GUARANTEEING THE ACCES OF THIRD PARTIES TO THE NETWORK INDUSTRIES SPECIFIC INFRASTRUCTURES – A VITAL COMPONENT OF EU'S POLICY IN THE FIELD OF COMPETITION ON THE ENERGY MARKET, IN THE CONTEXT OF THE NEED TO INSURE ENERGY INDEPENDENCE WHILE MANTAINING AFFORDABLE PRICES

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Abstract

As both the practical experience and the theoretical constructions of successive generations of practitioners and researchers of the phenomenon of the economy and the legal norms associated with its proper functioning have proven, the most important mechanism for increasing consumer satisfaction in a market, both from the perspective of the quality of the goods and services they benefit from, as well as from that of the prices demanded, is the competition. But in order to fulfill its otherwise noble functions, the competition must take place freely, since only then can it be considered genuine. Any deterioration of the free nature of competition results in a proportional decrease in consumer satisfaction (from the perspective of both previously identified dimensions) and, at the same time, an exponential deterioration of the functionality of the market in which competition occurs. From all these main considerations, but also in the light of the American experience, capitalized on the occasion of the recovery policies implemented as a result of the Great Crisis, exported through the conditionalities associated with the Marshall Plan, the European Communities and, subsequently, the Union have carried out a constant and active policy in the field of competition, whose legal basis is represented by numerous provisions of primary law, supplemented by provisions of secondary law and, of course, a rich jurisprudence on the matter. Ensuring free competition in the energy field is also part of this policy, an aspect that is consistent with the Union's policy in this aforementioned field. However, considering the impact of the war in Ukraine and the effects of the sanctions imposed on Russia on the review of the energy supply sources of the member states, aspects such as free competition in the energy field and the effects of the liberalization of this market on consumers become even more important, the more the price of energy resources increase or close to the origin of the inflationary phenomenon they are. Precisely for these reasons, our research will explore the issue of guaranteeing access to the infrastructures specific to the energy sector as a way of implementing the desired Union policy in the field of competition on the energy supply market.

Keywords: *guaranteeing, access, network industries, infrastructures, competition, energy market, energy independence, inflation, Russia, war, diversification of energy sources, affordable prices.*

1. Introductory considerations. The three-folded EU law approach to competition and energy policy

As the first year of the war between the Russian Federation and Ukraine has just come to an end and the second one has begun, one can remember, along with the Bucha, Irpin of Mariupol war crimes, the soaring energy prices and the galloping inflation that hit all the economic sectors. In this gravely affected economic and political environment, how can the EU maintain decent energy prices and, given the fact that the energy prices have a direct impact on all the prices, how can the EU keep an acceptable inflation[1], while at the same time breaking up from its dependency from Russian imported oil and gas? Because it cannot be argued that these goals must be met at the same time, as the alarming price increase is in itself a risk to the economic and social

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[1] We use the terms *acceptable inflation* because, as the economic theory states, the inflation is a perfectly normal phenomenon, only its dimension, extent or dynamism in a given period of time being normal or abnormal.

peace, while the dependency on Russian imported gas comes with the need to make painful political concessions to an already overly-aggressive international actor. As we will state in this study, in our view, the answer relies, in a significant part, in the EU's free and fair competition policy, applied to the energy field, to which the free access to infrastructure plays a part whose importance cannot be stressed enough.

Therefore, it is our opinion that, for reaching the goal of maintaining both energy independence and affordable prices, the European Union relies of a whole system of norms, each acting according to its force (given by its place in the hierarchy of the EU law sources) and object, therefore each one completing the others. This system consists of Treaty norms (providing the legal basis that the institutions require in order to be able to act according to the EU's competences and each institution's attributions), secondary law and non-binding EU law.

As far as the primary EU law dispositions, an extensive interpretation can even include the EU values among the applicable norms. Given the fact that the EU *„ is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities* [and] [t]*hese values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*"[2], it can be inferred that the EU is bound to refrain from establishing close economical or political cooperation with those states that do not support or respect these values.

Therefore, as importing oil and gas from Russia in large quantities helps supporting the Russian economy and, as a consequence, its regime that acts against those values, in the light of art. 2 TEU, it can be considered against the EU primary law to enforce such a regime.

Such an interpretation is further supported by the content of art. 3 point 4 TEU, which states that **„[i]*n its relations with the wider world, the Union shall uphold and promote its values*** *and interests* ***and contribute to the protection of its citizens****. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*"[3].

