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**Interaction between competition and regulation**

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# Interaction between competition and regulation

Mercedes Pedraz



# Interaction between competition and regulation

- ▶ When a market has been or is liberalized, regulation should be put aside, it is competition now that applies
- ▶ **In Regulated markets** the role of public power is the main protagonist, using regulation, for
- ▶ 1) the emergence, development and consolidation of the mechanisms of the market in free competition.
- ▶ 2) the realization that free competition is the only way to ensure the disappearance of the old monopolistic structure.
- ▶ 3) the need to guarantee the defense of consumers and the environment which are not automatically secured by the game of free competition.

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# Interaction between competition and regulation

- ▶ The characteristics of these sectors (regulated sectors) are:
- ▶ 1-. the complexity of the economic activities they encompass, and
- ▶ 2-. the atomization of legislation in permanent renewal.

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# Interaction between regulation and competition

- Antitrust Authorities: have the task to guarantee free competition within the framework of the market economy from the perspective of the defense of public interests.
- Regulation Authorities: have the task to regulate the sector, but also to ensure that the economic operators in the regulated sector work within the limits of the functioning of the market affected

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# Interaction between regulation and competition

- Risks of double control exist
- A clear evidence may be found in the case of mergers
- Both the regulator and the Antitrust Authority have power to control the merger
- The Issue: should competition displace regulation?

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# ESSENTIAL FACILITIES

- The term "*essential facilities doctrine*" originated in commentaries on United States antitrust case law. Now has multiple meanings, each having to do with mandating access to something to those who do not otherwise get access. The variance in definitions is great.
- BASICS: the owner(s) of an "*essential*" or "*bottleneck*" facility is (are) mandated to provide access to that facility at a "*reasonable*" price.
- For example, when a railroad must be made available on "*reasonable*" terms to a rival rail company or an electricity transmission grid to a rival electricity generator.
- The concept of "*essential facilities*" requires the existence of two markets, often defined as an upstream market and a downstream market



# ESSENTIAL FACILITIES

- ▶
- ▶ Essential facilities issues usually arise in regulated contexts: situations where the owner/controller of the essential facility is subject to economic regulation or is State-owned or otherwise State-related

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# ESSENTIAL FACILITIES

- A dominant company has, at least in some cases, a duty to supply, if a refusal will cause a significant effect on competition.
- When a customer is also a competitor of the dominant company in a market, usually downstream from the point at which the refusal to supply occurs, the effect on competition largely depends on three factors:
  - 1) whether the buyer can obtain the goods or service elsewhere;
  - 2) whether there are other downstream competitors; and
  - 3) how important the goods or services are to the buyer's business.



# ESSENTIAL FACILITIES



- If the buyer has another satisfactory source of supply, if the goods or services are not essential, or if one more competitor will not add significantly to competition, antitrust law should not oblige the dominant company to supply.
- If, however, in practice, the refusal by the dominant company to supply means that one of very few competitors is forced out of the market, EU antitrust law requires the dominant company to supply.
- In brief: access to a facility is "essential" when refusal would exclude all or most competitors from the market.



# ESSENTIAL FACILITIES

An Spanish example: distribution of Gas  
ABUSE OF DOMINANT POSITION

1-. There is a transporter (carrier), owner of storage, regasification or gas transmission pipelines with a pressure of more than 16 bar, acquires natural gas on the international market for sale to other transporters and/or distributors for the market at a tariff. It also allows access to its facilities to those third parties (transporters, marketers and qualified consumers) who request it, in exchange for the payment of a toll.



# ESSENTIAL FACILITIES

- 2-. There is also a **distributor**, owner of natural gas distribution facilities with a pressure less than or equal to 16 bar. Its function is:
  - -. To transmit natural gas by pipeline from transmission networks to supply individual points,
  - -. To build, maintain and operate distribution facilities,
  - -. To sell natural gas to consumers at a tariff,
  - -. This company also buys gas from the transporter at a regulated transfer price and sells it at a regulated price to customers at a tariff.



