On 29 September 2010, the Commission adopted a decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) (1). In accordance with Article 30 of Council Regulation (EC) No 1/2003 (2), the Commission is here publishing the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business secrets. A non-confidential version of the decision is available on the Directorate-General for Competition’ website at the following address:


1. INTRODUCTION

(1) This Decision is addressed to ENI SpA (hereafter referred to as ENI). ENI offered commitments to meet the competition concerns expressed by the Commission in a Statement of Objections, and this Decision makes the commitments binding.

2. PROCEDURE

(2) The case arose out of surprise inspections carried out on 5 May 2006 at the premises of ENI, its subsidiaries and the companies controlled by ENI active in the transmission of gas in and into Italy. On 20 April 2007, the Commission initiated proceedings under Regulation (EC) No 1/2003 (3) and Article 2(1) of Regulation (EC) No 773/2004 (4). On 6 March 2009, the Commission adopted a Statement of Objections (SO) setting out its competition concerns (5). The SO was notified to ENI by letter of 9 March 2009. On 1 October 2009, ENI replied, disagreeing with the findings of the SO. On 27 November 2009 an Oral Hearing took place. On 4 February 2010, ENI submitted commitments to the Commission in response to the concerns raised in the SO (6). 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 proposed commitments, and inviting interested third parties to give their observations on the commitments within one month following publication (7). 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 on the observations of third parties. Additional information requested pursuant to Article 18 of Regulation (EC) No 1/2003 was submitted by the undertaking on 24 May 2010.

(3) On 8 July 2010, ENI sent an amended version of the commitments in order to take the replies to the market test into account (hereafter the final commitments).

(4) The Advisory Committee on Restrictive Practices and Dominant Positions issued a favourable opinion on 9 September 2010 (8). The Hearing Officer presented his final report on 13 September 2010 (9).

3. CONCERNS IDENTIFIED IN THE STATEMENT OF OBJECTIONS

(5) The Commission’s Statement of Objection took the view that ENI may have abused its dominant position according to Article 102 TFEU by implementing a systematic and constructive refusal to supply strategy on its use of ENI’s transmission capacities.”

(1) With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 respectively of the TFEU. The substance of the two Articles has not changed. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 respectively of the EC Treaty, where appropriate.


(6) Pursuant to Article 9(1) of Regulation (EC) No 1/2003.


(8) See page 5 of this Official Journal.

(9) See page 6 of this Official Journal.
international pipelines transporting gas into Italy, specifically on the TENP (1), Transitgas (2) and on the TAG (3) pipelines.

(6) The systematic and constructive refusal to supply strategy might have reduced ENI’s competitors' opportunities to transport gas into Italy in its international network (by hording capacity, by offering it in a less attractive manner and by strategically limiting investments in additional capacity). The foreclosure of access to the import pipelines would therefore restrict competitors’ ability and incentives to develop an effective competition on the downstream gas supply markets in Italy. The Commission concluded that ENI may have embarked upon a strategy of deliberately keeping international transport capacity tight in order to limit gas imports by third parties into Italy and protect its profits in the downstream gas supply markets. The Commission’s view is that, in this case as laid out in the Statement of Objections, 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 practice would then be at the detriment of third party transport customers, competition and ultimately the end customers in the downstream supply markets in Italy.

4. COMMITMENTS

(7) ENI committed to divest its current shareholdings in companies related to international gas transmission pipelines (TENP, Transitgas and TAG) (4) to a suitable purchaser independent from and unconnected to ENI who does not raise prima facie competition concerns.

(8) With respect to TAG, ENI will divest its share to a public entity directly or indirectly controlled by the Italian Government (5).

(9) ENI also commits, for the period comprises between 22 December 2009 and the closing of the divestitures, 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.

(10) ENI’s final commitments are sufficient to effectively remove the competition concerns identified in the SO. The concerns are removed as ENI's anticompetitive behaviour emanated from its interest in protecting its supply margins while neglecting transportation revenues. In this respect, provided that the pipeline participations will be divested to suitable purchasers independent from and unconnected to ENI, and which do not raise prima facie competition concerns, the remedies proposed are adequate to solve this structural conflict of interest resulting from the vertical integration of the company.

(11) The commitments in their final form are also necessary because no behavioural measure would be as effective as the divestment of ENI stakes in the TSO's to remove the concerns expressed. ENI's commitment to divest its shareholdings in international gas transmission pipelines (TENP, Transitgas and TAG) is a structural measure of the type envisaged in the SO. Absent this structural remedy, the incentives for a vertically integrated gas company to further adopt the alleged anti-competitive behaviour would not have been removed, resulting in a risk of not effectively bringing the alleged infringement to an end.

(12) Not least given the large number of gas customers in the Italian downstream markets and the important potential harm for these customers, the commitments must be regarded as adequate and proportionate.

(1) The TENP/Transitgas pipelines allows to import North European gas to Italy through Germany and Switzerland. As for the TENP pipeline, ENI (together with E.ON) jointly controls the pipeline. Namely, ENI controls 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. ENI exclusively controls the TSO — Eni Gas Transport Deutschland SpA — which operates the TENP for the part of transportation rights held to ENI (i.e. on the [...] % of the TENP capacity).

(2) As for the Transitgas pipeline, ENI (together with Swissgas) jointly controls the pipeline. ENI holds 46 % of the Transitgas AG. ENI also exclusively controls the TSO, Eni Gas Transport International SA (ENI GTI), that manages and operates part of the Transitgas according to the capacity rights held by ENI on that pipeline (i.e. provides natural gas transportation services including the marketing of the approximately [...] % of transport capacity held by ENI).

(3) The TAG pipeline allows to import gas from Russia to Italy. ENI (together with OMV) jointly controls the TSO (Trans Austria Gasleitung GmbH) that holds the entirety of the capacity rights for the transport of natural gas on the TAG pipeline. ENI is entitled to approximately [...] % of the transport rights of the existing capacity on the TAG.

(4) Specifically, ENI committed to divest its stakes in the transmission system operators (the TSOs), and when applicable the vehicle companies that hold the TSO's shareholding and owns the assets.

(5) The Commission took the view that Cassa Depositi e Prestiti Spa (hereafter CDP) can be considered a suitable buyer for TAG.
5. CONCLUSION

(13) In the light of the commitments offered, the Decision finds that there are no longer grounds for action on the part of the Commission 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.