Further legal basis enshrined in the art. 3 TEU, which governs the matter of the EU objectives, is given by the third point of the aforementioned article, which states as follows: [t]*he Union shall establish an internal market.* ***It shall work for the sustainable development of Europe based on balanced economic growth and price stability****, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance*"[4]. As the content of this article reads, the EU is both entitled and obliged to act both in order to achieve the sustainable development of Europe, which cannot be achieved by depending on a single supplier of oil and natural gas, and in order to maintain a balanced economic growth, which would be severely affected by a constant and overwhelming prices increase, as it is the case in the very moment we write these lines.

As far as the Treaty on the Functioning of the European Union is concerned, it provides far more legal basis for the EU action in both competition and energy fields. For example, in the very beginning of the Treaty, article 3 states the competition among the exclusive competences of the EU, however limited to the aspects affecting the functioning of the internal market[5].

A veritable transposition of this internal competence in the field of the external agreements derives from another point of art. 3 TFEU, which states that „[t]*he Union shall also* ***have exclusive competence for the conclusion of an international agreement*** *when its conclusion is provided for in a legislative act of the Union* ***or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope***"[6].

[2] Art. 2 TEU.
[3] Art. 3 point 5 TEU.
[4] Art. 3 TEU.
[5] Art. 3 TFEU states as follows: *The Union shall have exclusive competence in the following areas*: (...)
(b) the establishing of the competition rules necessary for the functioning of the internal market (...).
[6] Art. 3 point 2 TFEU.

Regarding the energy area, the EU competence to act is enshrined, first of all, in the dispositions of art. 4 point 2 letter (i), which states that „[s]*hared competence between the Union and the Member States applies in the following principal areas:* (…) (i) *energy* (…)"[7].

To sum up, the TFEU places the EU competence in the areas of competition (having impact on the functioning of the internal market) and energy in two distinct categories of competence fields: the first in the exclusive competences category, while the second in the category of shared competences. Therefore, in order to better understand the way these competences are exercised we have to take a look at the Treaty rules governing the exercise of the competences.

Precisely, „[w]*hen the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts*"[8], while [w]*hen the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*"[9].

However, even if these general rules are well known and applied, they do not govern each and every aspect of exercising an EU competence, but only the main rules regarding it. The detailed procedural ways and, not less important, the limitations related to the exercise of each competence are enshrined in the specific dispositions of the Treaties, as the TFEU itself states: „[t]*he scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area*"[10]. These exact aspects are the one that we will talk about in the following.

2. Competition and energy policies. Specific provisions of the TFEU

As stated above, in order to precisely understand the scope, limits and procedures that govern the EU power to regulate in each specific field, one must firstly consult the specific provisions regarding the given fields. Given the fact that the TFEU acts as the *sedes materiae* for the most relevant primary law dispositions regarding competition and energy, our analysis will be centered on this Treaty and its structure will follow the two main branches of this study: competition and energy.

2.1. Competition in the TFEU

A first example of specific Treaty dispositions governing the exercise of EU competences in the competition field is the one stating that „[i]n *carrying out the tasks entrusted to it under this Chapter*[11] *the Commission shall be guided by:* (…) *developments in conditions of competition within the Union in so far as they lead to an improvement in the competitive capacity of undertakings* [and] (…) *the requirements of the Union as regards the supply of* ***raw materials*** *and semi-finished goods; in this connection the Commission shall take care to avoid distorting conditions of competition between Member States in respect of finished goods*[12]. Of course, such dispositions only set up certain guidelines for the institutions to keep in mind when drafting legislative acts proposals regarding competition. Nevertheless, simply by doing this, such provisions offer clear landmarks for the institutions, therefore playing a far from neglectable role in the EU action in the competition field.

More such dispositions can be found in Title VII of the TFEU, named *common rules on competition, taxation and approximation of laws*, and especially in its first chapter regarding the *rules on competition*, whose first section is home to the *rules applying to undertakings*. This section can be considered as having a two-fold approach: first, it sets certain prohibitions for the undertakings, and secondly, it offers the institutions the legal bases they need in order to act in the competition field.

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[7] Art. 3, point 2 letter (i) TFEU.

[8] Art. 2 point 1.

[9] Art. 2 point 2.

[10] Art. 2 point 6 TFEU.

[11] Art. 28 point 1 TFEU states as follows: *The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.*

[12] Art. 32 (b) and (c) TFEU.

Dispositions like the one stating that „[t]*he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts" fall in the first category*"[13].

