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COMMISSION DECISION

of

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the
European Union ('TFEU') and Article 54 of the EEA Agreement**

(Case COMP/39.315 – ENI)

(Only the Italian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, in particular Article 9(1) thereof,

Having regard to the Commission decision of 21 December 2007 to initiate proceedings in this case,

Having expressed concerns in the Statement of Objections of 6 March 2009,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the Final report of the Hearing Officer²,

WHEREAS:

1. SUBJECT MATTER

- (1) This Decision is addressed to ENI Spa ("ENI") and concerns ENI's conduct on the gas transportation market to Italy and on the gas supply markets in Italy.
- (2) In its Statement of Objections, the Commission came to the provisional conclusion that ENI holds a dominant position on the market for transport of gas to Italy and on the gas supply markets in Italy and that the suspected practices by ENI of managing and operating its natural gas transmission pipelines with the aim of limiting third party access to available and new capacity may have infringed Article 102 of the Treaty on the Functioning of the European Union ("TFEU")³. Notably, ENI may have foreclosed competition in the Italian gas supply markets by way of a refusal to supply gas transport services to third parties. This strategy may have been implemented by way of refusing to grant competitors access to capacity available on the transport network (capacity hoarding), granting access in an impractical manner (capacity degradation) and strategically limiting investment (strategic underinvestment) in ENI's international transmission pipelines.

¹ OJ L 1, 4.1.2003.

² The final report of the Hearing Officer was issued on the 13 of September 2010

³ With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this notice, references to Article 102 TFEU should be understood as references to Article 82 of the EC Treaty where appropriate.

2. THE ADDRESSEE

- (3) ENI is an Italian-state controlled company active at multiple levels of the production, transportation and supply chains in the energy sector, predominantly in natural gas and oil. ENI is a fully integrated gas company, with activities in the production and import of gas⁴, in the gas transmission and storage businesses, as well as in the downstream gas distribution business.⁵
- (4) ENI procures gas through its own production in Italy and Libya⁶, as well as through long-term contracts with leading gas producers (in particular in Russia, Norway, the Netherlands and Algeria).
- (5) ENI is also active in the business of international transportation services. In particular, together with the Austrian undertaking OMV, ENI owns and controls Trans Austria Gasleitung GmbH ("TAG GmbH"), which operates a pipeline (TAG) between Baumgarten near the Austrian/Slovak border and Italy. Furthermore, together with the German undertaking E.ON Ruhrgas AG ("E.ON"), ENI owns and controls Trans Europa Naturgas Pipeline GmbH & Co. KG ("TENP KG"), which owns a pipeline (TENP) between the Dutch/Belgian/German border and Wallbach at the German/Swiss border. Gas flowing through the TENP pipeline is further transported to Italy through Switzerland via the Transitgas pipeline, jointly owned and controlled by ENI and the Swiss company Swissgas AG ("Swissgas").
- (6) In 2008, ENI achieved a turnover of EUR 108 billion (net sales from operations) resulting in EUR 21.7 billion (adjusted operating profit) and EUR 8.8 billion of net profits.⁷

3. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003

- (7) The investigation was opened ex officio. An inspection took place at ENI's premises in May 2006⁸ and further fact-finding was carried out *inter alia* by way

⁴ In 2007 ENI's Gas&Power division sold [...]billion cubic metres ("bcm") of gas, of which [...]bcm were transported into Italy.

⁵ In 2007, ENI supplied gas in the Italian wholesale market for around [...] bcm (approx. 50-70% of total demand). At a retail level ENI supplied gas to gas fired power plants and to large industrial customers with market shares not less than 45-55%. According to the Italian regulator Autorità per l'energia elettrica e il gas ("AEEG") in 2008, ENI still controlled 50-70% of the gas available in Italy (national production, import and gas sales at the national border; see AEEG Annual Report July 2008, p.120; and AEEG 2008-2011 Strategic Plan).

⁶ ENI holds interests in the Western Libyan Gas Project (WLGP) which is a 50-50 joint venture between the latter and National Oil Corporation (NOC), a Libyan state owned energy company. The WLGP aims at carrying out exploration, production operation and transport of natural gas from Libya to Italy. WLGP is supplied from production at the off-shore Bahr Essalam and on-shore Wafa fields.

⁷ ENI, Selected and consolidated data, Annual Report 2008.

⁸ Inspection Decision of 5 May 2006 in case COMP/B-1/39.315.

of various requests for information to ENI and other market participants between 2006 and 2008.

- (8) On 20 April 2007, the Commission initiated proceedings against ENI pursuant to Article 2 of Regulation No 773/2004⁹ with a view to adopting a decision pursuant to Chapter III of Regulation 1/2003.
- (9) On 6 March 2009 the Commission adopted a Statement of Objections pursuant to Article 27(1) of Regulation (EC) No 1/2003 read in conjunction with Article 10(1) of Regulation (EC) No 773/2004 concerning alleged infringements of Article 102 TFEU by ENI. The Statement of Objections also constitutes a preliminary assessment within the meaning of Article 9 of Council Regulation (EC) No 1/2003.
- (10) The Statement of Objections was notified to ENI by letter of 9 March 2009. On 1 October 2009, ENI replied, disagreeing with the findings of the Statement of Objections. On 27 November 2009 an Oral Hearing took place.
- (11) On 4 February 2010, ENI submitted commitments to the Commission in response to the concerns raised in the Statement of Objections.
- (12) On 5 March 2010, a notice was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the Commission's concerns and the commitments and inviting interested third parties to give their observations on the commitments within one month following publication. The Commission received a total of 14 responses.
- (13) On 27 April 2010, the Commission informed ENI of the observations received from interested third parties following the publication of the notice. On 10 May 2010, ENI sent some clarifications in response to the observations of third parties. Additional information requested on 19 May 2010 pursuant to Article 18 of Regulation (EC) No 1/2003 was submitted by the undertaking on 24 May 2010. On 10 June 2010, the Commission informed ENI about the analysis of those further clarifications provided and on 8 July 2010 ENI submitted revised commitments (the "Final Commitments").
- (14) On 9 September 2010, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 13 September 2010, the Hearing Officer issued his final report.

4. PRELIMINARY ASSESSMENT

- (15) The Commission has gathered evidence that ENI may have abused its dominant position on the gas transportation market into Italy to the detriment of

⁹ Council Regulation (EC) No 773/2004 of the Commission of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, page 18).

competitors, competition and ultimately consumers on the downstream supply markets.

