of infrastructures as a single facility. However, neither access to, nor the duplication of, the overall set of infrastructures is indispensable to import natural gas and to compete in national gas supply markets. For this purpose, it is sufficient to access a single pipeline or LNG terminal or to build *ex novo* a single import infrastructure.

⁵⁶ *Ibid.* para. 42.

⁵⁷ *Ibid.* para. 44.

Access to, or duplication of, the entire set of transport infrastructures was not even indispensable to allow competitors to exercise ‘effective competitive pressure’,⁵⁸ within the meaning adopted by the Commission. A significantly lower additional transport capacity than that existing on the overall set of import infrastructures was sufficient to create effective competition. For instance, in *Eni*, it was not disputed that, to create the over-supply that the Commission deemed necessary to trigger effective ‘gas to gas competition’ in the Italian markets, it was sufficient: (i) to complete the expansion of the TAG and TTPC pipelines reserved to other shippers, which Eni was in any event obliged to realize (also due to the commitments offered to the ICA in *Eni/TTPC*); and (ii) that the Rovigo LNG terminal became fully operational (as it did in 2009). In light of third parties’ investment projects (then ongoing), it was hard to argue that competitors wishing to import and sell gas in Italy faced ‘technical, legal or economic obstacles capable of making it impossible, or at least unreasonably difficult’,⁵⁹ to build – alone or in cooperation with other operators – one or more import infrastructures with a capacity sufficient to trigger ‘effective competition’ in the downstream supply markets.

In addition, the logical and legal prerequisite for applying the EFD should be that the refusal concerns an input at the sole disposal of the dominant firm. As in these cases the input ultimately consisted of import capacity, it would have been necessary to take into account not only the formal control of the pipelines, but also the actual allocation of the capacity. The latter is held also by third parties, and can be sold on the secondary market by the shippers that have reserved it, but do not use it in full. In *Eni*, competitors held a significant share of the overall available capacity. In the period during which the contested conduct took place, the percentage of total import capacity allocated to third-party shippers progressively increased up to almost 50%, also as a result of the expansion projects carried out by the incumbent. Additionally, a substantive portion of the existing capacity of the three pipelines at issue was not under Eni’s control, but under that of the other operators that controlled the infrastructures jointly with the Italian incumbent. These entities could offer this capacity to third-party shippers wishing to import natural gas into Italy. Furthermore, they could unilaterally decide to fund the expansion of the pipelines and autonomously offer the resulting additional capacity. All in all, these elements appeared to indicate that import capacity into Italy was not an input at the incumbent’s sole disposal.

⁵⁸ Decision of 29 September 2010, Case COMP/39.315, *Eni*, para. 34.

⁵⁹ *Ibid.* para. 42.

6.2 THE CONDITION OF THE ELIMINATION OF EFFECTIVE COMPETITION IN THE DOWNSTREAM MARKET

The *GDF Suez* and *Eni* cases confirm the trend to interpret broadly and flexibly the strict conditions set forth by the ECJ in *Bronner*.⁶⁰ In that case, in order to prevent a proliferation of antitrust duties to deal, which would negatively affect firms' incentives to invest and innovate, the ECJ ruled that a refusal to grant access to an essential facility can be incompatible with antitrust rules only if it is likely to 'eliminate all competition' in the market.⁶¹ In *Microsoft*, the Commission seemed to soften this requirement, as it considered it sufficient that the refusal creates 'a risk of elimination of competition' due to the fact that the input concerned is necessary for competitors 'to viably stay on the market' in the medium-long term.⁶² In the judgment that upheld the *Microsoft* decision, the General Court (GC) further mitigated the condition identified by the *Bronner* judgment, as it clarified that it is not necessary to demonstrate that 'all competition on the market would be eliminated'.⁶³ According to the GC, it is sufficient to show that the refusal is 'liable to, or is likely to, eliminate all effective competition on the market'.⁶⁴ The GC pointed out that effective competition would not be guaranteed by the fact that competitors retain a marginal presence in certain niches of the market. On the basis of this ruling, the Commission Guidance on exclusionary abuses confirmed that, for the purpose of finding a refusal to deal abusive under Article 102 TFEU, it is sufficient that the refusal is 'likely to lead to the elimination of effective competition on the downstream market'.⁶⁵

In *GDF Suez* and *Eni*, the Commission adopted a similar approach, but it seemed to interpret the condition of elimination of competition even more broadly. In particular, in *Eni*, the Commission took the view that this condition is met when the refusal to deal is likely to 'lead either to the elimination or the prevention of the development of effective competition'.⁶⁶ According to the Commission, in the case at hand the condition was met. However, the actual market situation in *Eni* was quite different from that analysed by the Commission in *Microsoft*. Whereas Microsoft's shares in the market for work group server operating systems had continued to grow, thus attesting the progressive

⁶⁰ See Case C-7/97 *Bronner* [1998] ECR I-7791, para. 41.