The impact of such provisions on the activity of the undertakings from the energy sector cannot be overestimated. Given their usual size and market quotas, such undertakings are especially prone to agreements that cause disorder in the market and that prohibit fair and free competition. Therefore, it goes without saying that the simple existence of the aforementioned prohibitions achieves most of the desired effect of keeping the energy market as far as possible, given the circumstances, from being monopolized or shared in a matter that would devoid it from the real competition that is vital for keeping a decent level of prices.

However, the effect of these provisions on the real market is at least partially impeded by the existence of certain exceptions, part of which are enshrined in the Treaty (therefore being considered legal exceptions) and the other part deducted from the CJEU jurisprudence. The legal exceptions read as follows: „(…) *any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*"[14].

A similar effect can be attributed to the Treaty provisions that prohibit any „*abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*"[15]. As stated before, given their size and the difficulty of accessing and distributing the object of their trade, the energy companies are especially prone to such a behavior. Therefore, the fact that the Treaty prohibits abuses such as „*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;* (…) *limiting production, markets or technical development to the prejudice of consumers;* (…) *applying dissimilar conditions to equivalent transactions with other trading parties*, thereby *placing them at a competitive disadvantage;* (…) *making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*"[16] does a great deal to keep the energy market reasonably fair and competitive.

And keeping the market reasonably fair and competitive can be considered not only as an ideal, but as an imperative of the EU action in a time where „*the 'market' values and criteria such as efficiency and utility tend to obscure and even to replace non-market values like social solidarity, equity or civic engagement, changing the allocation of resources within society*"[17]

The second fold of the Treaty approach to the competition field consists in empowering the EU institutions to act in order to practically implement the primary law dispositions. This is what the TFEU does when stating that „[t]*he appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102*[18] *shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament*"[19] or that „[w]*ithout prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures*

[13] Art. 101 TFEU.
[14] *Ibidem*.
[15] Art. 102 TFEU.
[16] Art. 101 TFEU.
[17] M.F. Popa, *What the economic analysis of law can't do - pitfalls and practical implications,* Juridical Tribune no. 11/2021, pp. 81-94.
[18] Both previously discussed.
[19] Art. 122 point 1 TFEU.

appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy"[20].

The former can be considered a concession made to the specific situation of each member state, as opposed to the overall contemporary EU tendency to „*promote the application of uniform juridical solutions to different social and cultural contexts*"[21]

In a way related to the aforementioned second fold is also the proactive approach of another treaty disposition that institutes an obligation for the Union, in order to „*enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers,* (…) [to] *contribute to the establishment and development of* ***trans-European networks*** *in the areas of transport, telecommunications and* ***energy infrastructures***"[22].

So, from what we stated in this subsection, it can be inferred that the EU has all the competence it needs in order to keep the energy market (and not only it) safe from agreements or behaviors that affect competition, while at the same time acting in order to facilitate the development of energy infrastructures enshrined in the primary law dispositions. However, in order to also ensure a satisfactory level of functionality on the energy market, more than simple interdictions are needed and active measures are a vital necessity. Therefore, in the following we will refer to those active measures that the Treaties provide a legal basis for.

2.2. The European Union's energy policy

Most of the aspects that can be considered relevant for the energy policy of the EU can be found in Title XXI of the Treaty on the Functioning of the European Unions, named *Energy*. As the previous example regarding competition, it also follows a two-folded approach.

First of all, it states a series of objectives for the EU energy policy and the overall ecological imperative, when stating that „[i]*n the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks*"[23].

All of the above are legal solutions derived not only from the market imperatives but, given their social and ecological dimensioned, can be considered an expression of the practical application of „*the values common to the European Union, in general, and to each democratic state in particular, as the foundation of economic and social progress and the growth [welfare] of their members*"[24]

Second, on the active side, the Treaty sets out certain obligations for the institutions to act, at the same time providing the necessary legal basis of the said action: „[w]*ithout prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1*[25]*. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions*"[26].

The Treaty also contains a specific limitation, imposed by the words „[s]*uch measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply*"[27].

As can be derived from this, the objective of the energy independence was, before the war in Ukraine, set to be „*achieved gradually, (in line) with the economic and political evolution at national and international level"*[28]*,* but de sudden and catastrophic events triggered an almost complete EU-Russia economical and political breakup,

[20] Art. 122 point 2 TFEU.

[21] M.F. Popa, *Legal Taxonomies between Pragmatism and the Clash of Civilizations*, in Revista de Drept Public no. 1/2016, pp. 58-67.

