

Strategic underinvestment and gas network foreclosure – the ENI case ⁽¹⁾

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Introduction

On 29 September 2010, the Commission adopted a commitment decision addressed to ENI Spa (ENI) under Article 9 of Regulation 1/2003. With this decision, the Commission made binding on ENI the commitments it had offered to address the Commission's preliminary concerns regarding potential abuse of its dominant position in the market for gas transportation services. ⁽⁵⁾

The Commission's competition case concerning ENI's suspected abuse of a dominant position on the market for the transport of gas to Italy has its origin in the Commission's inquiry into the gas sector between 2005 and 2007. In the Final Sector Inquiry Report ⁽⁶⁾, the *insufficient unbundling of networks from the competitive parts of the gas sector (downstream supply)* was described as leading to a *systemic conflict of interest*. This structural conflict of interest, also at the heart of the ENI case, was identified as distorting incentives on the network segment (for instance for giving access to capacity or investing in additional capacity) due to substantial adverse supply-side interests of the same vertically integrated undertaking.

The competition concerns in the ENI case follow this logic and relate to practices resulting in possible anti-competitive foreclosure of competitors in the gas

supply markets in Italy, by limiting access to transport capacity. In particular, ENI's refusal to supply transport capacity to third-party shippers, to allow them to import gas into Italy, evidently arises from the inherent conflict of interest resulting from the vertical integration of ENI, dominant in both the transport business and the supply of gas on downstream markets. In order to resolve the conflict of interest and address these concerns, ENI committed to divest its shares in the three companies operating the relevant international transport pipelines, TAG, TENP and Transigas, which bring gas to Italy from Russia (TAG) and northern Europe (the TENP/Transigas system). This structural divestment will ensure that third-party requests to access the gas pipelines will be dealt with by an *independent* entity *unconnected* to ENI.

The decision of 29 September 2010 is noteworthy, as the commitments entered into by ENI consist of a structural divestiture of its international transportation activities to import gas to Italy. The rationale for this decision is to tackle competition problems on those pipelines that play a crucial role in creating a competitive single European gas market. The implementation of the commitments will bring about a substantial change in this sector, and will lay the foundations for more competition in the downstream supply markets.

This article provides an overview of the facts of the case and the Commission's competition concerns, and explains how these concerns are addressed by the structural remedies made binding by the Commission's decision.

The facts

ENI is an Italian state-controlled company active at multiple levels in the production, transportation and supply chain in the energy sector, predominantly natural gas and oil. ⁽⁷⁾

In April 2007, the Commission opened an *ex-officio* case ⁽⁸⁾ to investigate ENI's conduct in the operation and management of its international gas transmission networks, in particular with respect to the TAG, TENP and Transigas pipelines, which together account for more than 50 % of gas im-

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⁽⁵⁾ See press release IP/10/1197, 29.09.2010. A full non-confidential version of the decision can be found at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39315.

⁽⁶⁾ 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).

⁽⁷⁾ ENI is a vertically integrated gas company, with activities in the production and import of gas, in the gas transmission and storage businesses, and in the downstream gas distribution business.

⁽⁸⁾ Case COMP/39.315 — ENI.

ports into Italy. Following almost three years of investigation, starting with surprise inspections carried out at the premises of ENI and its subsidiaries active in the transport of gas, the Commission came to the view that ENI may have infringed Article 102 of the Treaty on the Functioning of the European Union (TFEU) through its *constructive refusal* to supply transportation capacity. This assessment was communicated to ENI in a statement of objections issued in March 2009.