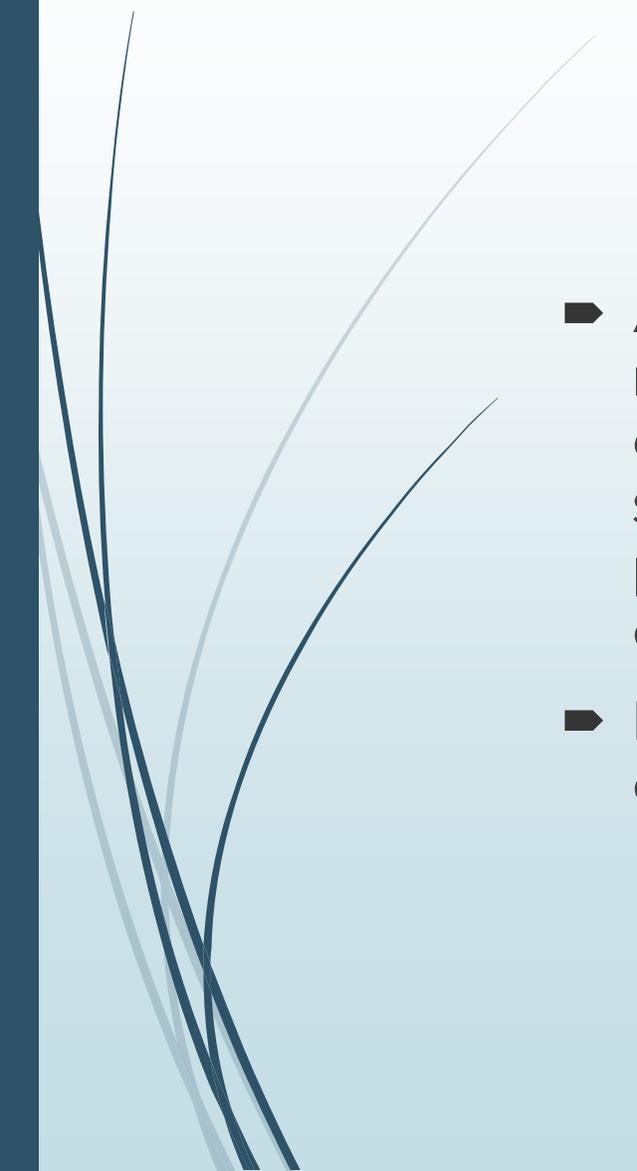
# ESSENTIAL FACILITIES



- BOTH the **carrier** and the **distributor** must allow access to their facilities to third parties
- The natural gas entering the system makes the following journey:
- 1° the primary transport axes,
- 2° crosses the secondary transport and/or distribution gas pipelines of 16 bar,
- 3° enters the network, with lower pressure, which runs through urban centres and reaches the final consumer.
-



# ESSENTIAL FACILITIES



- ▶ A distribution company that wishes to distribute natural gas in a municipality or town, in order to have natural gas, will have to connect the distribution network built within the town to a secondary transmission network or to a distribution network of 16 bar pressure, which are those connected to the primary transmission axes.
- ▶ Distribution facilities will require prior administrative authorisation, and applicants for it must prove a series of requirements.



# ESSENTIAL FACILITIES

- Problems common to Regulation and Antitrust:
- Definition of RELEVANT MARKET:
  - 1) economic point of view
  - 2) juridicial point of view
- ECONOMIC: There is an infrastructure of networks, those from 4 to 16 bar, which due to their characteristics and location may be susceptible to connecting other networks. An offer, and also a demand, is thus identified, constituted by the person or persons requesting the connection to that network.
- Finally, there is or may be a **price** for the service



# ESSENTIAL FACILITIES



- ▶ And, there is also a **Connected market**
- ▶ that of supplying natural gas to final consumers.
- ▶ The connection is evident : if the company which should supply consumers does not find access (they cannot connect their network to the network from 4 to 16 bar) they will not be able to supply either marketers or consumers.



# ESSENTIAL FACILITIES

- There is a company GN which has a double condition, it is a transporter and it is also a distributor,
- GN acts on the market :
- 1-. as a **carrier**, when it agrees to have other distributors connect to its 16 bar network;
- 2-. as a **distributor**, because the network it owns can host distribution connections
- WHAT HAPPENS: if these connections are granted by GN to a competitor (another distributor) it is in fact limiting its own distribution capacity.



# Essential facilities

- GN has an obvious incentive to deny other companies access to its network,
- The refusal to give access is not protected by law (it could be, but it is not)
- In the case GN gave access to GASLICANTE but asked a disproportionate price, making in fact access impossible.
- The ELETRIC REGULATOR did a study of the situation in the affected geographical area, and in order to check whether GALICANTE had other options. It assessed the **alternatives** offered at that area and date to connect to the network as it was needed.



# Essential facilities



- The conclusions of the Electric Regulator were that the distance that GALicante had to travel, or in other words:
- 1-. the kilometers of gas pipeline that it had to build to be able to connect with GN's network of 4 to 16 bar and
- 2-. the kilometers that it had to build to be able to connect with the EGAS network (the other alternative)
- were such that Galicante had to build around 30 kms of pipelines, at a cost of hundreds of thousands of euros (and in a period of several months) while for connecting with GN it needed just 2,5 km. with a very low cost and time needed.



# Essential facilities

## ► CONCLUSION

- It turns out that given the high cost of the alternatives for connection to the GD network, this company, GND, has a dominant position in the market for access to the distribution network from 4 to 16 bar in the municipalities concerned. And since there is no explanation or justification for the continued refusal over time to provide access to said network, such refusal must be classified as **abusive**.
- GD, by making it difficult for GALICANTE to access its networks, **first** is making it extremely difficult for this company to carry out its business activity, as it can neither increase its customers nor facilitate those it already has gas; and **second** it is increasing its own capacity to supply gas to third parties.



# Essential Facilities



- ▶ Access to the network was essential for GALICANTE because the alternatives, although possible, had in fact a cost that made their use economically ruinous, or characteristics that deprived such supplies of the character of a true alternative.
- ▶ Likewise, the customers of GALICANTE, with whom it had signed supply contracts, have been harmed.
- ▶ The company was unable to comply with them, or not properly, thus the image of said company deteriorated, despite the fact that it carried out various actions aimed at making up as far as possible for the impossibility of supply as a result of the plaintiff's refusal.