



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 7.6.2002  
COM(2002) 304 final

2001/0077 (COD)  
2001/0078 (COD)

Amended proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Directives 96/92/EC and 98/30/EC concerning rules for the internal markets  
in electricity and natural gas**

Amended proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on conditions for access to the network for cross-border exchanges in electricity**

(presented by the Commission pursuant to Article 250 (2)  
of the EC-Treaty)

## **EXPLANATORY MEMORANDUM**

### **A. Principles**

1. On 13 March 2001, the Commission submitted a proposal for a Directive of the European Parliament and the Council amending Directives 96/92/EC and 98/30/EC concerning common rules for the internal market in electricity and natural gas.
2. On 13 March 2002, the European Parliament adopted a series of amendments at its first reading. The European Parliament agrees with the main elements of the Commission proposal. The Commission has indicated in broad lines its position on the amendments, indicating which groups of amendments it could accept, subject to minor redrafting, those that could be accepted in principle or in part and those that could not be accepted. This position is reflected in the changes made to the original proposal.
3. The Economic and Social Committee issued its opinion on the proposal on 3 October 2001. It contains many worthwhile suggestions, which have been taken into account in the amended proposal.
4. Discussions in the framework of the Council started in March 2001 and have led to changes proposed to the Commission proposal by the successive Presidencies. Many of these changes are helpful clarifications and are acceptable to the Commission and compatible with the parliamentary amendments with which the Commission agrees.
5. On the 16<sup>th</sup> of March 2002 the European Council of Barcelona adopted important Conclusions on the internal energy market. These will be taken into account by the Commission and the co-legislators in the framework of the co-decision procedure.
6. In the framework of the accession process, the candidate countries have taken commitments in the Accession negotiations regarding the existing Electricity and Gas Directives. The Commission expects new Member States to fulfill the obligations created by this new Directive, but acknowledges that in duly justified and exceptional cases, it may be necessary to allow for a progressive phasing-in into the further developed electricity and gas markets. The Commission parts from the principle that any permanent derogation will, however, not be accepted.
7. In the light of these developments, the Commission has drafted this amended proposal.

### **B. European Parliament amendments**

The amendments of the European Parliament have been incorporated as follows:

#### **I. Amendments accepted in principle or in part**

##### **Recitals**

Amendment 4 specifies in which areas obstacles to a functioning market remain. The principle of defining in which areas obstacles remain can be supported, although the Commission has defined in recital 4 of its initial proposal that the main obstacles relate to access to the network and different degrees of market opening. However, the addition of ensuring a level playing field in generation and protecting small and vulnerable customers' rights and of disclosure on fuel sources can be supported.

(Recital 2). The reference to ownership unbundling cannot be incorporated (see justification under amendment 164). The reference to addressing the tendency to raise the demand for electricity will be incorporated in the forthcoming Commission proposal for a framework Directive on energy efficiency.

Amendment 6 specifies that the different approaches to internalisation of external costs do not contribute to a level-playing field. The Commission has always argued this, as demonstrated for instance in its proposal on energy taxation of 1997. (Recital 6). On the question of support for parts of the energy sector, the Commission is carrying out a survey of types of support for the different fuel sources. The report will be published in the course of the year and will, where necessary, propose measures.

Amendment 7 underlines the importance of non-discriminatory access to the network and the existence of favourable investment conditions. (Recital 7).

Amendment 8 states that construction and maintenance of network infrastructure will contribute to a stable supply. The Commission agrees with the assertion, but moves it from recital 5 to recital 20, which deals with security of supply.

Amendment 12, relating to regulation, emphasises the existence of effective regulation and the necessity to establish at least legally binding methodologies underlying transmission and distribution tariffs, instead of stressing the existence of national regulatory authorities with the competence to set or approve tariffs. This amendment can be supported in principle, the institutional element is less important than the guarantee of effective regulation. Practice in Member States with effective regulation allow for approval or fixing of the methodology by the national regulatory authority, leaving the publication of the individual tariffs to the system operators. When the methodologies are applied in a non-discriminatory manner and are published before entry into force, effective regulation can be ensured. The requirement that national regulatory authorities should be independent of government can not be accepted (Recital 12).