4.1. The system of infrastructures to import gas into Italy

- (16) Italy is a net gas importer; almost all imports and national production fulfil domestic needs, while gas exports are negligible.¹⁰
- (17) At the date the Statement of Objections was issued, gas to be imported into Italy could be transported through the following existing and operative infrastructures:
- the Trans-Mediterranean and Trans Tunisian pipelines (together TTPC/TMPC), used to import Algerian gas to Italy;¹¹
 - the Greenstream pipeline, used to import Libyan gas to Italy;¹²
 - the TENP/Transitgas pipelines, used to import North European gas to Italy;¹³
 - the TAG pipeline, used to import Russian gas to Italy;¹⁴
 - the Slovenian pipeline, which allows some marginal import/export of Russian gas via that country;¹⁵
 - the Panigaglia LNG (liquefied natural gas) Terminal.¹⁶

¹⁰ In 2007, national consumption was about 85 bcm. Demand was satisfied by imports for around 74 bcm, national production for around 10 bcm, and the rest with gas withdrawn from storage.

¹¹ The Italian-Algerian axis consists in a submarine pipeline, the Transmed link, and a pipeline section running through Tunisia. The submarine pipeline is owned by the TransMediterranean Pipeline Company Limited ("TMPC"), a company equally shared and jointly controlled by ENI and Sonatrach (the Algerian state-owned gas company). The Tunisian section of the TTPC/TMPC system is owned by the Tunisian state-owned company Sotugat. ENI can benefit of significant capacity rights of about 70-80% on those pipelines. In 2007 the TTPC/TMPC pipeline imported 22.5 bcm of gas into Italy corresponding to around 25% of national consumption.

¹² The Greenstream pipeline is a joint venture between ENI (75%) and NOC. All transport rights on that pipeline are held by ENI on an exclusive basis. Around 80% of the capacity is sublet to other shippers on a long term basis. In 2007, the Greenstream pipeline allowed the import of 9 bcm of gas into Italy corresponding to around 10% of national consumption.

¹³ In 2007, the TENP/Transitgas pipeline allowed the import of 15 bcm of gas into Italy corresponding to around 17% of national consumption.

¹⁴ In 2007, the TAG pipeline allowed the import of 24 bcm of gas into Italy corresponding to around 27% of national consumption.

¹⁵ The Slovenian gas network is operated by Geoplin, which is connected to TAG via the SOL pipeline. The pipeline, however, mainly operates as an export pipeline from Italy. In 2007 imports accounted only for 0.2 bcm corresponding to around 5% of the overall infrastructure capacity at the Slovenian/Italian border and to less than 0.5% of Italian national consumption.

In the meantime some limited additional new infrastructure has become operational.¹⁷

- (18) According to the Statement of Objections, all pipelines described above are solely or jointly controlled by ENI and ENI not only holds significant transportation rights on these infrastructures but also has booked a substantial amount of the available capacity on a long-term basis.
- (19) With regard to TENP, ENI (together with E.ON) jointly controls the pipeline¹⁸ and the transmission system operator ("TSO")¹⁹ that provides natural gas transportation services for the approximately 67% of the capacity rights on TENP held by ENI.
- (20) Concerning Transitgas, ENI (together with Swissgas) jointly controls the pipeline²⁰ and the TSO²¹ that provides natural gas transportation services including the marketing of the approximately 85-95% of transport capacity held by ENI.
- (21) Finally as regards TAG, ENI (together with OMV) jointly controls the TSO²² that holds the entirety of the capacity rights for the transport of natural gas on the TAG pipeline pursuant to a lease agreement and that provides natural gas transportation services.²³ ENI is entitled to approximately 85-95% of the transport rights of the existing capacity on the TAG.
- (22) On the basis of the corporate structure of the pipelines at stake and the shareholding agreements, the Commission considered that ENI was likely to have the necessary information and powers to effectively influence the decision making with regard to such infrastructures, namely the day-by-day management and operation of transport capacity as well as decisions with respect to new investment projects. Notably, ENI was entitled to decide the allocation of capacity on a short and long term basis and to independently carry out capacity enhancements throughout the relevant period.

¹⁶ Panigaglia is owned and operated by GNL Italia Spa, which holds all capacity rights. GNL Italia is wholly-owned by Snam Rete Gas Spa, which is controlled by ENI, holding 50.03% of its shares, the remaining ownership being dispersed. In 2007 the Terminal imported 2.4 bcm of gas into Italy corresponding to around 3% of national consumption.

¹⁷ The offshore LNG Terminal Rovigo with 8 bcm capacity went into operation in late 2008.

¹⁸ ENI controls Eni Gas Transport GmbH, which in turn holds a controlling participation of 49% in Trans Europa Naturgas Pipeline GmbH & Co, which owns and operates the TENP pipeline.

¹⁹ Eni Gas Transport Deutschland S.p.A..

²⁰ Transitgas AG.

²¹ Eni Gas Transport International SA (ENI GTI).

²² Trans Austria Gasleitung GmbH, 85-95% of the shares of which are held by ENI and 5-15% by OMV.

²³ OMV has sole ownership of the pipeline.

4.2. Relevant markets

4.2.1. The relevant product markets

- (23) In line with the Commission's previous decision practice, the Statement of Objections distinguished between markets for the *sale (supply)* of gas on the one hand and the transport infrastructure related markets, such as *gas transport services*²⁴, on the other hand.
- (24) The Statement of Objections established a clear distinction between high pressure transmission networks and low pressure distribution networks as competitive conditions differ significantly between the two.²⁵ The Statement of Objections defined a market for the transport of natural gas to and into Italy.²⁶
- (25) Within the gas *supply* markets, the Statement of Objections distinguished between markets for gas sales to *wholesalers* and to *final customers*. In line with previous practice, the wholesale market concerns sales to suppliers who intend to resell gas to others wholesalers or downstream suppliers. Within the market for final customers, the SO distinguished three separate markets, namely supplies of natural gas to power plants, to (large) industrial customers and to small customers (households and commercial customers).²⁷

4.2.2. The relevant geographic markets

- (26) The ultimate aim of a transport customer's business is to sell gas on a downstream wholesale or retail market. From the downstream perspective, it does not matter where the gas originates, as downstream gas demand can be satisfied irrespective of the production area of this gas as long as there is a viable transportation route between the area of origin and the destination area. The Statement of Objections concluded therefore that, for the purpose of this case, the entirety of the viable routes that a shipper/supplier could use to bring gas to the wholesale market in Italy constitutes one relevant market. Those are the ones described in paragraph

²⁴ 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.

²⁵ Transmission networks transport gas at high pressure over long distances and are connected only to large final customers such as power plants and large industrial customers. By contrast, distribution networks serve to distribute the gas locally to smaller final customers, in particular households. Regulation applying to transmission networks differs from regulation applying to distribution systems.

²⁶ For the competitive assessment, no further distinction was necessary as it was independent of whether gas is transported via transmission pipelines or LNG tankers and irrespective of whether the transport is carried out on a firm or interruptible basis or whether primary or secondary capacity is concerned.

²⁷ See e.g. cases COMP/M.3440 - EDP/GDP/ENI, COMP/M.3696 - E.ON/MOL and COMP/M.3868 - DONG/Elsam/Energi E2. Regarding possible further product market distinctions, it could be left open whether the markets for the sale of gas to final consumers should be further divided, since the competitive assessment would not change under either market definition.