Relevant markets: gas network system as an essential facility

Italy is a net importer of natural gas from both EU and non-EU countries.⁽⁹⁾ The transport of natural gas to Italy is a distinct activity and instrumental in downstream activities for the wholesale and retail supply of gas.⁽¹⁰⁾ ENI was able to effectively control or influence, either by means of its ownership rights or by its rights to transportation capacity, the use of the infrastructures for the import of gas to Italy.⁽¹¹⁾ On the demand side, shippers willing to serve consumers in the downstream gas markets need to have access to viable transportation capacity. From a *consumer perspective*, it does not matter from where the gas originates, as long as there is a viable transportation route between origin and destination. On the supply side, there were no alternative routes to the ENI-controlled infrastructures that could be considered interchangeable or substitutable for shippers in terms of their characteristics, prices and effective use during the investigation period (2001-2008). Therefore, all of ENI's gas transport infrastructures may be considered indispensable, since access to ENI's transport system was

objectively necessary to import gas and compete in the gas supply markets in Italy. Third-party infrastructures were, and still are, insufficient to exert effective competitive pressure,⁽¹²⁾ and duplicating the existing infrastructure was, and still is, unreasonably difficult.⁽¹³⁾

On this basis, the conclusion reached was that ENI's import infrastructures constitute a unique system that could be considered in its entirety as an essential facility⁽¹⁴⁾ and that ENI's dominance in the provision and use of this essential facility (the market for gas transportation, i.e. the overall system of infrastructures used to transport gas to Italy) could not be challenged within the foreseeable future.⁽¹⁵⁾

In addition, ENI was found to hold a dominant position on the downstream gas supply markets in Italy.⁽¹⁶⁾ ENI also maintains a significant portfolio of long-term gas import contracts and remains a gas producer in its own right in Italy and abroad.⁽¹⁷⁾

⁽⁹⁾ The share of imports in national consumption has increased in the past ten years to over 80 %, see annual reports of the national regulator *Autorità per l'Energia e il Gas* (AEEG) from 2000 to 2010.

⁽¹⁰⁾ See e.g. cases IV/493 — *Tractebel/Distrigas II*, paragraph 27 et seq.; COMP/M.3410 — *Total/Gaz de France*, paragraphs 15-16; COMP/M.3696 — *E.ON/MOL*, paragraph 97.

⁽¹¹⁾ The infrastructures are: the Trans-Mediterranean and Trans-Tunisian pipelines (TTPC/TMPC), which in 2007 carried imports of Algerian gas to Italy accounting for about 25 % of national consumption; the Greenstream pipeline, for importing Libyan gas to Italy, accounting for 10 % of the gas consumed in Italy; the TENP/Transitgas pipelines, owned jointly with E.ON Ruhrgas (TENP) and Swissgas (Transitgas), carrying gas from Northern Europe through Germany (TENP) and Switzerland (Transitgas) and accounting for about 17 % of national consumption; the TAG pipeline, owned jointly with OMV, which imports Russian gas through Austria to meet about 27 % of Italian demand; the Slovenian pipeline, carrying marginal volumes of Russian gas via Slovenia (less than 1 %); and the Panigaglia LNG (liquefied natural gas) Terminal, accounting for around 3 % of the gas consumed in the country.

⁽¹²⁾ Only in 2009 did some limited new infrastructure become operational: namely the offshore LNG Terminal Rovigo (owned by Edison) with a capacity of 8 bcm (less than 10 % of national consumption).

⁽¹³⁾ There are technical, legal and economic obstacles making it impossible, or at least unreasonably difficult, for would-be importers to duplicate ENI's transport infrastructure system (i.e. to create an infrastructure system capable of providing volumes comparable to ENI's or, at the very least, volumes sufficient to exert an effective competitive constraint on ENI), alone or in cooperation with other users. See Case C-7/97 *Bronner* [1998] ECR I-7791, paragraphs 44 and 46; see also, in the different context of products covered by intellectual property rights, Case C-418/01 *IMS Health* [2004] ECR I-5039, paragraph 29.