⁶¹ *Ibid.* paras 38 and 41; see also Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission* [1995] ECR I-743, para. 56, where the Court refers to the exclusion of 'all competition' in the downstream market; Case C-418/01 *IMS Health* [2004] ECR I-5039, para. 38, according to which access denial must be such as to 'exclude any competition on a secondary market'.

⁶² Decision of 24 March 2004, Case COMP/C-3/37.792, *Microsoft*, paras 779-781.

⁶³ Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, para. 563.

⁶⁴ *Ibid.* (emphasis added).

⁶⁵ Guidance, para. 81.

⁶⁶ Decision of 29 September 2010, Case COMP/39.315, *Eni*, para. 40.

marginalization of rivals, Eni's main competitors had significantly increased their market shares to the detriment of the incumbent during the years covered by the investigation, and they could not be considered marginal players. This was also due to the market share ceilings provided for by Legislative Decree No. 164/2000, which reserved to Eni's competitors a significant and growing share of sales.⁶⁷

The condition of the elimination of competition, as interpreted by the Commission in *Eni*, risks no longer representing an effective and meaningful filter for identifying cases of unlawful refusal to deal, at least under the usual EFD scenario where the holder of the facility is typically already dominant in the downstream market. Indeed, if the 'prevention of the development of effective competition' is sufficient and even competitors' growth is not considered relevant, a refusal to grant access to an important input by a dominant firm is very likely to be invariably considered incompatible with competition rules, also in light of the fact that the very existence of a dominant position implies a situation where competitive dynamics are already weakened.

6.3 STRATEGIC UNDERINVESTMENT: DUTY TO SUPPLY VERSUS DUTY TO INVEST

As mentioned, in *GDF Suez* and *Eni*, the Commission found that the incumbent failed to invest sufficiently in infrastructure development, despite the existence of unsatisfied demand for import capacity, in order to limit its competitors' ability to import additional gas volumes, thereby protecting its position on the downstream gas supply markets. As noted above, according to the traditional approach, lack of available capacity on an essential infrastructure constitutes, in principle, an objective justification for a refusal to grant access. In *GDF Suez* and *Eni*, the Commission considered that it did not and that, to the contrary, it could give rise to an obligation to invest in the expansion of the infrastructure. The rationale behind the Commission's position is that a vertically integrated operator, which is dominant in the downstream market for the sale of a final product, faces a structural conflict of interest. It may in fact decide to forgo profitable investments in the upstream market with a view to protecting the larger profits it obtains in the downstream market. Under this scenario, the lack of available capacity may constitute a pretext to keeping a tight control on the downstream market.

To assess whether the conflict of interest stemming from vertical integration had in fact led the incumbent to strategically reduce investments in additional transport capacity, the Commission applied what could be referred to as the

⁶⁷ Pursuant to Legislative Decree No. 164/2000, no player could intake natural gas volumes accounting for more than 75% of national gas consumption. This ceiling was to be reduced by 2% every two years and reach 61% by 2010. Moreover, no player could sell to end users gas volumes accounting for more than 50% of national yearly consumption.

independent facility operator test, pursuant to which it tried to identify which decisions a non-vertically integrated facility operator would have taken. Even though this test may seem, *prima facie*, a useful analytical tool, it raises serious perplexities due to the significant uncertainties and the great margin of error inherent in its application.⁶⁸ Investment decisions are made *ex ante*, when future developments of demand and offer, competitors' strategies and regulatory changes are not known, and can only be foreseen with a limited degree of reliability. The complexity of the variables involved in this exercise, the difficulties in forecasting future developments of market conditions, and differences in firms' inclination to risk may well cause different investors to adopt different investment decisions under the same set of circumstances. In such a scenario, any conclusions on the possible behaviour of a hypothetical independent operator risk becoming arbitrary. Moreover, the application of the independent facility operator test implies that an antitrust authority carries out such complex assessment *ex post*, possibly several years afterwards, in light of actual market developments, which the dominant firm did not know when it adopted its investment decisions. Finally, in assessing the risk and feasibility of an investment, market operators are typically better placed than antitrust authorities and judges, who normally have more limited knowledge of the sector concerned and no direct market experience.