Amendment 59 requires national regulatory authorities to set up market based mechanisms for balancing power as soon as the electricity market is sufficiently liquid. This is reflected in Recital 13 and extended to balancing the gas system as well. The part of the amendment stating that the national regulatory authority shall not only approve or fix tariffs, but also publish these cannot be supported. This is not necessarily the task of the regulator, but can be that of the operators providing those services.

In amendment 75, national regulatory authorities are given the task to ensure that, in approving/fixing transmission and distribution tariffs, they take account of the benefits of distributed generation and demand-side management measures. This is reflected in Recital 14, and in Article 22(1g).

Amendment 14 states that the benefits resulting from the internal market are mainly economic and that the positive impact on employment is due to a reduction in energy bills. The latter part can be accepted, but is slightly reformulated to reflect the fact that efficiency gains constitute the benefit, these may translate in price reductions, but prices also depend on other, external factors; however, the benefits of the internal market are not only economic in nature. (Recital 15).

Amendment 18 specifies the provisions on the examination of the security of supply situation in the Community, taking into account the interconnection capacity between Member States. It is specified that this monitoring should be carried out early enough to allow any necessary actions to be taken in due time. The Commission supports these specifications. The last phrase of amendment 18 states that energy efficiency and energy saving measures should be promoted by tax incentives. The Commission cannot support this, as this is too restrictive. Tax incentives are an important instrument to promote energy efficiency and saving, but other measures, such as targets or positive incentives, will equally be necessary. (Recital 20).

Amendment 95/96 calls for consideration to be given to the increased external dependence of the Union on natural gas and to consider measures to encourage reciprocal arrangements for access to networks of third countries. The Commission supports this addition; it is fully in line with the Commission's policy on security of supply and with the policy of the Commission towards candidate countries and third countries. (Recital 5).

Amendments 103 and 104 can be accepted in so far as they are compatible with the objective of achieving effective regulation (and not assuming splitting the Directive into two). (Recital 12). However, the reference to prior approval of tariffs or methodologies for setting tariffs for storage access goes beyond the Commission proposal which allows for a choice between negotiated and regulated access to storage as different flexibility mechanisms exist which may be taken into account in negotiations. This latter proposal can therefore not be supported.

Amendment 110 calls for admission to the gas network for biogas and gas for biomass for environmental reasons provided this is compatible with the secure and efficient operation of the network on environmental grounds. The Commission has redrafted the recital for clarification purposes. (Recital 21).

Amendment 111 states that long-term 'take-or-pay' contracts will remain an important and necessary part of the gas supply of Member States and should be maintained as an option. The Commission is of the opinion that long-term contracts should be maintained as an option. (Recital 22).

Amendment 112 calls, in a recital, for an obligation to supply customers with gas. The Commission can only accept the concept of an obligation to supply customers with gas, in so far as they are connected to the gas network. In contrast to electricity, gas is a substitutable fuel and an obligation to supply all customers cannot be imposed. (Recital 23).

## **Article 1**

Amendment 118 includes in Article 1 of the amended Gas Directive the reference that the Directive shall also apply to apply biogas and gas from biomass. The Commission can accept this addition, but adds a clause to the effect that this applies to these gases insofar as they can be technically and safely injected into the natural gas system. (Article 1, 10(3) gas Directive).

## **Article 2 - Definitions**

The principle of amendment 30 on the definition of energy efficiency/demand side management is supported by the Commission, but the definition is reformulated, because it was insufficiently precise in wording. (Article 2(30)-electricity).

Amendment 33 defining embedded generator has been redefined as distributed generation connected to the distribution grid, as this term is used most commonly in literature. (Article 2(32)-electricity).

Amendment 39 on the definition of disclosure has been reworded and the requirement alleviated. The reference to the specification of costs should be taken out as, as pointed out in the justification under amendment 6, differences in internalisation of external costs, and in support for fuel sources, would give rise to distorted comparisons. (Article 2(33)-electricity).

Amendments 119 and 120 change the definitions of storage and LNG facilities to clarify the interface of these with regard to storage. The Commission accepts these amendments with rephrasing. (Articles 2(9) and 2(11)-gas).

Amendment 124 proposes the inclusion of a definition of 'flexibility instrument'. The principle is agreed to, the formulation slightly amended. (Article 2(15)-gas)

## **Article 3 - Universal and Public Service Obligations**

Amendment 40 adding sustainable development to the scope of the Directive has been shortened in wording, without altering its sense.

