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Case COMP/M.3410 Total/Gaz de France Merger Control as a Tool to Greater Liberalisation in the Gas Sector

Eric Morgan de Rivery** and Vincent Guérard***

EC law; France; Gas supply industry; Mergers

Introduction

In its decision of October 8, 2004¹ (the “Decision”), the European Commission (“the Commission”) cleared French oil and gas producer Total’s acquisition of several gas assets located in the South-west and Central regions of France from the publicly owned French gas undertaking, Gaz de France (“GDF”). Total and GDF already jointly owned and/or controlled certain of these assets. The operation took place in the wider context of an unwinding of Total’s and GDF’s cross-shareholdings in the companies Gaz du Sud Ouest (“GSO”)² and Compagnie Française du Méthane (“CFM”).³ GSO and CFM are integrated companies involved in the business of gas transportation and supply respectively in the regions of South-west and Central France. The unwinding led to the resulting re-organisation of this complex contractual relationship, which dated from the 1950s.

Indeed, although Total had always been France’s main gas producer,⁴ it was unable to market its gas directly in France. This situation arose from the former monopoly system established by the French Law of April 8, 1946, which nationalised most gas activities in France (with the exception of production and storage) and entrusted these to GDF. Under this regulatory regime, GDF was granted both a monopoly on the import and export of gas and a quasi-monopoly on gas distribution (with only a few local distributors remaining). With respect to transportation, this activity could only be carried out by: (i) a state owned entity; or (ii) entities in which a state owned entity held at least a 30 per cent equity interest. GDF thus acquired a stake in GSO. In 1958, Elf Aquitaine (now Total) and GDF created CFM at the request of the French authorities, who were willing to structure a co-operation between the French oil sector and the national gas monopoly. Due to the above-mentioned contractual constraints, Total and GDF, and their respective affiliates GSO and CFM, were until recently closely tied together, both through cross-holdings and a complex bundle of supply, transportation, and storage contracts.

The existing regulatory framework was completely restructured in the wake of two European Directives (the “First Gas Directive”⁵ and “Second Gas Directive”⁶), which were respectively implemented by the French Law of January 3, 2003 and the French Law of August 9, 2004.⁷ In particular, the Second Gas Directive, which entered into force on July 1, 2004, provided for the broad opening of the gas market (since July 1, 2004, all non-residential customers have become so-called “eligible” (i.e. they are free to choose their supplier), which comprises 70 per cent of the French gas

¹ The authors wish to extend their thanks to Mr Jeremy Bernard, Associate, Jones Day, Paris and Mrs Sabine Thibault-Liger, Docteur en Droit, Associate, Jones Day, Paris, for their invaluable assistance in preparing this paper. All views expressed are strictly personal and do not necessarily reflect those of Total S.A.

² Avocat à la Cour de Paris, Partner, Jones Day.

³ Gas & Power, Legal Department, TOTAL.

2 GSO was jointly owned by GDF (30%) and Total (70%).
3 CFM was jointly owned by GDF (55%) and Total (45%).

⁴ Total’s gas assets in France chiefly derive from the long-standing holdings of Elf Aquitaine prior to their merger in 2000, and in particular, the Lacq gas field which had been the main source of gas supply in France until the exploitation of the North Sea in the 1970s.


market by volume), imposed third party access to all gas infrastructures (not only transportation and distribution networks and liquefied natural gas ("LNG") terminals, but also storage facilities), and required the legal unbundling of transportation and supply activities. This new legal framework: (i) allowed direct access to the market by new entrants, including Total; (ii) removed the necessity for transportation companies to be at least 30 per cent held by state owned entities; and (iii) required that GDF, GSO and CFM be split into entities separately carrying transportation and supply activities.

In this context, and with the encouragement of the French Energy Regulatory Commission (Commission de Régulation de l’Energie ("CRE")), Total and GDF decided to sever most of their previous ties. Consequently, in the South-west region of France, Total acquired exclusive control over GSO. Total also acquired some facilities owned, operated by and/or dedicated to GDF, consisting of: (i) gas transportation pipelines located within GSO’s network (the "Pipelines"); (ii) the gas pipeline between France and Spain (known as the "Lacal"); and (iii) Izaute’s natural gas storage facility ("Izaute"). Furthermore, in the Central region of France, Total took over a portion of CFM’s gas supply business (a portfolio of eligible customers referred to as SC1”), whilst selling its shareholding in CFM to GDF. However, since GDF already had exclusive control over CFM, the acquisition of GDF’s interest in CFM was not included in the scheme reviewed by the Commission.

Several aspects of the Decision can be regarded as concrete illustrations of the 2004 reforms of the European merger control framework. In particular, the Decision illustrated the possibility for the parties, under the amended EU Merger Control Regulation 139/2004, to notify the Commission of a proposed concentration, rather than a final concentration. In the present case, the parties to the concentration did not obtain the Commission’s jurisdiction by filing a definitive agreement. Rather, the parties notified a Protocole d’Accord (i.e. a framework agreement) of November 19, 2003 (amended on June 30, 2004) (the "Protocole"). The Protocole was an agreement to negotiate various agreements between Total and GDF, including those relating to the concentration. While not including any price, the Protocole contained a clear view of the parties’ goals, as well as detailed provisions on various key issues. Furthermore, the parties issued two press releases to publicly announce their intended operation, and the parties consulted both the French and European regulatory and competition authorities11 prior to, and following, signature of the Protocole. All of these initiatives made it clear that the contemplated concentration would be ultimately implemented.