The *Eni* case testifies to the high degree of uncertainty and the significant margin of error that characterize the application of the independent facility operator test. While in *GDF Suez* the Commission found evidence that, according to some internal financial analyses, extension of the capacity of the terminal concerned would have been sufficiently profitable, in *Eni* the Commission's objections were essentially based on speculations about the investment decisions that a non-vertically integrated TSO would have likely adopted. According to the Commission, a hypothetical non-vertically integrated and profit-maximizing TSO would have invested in the expansion of the pipelines more than Eni and its subsidiaries actually did, because: (i) there was substantial unsatisfied demand for long-term import capacity; (ii) some shippers had volunteered to partially finance the costs of the investment; (iii) the expansion of the transport infrastructures was technically feasible; and (iv) in determining transport tariffs, no regulator would refuse to ensure a reasonable return on investments.

However, several factors could legitimately lead Eni not to invest in the expansion of the import pipelines more than it actually did. First, the Italian gas demand forecasts were not positive. In deciding whether to invest in expansion projects, a TSO, whether independent or vertically integrated, cannot ignore the

⁶⁸ See U. Scholz-S. Purps, *The Application of EC Competition Law in the Energy Sector*, in *Journal of European Competition Law & Practice*, 2010, 37.

competitive conditions in the downstream markets. In the case of over-supply, ship-or-pay contracts do not provide the TSO with absolute coverage against the risk of not recovering the investments made. Regardless of the doubts on the enforceability of the obligation to pay for transport services in case of application of the derogation provided for by Articles 24 and 26 of Legislative Decree No. 164/2000,⁶⁹ these agreements do not in any event shelter the TSO from the risk of shippers' insolvency. Additionally, projects for the development of alternative import infrastructures undertaken by competitors during the time period concerned made the recovery of possible additional investments in import capacity even riskier, since they would have increased the overall transport capacity available on the market. Moreover, due to the peculiarities of the applicable transport tariff regimes, some of the TSOs managing the pipelines concerned were actually incurring losses with respect to expansion projects already completed. Finally, no third-party shipper had actually volunteered to finance the entire cost of possible additional expansions on the pipelines concerned.

Apart from the difficulties and uncertainties raised by the application of the test devised by the Commission, Article 102 TFEU does not appear to be the appropriate tool for imposing an obligation to invest. The use of antitrust rules to force dominant firms to make onerous investments amplifies the risk of negative effects traditionally associated with the EFD. The possibility for competitors to take advantage of dominant firms' assets, even if capacity is not available, may translate into an even stronger reduction of the dominant players' incentives to develop new infrastructures and, even more so, of competitors' incentives to create alternative facilities.⁷⁰ Investments in new infrastructures, or in the expansion of existing ones, can be more efficiently and proportionally promoted through ad hoc regulatory measures, which could be designed on the basis of the specific needs of the sector at issue, and would not risk distorting the incentives of firms active in other product or geographic markets. Furthermore, since the *GDF Suez* and *Eni* cases seem to suggest that, under certain circumstances, vertical integration may be considered (almost) inevitably conducive to abusive conduct, an antitrust duty to invest risks discouraging vertical integration as such, thus distorting firms' organizational choices.

⁶⁹ See *supra*, Section 3.2.

⁷⁰ The reduction of competitors' incentives to develop alternative facilities would produce the perverse result of consolidating the dominance of the infrastructure holder. See, e.g., J. Temple Lange, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, in B. Hawk, *Annual Proceedings of the Fordham Corporate Law Institute*, Huntington, NY, 1995, 245.

7 FINAL REMARKS

Although some previous Commission decisions already suggested that refusal to grant access might not be justified by capacity saturation when a vertically integrated dominant firm departs from rational, profit-maximizing investment decisions in the expansion of the facility's capacity, the *Eni/TTPC*, *GDF Suez* and *Eni* decisions have gone a step further, as they directly address the issue of strategic underinvestment by facility operators.

The application of abuse of dominance rules to strategic underinvestment seems to be at least questionable, as shown by the fact that the ICA and the Commission analysed similar cases in a profoundly different manner. In *Eni/TTPC*, the ICA reasoned that the TTPC pipeline was not an essential infrastructure, and no obligation to invest could be imposed upon the incumbent. However, it did find an abuse of dominant position by relying on an unprecedented theory, i.e., the exercise by the parent company of unlawful interference in the conduct of its subsidiary to pursue an anticompetitive strategy (which was, however, subsequently excluded by the Council of State). To the contrary, in *GDF Suez* and *Eni*, the Commission relied on the EFD, but interpreted and applied the principles established by the ECJ in a questionable manner. First, the Commission qualified the overall set of infrastructures used to import gas as a single essential facility, even though, in order to operate on the downstream gas supply markets, competitors did not need to use all of them at the same time and individual import infrastructures could be (and were actually being) duplicated. Second, it loosely interpreted the condition of elimination of competition. Third, it introduced an obligation to invest in infrastructure development, which goes well beyond the obligation to share existing indispensable assets with competitors.