⁽¹⁴⁾ Since gas infrastructures are considered to have the character of a natural monopoly, the EU has imposed obligations to allow third-party access to existing networks (see 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 and the previous Gas Directives from 2003 and 1998 – 'the Third Gas Directive', OJ L 211, 14.8.2009, p. 94, as well as the Communication from the Commission to the Council and the European Parliament, SEC (2005)1448, of 15 November 2005).

⁽¹⁵⁾ As said before, ENI's dominance is based on its ownership of import routes to Italy and its rights to this transport infrastructure. ENI has exclusive or joint control over the TSOs operating all pipelines and the Panigaglia LNG Terminal, and holds significant capacity/use rights to those infrastructures.

⁽¹⁶⁾ The statement of objections set out evidence of ENI's dominant position in the wholesale gas supply market and in the retail markets for gas supply to power plants and (large) industrial customers.

⁽¹⁷⁾ ENI's share of domestic production was around 85 % in 2008 while imports ranged between 60-70 % (see *Autorità per l'energia elettrica e il gas* [AEEG], Annual Report, July 2008, p. 120). Furthermore, ENI holds interests in exploration, production and operation, as well as in the transport of natural gas from Libya to Italy.

There are high entry barriers in the downstream gas supply markets due to difficulties in international gas procurement and existing bottlenecks in import capacity, combined with declining national production and difficulties with access to storage.⁽¹⁸⁾ The relatively limited transport capacities available to suppliers other than ENI translate into equally low market shares on the downstream gas supply markets. The Commission concluded that ENI's competitors in the downstream supply gas markets in Italy neither have the ability nor the economic incentives to exercise an effective competitive pressure on ENI. This is because they lack a sufficient degree of access to independent gas imports or domestic production, so their dependence on ENI's sales renders them more likely to align their prices.⁽¹⁹⁾

The practices

The 'theory of harm' set out in the statement of objections is that ENI may have intentionally operated and managed the TAG, TENP and Transigas pipelines in such a way as to limit gas inflows into Italy. Specifically, ENI refused to grant access to its available transport capacity (*capacity hoarding*), granted access in a less attractive form (*capacity degradation*), and strategically limited investment in new capacity on its network (*strategic underinvestment*). This conduct took place at least during the period 2000-2008, despite a steady and significant demand for transport capacity from third parties to import gas to Italy on these international pipelines.

The Court of Justice has held that refusal by an undertaking holding a dominant position in a given market to supply services to a rival undertaking competing in a neighbouring market, where these services are indispensable for the rival to pursue its business and to the extent that the conduct in question is likely to eliminate all competition on the part of that rival, constitutes an infringement of Article 102 TFEU, unless the refusal is objectively justified.⁽²⁰⁾ The same is true for access granted to competitors on terms less favourable than those granted

to the dominant undertaking's own business unit active in the same market ('constructive refusal to supply').

Capacity hoarding

The Commission's investigation showed that demand from third parties, both short- and long-term, largely exceeded the capacities offered. This led to *rejection* of third parties' transmission requests by ENI without objective justification. The Commission investigated whether some transportation capacity was indeed available on ENI's pipelines but not effectively offered on the market. In order to do so, the Commission requested, for the period 2001-2007, extensive data from ENI and the transmission system operators (TSOs) for the three pipelines concerned in order to establish hourly capacity utilisation rates. Based on this analysis, the Commission took the view that ENI may have hoarded available capacity that could have been profitably offered to third parties. In order to assess the likelihood of anti-competitive conduct by ENI, it is worth comparing the capacity available to third parties with ENI's capacity rights and utilisation. It was acknowledged that ENI had capacity rights of no less than 80 %⁽²¹⁾ while third-party competitors realistically could only hope to obtain on average less than 3-10 % of the available capacity on the pipeline.

In addition, the investigation gave rise to further concerns, namely that ENI may have understated its technically available capacity. As a result, the scarce transport capacity may have been managed in a manner that prevented many competitors from gaining sufficient and viable access to it.