The involvement of both regulatory and competition authorities can be explained by the fact that: (i) the Decision was the first major Commission concentration decision concerning the gas sector to be adopted after the entry into force of the European Directives opening this sector; and (ii) said Decision may be regarded as launching the transition from a traditionally monopolistic French gas industrial framework (recently liberalised) to a free competition situation. The Decision may, in fact, be construed as an example of the possible utilisation of the merger rules, with the aim of furthering liberalisation of the gas market.13

8 The CRE is the French independent regulator for the electricity and gas sector.
10 The previous merger control Regulation, Regulation 4064/89, imposed the notification of a concentration with a Community dimension “not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest” (emphasis added) (Art.4(1), first indent, of Regulation 4064/89). By contrast, the new merger control Regulation allows the notification of: (i) concentrations with a Community dimension “prior to their implementation” and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest” (emphasis added); and (ii) proposed concentrations with a Community dimension (Art.4(1), second indent, of Regulation 139/2004). Under Regulation 139/2004, the notification of such proposed concentration must be filed when the parties demonstrate “a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a community dimension.” (ibid.). The burden of proving the existence of a good faith intention to enter into an agreement lies with the parties to the proposed concentration. As evidence of such an intention, the European legislator lists the following documents: “an agreement in principle, a memorandum of understanding, or a letter of intent” (Recital 34 of Regulation 139/2004). However, none of these concepts has been defined thus far.
11 Deliberation of the CRE of December 15, 2003 on the framework agreement between Gaz de France and Total concerning the unwinding of their cross shareholding in CFM and GSO.
13 On several occasions, the Commission sought to obtain undertakings from the parties in order to merely improve or accelerate liberalisation of a formerly monopolistic sector. In the latter case, the Commission has, for instance, imposed
Indeed, the Decision closely coincided with the rendering of two other EU antitrust decisions also relating to the French gas market,14 and brings a major, albeit not final, contribution to liberalising such market. Through the Decision itself, the Commission sought to stimulate the liberalisation process of the French gas market. This required flexibility in applying the EU merger control rules, in order to assimilate both the full complexity of the operation and the transitory period in which the concentration was sought to be implemented. The Decision thus demonstrates a flexible approach aimed at assessing the overall operation with a view to opening the French gas market (Section I). However, the Commission clearly appeared determined to ensure full and unconditional liberalisation of this market, and in particular to prevent the parties from impairing this in the short or medium-term. As a result, the Decision adopted a comprehensive regulatory approach, first through a competition analysis based on the objectives of the Second Gas Directive (Section II), and second by imposing behavioural remedies to secure such objectives (Section III), thereby using EU merger control as a tool to extend the reach of this Directive.

1. A flexible approach to assessing the operation as a whole

Both the historical context and the liberalisation goal of the concentration explain the breadth and specificity of the operations involved. Indeed, understanding the complexity of the historical contracts between Total and GDF required a careful delineation of the scope of the concentration itself. Moreover, the concentration on the parties to a concentration that they transform a subsidiary into an economically viable competitor (e.g. in the EDF/EnBW Decision, the French incumbent electricity operator, EDF, accepted to render CNR a fully independent electricity producer; see Commission Decision of February 7, 2001, Case COMP/M.1853 EDF/EnBW, at [91] and [92]) or that they open facilities to third parties and to which competitors must have access in order to compete effectively with the parties to the concentration (e.g. in the VEBA/VIAG Decision, VEBA agreed to increase the access for newcomers to the electric interconnector between Germany and Denmark; Commission Decision 2001/5319 of June 13, 2000, Case COMP/M.1673 VEBA/VIAG [2001] O.J. L188/1, at [224], [246] and [247]). In one merger decision, the Commission even imposed an electricity release (see [93]–[104] of the EDF/EnBW Decision).

While the early termination of the first two above-mentioned agreements reveals a flexible definition of the concept of an undertaking that can be subject to a change of control (1.1.1.), the last operation reflects a more flexible conception of the notion of change of control itself (1.1.2.).

1.1. A flexible concept of a concentration

The concentration's primary goal required the parties to undo the intricate ties between them, which had been established several decades ago on the French gas market. In particular, this required termination of the parties' cross-shareholdings in GSO and CFM, to enable new entry onto this market.

This goal was attained through five different operations, which established the boundaries of the concentration. While two of these (the acquisition of SC1 and the Pipelines) did not raise specific issues, the other three operations contained unusual features and illustrated the adaptability of the Commission's practice in this area:

- early termination of a lease agreement (the so-called "contrat d'affermage de concession de canalisations de transport de gaz") relating to the Lacq pipeline between Lacq and the French/ Spanish border;
- early termination of storage agreements relating to the Izauta underground gas storage facility located in the South-west region of France; and
- early withdrawal of GDF from GSO, which was to enable Total to exploit a gas network and to supply customers and local gas distributors located in the South-west region of France.

While the early termination of the first two above-mentioned agreements reveals a flexible definition of the concept of an undertaking that can be subject to a change of control (1.1.1.), the last operation reflects a more flexible conception of the notion of change of control itself (1.1.2.).

1.1.1. A flexible definition of the undertaking subject to a change of control

In the Decision, the Commission considered that certain transmission and storage facilities, which formed...
part of the concentration, constituted an undertaking within the meaning of the merger control rules. This legal qualification constitutes a plain, though unusual, application of the provisions of the 1998 Notices interpreting the concepts of concentration and undertakings concerned within the meaning of the EU merger control regime:

— First, these Notices consider that an asset can be an undertaking, provided that such asset constitutes a business to which a turnover can be attributed. \(^{15}\)

— Secondly, the Notice on the concept of a concentration indicates that joint control may result not only from equality between the two parent companies in voting rights or in representation in the decision-making bodies of the joint venture, but also from the exercise of a veto right and/or the implementation of one or more joint decision-making procedures, i.e., such veto rights and joint decision-making procedures must be related to the strategic commercial behaviour of the joint venture and must go beyond the rights granted to investors in order to protect their financial interests. For instance, the veto rights related to the budget, business plan, major investments and the appointment of senior management of the joint venture go beyond those normally accorded to investors. These veto rights and decision-making procedures can be set out in the statutes of the joint venture or conferred by an agreement between the parent companies. \(^{17}\)

\(^{15}\) Commission Notice on the concept of concentration under Council Regulation 4064/89 on the control of concentrations between undertakings, [1998] O.J. C66/S, Commission Notice on the concept of undertakings concerned under Council Regulation 4064/89 on the control of concentrations between undertakings, [1998] O.J. C66/14. These Notices interpret former Regulation 4064/89. Despite the replacement of such Regulation by Regulation 139/2004 (see Art.25 of Regulation 139/2004), these Notices can still be considered applicable since the definition of control provided in Regulation 139/2004 is exactly the same as in the previous Regulation.

\(^{16}\) "The object of control can be one or more undertakings which constitute legal entities, or the assets of such entities, or only some of these assets. The assets in question, which could be brands or licenses, must constitute a business to which a market turnover can be clearly attributed" (Commission Notice on the concept of concentration, para.11). "The concept of 'parts' is to be understood as one or more separate legal entities (such as subsidiaries), internal subdivisions within the seller (such as a division or unit), or specific assets which in themselves could constitute a business (e.g., in certain cases brands or licenses) to which a market turnover can be clearly attributed" (Commission Notice on the concept of undertakings concerned, para.14).