In all the cases discussed above, antitrust intervention was ultimately aimed at defusing a situation of conflict of interest. According to competition authorities, a vertically integrated operator might prefer not to invest in the expansion of the capacity of a given infrastructure to pre-empt competitors' growth and to protect its profits in the downstream market. This would justify an antitrust intervention aimed at punishing any conduct that appears to be not in line with the conduct that would have been followed by a hypothetical non-vertically integrated facility operator. However, the idea that an antitrust authority or a court should substitute its own appraisal for that of the operators concerned, with a view to second-guessing the assessment of the profitability of uncertain, risky and extremely complex investments, is somewhat worrying.

The cases on strategic underinvestment allowed the Commission and the ICA to achieve, to a significant extent, regulatory objectives. In particular, the *Eni* case

led to the ownership unbundling of the pipelines concerned, which the Commission had previously failed to achieve through legislative measures.⁷¹ The use of the antitrust tool to pursue a regulatory objective is demonstrated not only by the questionable application of the principles on refusal to deal, but also by two additional considerations. First, in *Eni*, the refusal, rather than being explicit, was inferred from the alleged existence of a large unsatisfied demand of transport capacity on the infrastructures concerned from actual or potential competitors. Unlike all the previous EFD cases of the Commission, the investigation was not triggered by a complaint from a competitor that had been denied access to the essential facility, but was initiated *ex officio*. Second, the *Eni* case constitutes the first case of application of the EFD where the remedy considered necessary by the Commission to bring the abuse to an end – and subsequently offered by the incumbent under Article 9 of Reg. 1/2003 – was not an obligation to provide access or, possibly, to expand the facility concerned, as in *GDF Suez*, but the divestiture of (part of) the infrastructure. In fact, the Commission seemed to consider that only a non-vertically integrated operator could ensure an efficient management of transport infrastructures – and, consequently, of available capacity – and, more importantly, would be likely to sufficiently invest in further expansion of those infrastructures. Such an expansion would then create additional import capacity into Italy to the benefit of competitors. Thus, under the umbrella of Article 102 TFEU, the Commission adopted, *de facto*, a regulatory measure, which was aimed at increasing the degree of competition in the Italian gas supply markets.

The solutions adopted by the Commission seem to call into question the complex balance between the protection of competition, on the one hand, and the preservation of the incentives to invest, on the other, laboriously reached by the EU Courts over decades. Whereas the ICA decision and the judgments of the administrative courts in *Eni-TTPC* appear to have been heavily influenced by an extremely complex and peculiar factual background (in particular, by the fact that the expansion project had already been launched and had been subsequently interrupted), the *GDF Suez* and *Eni* decisions directly impinged on the firms' freedom to invest and on the application of the EFD.

Under this perspective, one may wonder which consequences the *Eni* and *GDF Suez* decisions may have on future antitrust enforcement. As a matter of principle, commitment decisions do not constitute reliable precedents and

⁷¹ Indeed, contrary to the Commission's proposals, the Third Gas Directive (Directive 2009/73/EC) does not consider ownership unbundling as the only unbundling model for transport infrastructures, as it allows Member States to choose between this option and two other less intrusive unbundling models, *i.e.* the independent system operator (ISO) and the independent transmission operator (ITO), which are considered equally effective.

appropriate tools for developing antitrust law, for at least three reasons: (i) they do not contain a complete and detailed analysis of the alleged infringement; (ii) the robustness of the reasoning and interpretative choices is normally not tested before judges; and (iii) the imbalance in bargaining power between the investigated firms and competition authorities, which play the roles of prosecutor, judge and negotiator, along with their tendency to confirm, at the end of the proceedings, their initial allegations, may lead firms to offer commitments even if they face charges that would probably not survive judicial scrutiny, in order to avoid the costs and risks associated with the continuation of proceedings and the subsequent judicial stage. However, commitment decisions are sometimes cited as precedents by private parties and even by national competition authorities.⁷² Thus, in spite of their limits, they can influence the evolution of decisional practice and case law.

The *GDF Suez* and *Eni* commitment decisions confirmed that the *Bronner* judgment has been de facto superseded in current antitrust enforcement practice. By adopting a broad and flexible interpretation of the EFD, they seem to have marked a further lowering of the threshold above which antitrust authorities may find a refusal to grant access to an important facility to be abusive. Furthermore, they introduced a notion of strategic underinvestment based on the independent facility operator test, which seems extremely discretionary and difficult to apply.

⁷² See, for example, ICA decision of 27 January 2010, No. 20705, Case A423, *Enel – Dynamics price formation electric energy market in Sicily*, Bulletin No. 4/2010, para. 23.

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