4.1 above (i.e. the pipelines TTPC/TMPC, Greenstream, TENP/Transitgas and TAG, as well as the Panigaglia LNG Terminal).

- (27) Given the lack of competitive constraints from the transportation services outside ENI's import infrastructures, the existing supply routes to and into Italy constitute the relevant geographic market.²⁸
- (28) With regard to the geographic scope of the supply markets, wholesale exchanges and supplies to large customers (power plants and industrial customers) are considered to be national in scope. This is in line with the decision practice of the Commission²⁹, the Italian Competition authority and the courts.³⁰

4.3. ENI's dominant position on the relevant markets

- (29) The Commission concluded in its Statement of Objections that the system of gas import infrastructures described above, existing and operating at the date of the Statement of Objections, is controlled by ENI and that ENI may have held a dominant position not only on the gas transport market towards Italy since 2000, but also in downstream supply markets in Italy.
- (30) With respect to *gas transmission*, the Commission considered that ENI holds a dominant position on the market for the transport of natural gas to and into Italy by means of its ability to effectively control and influence the usage of all viable international pipelines for shipping gas into Italy (i.e. the pipelines TTPC/TMPC, Greenstream, TENP/Transitgas and TAG) and the Panigaglia LNG Terminal.
- (31) Notably, ENI controls (or joint controls) all those viable network infrastructures and owns the transport companies holding significant capacity/use rights on those import pipelines including the LNG Terminal, existing at the date the Statement of Objections was issued.
- (32) In view of the fact that new gas pipeline projects are not expected to be operational before 2011 and absent economically viable alternatives for shippers/consumers to import gas, ENI's position in the transport of gas into Italy will not be challenged within the foreseeable future.
- (33) As concerns the downstream *gas supply* markets, despite regulatory market caps³¹, ENI maintains a strong market position in those markets. ENI continues to

²⁸ Among various envisaged new infrastructure projects, only the Rovigo LNG Terminal became fully operational at the end of 2009 with a capacity of 8 bcm, 80% of which is allocated to Edison Spa, the second gas producer and supplier in Italy, active also in the electricity market.

²⁹ See e.g. case IV/M.713 – *RWE/Thyssengas*, paragraphs 15-19; case COMP/M.2822 – *EnBW/ENI/GVS*.

³⁰ See Autorità garante della concorrenza e del mercato ("AGCM"), Decision n.17723 and n.17724 of 13 December 2007.

³¹ Under the Legislative Decree 164/2000, during the period 2002-2010 no operator may, directly or by way of affiliated companies, import or produce more than 75% of the annual domestic consumption

hold a significant portfolio of long term gas import contracts and remains a gas producer in its own right in Italy and abroad. Entry barriers into the Italian wholesale market are high due to difficulties in international gas procurement, existing bottlenecks in import capacity (tight capacity and long term bookings by ENI of a significant part of the existing capacity) combined with declining Italian production and difficulties of access to storage. The market structure is still characterised by a quasi-monopoly of the vertically integrated incumbent ENI.³²

- (34) The relative limited volumes of transport capacities available to suppliers other than ENI translate into equally low market shares on supply markets served by the existing pipelines, notably on the wholesale supply markets. The Statement of Objections concluded that gas wholesale suppliers in Italy do not have the ability and economic incentives to exercise an effective competitive pressure on ENI, as they do not have access to a sufficient degree of independent gas imports or domestic production and are more likely to align. ENI still largely dominates both sources of gas available for consumption in Italy.³³ As a consequence, much of ENI's wholesale competition in Italy is fragmented and is ultimately dependent on supplies by the incumbent itself either in the form of gas sales at the entry points to Italy or sales in Italy.³⁴
- (35) The Statement of Objections therefore provisionally concluded that ENI holds a dominant position on the wholesale supply market in Italy as a whole and in particular - owing to its persistently high market shares, its position in the gas supply chain and the existence of high barriers to entry - on the market for supplies to gas fired power plants and on the market for supplies to large industrial customers.³⁵

of gas. This market share cap is progressively reduced by 2 percentage points each year down to a limit of 61% at the end of the period.

³² On the competitive conditions in the gas markets in Italy see AEEG, Sector Inquiry of gas storage IC38 - Mercato dello stoccaggio del gas naturale, Decision n. 17639 of 22 November 2007, and AEEG, Three Year Strategic Plan 2008-2010, January 2008, p. 7.

³³ ENI's share of domestic production is around 85% in 2007 while the share of imports is around 65%, or up to 70% if ENI's sales of gas to national suppliers at the Italian borders are included. See AEEG, Annual report, July 2008, p. 120.

³⁴ According to the regulator, no less than 40% of gas sales of other suppliers in Italy depend on ENI's gas. See AEEG, Annual report, July 2008, p. 120, and AEEG, Strategic Plan 2009-2011, January 2009.

³⁵ Under the Legislative Decree 164/2000, during the period 2003-2010 no operator may, directly or by way of affiliated companies, sell more than 50% of annual domestic consumption to final consumers. This threshold is eventually computed on the overall gas supply to all final consumers thus including consumers in all three relevant retail markets: supplies to power plants, supplies to industrial consumers, supplies to household and small business consumers. It was observed that ENI's market shares on the market for supplies to power plants and large industrial customers were constantly between 50-60%.

4.4. Substantial part of the internal market

- (36) In the Statement of Objections the Commission took the view that the relevant markets in which ENI is considered to hold a dominant position constitute a substantial part of the common market as required by Article 102 TFEU.
- (37) Gas consumption in Italy is one of the highest in the European Union, with national demand in 2007 (of about 85 bcm) exceeding 15% of total consumption in the EU. Of this, around 87% (or around 74 bcm) constituted imports, thereby demonstrating the particular importance of the import infrastructures, access to which is essential. In this respect, the TAG and TENP/Transitgas pipelines account for more than 50% of gas imports – respectively about 30% and 20% – and are indispensable for the import of gas from Northern Europe and Russia.³⁶
- (38) It can be concluded that the affected markets for gas transport in and to Italy and supply markets in Italy are thus of particular economic importance in relation to the whole internal market and may be considered a substantial part of the internal market.

4.5. The competitive concern of a refusal to supply strategy

- (39) In the Statement of Objections the Commission considered that an undertaking occupying a dominant position in the provision and use of an essential facility (i.e. a facility or infrastructure, without access to which competitors cannot provide services to their customers), and refusing other companies access to that facility without objective justification or granting access to competitors only on terms less favourable than those granted to its own services, infringes Article 102 TFEU.³⁷ The Court of Justice held that the refusal by an undertaking holding a dominant position in a given market to supply with services an undertaking competing in a neighbouring market, where these services are indispensable to carrying on the rival's business and to the extent that the conduct in question is likely to eliminate all competition on the part of that undertaking, constitutes an infringement of Article 102 TFEU.³⁸
- (40) The Statement of Objections has therefore assessed if in this case the following conditions are fulfilled:
- (i) The refusal relates to a product or service that is indispensable to the exercise of a particular activity on a downstream market;

³⁶ See in this respect the judgment of 10th December 1991, T 179/90, *Merci convenzionali porto di Genova/Siderurgica Gabrielli* (1991) ECR I-05889, para. 15.