\(^{17}\) Commission Notice on the concept of concentration, paras 21-23.

In casu, the Commission considered that the Lacal and Izauta facilities could be considered as undertakings for merger control purposes. Whilst such possibility has existed since 1998, the Commission appears to have seldom applied it. Nevertheless, it can be said that concrete applications for such provisions on undertakings are likely to arise from concentrations involving undertakings that control facilities in network industries that cannot be duplicated. Since such facilities cannot be either split or duplicated, but only shared, a change of control on a lasting basis of such facilities has ipso facto an impact on the structure of the market. In this respect, such change of control may be subject under certain conditions to the EU Merger Regulation.

Precisely, the Commission considered that the early termination of the leases on such assets amounted to a change of control over them. Prior to the concentration, although Total was the sole owner and authorised operating manager of the Lacal and Izauta facilities, GDF was the sole user of these facilities and benefited, under the lease and storage agreements, from a veto right on any significant investments initiated by Total. As regards the Lacal facility, the lease agreement also attributed an exclusive right to GDF to sell the transport capacities to third parties and a joint decision-making right with Total on issues related to the financial management of this particular facility. The Commission considered that by eliminating these specific characteristics, Total would acquire sole control, rather than GDF and Total exercising joint control as provided in the existing agreements.

Beyond a flexible concept of an undertaking subject to a change of control, the Decision relies on a flexible conception of the change of control itself, which, pursuant to Art.3(1) of Regulation 139/2004, constitutes the criterion for a concentration.

1.1.2. A flexible conception of the change of control

The third operation included by the Commission in the scope of the concentration consisted of Total's acquisition of sole control over GSO. Such acquisition reveals a flexible concept of change of control which, in the present case, derived from the termination of GSO's economic dependence on GDF. The parties ended such dependence through GDF's early withdrawal from GSO.

Prior to the concentration, GSO was subject to the joint control of Total and GDF. Total had a 70 per cent stake in GSO and a corresponding presence on the Board of Directors of the company. GDF had a 30 per cent stake and no veto rights. On a de facto
basis, the Commission considered that GDF jointly controlled the company with Total. Such situation is expressly contemplated by the above-mentioned Notice on the concept of concentration. Indeed, the Notice acknowledges that joint control can be established on a legal or de facto basis and that it is possible that an "economic dependence situation leads to control on a de facto basis where, for example, very important long-term supply agreements [. . .], coupled with structural links, confer decisive influence". The Commission considered that, besides GDF's 30 per cent stake in GSO's share capital, GSO was so heavily dependent on GDF that the latter had de facto joint control with Total over the company. Indeed, GDF purchased more than 50 per cent of GSO's natural gas sales, while supplying over 50 per cent of GSO's gas needs.

The change of control over GSO resulted from a set of combined operations that terminated such economic dependence, i.e. (i) Total's purchase of GDF's shares in GSO; and (ii) Total's internal reorganisation of its interests in the gas market. The Commission considered that the following elements (i.e. the sale of GDF's 30 per cent stake in GSO to Total, combined with the merger of GSO with other Total assets, and the conclusion of new gas purchase and sales agreements between Total and GDF for diminishing quantities over a certain period) would lead to Total's exclusive control over GSO. All of these combined operations led to the termination of GSO's economic dependence on GDF, and therefore to Total's acquisition of sole control over GSO.

The organisation of the French gas sector in the GSO area, both prior and subsequent to the concentration, explains the substantial role of the economic dependence factor in defining the change of control. Prior to the concentration, the parties' joint control over GSO was primarily explained by the close contractual relationship linking Total and GDF. Pursuant to the concentration, the new agreements re-defined such relationship by ending the aforementioned economic dependence, and thereby replacing joint control by exclusive control over GSO.

The assessment of the various contracts contributing to defining the parties' relationship on the market following the concentration also benefited from the Commission's flexible application of the EU merger rules. Indeed, the flexibility that characterised the Decision's concept of a concentration was reinforced by the Commission's flexible approach in its treatment of the bundle of contracts that the parties planned to conclude upon implementation of the concentration.

1.2. A flexible treatment of the overall operation

The assessment of the overall operation between Total and GDF included several contracts between Total and GDF, as mentioned in the Protocol notified by the parties. These contracts served to provide Total with a transitional period for building an independent business in order to compete effectively with GDF. While remaining outside the scope of the concentration itself (1.2.1.), these contracts formed an integral part of the Commission's examination of the overall operation (1.2.2.).

1.2.1. A bundle of contracts remaining outside the scope of the concentration itself

The contracts listed in the parties' Protocol would technically remain outside the scope of the concentration itself. However, they were inextricably linked to the concentration, in so far as they would remain a crucial and inevitable part of the reassessment and reorganisation of the post-concentration relationship of the merging parties. In particular, these contracts addressed the conclusion of: (i) long-term transportation and storage contracts in the GSO area; (ii) long-term transportation and storage agreements enabling Total to supply gas in the GSO area; and (iii) medium-term purchase and supply contracts between Total and GDF.

Such contracts confirmed that the parties could not simultaneously sever all their links, due to: (i) the specificity of the gas sector, which involves facilities that

18 "As in the case of sole control, the acquisition of joint control (which includes changes from sole control to joint control) can also be established on a legal or de facto basis" (Commission Notice on the concept of concentration, para.18).
19 Commission Notice on the concept of concentration, para.9.
20 The supply business of GSO was merged into an established company, called "Total Energie Gaz", aimed at regrouping and developing Total's gas supply business in France. The transportation and storage business of Total, previously located in separate companies, were also merged into a new entity called "Total Infrastructure Gaz France".
21 See para.7(v) of the Decision.
22 As mentioned above in 1.1.2, it may be noted that the Commission has relied on some of the characteristics of the supply contracts (i.e. decreasing quantities) to justify the change of control over GSO.
23 Referred to at paras 52, 53 and 59 of the Decision.
24 Referred to at para.59 of the Decision.
25 Referred to at paras 52, 59 and 64 of the Decision.
can only be shared, not divided; and (ii) the necessity of allowing a transition period to take place, since it would be impossible to impose an immediate change in long-term supply agreements made under the legal protection and privilege of gas monopolies.