Amendments 41 and 125 introduce climate change, energy efficiency and research and development among the subjects to which public service obligations may relate. The Commission subscribes to the importance of these and can accept the addition of energy efficiency and climate change measures as extensions of environmental protection already included in Article 3,2. Whilst research and development may, in certain cases, be carried out in the context of public service obligations, it is not necessary to specifically refer to this in Article 3(2).

The addition in amendment 125 that public service obligations shall not unduly restrict competition is incorporated by the fact that, in the report of the Commission on the measures to fulfil public service obligations, the Commission will assess their effect on competition in both the electricity and gas market. This equally follows on from amendments 127 and 128. However, the reference to the monitoring of retail tariffs by regulators, the proper consultation of consumer organisations and the possibility of introducing price caps are too detailed for this framework Directive. Furthermore, the existence of price caps has contributed to the crisis in security of supply in California, as the price signal was distorted. These matters should be left to subsidiarity. (Articles 3(2), 3(8), 26(1) electricity and 3(2), 3(7) and 28(1) gas)

Amendments 42 and 126 reinforce the provisions on the protection of vulnerable customers and oblige Member States to guarantee that effective procedures are in place to enable individual customers to switch supplier. The Commission has modified this last provision slightly and refers to eligible customers, as they are entitled to choose their supplier and should therefore be able to switch. The inclusion of a sentence that 'affordability should be properly defined' is not appropriate for an

Article of a Directive. The assertion that universal service is a dynamic concept or that nothing in this Directive should prevent Member States from strengthening the position of small customers does not add value to the Directive. The restriction of paragraph 3, Article 3, in amendment 126 to domestic customers cannot be accepted. (Articles 3(3 and 4) electricity, 3(4)gas)

Amendment 43 introduces the obligation to specify fuel sources into the body of the Directive. In the initial proposal this was part of the annex. Furthermore it specifies the disclosure requirements in more detail. The Commission agrees that disclosure is important in enabling effective choice, and does not oppose inclusion in the Article, nor a certain specification. However, the amendment is too detailed. The Commission therefore alleviates the disclosure requirements to a certain extent. The obligation to impose penalties on companies which do not comply with the requirements, specify the percentage production of CHP plants or the establishment of a certified body to guarantee transparency in quantity and methods of generation, are too detailed and should be left to subsidiarity. (Article 3(5)-electricity).

Amendment 45 obliges Member States to set minimum criteria for delays within which system operators must effectuate connections and repairs. The Commission has added the observance of the measures taken by Member States to assure this, to the tasks of the regulator in Article 22. (Article 22(d) electricity and added in Article 22(d) for gas).

Amendment 46 specifies that Member States shall notify all their measures to fulfil public and universal service obligations upon implementation and subsequently every two years any modifications to those measures. Amendment 46 and part of amendment 125 specifically add public service obligations relating to environmental protection, through promotion of renewable energy sources and energy efficiency demand side management measures. (Article 3(8) electricity, 3(2) gas)

Amendments 48 and 129 specify that customers shall be informed about their rights regarding universal service. (Annex, point f)

#### **Article 5 - Authorisation procedures (electricity)**

Amendment 50 calls for simplified authorisation procedures for small or embedded generation under 15 MW. The Commission can accept this principle, but has changed the wording in accordance with the relevant provision from Directive 2001/77/EC on renewable sources of energy in the internal electricity market. The Commission does not support the part of the amendment stating that no authorisation should apply to fuel cell, micro CHP or similar technology on domestic premises. Authorisation should be required, for instance with regard to neighbouring premises with regard to noise etc., but speedier procedures should be achieved. (Article 5(3)).

#### **Article 6 - Tendering (electricity)**

Amendment 51 adds to the tendering option a possibility to tender explicitly for energy efficiency/demand side management measures in the interest of security of supply and environmental protection. The Commission agrees to the importance of energy efficiency and saving for both security of supply and environmental protection. The provision that the Commission may co-ordinate the tendering process if more than

one Member State is concerned is superfluous, given the fact that the calls for tender are published in the Official Journal. (Article 6(1) electricity).