³⁷ Commission decision 94/19/CE, of 21 December 1993 in case IV/34689 - *Sea Containers/Stena Sealink* - Interim measures (OJ L 15, 18.01.1994, page 8, paragraph 66).

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

- (ii) The refusal is likely to lead either to the elimination or the prevention of the development of effective competition on the downstream market resulting in consumer harm;
 - (iii) The refusal is not objectively justified.
- (41) The Statement of Objections took the view that ENI's transport infrastructures to import gas may be considered an indispensable infrastructure since access to ENI's system of transport was objectively necessary to import gas and compete in the gas supply markets in Italy.
- (42) The Commission has further considered that there are technical, legal and economic obstacles capable of making it impossible, or at least unreasonably difficult, for the would-be importer 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), alone or in cooperation with other users.³⁹
- (43) In this respect, the Statement of Objections has identified concerns that ENI may have abused its dominant position on the relevant markets, thereby violating Article 102 TFEU, by implementing a *refusal to supply* strategy on its international transmission pipelines. Based on an assessment of ENI's management and operation of the TENP/Transitgas and TAG pipelines, the Commission took the preliminary view that ENI may have foreclosed its competitors by refusing to grant them access to capacity available on its transport networks (capacity hoarding, see paragraph 4.5.1 below), by granting access in a less attractive manner (capacity degradation, see paragraph 4.5.2 below) and by strategically limiting investment (strategic underinvestment, see paragraph 4.5.3 below).
- (44) These practices are considered to have taken place despite very significant short and long-term demand from third party shippers, potentially weakening competition on the downstream Italian gas markets and harming consumers in Italy.

4.5.1. Capacity hoarding

- (45) Based on the Commission's investigation, there is evidence that ENI may have implemented a strategy to systematically reduce access to capacity for third parties on its gas transport infrastructure to Italy.
- (46) Despite a steady and significant demand for capacity by third parties on a short and long term basis, ENI refused to offer existing available or unused capacity to other shippers on the TENP/Transitgas and TAG pipelines.

³⁹ 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, the ECJ judgment of 29 April 2004 Case C-418/01 *IMS Health* [2004] ECR I-5039, paragraph 29.

- (47) The Statement of Objections also sets out concerns that ENI failed, or (as regards TAG) may even have obstructed attempts, to increase the efficiency of the capacity management and thus to mitigate the problem of capacity congestion.
- (48) Finally, the Statement of Objections took the view that ENI may have *understated the capacity* that was technically available to third party customers, leading to unjustified refusals and deterring them from requesting transport capacities.
- (49) In this context, the Statement of Objections pointed out that ENI carefully maintained a direct control over import capacity to Italy over time. Notably, ENI secured significant primary capacity rights (although part of these were sublet by ENI on a long term basis to certain market players under bilateral agreements)⁴⁰ and corresponding long term booking contracts on its infrastructures both at the time the pipelines were built and throughout all subsequent capacity enhancements, with the exception of the latest capacity expansion on the TAG (operational from 2008).⁴¹
- (50) As a result, third party shippers only had limited access to transport capacity on ENI's import infrastructures preventing effective competition in the downstream gas supply markets. These practices can therefore be regarded as a constructive refusal to supply capacity to third parties. The Commission's concern is that this indicates an intentional strategy aimed at protecting ENI's interests in the downstream gas supply markets by foreclosing shippers willing to independently import gas into Italy.

4.5.2. Capacity degradation

- (51) In the Statement of Objections, the Commission raised the concern that even when capacity on the pipelines was offered by ENI, its purchase was made more difficult and less valuable to third parties by various means.
- (52) There is evidence that ENI may have intentionally delayed allocation of new available capacity or offered it to third parties on a short-term basis through subsequent organised sales even when it could have been offered on a longer-term basis (i.e. fragmented it). The Commission took the view that this practice would have reduced the value of capacity for ENI's competitors by rendering it more difficult to organize and plan their operations (from procurement of upstream gas to the contract with downstream clients).
- (53) It also appears that allocation procedures were designed in such a way that they would result in separate and uncoordinated capacity sales on complementary

⁴⁰ Namely, i) the so called "vendite innovative" which correspond to sales of secondary capacity and gas to four Italian shippers on the Swiss-Italian border for 10 years; ii) a long term sublet to a national electricity supplier on the TAG; iii) sublets of capacity and gas on the Greenstream pipeline to two gas suppliers.

⁴¹ The third party release of new capacity on the TAG was, however, offered by ENI as a commitment to remove antitrust concerns (see Commission press releases IP/05/195 and IP/03/1345 and AGCM Decision n. 11421 of 21 November 2002).

pipelines (such as TENP and Transitgas). This lack of coordination may have discouraged or prevented shippers from obtaining capacity they initially had, or had intended to, bid for.

- (54) In addition to these issues, the Commission also identified concerns that in some circumstances the type of capacity offered (interruptible and not firm) was such as to lower its value for third parties.

4.5.3. Strategic limitation of investment

- (55) 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.

- (56) According to the evidence in the Commission's possession, there was significant and credible long term capacity demand by third party shippers on ENI's international pipelines. Furthermore ENI was aware that additional capacity was necessary to satisfy these capacity requests as possible expansion projects were studied. In one internal document, ENI also recognised having an obligation as a holder of an essential facility⁴² to provide third party access and to assess in good faith capacity expansions that third parties could duplicate only at superior costs, if at all.⁴³

- (57) Nevertheless, according to the Statement of Objections, ENI's decisions to enhance transport capacity were mainly based on ENI's own needs resulting from new long-term contract commitments and the goal of keeping gas supply tight, while refusing to consider and eventually carry out expansions of capacity that would have allowed responding to third-party requests. In fact, ENI did not even gauge capacity demand from third party shippers, for instance via "open season" procedures, and also neither explored the willingness of third parties to commit financially to an expansion project nor explored specific co-financing offers made by some shippers.

- (58) The Commission took the preliminary view that the strategic limitation of investment in transport pipelines was driven by ENI's objective to keep a tight control over transport capacity. In particular, ENI was aware that if directly allocated to third parties additional capacity would boost competition on the downstream markets. Hence, limitation of investments was not driven by the lack of profitability of an increased transportation activity for ENI as a TSO. Rather, the Commission's concern is that such a strategy has been the result of ENI's conflict of interest stemming from, on the one hand, the negative repercussions on

⁴² The document in question referred to the expansion of the TTPC pipeline.