[22] Art. 170 TFEU.

[23] Art. 194 TFEU.

[24] D.M. Marinescu, *Respecting equal opportunities - a guarantee for maintaining societal security in Romania and in the European Union,* in Proceedings of the „Romania in the New International Security Environment" Conference, University National Defense „Carol I", June 26, 2020, pp. 38-46.

[25] Previously stated.

[26] Art. 194 TFEU.

[27] *Ibidem*.

[28] O.M. Salomia, A. Mihalache, *Principiul egalității statelor membre în cadrul Uniunii Europene*, in Dreptul no. 1/2016, pp. 166-174.

which had a major impact on the EU energy supply, therefore conducting to a severe replacement of the oil and natural gas imports from the Russian Federation.

The two-fold approach would, however, be incomplete and would not reach its purpose in the absence of secondary law sources governing the detailed and often profoundly technical aspects of the energy sector – especially in the power and gas fields. Therefore, in order to have a decent understanding of how the EU can maintain a reasonable level of competition in these markets we must get down to the level of the Regulations and Directives that govern the right of access for third parties at the power and gas infrastructure.

3. Secondary law dispositions governing the access of third parties to the energy infrastructures

The fields of the energy market that have by far the heaviest impacts on the overall goods prices are the power and the gas fields. Both these fields share a particular trait: the infrastructure needed to provide power and natural gas is vast and both expensive to build and to maintain. Therefore, only the big operators, most of the times state-owned or previously state-owned have developed the infrastructure they need. As a consequence, in the absence of specific legal provisions, they could distort the competition by simply refusing the access of third parties to their infrastructure. This is exactly the kind of situation that made the EU intervention necessary and for which the Treaties have provided both the incentives and the legal basis that are necessary in order for the EU to act.

3.1. The power field

In the power field, the two main secondary law acts that govern the right to access by third parties to the energy infrastructure are the **Directive 2019/944 of the European Parliament and the Council of June 5, 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU**[29] (hereinafter called *The Power Directive*) and **Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity**[30] (hereinafter called *The Power Regulation*).

First of these acts, the Directive, aims, according to its preamble, to „[p]romot[e] *fair competition and easy access for different suppliers is of the utmost importance for Member States in order to allow consumers to take full advantage of the opportunities of a liberalized internal market for electricity*"[31]. However, „[i]*n order to foster competition and ensure the supply of electricity at the most competitive price, Member States and regulatory authorities should facilitate cross-border access for new suppliers of electricity from different energy sources as well as for new providers of generation, energy storage and demand response*"[32].

The Directive also „*aims to ensure affordable, transparent energy prices and costs for consumers, a high degree of security of supply and a smooth transition towards a sustainable low-carbon energy system*"[33]. In order to achieve this objective and the ones we stated before, „[i]*t lays down key rules relating to the organization and functioning of the Union electricity sector, in particular rules on consumer empowerment and protection, on open access to the integrated market, on third-party access to transmission and distribution infrastructure, unbundling requirements, and rules on the independence of regulatory authorities in the Member States*"[34].

With this view in mind, certain obligations are imposed to the Member States. One of them is that they „*ensure a level playing field where electricity undertakings are subject to transparent, proportionate and non-discriminatory rules, fees and treatment, in particular with respect to balancing responsibility, access to wholesale markets, access to data, switching processes and billing regimes and, where applicable, licensing*"[35].

Member states are obliged to „*ensure the implementation of a system of third-party access to the transmission and distribution systems based on published tariffs, applicable to all customers and applied objectively and without discrimination between system users.* [They are also to] *ensure that those tariffs, or the methodologies underlying their calculation, are approved* (…) *prior to their entry into force and that those tariffs,*

[29] OJ L 158/125 from 14.06.2019.
[30] OJ L 158 from 14.06.2019.
[31] Considerent (12) from the Preamble of the *Power Directive*.
[32] Considerent (13) from the Preamble of the *Power Directive*.
[33] Art. 1 of the *Power Directive*.
[34] *Ibidem*.
[35] Art. 3 *Power Directive*.

and the methodologies — where only methodologies are approved — are published prior to their entry into force"[36].

However, this does not mean that „[t]*he transmission or distribution system operator may* [not*] refuse access where it lacks the necessary capacity. Duly substantiated reasons shall be given for such refusal* (…), *and based on objective and technically and economically justified criteria. Member States or, where Member States have so provided, the regulatory authorities of those Member States, shall ensure that those criteria are consistently applied and that the system user who has been refused access can make use of a dispute settlement procedure. The regulatory authorities shall also ensure, where appropriate and when refusal of access takes place, that the transmission system operator or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. Such information shall be provided in all cases when access for recharging points has been denied. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information*"[37].