Capacity degradation

The Commission further gathered evidence indicating that, even when capacity on the pipelines was offered, ENI made it more difficult to purchase and less valuable to third parties by various means (*capacity degradation*).

One practice was to delay allocation of available capacity: i.e. by organising sequential sales of capacity so as to engender expectations of scarcity. Another method was to offer capacity on a short-term basis (monthly allocations) rather than on a long-term basis (yearly allocations). Further, ENI may have organised auctions on complementary pipelines (such as TENP and Transigas) in an uncoordinated way, i.e. capacity was offered on a standalone basis

⁽¹⁸⁾ Recently, the Italian antitrust authority (Autorità garante per la concorrenza e il mercato, AGCM) conducted a sector enquiry into the gas storage system in Italy (decision No 19925 28/05/2009) together with the national regulator (AEEG). The main finding is that storage has been systematically 'rationed' as upgrades have been too conservative. Other barriers are regulatory in scope.

⁽¹⁹⁾ ENI sells gas to suppliers active in the Italian downstream gas markets, not only in the wholesale market in Italy (ENI's sales to competitors are around 25 %) but also directly at the Italian borders (6 % of gas imported is ENI gas sold directly at the border). Furthermore, though accounting for slightly less than 10 %, ENI has long-term capacity contracts with some competitors for Libyan gas transported via the Greenstream pipeline.

⁽²⁰⁾ See ECJ judgment of 26 November 1998, Case C-7/97, *Bronner* [1998] ECR I-7791, paragraph 38.

⁽²¹⁾ Some of the capacity rights are available to stakeholders in the joint ventures (OMV in the case of TAG, E.ON Ruhrgas in the case of TENP and Swissgas in the case of Transigas).

on each stretch of the network, whereas the value for a shipper wanting to import gas to Italy derives from access to the entire system, rendering capacity on individual stretches of the pipeline useless. Occasionally, ENI may also have offered capacity in an interruptible form⁽²²⁾ when it could have offered firm capacity. Finally, ENI may have imposed limitations on the amount of lots individual shippers could bid for.

The Commission took the view that all those practices would have reduced the value of capacity for ENI's competitors by making it more difficult for them to organise and plan their operations (from procurement of upstream gas to the contract with downstream clients) and rendering capacity less accessible by pushing up its price.

Strategic underinvestment

The statement of objections also raised concerns with respect to ENI's investment decisions whether or not to expand existing transport capacity on its pipelines. Indeed, gas flows can be reduced not only by hoarding or degrading capacity, but also by limiting expansion.

There is evidence that ENI may have refrained from investing in capacity expansion that would have allowed it to respond to requests from third parties.⁽²³⁾ Rather, ENI's decisions to enhance transport capacity over recent years have mainly addressed its own new long-term contractual commitments, with the aim of ensuring that transport capacity to Italy (and as a consequence gas supply in Italy) does not become too abundant. This was despite the fact that ENI itself acknowledged not only that the existing pipeline capacity might be insufficient to satisfy the growing demand for gas in Italy but also that it had an obligation as a holder of an essential facility⁽²⁴⁾ to provide third-party access and to give proper consideration to capacity

expansion that third parties could duplicate only at greater cost, if at all.⁽²⁵⁾

Concrete evidence substantiated the Commission's concern that the absence of additional investment in transportation capacity was not driven by a lack of profitability, but rather by ENI's aim of keeping tight control over transport capacity and thereby ultimately the quantity of available gas on the downstream market. Direct allocation of additional capacity to third parties would have indeed boosted competition on the downstream markets and jeopardised ENI's downstream margins.⁽²⁶⁾

The Commission took the view that, in the situation of scarce capacity that characterised the period under investigation, capacity enhancements were legally and technically feasible and also likely to be profitable from a TSO point of view. Legally, ENI was entitled to initiate the investments needed to enhance capacity on all pipelines. Technically, an existing pipeline system can always be expanded at a lower cost than a greenfield project of the same size, and this would also have been economically viable not least in view of substantial long-term capacity demands from shippers. Furthermore, even from a regulatory point of view, the investment cost could most likely have been recovered even under *ex-ante* tariff regulation.⁽²⁷⁾ ENI also neither estimated capacity demands, for instance via an 'open season' pro-

⁽²²⁾ Interruptible capacity is more limited in scope, as the transmission system operator is entitled not to provide (i.e. to interrupt) the transportation service under certain circumstances.