⁴³ In this context it is noteworthy that the mere fact that the current capacities are fully used by the 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, L 72/30). In such a situation, a dominant essential facility holder is under the obligation 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 of the essential facility available.

the profitability of its own gas supply business from supplying capacity to downstream competitors in the Italian market and the relatively modest increase in profits due to expansions on the level of its transport network business on the other hand.

- (59) The strategic limitation of investments was therefore meant to protect ENI's own downstream profits at the detriment of profits on the transportation level in order to maximize overall profits.⁴⁴ Any incentive for ENI, as operator of the transport pipelines, to make additional profits from transporting more "independent" gas on its pipelines was more than outweighed by the negative impact on ENI's profits in selling gas to customers on the Italian wholesale market.
- (60) The Commission concluded that ENI, as a vertically integrated and dominant company controlling the gas transport infrastructures to import gas into Italy, may have embarked upon a strategy of deliberately avoiding capacity expansions in order to ultimately limit third party access to capacity and thereby prevent competition and lower prices on the downstream markets.

4.5.4. Conclusion

- (61) For the above reasons, the Commission came to the preliminary conclusion that ENI's behaviour consisting of capacity hoarding, capacity degradation and strategic underinvestment can only be explained by the intention to protect the profits of its gas supply business in Italy by limiting gas imports by third parties into Italy. Furthermore, this behaviour of limiting competitors' access to indispensable gas transport capacity to Italy may have negatively affected competition and prices on the downstream gas supply markets, and may thus constitute an abuse under Article 102 TFEU.

4.6. Effect on trade between Member States

- (62) The Statement of Objections concluded that the potentially abusive behaviour may have affected trade between Member States within the meaning of Article 102 TFEU. According to the Court of Justice, any influence, direct or indirect, actual or potential, on the pattern of trade between Member States is sufficient to fulfil this criterion as long as the effect is appreciable.⁴⁵ According to the Commission's Statement of Objections, ENI's behaviour are capable of affecting trade between Member States because ENI's practices were capable of limiting the access to gas coming from other Member States and therefore raising barriers to entry for competing gas undertakings, including undertakings from other Member States, with regard to the gas supply markets. In other words, ENI's practices are likely to have affected import flows by hindering and excluding competitors from effectively competing with ENI in the supply markets in Italy.

⁴⁴ Due to the market caps on gas inflows on the incumbent player, which would limit the possibility to expand market shares, ENI would want to prevent competition downstream and to secure its margins by retaining control over the transport routes and limit their capacity.

⁴⁵ See Commission Notice, Guidelines on the effect on trade concept contained in Arts 81 and 82 of the Treaty, (2004) OJ C101/07, paragraphs 23 *et seq.* and 44 *et seq.*

5. PROPOSED COMMITMENTS

- (63) ENI does not agree with the findings of the Commission's Statement of Objections. It has, nevertheless, offered commitments pursuant to Article 9 of Regulation (EC) 1/2003, to meet the Commission's competition concerns (the "Commitments"). The Commitments can be summarised as follows:
- (64) ENI committed to divest its current shareholdings in companies related to 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. With respect to TAG, the Commitments foresee the divestiture to a public entity directly or indirectly controlled by the Italian Government, which is likely to be Cassa Depositi e Prestiti Spa.
- (65) Should no binding sale and purchase agreements be signed within the divestiture period, ENI will grant an exclusive mandate to an independent trustee ("divestiture trustee") to sell the divestment businesses to a suitable purchaser at no minimum price. In the case of TAG, the divestiture trustee would not be bound to sell the TAG shares to a public entity but would be entitled to sell to any suitable (public or private) purchaser.
- (66) Specifically, ENI committed to divest its stakes in the transmission system operators (the TSO's), and when applicable in the companies that hold the respective TSO's shareholding, of the pipelines TENP (the gas transmission system business in Germany), Transitgas (the gas transmission system business in Switzerland) and TAG (the gas transmission system business in Austria).
- (67) Concerning the gas transmission system business in Germany, ENI notably committed to divest (hereafter "the Divestment Business Germany"):
- its entire shareholding in Eni Gas Transport GmbH (hereafter "ENI D"), which in turn corresponds to a controlling participation of 49% in Trans Europa Naturgas Pipeline GmbH & Co. KG, the company owning and operating the TENP pipeline system with a total length of approx. 500 km (from the Dutch border where the TENP pipeline system is connected to the Dutch network to the Swiss border where TENP is interconnected with the Transitgas pipeline system);
 - its entire shareholding in Eni Gas Transport Deutschland S.p.A., which provides natural gas transportation services (as transmission system operator/TSO) through its ca. 60-70% of the capacity rights of TENP, with the remaining (ca. 30-40%) capacity managed by the other carrier E.ON Gastransport GmbH;
 - auxiliary equipment necessary for the operation of the transmission network;
 - intangible assets necessary for the operation of the transmission network (such as contracts and licenses and the beneficial use agreements).

- (68) Concerning the gas transmission system businesses in Switzerland, ENI notably committed to divest (hereafter "the Divestment Business Switzerland"):
- its share of 46% in Transitgas AG, which owns and operates the Transitgas pipeline system consisting of approx. 292 km of natural gas pipelines;
 - its entire shareholding in Eni Gas Transport International SA (hereafter "ENI GTI") which as TSO provides natural gas transportation services (including marketing and auxiliary services) for approx. 85-95% of the capacity of the Transitgas pipeline system;
 - auxiliary equipment necessary for the operation of the transmission network;
 - intangible assets necessary for the operation of the transmission network (such as contracts and licenses, plus the lease agreement under which capacity rights are assigned).
- (69) Concerning the gas transmission system businesses in Austria, ENI notably committed to divest (hereafter "the Divestment Business Austria"):
- its share of 89% in Trans Austria Gasleitung GmbH which holds 100% of the capacity rights for the transport of natural gas on the TAG pipeline pursuant to a lease agreement and that provides natural gas transportation services (as TSO);
 - intangible assets necessary for the operation of the transmission network (such as contracts and licenses, lease agreement).
- (70) The businesses will be endowed with the personnel necessary for the operation of the transmission network.
- (71) With respect to some auxiliary services, namely the metering, nominations and balancing activities, which are currently provided under a specific agreement by ENI GTI to both the Divestment Business Switzerland and the Divestment Business Germany, ENI has committed to set up an ad hoc company under its control for the supply of those activities to the purchaser(s) if required for a limited period of time following the closing of the divestitures.
- (72) Finally, as from 22 December 2009 and until the time of closing of the divestitures, ENI commits not to prolong or renew any transport contract or enter into any new transport contract for its benefit as shipper on the TAG, TENP and Transitgas pipelines, except for possible future auctions and other public allocation procedures for reverse flow transportation capacity towards markets other than the Italian one.