Although remaining outside the scope of the concentration itself, the Commission’s Decision gave these contracts full consideration in its appreciation of the compatibility of the concentration with the common market. This further reflected the adaptability of the Commission in its competition analysis under EU merger control rules.

1.2.2. A bundle of contracts forming an integral part of the competition analysis

The supply, transportation and storage contracts to be concluded between Total and GDF became, in a novel way, an integral part of the Commission’s competition analysis of the concentration. Although intimately linked to the concentration and raising novel issues, these contracts could have also been formally treated as ancillary restraints. However, the Commission did not follow this course of action.

Ancillary restraints are direct restrictions and are necessary to the implementation of a concentration. Pursuant to Regulation 139/2004, a decision declaring a concentration compatible with the common market is also deemed to cover ancillary restraints.26 The Commission’s position related to ancillary restraints is set out in a new Notice adopted in 2004 and recently published in the Official Journal of the European Union.27 This Notice defines restrictions directly related to the implementation of a concentration as restrictions to competition that are closely linked to the concentration itself, i.e. restraints entered into in the same context or at the same time as the concentration and which are economically related to the main transaction and intended to allow a smooth transition towards the newly created situation. Restrictions necessary to the implementation of a concentration mean that in the absence of these restraints, the concentration cannot be implemented or only with considerable difficulty.28

Under the previous Merger Regulation 4064/89, the Court of First Instance of the European Communities held that the Commission was required to formally assess the ancillary restraints notified by the parties to a concentration in each individual merger case.29

The new Merger Regulation 139/2004 removes this obligation, such that ancillary restraints are now deemed to be covered by the Commission’s decision approving the concentration, without requiring the Commission’s express appraisal.30 An express assessment of ancillary restraints, however, must still be carried out by the Commission: (i) at the request of the parties to the notification; and (ii) in the event of a case presenting “novel or unresolved questions giving rise to genuine uncertainty”.31 A case is considered to present a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission Notice in force or by a published Commission Decision.32

In the present case, the continued existence of the above-mentioned contracts between GDF and Total was necessary for the operation’s economic viability and sustainability. Indeed, Total will continue to purchase gas from GDF and sell gas to GDF’s local distribution for a transitional period whereby the quantities will decrease progressively, thus allowing Total to find alternative suppliers and customers and maintain in the long term a critical size in order to compete against GDF in all segments of the French market.33

Against such background, these contracts could have been subject to a formal Commission assessment within the Decision itself. The Commission, however, adopted a different course of action, which may be explained by the new policy approach of the new Merger Regulation. Without explicitly placing itself under the ancillary restraints umbrella, the Commission implicitly acknowledged the importance of the contracts for the

26 Arts 6(1)(b), second indent, 8(1), second indent and (2), third indent, of Regulation 139/2004. This provision was inspired by Regulation 4064/89 which also stated that a decision authorising a concentration covered ancillary restraints (Arts 6(1)(b), second indent, and 8(2), second indent, of Regulation 4064/89).
28 Commission Notice on restrictions directly related and necessary to concentrations, paras 12 and 13.
31 Recital 21 of Regulation 139/2004.
32 ibid.
33 “Agreements necessary to the implementation of a concentration are typically aimed at protecting the value transferred, maintaining the continuity of supply after the break-up of a former economic entity, or enabling the start-up of a new entity” (Notice on restrictions directly related and necessary to concentrations, para.13) (emphasis added).
assessment of the concentration by including them within its market inquiry. The Decision itself is quite restrained in presenting the Commission’s views of the agreements, and more precisely, on what it regarded as appropriate conditions (e.g. duration and other terms) for them. Indeed, although this is the first major Commission decision related to the gas sector following the entry into force of the European Directives liberalising the European gas sector, the Commission did not use this as an opportunity to provide public guidance regarding the appropriate duration for long-term gas purchase and supply agreements. Rather, the Commission encouraged Total and GDF to, in particular, reduce the duration of their proposed contracts and further decrease the quantities involved.

The specific context of the concentration therefore led the Commission to develop a flexible understanding of the EU merger control rules in order to include an unusual range of operations within the scope of the concentration, as well as an unusual bundle of contracts that were not formally included within the concentration’s scope. This flexible approach ensured initiating the opening of the French gas sector to competition. At the same time, the Commission also took a regulatory minded approach to the merger assessment, towards ensuring the long-term success of liberalisation, and thereby adopted a competition analysis based on the objectives of the Second Gas Directive.

II. A competition analysis based on the objectives of the Second Gas Directive

The Decision’s competition assessment reveals the complex relationship between the EU merger rules and the gas sector liberalisation provisions. Indeed, the Commission was required to assess Total’s position as a new entrant in most regions of France and as an historic player in the South-west region of France. At the same time, the Commission also sought to promote further liberalisation in all areas of the French gas sector. This goal led the Commission to define the relevant markets so as to favor entry into this sector (2.1.). Since the market definition was tailored towards allowing the Commission to identify the competition concerns which, in its view, were raised by this specific operation, its value as a precedent may be questioned. This is particularly true, as applicable gas regulations appeared to already provide safeguards towards alleviating the competition concerns identified by the Commission (2.2.).

2.1. A market definition designed to favour newcomers’ entry

The Decision delineates highly segmented markets at both product and geographic levels, in view of justifying the Commission’s specific intervention through the imposition of remedies on the merging entity (2.1.1.). Indeed, defining narrow markets enabled the Commission to scrutinise the structural impact of the concentration on distinct but closely linked markets (2.1.2.), and to identify competition concerns on some of these (2.1.3.).

34 It is a common feature of the gas sector that contractual arrangements are generally provided under long-term purchase and supply agreements (up to 30 years). Indeed, such long-term agreements are necessary to: (i) ensure the security and continuity of supply, as mentioned in Recital 25 of the Second Gas Directive (whereby "[l]ong-term contracts will continue to be an important part of the gas supply of Member States and should be maintained as an option for gas supply undertakings"); and (ii) ensure the financing of gas production infrastructure, which requires particularly heavy investment. In addition, these long-term purchase and supply agreements are related to downstream long-term transportation agreements entered into with transportation operators with a view to safely reserving the transportation capacities necessary for the transportation of the gas volumes provided in the purchase and sale agreements.