⁽²³⁾ Documents show that different expansion projects were studied and that additional capacity would have been necessary to satisfy the significant and credible long-term capacity demand of third-party shippers on ENI's international pipelines.

⁽²⁴⁾ The internal document in question referred to the expansion of the TTPC pipeline.

⁽²⁵⁾ In this context, it is noteworthy that the mere fact that current capacities are fully used by an essential facility holder is not sufficient to exclude an abuse under Article 102 TFEU (see e.g. Commission Decision of 20.11.1974, OJ L 117, 1/9; Sea-Link, 21.12.1993, OJ L 15/18; Decision of 21 December 1993 — Port of Rødby, OJ L 55, 26.02.1994, page 52; Frankfurt Airport, 14.1.1998, OJ L 72, 11.03.1998, page 30). In such situations, a dominant essential facility holder is obliged to take all possible measures to remove the constraints imposed by the lack of capacity and to organise its business in a manner that makes a maximum amount of capacity available.

⁽²⁶⁾ In its Report of 11 June 2008 to the Prime Minister regarding action to be taken in order to promote competition and enhance the economy (*AS453 — Considerazioni e proposte per una regolazione proconcorrenziale dei mercati a sostegno della crescita economica*), the AGCM pointed out that in the absence of investment in new import infrastructure and storage facilities, the share of gas flowing independently from ENI had not increased between 2000 and 2008, with a negative impact on the wholesale market in Italy in terms of market concentration and competition.

⁽²⁷⁾ The TENP pipeline had not yet been made subject to *ex-ante* tariff regulation by the German regulator at the time of the investigation, since a request by ENI for exemption from such regulation was still pending. The Transitgas pipeline is not subject to tariff regulation under Swiss law. The TAG pipeline has been subject to regulated third-party access (rTPA) only since 2006. An obligation on TSOs to carry out 'capacity enhancements corresponding to need in accordance with the approved long-term planning of the balancing zone leader' was also introduced. Network tariffs for cross-border transports must be based on the principles of non-discrimination and cost-orientation.

cedure, nor did it explore the willingness of third parties to commit financially to an expansion project. On the contrary, it did not even follow up specific co-financing offers made by some shippers.

Having said that, ENI's long-term capacity management decisions were also not objectively justified in the light of both the First and the Second Gas Directives, under which gas TSOs had a special obligation to carry out commercially viable investment necessary to meet capacity demands.⁽²⁸⁾

Rationale of the conduct

Access to ENI's international network to transport gas into Italy is crucial for suppliers to effectively compete in the downstream gas markets in the country, where ENI continues to be a dominant company. However, due to the market caps on gas inflows imposed by Italian law on ENI⁽²⁹⁾, limiting its possibility to expand in terms of market share in reaction to price competition, ENI's strategy consisted of maintaining and securing its supply margins by preventing the development of effective competition in the downstream markets. Indeed, any incentive for ENI, as a transport operator, to increase the profits of its transport business by expanding the infrastructure to accommodate third party requests would have been more than outweighed by the negative repercussions of the additional influx of gas into Italy on the profitability of its own gas supply business downstream.

To protect its profits downstream, ENI retained control over the transport routes, by embarking upon a strategy of deliberately keeping capacity *tight* in order to limit third parties' access to import infrastructures and therefore foreclose downstream gas supply markets.