#### **Article 6a (electricity), 4a (gas) - Monitoring of Security of Supply**

Amendments 53, 54, 130 and 131 suggest the creation of a European Regulatory Group for the European electricity and gas markets by the Commission. The Commission has the intention to create such a consultative body shortly, through a Commission decision. The purpose of this group will be to encourage co-operation and co-ordination of national regulatory authorities, in order to promote the development of the internal market for electricity and gas, and to seek to achieve a consistent application, in all Member States, of the provisions set out in this Directive and in the Regulation on cross-border exchanges of electricity.

Amendment 109 includes the environment and public service requirements in addition to security of supply as a reason to monitor the demand/supply balance. The Commission can accept this addition. It does acknowledge the importance of energy efficiency and saving in the context of security of supply, as reflected in amendment 51. (Article 6a (electricity), 4a (gas)).

Amendment 132 adds in the report by the Commission on security of supply in natural gas, an examination of issues relating to system capacity levels. This is accepted; the Commission proposed in its recent Communication on European energy infrastructure to combine the security of supply report with a report on the situation regarding infrastructure. (Article 26(1) electricity, 28(1) gas).

#### **Article 7/a - 10 - Unbundling of Transmission and Distribution System Operators**

Of amendment 56, the part amending Article 7, 6c, which proposes that the system operator shall have efficient decision making rights as to the assets necessary to maintain and develop the network, can be accepted, with modified wording. This equally applies to amendment 163, which states the same objective in different wording, and to 62 on the distribution system operator. The Commission has changed the wording of amendment 137 relating to gas system operators in the same sense. (Article 7,(4c) electricity, 7a,(2c) gas).

Amendment 135 specifies that at least the methodologies for the establishment of tariffs and terms for balancing the gas system shall be approved or fixed by the national regulatory authority. The tariffs and terms shall be published. This is in line with amendment 76. (Article 7(3) electricity and gas).

Amendment 140 calls for admission to the gas network for biogas and gas for biomass for environmental reasons on condition that this is compatible with the secure and efficient operation of the network on environmental grounds. The Commission proposes to redraft this amendment for clarification purposes. (Article 10(3), gas).

#### **Article 8 - Maintenance and Development of the network by the TSOs.**

Amendment 57 states that costs of connecting producers of electricity from renewables and combined heat and power shall be objective and non-discriminatory. The Commission is of the opinion that the costs of connection of all producers should be non-discriminatory, but that, in addition, the specific characteristics and the costs and benefits of connecting producers from renewables and combined heat and power

to the grid should be taken into account. This is reflected in Article 22. The explicit reference to ensure no obstacles exist to the stimulation of dispersed generation, is taken on board in Article 22(1g) as well, where the regulators shall monitor the measures taken by Member States to ensure that the benefits of connecting renewables producers and distributed generation to the system are taken in account. (Article 22(1g) electricity).

### **Article 13/14 - Unbundling of Accounts**

Amendment 66 specifies that the national regulatory authority shall have access to the accounts of generation, transmission, distribution and supply undertakings. This can be supported, but has been reformulated to ensure that it is made explicit that these authorities shall have access to these accounts, even if the activities are not carried out by separate undertakings. This was implied in the Commission proposal. The reference to trading and retail can not be supported, as these terms are not used in the Directive. (Article 13 electricity).

### **Article 15 and 16 - Access to the Network**

Amendment 172 introduces the notion that tariffs should 'reflect long-term, marginal avoided network costs from decentralised electricity production and demand side management measures. The Commission proposal confers the task of monitoring/setting these tariff conditions to the national regulatory authorities. They will take account of the work on this subject carried out in the Madrid and Florence Fora and in the framework of the Regulation. (Recital 14, Article 22, electricity and gas). Amendment 172 furthermore introduces the notion of published benchmarking tariffs. This leaves room for deviation or negotiation with respect to the published tariffs, this part of the amendment cannot be accepted.

Amendment 70 obliges system operators to quote terms for reinforcing the network. The principle can be supported, but to avoid undesired consequences obliging system operators to engage in costly feasibility and cost studies after every refusal of access, the Commission has changed the wording to reflect the fact that such quotes should be provided on request. (Article 16(2) electricity).

Amendment 145 refers to access to flexibility instruments. The Commission can accept to add access to flexibility instruments to access to storage, which is one of the most important flexibility instruments in most Member States. The Commission can not accept, however, that access requires that it is necessary both in technical and economic terms. If it is necessary for only one of these reasons, access should be provided. (Article 15(2) gas).