35 While the First Gas Directive required that transposition to be made by August 10, 2000 (see n.12), Member States were to transpose most of the provisions of the Second Gas Directive by July 1, 2004 (see Art.33 of this Directive). The VEBA/VIAG Decision was adopted prior to the entry into force of the First Gas Directive and did not mention any ancillary restraints.


37 For another example of such approach, see Commission Press Release IP/02/792 of May 31, 2002: “The Commission clears Irish Synergent venture between ESB and Statoil following strict commitments".
2.1.1. A narrow definition of product and geographic markets

The relevant product and geographic markets are both narrowly defined. Regarding the product markets, the Commission referred to both the segmentation adopted in the first decisions related to concentrations in the gas sector and the definition set forth in the Second Gas Directive. The Commission found in casu three relevant product markets: (i) transportation; (ii) storage; and (iii) supply to eligible customers. With respect to supply, the Commission took a different stance from previous cases and considered the supply of some sellers (i.e., distributors) as a subdivision of the market for the supply of eligible customers, and not as a distinct market or as a part of the “wholesale market”. Thus, the Decision considered nearly all gas product markets in France, from the entry of natural gas into the French territory to its delivery to the end-user.

The relevant geographic markets also reflect the same narrow segmentation, even though the Commission made no final decision as to the appropriate geographic markets corresponding to the aforementioned product markets. However, due to the existence of regional tariff zones, the Commission did not exclude a regional dimension to the relevant product markets. Indeed, for each relevant product market, the Commission conducted an analysis at both the: (i) national level; and (ii) regional level, i.e. the South-west of France in the so-called “GSO area”. The Commission’s competition analysis also referred to the possibility of subdividing the market for gas supply to eligible end-users in the CFM area into two regional markets: (i) the CFM-West market and (ii) the CFM-Central market, where Total acquired SC 1.

According to the Commission, several arguments support the “zonal” demarcation of the relevant markets:

- **First**, the existence of the above-mentioned regional tariff zones impacts the price of gas transmission, which depends on the price paid for mileage between the network entry point and the exit or delivery point. Despite the fact that such prices are based on a tariff list established by Decree, the Commission noted that such transmission prices would always vary. Such variation may be explained by the fact that the tariff list depends on the cost structure of each transmission operator, with each operator having its own contract for network access.

- **Secondly**, while taking into account the scheduled decrease in the number of tariff zones (from eight to five zones on January 2005, and from five to three zones on January 2009), the Commission noted that alleviating congestion within the French network would require high investment from GDF.

38 Including the Commission Decision of September 1, 1994, Case IV/M.493 Tractebel/Distrigaz (II), at [21]–[32].
39 The Commission emphasised that natural gas storage performs three functions, namely: (i) security of supply in case of shortfall; (ii) public service for certain categories of customers; and (iii) balancing of volume entering and exiting the network. While these functions can be performed by alternative means, such as, for instance, diversification of supply sources including contractual flexibility in the purchase of gas or execution of interruptible supply, the Commission determined that such alternative means were not substitutable to storage.
40 The French distributors are mainly comprised of: (i) non-independent GDF divisions in charge of the operation of the distribution network and of the supply of natural gas to clients connected to such networks; (ii) 17 local distributors, which were not nationalised in 1946 because they were already controlled by municipal authorities and which, like GDF, operate a distribution network and supply gas to clients connected to their network; and (iii) five independent distributors selected by municipalities not supplied by GDF and which GDF has refused to include in the gas equipment plan. Such distributors enjoy the monopoly of supplying non-eligible (i.e. domestic) customers until July 1, 2007.
41 In casu, the Commission was probably influenced by the wording of the Second Gas Directive and French laws. See [21]–[32] of the Tractebel/Distrigaz (II) Decision and Commission Decision of May 17, 2002, Case COMP/M.2801 RWE/Eonology, at [23].
42 The Decision does not, however, consider the following four upstream markets, which are related to the production of natural gas: (i) the exploration of natural gas and crude oil (Commission Decision of January 23, 2003, Case COMP/M.3052 ENI/Forum Gas, at [9] and [10] and Commission Decision of December 19, 2003, Case COMP/M.3288 TNK-BP/Sibneft/Slavneft JV, at [9]); (ii) the production and sale of natural gas; (iii) the upstream transportation of natural gas; and (iv) the processing of natural gas [9] and [10] of the ENI/Forum Gas Decision). Indeed, notwithstanding the fact that some natural gas is produced in France by Total, the operation submitted to the Commission did not concern production activities.
43 At the time of the Decision, the French transportation network was actually divided in eight tariff zones (seven for GDF; one for GSO). Each zone had a separate entry and exit tariff. Tariff zones were also considered as balancing zones, since each gas supplier was required to either balance its flows inside each zone or be subject to penalties.
44 See paras 23–34 of the Decision.
45 See Decree No.2004-994 of September 21, 2004 concerning utilisation tariffs applied to transmission networks and natural liquefied gas installations.
46 Pursuant to Recital 16 of Directive 2003/55, transmission tariffs (which are drafted or approved by national authorities) must reflect costs.
— Thirdly, the Commission further noted that since most new entrants do not have access to all entry points of the French gas transmission network, competition is likely to stay very heterogeneous between the different tariff zones.

The Commission’s decision to examine very narrow markets may nonetheless be questioned, even if the shift to liberalisation and the evolving context of the case could justify, to a certain extent, that the relevant geographic markets were not precisely defined. Indeed, the Commission had various pertinent elements to provide guidance in determining the geographic markets. In this regard, the Commission could have examined:

— Whether several tariff zones could together constitute a distinct market: (i) in the absence of significant tariff barriers or capacity constraints; or (ii) in the presence of the particular functions of some facilities, such as storage, which are critical to the secure supply of several tariff zones.
— Whether there was the possibility of an international market (in particular for the storage market) in the context of current and prospective connections with the Spanish network and LNG terminals.\(^47\)

Nonetheless, the Commission’s market definition, which was well-crafted to suit its intentions, enabled it to thoroughly appraise the structural impact of the concentration on a bundle of closely connected markets.

2.1.2. The Commission’s selected market definition permits close scrutiny of the concentration’s structural impact

The extremely segmented product and geographic markets, and in particular the combination of regional and national markets, allowed the Commission to examine the structural impact of the concentration on various distinct but closely connected markets. The assessment focused on Total’s position on each of these narrowly defined markets. However, despite its carefully crafted market definition, the Commission was unable to identify any structural impact of the concentration on any of these markets.