The Commission considered that *capacity boarding*, *capacity degradation* and *strategic limiting of investment in*

additional capacity were all forms of behaviour ultimately aimed at reducing the amount of gas flowing into Italy. By implementing this operation and management strategy, ENI engaged in a systematic and constructive refusal to supply. Such behaviour may have undermined, specifically on the TENP/Transitgas and TAG pipelines, the opportunities for ENI's competitors to independently supply gas to Italy, and restricted their ability and incentives to effectively compete downstream to the detriment of competition and ultimately final customers in those markets.

The structural remedies: paving the way for more competition

To address the Commission's concerns, ENI offered to divest its current shareholdings in companies connected with international gas transmission pipelines (TENP, Transitgas and TAG) to a suitable purchaser approved by the Commission that is *independent* of and *unconnected* to ENI and does not raise *prima facie* competition concerns.⁽³⁰⁾ With respect to TAG, the commitments stipulated that the purchaser should be Cassa Depositi e Prestiti (CDP), an Italian state-controlled bank, or another public entity directly or indirectly controlled by the Italian government. ENI also undertook not to prolong or renew any transport contract or enter into any new transport contract for the pipelines at stake.⁽³¹⁾

In response to the market test notice published on 5 March 2010 under Article 27(4) of Regulation 1/2003, the Commission received a significant number of responses from interested third parties representing different kinds of market participants. Most respondents welcomed the commitments as necessary for improving competition on the market for gas transmission.

The Commission took the view that the commitments are *sufficient* to address the concerns identified in the statement of objections, i.e. the constructive

⁽²⁸⁾ Article 7(1) of the First Gas Directive (Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998) and Article 8(1)(a) of the Second Gas Directive (quoted) require each transmission system operator to 'operate, maintain and develop under economic conditions secure, reliable and efficient' transmission facilities. The Third Gas Directive made this even more explicit, as Article 13(2) states that each 'transmission system operator shall build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity'. Recital 6 of the Third Gas Directive goes even further by stating that 'Without effective separation of networks from activities of production and supply (effective unbundling), there is a risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks.'

⁽²⁹⁾ Under Legislative Decree 164/2000, during the period 2002-2010 no operator was allowed, directly or by way of affiliated companies, to import or produce more than 75 % of annual domestic gas consumption. This market share cap was progressively reduced by 2 percentage points each year down to a limit of 61 % at the end of the period.

⁽³⁰⁾ In other words, ENI committed to divest its stakes in the transmission system operators (the TSOs), and if applicable in the companies holding shares in the TSOs. In particular, ENI will divest its shares in Eni Gas Transport GmbH (100 %), which is the co-owner of the pipeline TENP (49 %), jointly owned with E.ON Ruhrgas, and its entire participation in Eni Gas Transport Deutschland S.p.A. (100 %), the TSO for ENI's share of the pipeline; its participation in Transitgas AG (46 %), which is the owner of the Transitgas pipeline, jointly owned with Swissgas, and its entire participation in Eni Gas Transport International SA (100 %), the TSO for ENI's share of the infrastructure; and its participation in Trans Austria Gasleitung GmbH (89 %), which is the TSO for the TAG infrastructure, jointly owned with OMV.

⁽³¹⁾ ENI will not be excluded from participating on those pipelines in future auctions and/or other public allocation procedures, but only for reverse flow transportation capacity towards markets other than the Italian market.

refusal to grant access to transport capacity needed for third shippers to compete downstream. The commitments are *appropriate*, as the competition concerns arose from ENI's interests as a vertically integrated undertaking, active in both the provision of gas transportation services and gas supply in Italy. In particular, in the light of ENI's incentive to protect its downstream supply margins at the cost of comparably lower additional transportation revenues, only a structural separation of ENI from its transport business would eliminate those incentives.