### **Article 22 - Regulation**

Amendments 75, 76, 149 and 184 on the national regulatory authority can be supported in part. With respect to the independence of the national regulatory authority, the Commission proposes that it is important that the regulatory authority is independent from the interests of industry. The reference to benchmarking tariffs in amendment 75 under paragraph 1a cannot be supported. The Commission can accept the approving or fixing by the regulator of methodologies underlying the calculation of the transmission and distribution tariffs, terms and conditions and tariffs for the

provision of balancing services (this also applies to amendment 12). (Article 22(2) and 22(4) electricity and gas).

Amendments 77 and 78 can be accepted, however the wording ‘competent body’ is replaced with ‘national regulatory authority’ as this is the competent body in question. (Article 22(1) electricity and gas).

Amendments 79, 149 and 151 add to the tasks of the national regulatory authority the reporting on market dominance, market concentration and predatory and anti-competitive behaviour. These requirements are added to Article 22, by requiring the national regulatory authority to monitor ‘effective competition’. (Article 22(1) electricity and gas).

Amendments 60 and 65 state that transmission and distribution system operators shall be placed ‘under a positive obligation’ to release information on capacity allocation. This is translated as a task of the national regulatory authority to monitor that system operators do indeed publish aggregated information on interconnectors, grid usage and allocation to interested parties. (Article 22(1)(e) electricity and added in 22(1)(e) for gas).

Amendment 90 on the prohibition of cross-subsidisation is accepted in principle and reflected in Article 22(1f).

#### **Article 23 (electricity) – EU imports**

Amendment 82 changes the reporting obligation on imports of electricity from once a year to once every three months. The Commission is, in principle, willing to except a shorter periodicity for the reporting obligation. Article 23(a).

#### **Article 24 (electricity)- Stranded costs and small, isolated systems**

Amendment 84 deletes Article 24 (electricity). This can be accepted for paragraphs 1 and 2 relating to stranded costs as all Member States have had the possibility to introduce their application under the Directive, and the deadline referred to in paragraph 2 has expired. Paragraph 3, however, should be maintained as exemptions for small, isolated systems may continue to be required.

#### **Article 26 (electricity) – 28 (gas) - Reports**

Amendments 55, 130 and 132 (relating to Article 6 which is moved to Article 26(1) electricity) and 28(1)gas) specify the provisions on the examination of the security of supply situation in the Community, taking into account the interconnection capacity between Member States. It is specified that this monitoring should be carried out early enough to allow any necessary actions to be taken in due time. The Commission supports these specifications.

Amendment 86 regroups in one article the different reports that the Commission is obliged to publish. The Commission supports the principle of regrouping the reports, but the amendment is formulated too restrictively. The Commission maintains all the elements in essence, and adds the report on public service obligations and on harmonisation requirements of former Article 3a and Article 25 respectively.

Amendment 153 on reporting on gas imports from third countries is incorporated in Article 28 of the amended Gas Directive under the reporting obligation of the Commission.

### **Annex**

Amendments 89, 158, 159 and 160 specify some provisions of the annex on consumer protection. Most of these can be accepted. However, as the obligation on disclosure is moved from the annex to Article 3(5) for electricity, point d) of the annex is deleted. The part on debt staggering is deemed too detailed, and will fall under protection of vulnerable customers. The obligation to offer customers with a connection capacity of less than 10 kW at least one contract without a fixed minimum price, should equally be left to subsidiarity.

## **II. Rejected amendments**

All amendments (1, 3, 10, 11, 17, 21, 22, 23, 25, 85, 87, 91, 92, 93, 94, 98, 99, 100, 101, 105, 106, 107, 108, 113, 114, 116, 156, 157) relating to, or implying, the splitting of the proposal of the Commission into two separate proposals, one amending the Electricity Directive 96/92/EC and one amending the Gas Directive 98/30/EC are not accepted. The electricity and gas markets are increasingly interdependent and should therefore be treated in parallel. The majority of new power generation plants are gas fired. Confronting actors working on both markets with two separate sets of rules would severely hamper the efficient functioning of the internal market. Furthermore, there is a risk that the splitting of the proposal would lead to a divergence in the dates of adoption.

### **Recitals**

Amendment 9 states that only locally owned utilities can benefit from the exemption to the obligation to legally unbundle the distribution system operator in distribution companies supplying more than 100.000 customers. This would be a discriminatory distinction between companies.