The Decision found no structural impact of the concentration on any of the markets defined at the national level. The Commission considered that the concentration raised no competition concerns on these markets, since GDF held a dominant position on all of them, and since Total’s market shares were much smaller than GDF’s.\(^48\)

The Commission also found no competition concerns on the relevant product markets in the CFM areas. Following the acquisition of SC1, Total would enjoy a 15 to 25 per cent market share on both the market for the supply of natural gas to eligible end-users in the CFM-Central area and the market for the supply of natural gas to eligible end-users in the CFM-West area. Prior to the concentration, Total had no activity on these regional markets. However, since GDF would retain a 70 to 80 per cent market share in the CFM-Central area and a 75 to 85 per cent market share in the CFM-West area, the Commission concluded that Total’s acquisition of SC1 would not raise serious doubts regarding its compatibility with the Common Market.

The Commission also concluded that the concentration would not alter the structure of competition on the GSO markets, since it would bring pro-competitive effects in the GSO area by severing the cross-shareholdings between both competitors. The Commission considered the following in its assessment:

— First, the structure of the GSO markets respectively for: (i) gas transmission; and (ii) gas storage would remain unchanged, since Total would keep a 100 per cent share on these markets post-concentration, i.e. pre-merger, Total already held a monopoly or a quasi-monopoly over the gas transportation and storage facilities in this GSO area.
— Secondly, on the GSO market for the supply of eligible resellers, Total would also maintain, post-merger, the same 100 per cent market share.\(^49\)

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47 Such as the so-called “Euskadour” pipeline, which will link the Izautre storage to the Bilbao LNG terminal in late 2005.

48 First, on the supply market for eligible resellers, GDF holds a market share of 85–95% and on the supply market for eligible end-users, its market share equals 80–90%, whereas Total’s market share on both markets amounts to 5–15%, prior to and subsequent to the concentration. Secondly, on the market for the transportation of natural gas, GDF holds an 85–95% market share. As a result of the concentration, Total’s market share equals 10–15% on this market post-concentration (including 0.5% for the Local and 0.5% for the Pipelines). Finally, on the market for the storage of natural gas, GDF’s market share equals 75–85%, whereas Total will keep a 15–25% market share since it has exclusive control over Lussagnet and joint control over Izautre with GDF.

49 Total’s market share on the market for the supply of eligible users would remain unchanged since, prior to the concentration, Total already held a monopoly on this market via GSO, which it jointly controlled with GDF.
The Commission noted that the supply of GDF's public distributors did not constitute a competitive market because, in the event these distributors ceased to purchase gas from Total, they were most likely to be supplied by GDF since they were a non-independent division of the public entity. Consequently, the Commission considered that the notified concentration would not significantly alter the structure of competition on the market for the supply of natural gas to eligible customers in the GSO area.

— Thirdly, on the market for the supply of eligible end-users, Total would hold a 45 to 55 per cent market share post-merger, through its exclusive control over GSO. Again, the Commission found no impact on the competitive structure of this market, since pre-merger, Total already had, before the merger, a 40 to 50 per cent market share due to Total and GDF's joint control over GSO.51

Therefore, the Commission's narrow market definitions enabled it to thoroughly investigate Total's potential dominant position on each segment market of the French gas sector. Although no changes were identified in the competition structure on the segmented markets, the relevant market definitions allowed the Commission to raise competition concerns on several of these markets in view of favouring newcomer entry.

2.1.3. A well-chosen market definition allows the Commission to express concerns regarding Total's presence on closely connected markets

By very narrowly defining the relevant markets, the Commission sought to ensure the ability of new entrants to enter any segment of these markets, and especially those segments on which Total would hold a significant position in the GSO area.

By acquiring the Pipelines and sole control over the Lacle and GSO, Total would hold a monopoly on the post-merger market for the transmission of natural gas in the GSO area. Total would also obtain the sole control of Izaute which, in combination with Lussagnet (the only other storage facility within the GSO area),52 would provide Total with a monopoly on the market for gas storage in the GSO area. However, as previously noted, none of these transactions would significantly modify the market's structure, as Total already enjoyed a strong position on these markets through its joint control of the Lacle and Izaute.

The Commission considered that Total could potentially restrict new entry in the South-west region of France, in view of Total's: (i) significant market share on the eligible customers market in the GSO area; and (ii) monopoly on the GSO market for natural gas transmission and monopoly on storage facilities in the GSO area.53 However, it is notable that without the new test for competitiveness introduced by Regulation 139/2004, the Commission would have been unlikely to find that Total's market position raised competition concerns, since no dominant position was created or strengthened.54

The Commission decided to appraise whether Total's strong market position could impair the Second Gas Directive's objectives, and in particular, prevent third party access to Total's gas transportation and storage facilities in this area.55 The Commission's appraisal therefore relied exclusively on examining Total's potential behaviour post-concentration.

Thus, the Commission's choice of a narrowly defined market, while insufficient to show structural changes on the relevant markets, enabled the Commission to identify competition concerns on some of the GSO markets in view of Total's expected behaviour on these markets.

However, notwithstanding Total's strong position on both: (i) the market for the sale of natural gas to eligible resellers; and (ii) the markets for the transportation and storage of natural gas within the GSO area, the Commission found that the contemplated operation would give Total neither the capability nor the incentive

50 See paras 62–65 of the Decision.
51 In the event that an undertaking holds joint control in another undertaking (pursuant to merger control rules), the entire market share of the joint venture shall be attributed to the parent undertaking and added to the own market share of the parent undertaking (see Commission Decision of May 27, 1998, Case IV/M.1 Telia/Telektron/Skrivbibliotek, [3] and [43]).
52 Lussagnet is a pure storage installation owned by Total and located next to Izaute.
53 See paras 60 and 71 of the Decision.
54 Under Regulation 4064/89, which was repealed and replaced by Regulation 139/2004, the Commission applied the so-called dominance test: a concentration raised concerns when it created or strengthened a dominant position (see Art.2(2) and (3) of this Regulation). Regulation 139/2004 provides a new test according to which a concentration raises concerns when it significantly impedes effective competition in the Common Market or in a substantial part of it (see Art.2(2) and (3) of this Regulation). The creation or strengthening of a dominant position is no longer a required condition and is now merely a potential indication of such significant impediment to effective competition.
55 Art.18 of the Second Gas Directive imposes freedom of access to gas transportation and storage facilities to enable eligible customers to choose their gas supplier. See, in particular, para.51 of the Decision.
to restrict the GDF's access to its transmission network and storage facilities.\textsuperscript{56} Indeed, Total was dependent on GDF for its activities inside and outside the GSO area.