6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) No. 1/2003

- (73) In response to the publication of 5 March 2010 of a notice pursuant to Article 27(4) of Regulation (EC) No. 1/2003, the Commission received 14 responses from

interested third parties, namely from shippers, some vertically integrated TSO's and two regulators.

- (74) In general, the respondents welcomed the structural remedies offered by ENI. Although some respondents raised concerns with respect to certain elements of the Commitments, the Commission does not consider that these concerns put the effectiveness and viability of the Commitments in question, for the following reasons.
- (75) According to some respondents, ENI had very low capacity utilisation rates on the TAG pipeline throughout the period 2008-2010. These respondents consider that such low utilisation rates indicate that ENI may have hoarded a significant degree of secondary capacity (i.e. capacity already booked by ENI on a long-term basis) and that the divestiture by ENI of its stake in the TAG TSO would not address this concern, since ENI would retain its current capacity bookings on the pipeline.
- (76) The statements in question were based on calculations mainly drawing from publicly available data on the TAG website. As a result, the figures did not take account of a number of factors such as the interruption of gas supply from Russia in the first couple of months of 2009 or the gas volumes auctioned during the relevant period by ENI on the secondary market. With respect to this latter factor, public data refer to allocation of primary capacity and thus are unlikely to have distinguished between users when this capacity has been sublet or sold on a secondary basis. Therefore, in this particular situation, the concerns with respect to alleged secondary capacity hoarding could not be substantiated to such a degree that the Commission would consider, for the purpose of this decision, that there is a sufficient European Union interest that would justify requiring ENI to address these concerns in the Commitments.
- (77) Some third parties suggested clarifying ENI's rights to acquire reverse gas flows on the divested network infrastructures in the proposed Commitments. However, it appears that these comments are based on a misunderstanding with regard to the alleged existence of pre-emption rights to ENI's benefit. Indeed, it is clearly stated in the Schedules of the Commitments, that ENI does not hold any predefined rights with respect to reverse flow capacity on the existing pipelines, but only that ENI can participate on an equal basis with other market players to possible "future auctions and other public allocation procedures for reverse flow transportation capacity towards markets other than the Italian one". The Commission has clarified that the reverse flow does not negatively affect transport capacity into Italy.
- (78) A number of comments concerned the non-inclusion of certain auxiliary services carried out by ENI GTI among the transferred assets. Namely it was considered problematic not to include the activities of nomination, matching and capacity allocation, metering and billing and credit. In particular, respondents emphasized the sensitiveness of the information on third-party flows that ENI could still collect if it were to continue to provide these services.
- (79) The Commission agrees that a clarification of this issue may contribute to avoid any misunderstanding as to the divestments to be undertaken. Indeed, ENI D and

ENI GTI concluded a service contract for the activities of metering, nomination, matching and capacity allocation (the "Service Agreement") in order not to duplicate personnel. The ENI GTI team that is part of the Divestment Business Switzerland currently provides these services in part also for the Divestment Business Germany as ENI D's personnel (which is part of the Divestment Business Germany) can not fully cover the services by itself. As a result, under the original commitment proposal there would be a full divestment of these services for the Divestment Business Switzerland while an issue would have partly remained for the Divestment Business Germany. Indeed, ENI upon request of the purchaser would have provided those services to the Divestment Business Germany.

- (80) Other comments concerned issues outside the scope of the procedure or could not be considered as valid arguments against the effectiveness of the remedies. This concerns the fact that the Commitments, notably, do not foresee a capacity release as is the case in other recent antitrust proceedings against gas undertakings or the claim that ENI should be required to divest its Italian national gas transmission grid as a supplementary measure. As for this latter objection any measure regarding the national network would be out of the scope of the current procedure, as the concerns only relate to ENI's management of its international import pipelines. With respect to a possible capacity release, the Commission considers that the theory of harm in the present case differs substantially from the other antitrust cases mentioned in the submissions. In the present case, the Commission's concerns are that certain features of the management and operation of natural gas transmission pipelines by ENI, namely the way access to capacity was provided by ENI (i.e. by hoarding some capacity, by offering it in a degraded manner or by not investing despite the demand), could constitute an abuse of a dominant position infringing Article 102 TFEU. In the latter cases the Commission came to the preliminary view that the long-term reservations by dominant shippers, not the management of the transmission network as in this case, might have infringed Article 102 TFEU in a way that would have completely jeopardised access by third parties.⁴⁶
- (81) Finally, some respondents raised concerns with respect to the suitability of Cassa Depositi e Prestiti Spa (hereafter CDP) to acquire TAG. The Commission considers that CDP is indeed independent of and unconnected to ENI as long as the divested business is included in the "ordinary activities" of CDP, for the reasons outlined in paragraphs (96) et seq. below.
- (82) In response to the market test, ENI submitted a revised proposal for commitments ("Final Commitments") on 8 July 2010, which took account of the comments received.
- (83) According to the Final Commitments, the Divestment Business Switzerland will continue to provide the above-mentioned operational activities to ENI D under the

⁴⁶ See Commission decision of 3 December 2009 in case COMP/39.316 – Gaz de France and Commission decision of 4 May 2010 in case COMP/39.317 – E.ON gas foreclosure (not yet published; see press release IP/10/494 of 4 May 2010).

terms and conditions of the current contract, if so required by the purchaser up to a maximum of two years after the closing of the Divestment Business Germany.

- (84) In view of the results of the market test, the Commission considers the Final Commitments sufficient to effectively remove the competition concerns expressed in the Statement of Objections.

7. PROPORTIONALITY OF THE FINAL COMMITMENTS

Introduction

- (85) According to settled case law, the principle of proportionality requires that the measures adopted by EU institutions must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.⁴⁷ Where there is a choice between several appropriate measures, recourse must be had to the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued.⁴⁸ For the assessment of the proportionality of Commitments submitted within the framework of Article 9 of Regulation 1/2003, the Commission takes into account that the Commitments are not imposed by the Commission for an established infringement under Article 7 (1) of Regulation 1/2003, but voluntarily proposed by the undertaking seeking to bring the procedure to an end without a formal decision on the existence of an infringement. The Commission also takes into account the relevant national regulatory framework.
- (86) According to the case law of the Court of Justice⁴⁹, the Commission has a margin of appreciation in examining whether the commitments are appropriate and necessary, also in view of ensuring an efficient handling of competition cases. Specifically, the Court states that, in connection with the acceptance of commitments given by undertakings, compliance with the principle of proportionality requires the Commission only to ascertain that those commitments address the problems it has identified and expressed to the undertakings, and that they have not offered less onerous commitments that also address those concerns adequately. The Commission is not obliged to seek out less onerous or more moderate solutions than the commitments offered to it, or to compare the commitments offered by an undertaking with the (potential) measures it would itself have imposed in an Article 7 decision, and to regard as disproportionate any commitment which goes beyond these (potential) measures. Undertakings offering commitments consciously accept that the concessions they make may go beyond

⁴⁷ Judgement of the Court of First Instance of 19/07/1997 in case T-260/94, *Air Inter v Commission* [1997] ECR II-997, paragraph 144, and Case T-65/98, *Van den Bergh Foods v Commission* [2003] ECR II – 4653, paragraph 201.