The commitments are also *proportionate* as there is no equally effective alternative to the divestment of ENI's shares in its transport network businesses. Without structural unbundling, the incentives of a vertically integrated gas company, such as ENI, to continue to pursue the alleged anti-competitive behaviour would not be removed, with the risk that the alleged infringement could not be effectively brought to an end.⁽³²⁾

As a result, the Commission decided to declare the commitments binding upon ENI and to end its investigation.

With this decision, the Commission aims to restore proper incentives for managing and operating gas transport networks in Europe. In order to ensure this, *suitable buyers* for the TENP and Transigas pipelines should be operators independent from and unconnected to ENI without any activity on the downstream markets, and thus willing to run the transportation business with a view to maximising this activity. As far as the TAG pipeline is concerned, the Commission has already verified in its decision that CDP fulfils these criteria. In particular, CDP can be regarded as independent from and unconnected to ENI. Indeed, under the Commission's practice, notably in the field of merger control, two undertakings owned by the same state are to be considered independent of and unconnected with each other if they are part of different economic units with independent power of decision, and the Commission was satisfied that this was the case for CDP.⁽³³⁾

Conclusion

This case is the ninth major decision since the 2007 Energy Sector Inquiry, which had shown that consumers and businesses were losing out due to a lack of competition on electricity and gas markets.

In contrast to these other major cases, the ENI case presents some peculiarities, both in terms of procedure and outcome.

With regard to procedure, the commitment decision in this case was not based on a 'preliminary assessment' as provided for in Article 9 of Regulation 1/2003 but followed an in-depth investigation and the issuing of a statement of objections detailing the theory of harm and the available evidence.

In contrast to the commitments accepted in the other recent decisions concerning gas operators, such as E.ON gas⁽³⁴⁾ in Germany or GDF Suez⁽³⁵⁾ in France, where capacity releases were offered to meet competition concerns, the ENI decision relies on structural separation. Arguments have been presented according to which ENI could also have released capacities in similar magnitudes as in the case of E.ON or GDF Suez. What these commentators overlook is the fact that the theory of harm in the ENI case differs substantially from the other anti-trust cases mentioned above. In the present case, the Commission's investigation showed that ENI had designed a constructive refusal-to-supply strategy consisting of capacity hoarding, capacity degradation and strategic underinvestment in capacity aimed at limiting the total amount of gas flowing into Italy. In contrast, in the other gas cases referred to above, the long-term reservations by dominant shippers were found to be problematic, and not the way transmission networks were operated by a vertically integrated TSO as in the ENI case. In these cases, the foreclosure was not motivated by the aim of maintaining a tight control on total gas inflows but rather by the goal of limiting the number of competitors active in the downstream market at given gas inflow levels.

However, the ENI case follows a line started with the E.ON electricity and RWE cases,⁽³⁶⁾ in that a competition problem created by the conflict of interest inherent in vertically integrated energy incumbents owning and operating the electricity or gas transmission network while also supplying electricity or gas in their network area is solved through a structural remedy that separates ownership of the critical infrastructure from the supplier. The Commission's decision in the ENI case demonstrates that structural remedies are a legitimate and proportionate means to solve competition problems created by anti-competitive conduct.

⁽³²⁾ According to the case law, compliance with the principle of proportionality requires the Commission only to ascertain that the commitments address the problems it has identified and expressed to the undertakings; see Case C-441/07 P *Commission v Alrosa Company Ltd.*

⁽³³⁾ According to the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C95, 16.4.2008, p. 1), points 52 and 53.

⁽³⁴⁾ Commission Decision of 4 May 2010 in case COMP/39.317 — *E.ON gas foreclosure.*

⁽³⁵⁾ Commission Decision of 3 December 2009 in case COMP/39.316 — *Gaz de France.*

⁽³⁶⁾ Commission Decision of 26 November 2008 in cases COMP/39.388 — *German Electricity Wholesale Market* and COMP/39.389 — *German Electricity Balancing Market*; Commission Decision of 18 March 2008 in case COMP/39.402 — *RWE gas foreclosure.*