Regulation (EU) 2019/943 of the European Parliament and of the Council of June 5, 2019 on the internal market for electricity does complete and circumstantiate some of the dispositions that can be found in the Directive. It has as the main objectives to „*set the basis for an efficient achievement of the objectives of the Energy Union and in particular the climate and energy framework for 2030 by enabling market signals to be delivered for increased efficiency, higher share of renewable energy sources, security of supply, flexibility, sustainability, decarbonization and innovation*; [to] *set* [a series] *fundamental principles for well-functioning, integrated electricity markets, which allow all resource providers and electricity customers non-discriminatory market access, empower consumers, ensure competitiveness on the global market as well as demand response, energy storage and energy efficiency, and facilitate aggregation of distributed demand and supply, and enable market and sectoral integration and market-based remuneration of electricity generated from renewable sources;* [to] *set fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal market for electricity, taking into account the particular characteristics of national and regional markets, including the establishment of a compensation mechanism for cross-border flows of electricity, the setting of harmonized principles on cross-border transmission charges and the allocation of available capacities of interconnections between national transmission systems* [and to] *facilitate the emergence of a well-functioning and transparent wholesale market, contributing to a high level of security of electricity supply, and provide for mechanisms to harmonize the rules for cross-border exchanges in electricity*"[38].

In order to achieve these objectives, the Regulation sets up a number of principles „*regarding the operation of electricity markets Member States, regulatory authorities, transmission system operators, distribution system operators, market operators and delegated operators*"[39], amongst which can be found the one stating that „*market participants shall have a right to obtain access to the transmission networks and distribution networks on objective, transparent and non-discriminatory terms*"[40].

Ensuring equal access is vital to a balanced market, as stated in the dispositions imposing the obligation for the Member States to organize the energy markets „*in such a way as to* (…) *ensure non-discriminatory access to all market participants, individually or through aggregation, including for electricity generated from variable renewable energy sources, demand response and energy storage*"[41].

Almost the exact same principles are formulated in the secondary law sources that govern the gas market, as we will state in the following.

4. The natural gas field

Matters relating to the right of access for third parties to the gas infrastructures are enshrined in Directive 2009/73/EC of the European Parliament and of the Council of July 13, 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC[42] (hereinafter called *The Gas Directive*) and in Regulation (EC) no. 715/2009 of the European Parliament and of the Council of July 13, 2009 on conditions for

[36] Art. 6 *Power Directive*.
[37] *Ibidem*.
[38] Art. 1 *Power Regulation*.
[39] Art. 3 *Power Regulation*.
[40] Art. 3 letter (q) *Power Regulation.*
[41] Art. 6 *Power Regulation.*
[42] OJ L 211 from 14.08.2009.

access to the natural gas transmission networks and repealing Regulation (EC) no. 1775/2005[43] (hereinafter called *The Gas Regulation*).

The aforementioned Directive „*establishes common rules for the transmission, distribution, supply and storage of natural gas. It lays down the rules relating to the organization and functioning of the natural gas sector, access to the market, the criteria and procedures applicable to the granting of authorizations for transmission, distribution, supply and storage of natural gas and the operation of systems*"[44].

In order to achieve these aims, „[t] *he activity of gas transmission include*[s] *at least* (…) *granting and managing third-party access on a non-discriminatory basis between system users or classes of system users; the collection of all the transmission system related charges including access charges, balancing charges for ancillary services such as gas treatment, purchasing of services (balancing costs, energy for losses)*"[45].

In practically the same vein, the Regulation comes up with a series of definitions that clarify some of the terms used in both the Directive and in the Treaties themselves. For example, by *transmission*, the Regulation understands „*the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply*"[46], a definition that is of utmost importance for the whole gas market EU policy, as it sets the basis for the dispositions regarding the right of access.

The main objectives of the Regulation are to „*set*(…) *non-discriminatory rules for access conditions to natural gas transmission systems taking into account the special characteristics of national and regional markets with a view to ensuring the proper functioning of the internal market in gas;* [to]*set*(…) *non-discriminatory rules for access conditions to LNG facilities and storage facilities taking into account the special characteristics of national and regional markets;* (…) [or to] *facilitat*[e] the *emergence of a well-functioning and transparent wholesale market with a high level of security of supply in gas and providing mechanisms to harmonize the network access rules for cross-border exchanges in gas*"[47].