⁴⁸ Judgement of the Court of 11/07/1989 in case 265/87, *Schröder* [1989] ECR 2237, paragraph 21, and judgement of the Court of 9/03/2006 in case C-174/05, *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I – 2243, paragraph 28.

⁴⁹ Judgment in Case C-441/07 P *Commission v Alrosa Company Ltd.*

what the Commission could itself impose on them in a decision adopted under Article 7 of Regulation No 1/2003.

Divestiture of transport infrastructures

- (87) The Final Commitments proposed by ENI are *necessary* and *sufficient* to address the concerns identified by the Commission in its Statement of Objections, without being disproportionate. Notably, it was the view of the Commission that ENI may have abused its dominant position by implementing a refusal to supply strategy on its transportation pipelines. ENI's management and operation of natural gas transmission pipelines, including investment decisions on capacity expansions, may have resulted in a foreclosure of competitors in the supply of gas into Italy and subsequently harm to consumers.
- (88) ENI's commitment to divest its shareholdings in international gas transmission pipelines (TENP, Transitgas and TAG) is a structural commitment of the type envisaged in the Statement of Objections.
- (89) The Final Commitments are suitable to remove the Commission's competition concerns expressed in the Statement of Objections for the following reasons. The divestiture of ENI's stakes in its international transport businesses sufficiently addresses competition concerns directly related to the management of capacity on the import infrastructures. ENI will no longer be subject to the inherent conflict of interest it faced operating both as a transmission system operator and as a company active on the Italian wholesale market. Given the fact that ENI will lose control over the transport infrastructures, it will effectively no longer be in a position to refuse to grant access to these transport infrastructures, grant access in a less attractive manner, and limit investments in new capacity to transport gas into Italy.
- (90) The Final Commitments are proportionate as there is no equally effective behavioural remedy to the divestment of ENI's shares in its transport network businesses to address the Commission's concerns. According to the Statement of Objections, the Commission had concerns about the incentives ENI had with regard to the daily management and operation of its transport infrastructure as well as with respect to its incentives to explore and implement investments in new capacity. The Commission took the view that ENI's conduct may have limited short and long-term capacity available to third parties, repeatedly and lasting for a period of several years. As laid out in the Statement of Objections in this case, this refusal to supply strategy would have derived from the inherent conflict of interest a dominant operator such as ENI, faces in controlling both, the transmission and at the same time the supply of gas. This position gave ENI the incentive to engage in a profitable strategy of foreclosing rivals to protect its margin in the downstream gas supply markets.
- (91) Absent a structural remedy, the incentives of a vertically integrated gas company to further adopt the alleged anti-competitive behaviour would not have been removed, resulting in the risk of not effectively bringing the alleged infringement to an end. Decisions both with respect to day-to-day management of gas transmission systems and to invest in transport capacity should be taken not only independently

by the TSO, but also having regard to the commercial interests (i.e. profit maximising) of the TSO alone and not of any particular gas supplier.⁵⁰ Only by this means is it possible to remove the link between the decisions on the TSO level and the interests of downstream profitability.

- (92) A behavioural remedy would not only have required relying on additional measures of supervision (including the constant monitoring of the TSO's management and operation) but moreover would not have been sufficient to fully alleviate the Commission's concerns. In this regard it has to be noted that during the period of investigation, compliance programmes and monitoring of the TSO's behaviour already formed an integral part of the regulatory framework but did not prevent ENI from engaging in the alleged anticompetitive conduct analysed in the Statement of Objections.⁵¹
- (93) Conversely, the divestiture of transport businesses to a suitable buyer (independent of and unconnected to ENI) allows restoring the proper operation and management of the gas transit pipelines in line with market demand. This provides for a clear-cut solution to the identified competition concerns.
- (94) Overall, and in particular with a view to the large number of gas customers in the Italian downstream markets and the important potential harm for these customers, the Final Commitments must be regarded as adequate and proportionate.
- (95) The public consultation pursuant to Article 27 (4) of Regulation (EC) No. 1/2003 confirmed that the divestiture of ENI's international transport pipelines is proportionate to the identified competition concerns.

Suitability of CDP or another public entity controlled by the Italian government as purchaser of the gas transmission business in Austria

- (96) ENI's Commitments regarding TAG are such that ENI will divest its shareholding to either CDP or another public purchaser controlled by the Italian government. If no binding sales and purchase agreement will be concluded before the end of the divestiture period, ENI's shares in TAG will be sold by the divestiture trustee to any suitable public or private purchaser.
- (97) As a result of the divestiture to CDP, the latter will jointly control the TSO together with OMV.⁵²

⁵⁰ A structural separation between transportation and supply activities is considered "*the most effective tool by which to promote investments in infrastructure in a non-discriminatory way, fair access to the network for new entrants and transparency in the market*". See Directive 2009/73/EC, of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, Recital 8.

⁵¹ On the difficulties to implement behavioural remedies, see also Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, page 1, paragraphs 15, 17 and 69.

⁵² Should such a divestiture to CDP, or to another public body, not be achieved, the sale of the shareholding by the trustee to a private purchaser (suitable buyer) [...].

- (98) The Commission has therefore further investigated whether CDP is to be considered a viable and suitable purchaser for ENI's shareholding in TAG.
- (99) In line with the Commission's practice in cases where a party to a competition proceeding commits to divest a business with a view to removing competition concerns,⁵³ in order to be approved as a potential purchaser, CDP or another public body should prove to:
- be independent of and unconnected to ENI;
 - have the financial resources, competencies and incentives to develop the divested business as a viable and reliable facility;
 - not create prima facie competition concerns.
- (100) With respect to the criterion of independence and lack of connection to ENI, it should be noted that according to the Commission's practice, 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 having an independent power of decision. [...].⁵⁴
- (101) In the present case, the Commission is satisfied that CDP meets these criteria that provide an appropriate benchmark also in this case.
- (102) CDP is a joint-stock company under public control of the Italian government, through the Ministry of Economy and Finance ("MEF").⁵⁵ CDP's main purpose is to deploy financial resources for public investments, infrastructure projects for the delivery of public services, large-scale public works of national interest and other public-interest projects. Among its main lines of activity, CDP may acquire equity investments and interests in companies, other businesses, consortiums and business groupings in Italy and abroad. Inter alia, CDP owns participations in activities that are of general economic interest as well as activities that are potentially conducted in competition with other market players. Specifically, CDP currently holds majority or minority stakes, among others, in the following companies: ENI, TERNA, Tunnel di Genova and Fondi Italiani per le Infrastrutture SGR .