With respect to new entrants, however, the Commission determined that Total could have the incentive and ability to restrict access of operators (other than GDF) to its transmission networks and storage facilities. The competition concerns raised by the concentration did not derive from Total's market share as such, but from Total's presence on several limited but closely connected markets that were very narrowly defined. These concerns were particularly triggered by Total's monopoly on the transportation and storage markets, which according to the Commission, could lead to potential abuse by Total on the downstream supply market.

The Commission's assessment, however, may be questioned since the Second Gas Directive could have been construed as already providing sufficient safeguards to prevent the competition concerns identified in the Decision.

2.2. Strict competition analysis despite the safeguards already provided by third party access rules

It is notable that the Commission's appraisal identified competition concerns on markets already subject to the applicable EU and French provisions governing third party access to gas infrastructures, \textit{i.e.} principally the Second Gas Directive and French Law of January 3, 2003 as amended by French Law of August 9, 2004. These laws precisely aimed at restraining Total from potentially foreclosing the relevant markets and precluding new entry.

The Commission's concerns derived from Total and GDF's shared use of most of GSO's network transmission capacities, as well as most of Izauté's and Lussagnet's storage capacities. Thus, the Commission was concerned that Total could legally refuse to grant third party access to its network and facilities on the grounds of a lack of capacity. Indeed, the lack of available capacity on a transportation network or storage facilities is among the list of legitimate reasons set out in the Second Gas Directive in order for a transportation and storage operator to refuse a third party's access request.\textsuperscript{57} Such situation, which is consistent with the conditions applied to third party access may, according to the Decision, be reinforced and perpetuated by the conclusion of long-term transmission and storage agreements between Total and GDF.

The Commission's findings are nonetheless remarkable, given that Total's monopoly on transportation network and storage facilities is strictly limited by the French and EU rules establishing non-discriminatory and transparent third party access to gas transmission networks\textsuperscript{58} and storage facilities.\textsuperscript{59} In particular:

- The above-mentioned rules provide for regulated transportation tariffs, strict limitations on denial of access, specific litigation procedures involving the CRE, and legal unbundling of transportation activities from other gas-related activities.
- The Commission was also aware that Total had actually gone beyond the Second Gas Directive's requirements. Indeed, unlike most other gas players, Total had decided to consolidate all of its gas activities regulated by third party access (and not just transportation) into one new entity independent from its other gas activities, such as supply and production. Thus, in the GSO area, all transmission and storage facilities would be controlled by a single undertaking (Total Infrastructure Gaz France) completely independent of Total's other gas activities.

The Commission's conclusion reflects certain doubts regarding the effectiveness of the Second Gas Directive. It also reflects the Commission's willingness to impose additional requirements, akin to regulatory remedies, at least for recently liberalised sectors (in traditional sectors, no such remedies exist).

III. Recourse to behavioral remedies to secure the objectives of the Second Gas Directive

In view of the competition concerns raised by the proposed transaction, the Commission decided to clear the concentration subject to certain remedies which,
by their exclusively behavioural nature, confirm the Commission’s regulatory minded approach in this case.

These behavioural remedies aim at improving access to Total’s gas facilities in the GSO area, as required under the Second Gas Directive (3.1). The Decision also addresses the appropriate monitoring of such remedies, which could involve the French gas regulator together with an appointed trustee (3.2).

3.1. Imposition of remedies to ensure new entrants’ access to total’s gas facilities

Given the competition concerns raised by the concentration and the impossibility to duplicate the existing gas storage and transportation facilities, the Commission felt compelled to impose behavioural remedies to ensure the sharing of such facilities between incumbents and new entrants. Indeed, the Commission did not consider that existing EU and French legal frameworks sufficiently protected new entrants in relation to third party access to transmission networks and storage facilities. It therefore imposed additional obligations on Total through diverse undertakings aimed at offering “sufficient and secured access”60 to Total’s gas transportation network and gas storage facilities.

Total agreed to the following undertakings:

(i) to publish its transportation and storage capacities on its website;
(ii) to offer, on a transparent and non-discriminatory basis, a daily remunerated balancing service to gas operators that entered into a contract to access Total’s storage; this service aimed at compensating their daily imbalance on Total’s transportation network by using their stock instead of buying gas from the transportation network manager at a much higher price;
(iii) to allow the sale of transportation and storage capacities in order to develop a secondary market;
(iv) in the event that a customer changed its supplier, to transfer from the former supplier to the new supplier the transportation capacities: (vi) at the delivery points of Total’s transportation network; and (vii) on Total’s regional network, which are necessary to supply this customer61;
(v) to introduce a release mechanism for unused transportation capacities at the entry points on Total’s transportation networks (the so-called “use-it-or-lose-it” principle), in order to prevent abusive capacity bookings that would preclude other operators from entering the market; and
(vi) to publish an allocation method for storage capacities and transportation capacities at Total’s transportation network entry points, in case of congestion. The principle applied will be the transfer from the former supplier to the new supplier of the transportation and storage capacities necessary to supply a customer that has changed its supplier.

These undertakings were inspired by the remedies agreed by GDF in April 2004 when the Commission settled the Marathon case.62 In Marathon, the Commission addressed a situation that had arisen prior to liberalisation in order to impose undertakings on several European incumbent gas operators. Certain undertakings went beyond the provisions of the Gas Directives.63

The Commission did not impose on Total all of the undertakings obtained from GDF in the Marathon case. In Marathon, GDF further agreed to: (i) gradually
to residential clients and non-interruptible and non-residential clients to comply with the obligation to hold sufficient storage capacities in order to perform their supply obligations between November 1 and March 31 of each year (see Art.30-2(1) of the French Law of January 3, 2003).