The aforementioned objectives translate into „*the setting of harmonized principles for tariffs, or the methodologies underlying their calculation, for access to the network, but not to storage facilities, the establishment of third-party access services and harmonized principles for capacity-allocation and congestion-management, the determination of transparency requirements, balancing rules and imbalance charges, and the facilitation of capacity trading*"[48].

The means of achieving these objectives are mainly stated in the obligations for the transmission system operators to „*ensure that they offer services on a non-discriminatory basis to all network users;* (…) [to] *provide both firm and interruptible third-party access services* (…) [and to] *offer to network users both long and short-term services*"[49].

In the same vein, the Liquified Natural Gas (LNG) operators are obliged to „*offer services on a non-discriminatory basis to all network users that accommodate market demand; in particular, where an LNG or storage system operator offers the same service to different customers, it shall do so under equivalent contractual terms and conditions;* [to] *offer services that are compatible with the use of the interconnected gas transport systems and facilitate access through cooperation with the transmission system operator; and* [to] *make relevant information public, in particular data on the use and availability of services, in a time-frame compatible with the LNG or storage facility users' reasonable commercial needs, subject to the monitoring of such publication by the national regulatory authority*"[50].

Apart from this, all the natural gas system operators are to „*provide both firm and interruptible third-party access services; the price of interruptible capacity shall reflect the probability of interruption;* [to] *offer to storage facility users both long and short-term services; and* [to] *offer to storage facility users both bundled and unbundled services of storage space, injectability and deliverability*"[51].

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[43] OJ L 158 from 14.06.2019.
[44] Art. 1 *Gas Directive.*
[45] *Ibidem*.
[46] Art. 2 *Gas Directive.*
[47] Art. 1 *Gas Regulation*.
[48] *Ibidem*.
[49] Art. 14 *Gas Regulation*.
[50] Art. 15 *Gas Regulation*.
[51] *Ibidem*.

5. Conclusions

The whole point of the EU competition and energy policies seems to be the creation of a harmonized, functioning and resilient space, characterized by *„ties that go beyond the framework of the nation-state, (...) voluntary adhesion, (...)* [and] *peaceful transformation*"[52] This outstandingly ambitious objective has always been torn apart between the states' ambitions and legitimate objectives of following their own interests in energy and, moreover, in economy areas and the need to follow common policies. This former need has only amplified over time, along with and as an effect of *„the multiplication of the areas which fall under the exclusive competences of the European Union and of those shared between the European Union and the Member States, correlated with the principles of subsidiarity, proportionality, conferral and loyal cooperation*"[53]. Such an amplification is at the very origin of the multiple layered approach that we have seen has been followed by the Union in the competition and energy markets. The very objective of this complex approach is centered both on the enterprises and on the consumers. The consumers stand to gain from an economic environment characterized both by free and by fair competition, as free competition can sometimes be less fair, as enterprises tend to reach certain agreements that impede the normal competition that can be found on an ideal market. However, in order to maintain both a decent level of prices and a fair level of innovation and quality of goods and services (both of them contributing to the customers' satisfaction), competition must be kept fair, although this might mean that it is not completely free (anti-competition agreements being forbidden).

Therefore, the Union action in the competition field is not merely an option but a necessity. This is all the truer in the field of energy, and especially in the power and natural gas areas, as both the production and the distribution of power and gas are complex, expensive industries, prone to concentration and anticompetition agreements. So, the states as authors of the Treaties have granted it the power to act in both fields. They have done this by, on the one hand, including certain interdictions in the Treaties and by granting the EU the power to act not only to put them in practice but also to develop common policies consisting in active measures. In its turn, the EU has acted by the means of secondary law sources, namely Regulations and Directives, thus creating an integrated and until now functional competition and energy space. However, the war in Ukraine and the sudden and almost total breakup from what we now perceive as the overwhelming European dependence on the oil and gas imported from Russia has created an energy shock on European markets, in a way similar to the oil shocks in the 1970s, thus putting the whole EU policies in the competition and energy fields to a test, as they are now called to act for maintaining decent overall prices and decent power and gas prices in particular. This is exactly where the Member States are also called to act. As in each and every one of them „[t]*he integration into the European Union,* (...) *has generated a series of* [profound and probably irreversible] *changes*"[54], they are now tied to each other and a faulty conduct by one of them can have disastrous consequences of all, thus making the current situation a true and thorough test of the efficacity of the whole European project.

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