⁵³ See for commitments under the EC Merger Regulation the Commission Notice on remedies acceptable under Council Regulation (EC) No 137/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1, point 48. The Commission has applied the same criteria for divestitures under Article 9 of Regulation No 1/2003, see Commission decision of 26 November 2008, cases COMP/39.388 – German Electricity Wholesale Market and COMP/39.389 – German Electricity Balancing Market, and decision of 18 March 2008, case COMP/39.402 – RWE gas foreclosure.

⁵⁴ See Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.04.2008, p. 1, points 52 and 53.

⁵⁵ CDP is the result of the transformation of a government agency into a joint-stock company pursuant to Article 5 of Decree Law 269 of 30 September 2003. The MEF holds a controlling share of 70% in CDP, while the rest is held by a group of bank foundations.

- (103) CDP's by-laws established a system of organisational and accounting separation between the activities of general economic interest (Separate Account) and the other activities performed by CDP (Ordinary Account) that are not of general economic interest and are, therefore, potentially conducted in competition with other market players. As regards the organisational structure of CDP the Public Investments and Development Policies Management & Support divisions fall under the Separate Account, while the Infrastructure & Strategic Projects division falls under the Ordinary Account.⁵⁶
- (104) Separate Account activities include, among others, the management of the assets and functions transferred to MEF at the time of CDP's transformation into a joint-stock company, and the provision of advisory services to government bodies. [...].⁵⁷ Among these are the shares that CDP holds in ENI. It can therefore be considered that this shareholding is managed as if it were a direct shareholding of the MEF and is only attributed to CDP for accounting purposes.⁵⁸
- (105) For the rest of the activities carried out by CDP, the ordinary management applies. [...].
- (106) CDP may be regarded as independent from ENI, provided that the TAG shareholding is transferred to CDP under its "Ordinary Account" management.
- (107) CDP forms an economic unit with an independent power of decision with respect to the "Ordinary Account" shareholdings. [...]. There are no interlocking directorships between CDP and ENI, and there exist adequate safeguards ensuring that commercially sensitive information is not shared between them. [...].
- (108) The fact that CDP also holds shares in ENI does not exclude CDP's independence of ENI, [...]. Indeed, this shareholding is to be assessed as if it were directly held by the MEF.
- (109) The Commission is furthermore satisfied that CDP has the financial resources, competencies and incentives to develop the divested business as a viable and reliable facility. CDP is a financially solid company with a proven expertise and experience in managing majority and minority shareholdings in a number of important companies active in various sectors of the economy, in particular in infrastructure (including for example in the operation of the Italian national electricity grid, through its participation in TERN). Whilst CDP may for the time

⁵⁶ This new organisational structure went into effect on 31 December 2008.

⁵⁷ CDP's by-laws establish that pursuant to article 5, paragraph 9, of the Decree Law 269/2003, the Minister of Economy and Finance has the power to determine the general policies of the Separate Management and also has the power, pursuant to Article 5, paragraph 11, of the Law Decree, to determine the terms and conditions of the exercise of the Separate Management as stated therein.

⁵⁸ This is explicitly stated in CDP's by-laws Article 5, paragraph 8, of Law Decree No. 269/2003 which stipulates that a separate system for the sole accounting and organisational purposes (hereinafter the "Separate Management") shall be established within CDP the management of which is in line with transparency and safeguard criteria of the economic balance for the achievement of the corporate object of CDP.

being not have specific experience in managing gas transportation systems, it has to be highlighted that with the acquisition of ENI's shares in TAG GmbH, TAG GmbH will be jointly controlled by CDP and OMV, the latter of which as well as TAG GmbH itself appear to dispose of all the technical and organisational skills to effectively manage the gas transportation activity.

- (110) Finally, as CDP is currently neither directly nor indirectly involved in any activity in the procurement, transport or supply of natural gas (apart from the stake in ENI already discussed before), its acquisition of ENI's shareholding in TAG does not create any prima facie competition concerns.
- (111) The Commission therefore concludes that CDP is a suitable purchaser for the divested business in Austria.
- (112) In case ENI were to sell its shareholding in TAG not to CDP but to another public entity controlled by the Italian government, the Final Commitments provide that the purchaser has to be approved by the Commission according to the same criteria as laid out in points (99) and (100) above.

Other provisions of the Commitments

- (113) ENI has also committed not to prolong or renew any transport contract or enter into any new transport contract for its benefit as shipper on the TAG, TENP and Transigas pipelines⁵⁹, except for possible future auctions and other public allocation procedures for reverse flow transportation capacity towards markets other than the Italian one. This provision is necessary and proportionate to ensure that ENI will not be in the position to increase its capacity rights at the detriment of third parties, thus jeopardizing the effectiveness of an independent allocation of primary capacity available on the existing pipelines to other shippers. In contrast, contracts for the acquisition of reverse flow capacity do not alter the availability of existing transport capacity.
- (114) The remaining elements of the Final Commitments such as the preservation of the viability of the business to be divested, the hold-separate obligations, and the provisions on ring-fencing, non-solicitation, due diligence and reporting as well as the role conferred upon the divestiture trustee are transitional and ancillary to the main commitments. Those provisions are necessary to ensure the implementation of the Final Commitments offered by ENI and are proportionate. They also reflect the standard practice of the Commission in case of divestiture remedies in merger proceedings as set out in the Commission notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004.⁶⁰

⁵⁹ As stated in paragraph (72) above, this provision will last from 22 December 2009 until the time of closing of the divestitures.

⁶⁰ OJ C 267, 22.10.2008, page 1.

8. CONCLUSION

- (115) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No. 1/2003, the Commission makes the Commitments, offered by the undertaking concerned to meet the Commission's concerns expressed in its Statement of Objections, binding upon it. This decision does not conclude whether or not there has been or still is an infringement. The Commission's conclusion that the Final Commitments offered are sufficient to meet its concerns and proportionate is based on its Statement of Objections, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation 1/2003.
- (116) In the light of the Final Commitments offered, the Commission considers that there are no longer grounds for action and, without prejudice to Article 9(2) of Regulation (EC) No. 1/2003, the proceedings in this case should therefore be brought to an end. This decision is without prejudice to the transposition and application of the Directive 2009/73/EC and Regulation 715/2009 (third package)⁶¹ on the establishment of an internal market for energy and in particular on the different models of unbundling foreseen therein.

⁶¹ 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 Regulation 715/2009 of the European Parliament and of the Council of 13 July 2009 (OJ L 211/94 of 14.8.2009) on conditions for access to the natural gas transmission networks (OJ L 211/36 of 14.8.2009).

HAS ADOPTED THIS DECISION:

Article 1

The Commitments attached to this decision shall be binding on ENI Spa and all its subsidiaries.

Article 2

There are no longer grounds for action by the Commission and the proceedings in this case shall be brought to an end.

Article 3

This Decision is addressed to Eni S.p.A., Rome, Piazzale Mattei 1.

Done at Brussels,

For the Commission

Member of the Commission