62 See Commission Press Release IP/04/573, “The Commission settles Marathon case with Gaz de France and Ruhrgas”, April 30, 2004. In this case, during the 1990s, the Norwegian subsidiary of Marathon, a US gas and oil producer, requested access to the gas transportation networks of five European operators, including GDF. Its requests were denied, and Marathon brought the case to the Commission alleging a violation of Art.82 EC. The Commission finally settled the case with the five operators, after they agreed to undertakings aimed at securing sufficient access for newcomers to their gas transportation networks.
63 The Commission achieved the imposition in several EU Member States of a uniform set of rules that are included in the proposal for a Regulation on conditions for access to the gas transmission networks, COM(2003) 741, December 10, 2003, or in the Guidelines for Good TPA Practices (revised version) (annexed to the Conclusions of the 7th Meeting of the European Gas Regulatory Forum of September 24–25, 2003, the so-called “Madrid Forum”). Some of these principles were already applied or set to be applied in France. However, this was not the case in certain countries, and in particular Germany and the Netherlands. It is also remarkable that, in the Marathon case, the Commission successfully imposed undertakings related to, inter alia, (i) storage facilities and LNG terminals, and (ii) the supply activity (by imposing a gas release programme), whereas the initial plaintiff’s request only concerned access to transportation networks.

60 See para.71 of the Decision (free translation).
61 Art.30-2(1), second indent, of French Law of January 3, 2003 provides a similar rule, whose scope is limited to storage capacities. This provision was introduced by the French Law of August 9, 2004, enabling suppliers that provide natural gas
reduce the number of tariff and balancing zones on its transportation networks; (ii) offer the possibility of converting H gas into L gas; (iii) implement in the Southern region of France the gas release programme agreed with the CRE (GSO also agreed to apply such a programme in its own area); and (iv) authorise the possibility of daily transport capacity. \(^{64}\)

At least three reasons explain the Commission’s difference in approach:

— *First*, Directive 2003/55 had been transposed into French law after the adoption of the *Marathon* decision.

— *Secondly*, Total agreed with the CRE (either directly or via its subsidiary GSO) to establish a gas release programme in the South-west region of France that was similar to GDF’s gas release programme.

— *Thirdly*, the Commission’s exclusive goal in the present case was to allow newcomers sufficient and secure access to a local transportation network and local storage facilities, whereas the remedies imposed in the *Marathon* case aimed at creating an effective third party access regime on a nationwide transportation network.

Nonetheless, some undertakings imposed on Total are novel. In particular, undertaking (vi) implements the principle that “capacity follows the customer”, except where the former supplier can justify that it needs this capacity in order to comply with valid public service or contractual obligations. This undertaking should provide a new supplier with the capacity necessary to supply a customer, even if there is no current capacity available. While such undertaking was intended as temporary, the Commission found it could be used as a permanent rule governing allocation. It should be noted that the French Law of August 9, 2004 requires implementing such principle with respect to storage capacities. However, several practical issues remained open. For instance:

— with respect to storage capacities, determining the order of priority of each category of customer in case of congestion; or
— with respect to transportation capacity, determining how to satisfy a new entrant if the former supplier lacks spare capacity on the requested entry point.

Such questions imply the involvement of the national regulatory authorities charged with drafting regulations or settling disputes with respect to network access. This in turn raises the question of appropriate monitoring of eventual undertakings.

### 3.2. Appropriate monitoring of such remedies: co-ordination of trustee and regulator

Under the EU merger rules on remedies, a trustee is generally appointed to monitor the notifying party’s compliance with the undertakings. The relationship between the remedies imposed on Total and the provisions of the Gas Directives could have led the Commission to request the monitoring of such remedies by the French gas regulator, rather than a trustee.

In the Total case, a trustee distinct from the CRE was appointed, demonstrating the Commission’s willingness to keep direct contact with the issue of the gas market’s liberalisation. However, the trustee performed its task in close co-ordination with the CRE, which approved final drafts. The French energy ministry was consulted and kept informed by the notifying party. This kind of monitoring avoided any overlap or contradiction with either: (i) current or projected national regulations; or (ii) the CRE’s procedures or action plan.

### Conclusion

While the Decision cannot necessarily be presented as a turning point in the Commission’s overall merger practice, its specific context provides valuable insight into anticipating the Commission’s policy with respect to recently liberalised sectors, and especially the gas industry. The Commission welcomed the proposed transaction, which led to the emergence of a strong competitor to the established dominant French player by replacing historic contracts with agreements fully compatible with European directives applicable to the sector. While Total could be viewed as an incumbent in a small portion of the market, it was heavily dependent on GDF and thus needed a transitional period before severing all of its purchase and supply bonds with its traditional supplier.

The Decision represents one of the significant steps towards liberalising the French gas market. Some may consider this as a mere passage from a monopoly to an oligopoly, but the operation’s outcome calls for more
optimism in relation to liberalisation in France and beyond:

— while encouraging the emergence of Total as a first rate competitor of GDF in France, the Commission also sought significant commitments from Total to insure that its strong position in the South-west region of France would not prevent the entry of new competitors in this area. Furthermore, shortly following the issuance of the Decision, new players successfully obtained quantities of gas in the South-west region through the gas release programme put in place by Total.

— the Commission, following the Marathon case and the Decision, effectively pursued its goal of liberalisation by: (i) settling the GDF/ENI/ENEL case by prohibiting destination clauses and allowing ENI and ENEL, two Italian operators, to freely market their gas in France; (ii) considering that EDP’s and ENI’s joint acquisition of GDP was incompatible with the common market; and (iii) settling the OMV/Gazprom case, by prohibiting the destination clause. 67


Finally, it is remarkable that few historic players, other than GDF and Total, have taken dramatic steps such as the unwinding of Total and GDF’s assets, without being forced to do so. 68 However, particularly in the gas sector, situations quite similar to the GDF/Total transaction do exist in other countries. In a recent report, the Commission noted that liberalisation in the gas sector remained unsatisfactory. 69 A key reason for this slow progress may be the considerable investments (both for production and transportation) and long-term commitments necessary in this sector. Indeed, such requirements are not amenable to rapid and sweeping change. The Commission appears to remain determined, though, to continue using all opportunities to enhance liberalisation of the gas market across the EU. In this regard, it may be anticipated that the Commission will continue to show the same kind of pragmatism as in the Total/GDF Decision.

68 In several countries, significant structural changes occurred in the energy market, but were due to governmental intervention: in the UK, the dismembering of British Gas; in Spain, the limitation of the importation of gas by the incumbent operator Gas Natural; and in Italy, the divestiture of some electricity production assets owned by ENEL.