Amendment 16 states that the same rules on tax, subsidies and concessions form the basis of a functioning market. The European Union has not arrived at this degree of harmonisation and one cannot assert that the market is not functioning. Improvements can be made. For this reason the Commission has presented its proposal on energy taxation, and is now examining the situation regarding support for fuel sources.

Amendments 19 and 83 call on the Commission to come forward with proposals on combined heat and power and on access from third countries imports respectively. Whilst it is the intention of the Commission to come forward this year with the proposal on combined heat and power, and where necessary, measures on access from third countries, a Directive is not the place to call on the Commission to present proposals.

### **Article 2 - Definitions**

Amendments 180, 27, 29, 31, 35, 36, 37, and 38 concern amendments introducing definitions which are too detailed or serve no purpose in the framework of this Directive in the light of the fact that the Commission rejects the amendments in which these defined terms are used.

Amendments 121 and 122 deleting the definitions of system and ancillary services cannot be accepted as, in combination with amendment 120, it would not change anything in substance, but renders the definition of the different parts of the system more difficult to understand.

#### **Article 6 (electricity) - Security of Supply**

Amendment 52 deletes the provision from Article 6 requiring that offers from existing producers shall be received in calls for tender for generation capacity if additional requirements can be met by existing generators. This is incompatible with public procurement rules and indeed general principles of fair competition. A specification of primary energy sources can in any case be included and applies equally to existing generation should Member States wish to exclude certain types of fuel.

#### **Article 7 (electricity), 7a (gas) - Unbundling of Transmission System Operator**

Amendment 164 calls for ownership unbundling in electricity in principle. If Member States were not to choose ownership unbundling, they should be able to prove that the unbundling measures they apply will have the same results in terms of non-discrimination as ownership unbundling. The Commission has proposed legal unbundling coupled with measures of functional unbundling and following adoption of this proposal will carefully monitor results to determine whether this is adequate to achieve the objective of non-discriminatory network access. The Commission will review the effectiveness of this provision in its report referred to in Articles 26 (electricity) and 28 (gas), and may propose further measures, if necessary.

Amendments 133 and 139 would allow the integrated gas undertaking to be in control of transmission and distribution system operation. The responsibility for operating these networks should lie with the legally separated transmission and distribution system operator, not the integrated company.

#### **Article 10 - Unbundling of Distribution System Operator**

Amendment 170 increases the threshold for the exemption of the obligation to legally unbundle the distribution system operator in electricity from 100.000 to 150.000 clients; furthermore, this would only apply to locally owned utilities (see rejected amendment 9). This would lead to an exemption for too many distribution companies.

Amendments 63, 138, 142 either change or delete altogether (in the Gas part of the proposal) the obligation to nominate a compliance officer to guarantee that the non-discrimination and confidentiality measures are upheld in a legally separate system operator. The Commission cannot accept these changes to this provision.

Amendment 64 proposes that only the book value can be used for the valuation of the network in the event that new utilities are set up which would be owned or controlled by local authorities. The Directive is not the place to enter into details regarding the valuation of networks, which has a significant impact on tariffs and on the viability of these companies. This should be left to subsidiarity and the European regulatory fora and, possibly, be examined under competition rules, including state aid rules.

### **Article 14 (electricity) - Unbundling and Transparency of Accounts**

Part of amendment 67 alters the provision on accounting unbundling to apply only to transmission or distribution activities on the one hand and generation or supply activities on the other hand. This cannot be accepted, as for a number of years, companies will retain de jure or de facto captive customers. The risk of cross subsidisation therefore persists and should be controlled by national regulatory authorities. The details on what can be calculated in the distribution tariffs should be left to subsidiarity, to national regulatory authorities.

Amendment 68 relating to the separate accounting and management of future nuclear decommissioning funds and waste management activities cannot be supported. While the Commission agrees to the importance of the issue, this matter has to be addressed under the relevant Community rules, which deal with such measures. Its place is not in this Directive. The Commission is preparing a report on the different forms of public support for fuel sources. This report will be published later this year and will contain conclusions and, where appropriate, propose measures.

### **Article 16 (electricity), 14 (gas) - Access to the Network**

Amendments 72 and 146 stipulate that the available capacity of the gas and electricity networks not used shall be made available to system users. This is dealt with under the Regulation for electricity, and in the Madrid Forum for gas.

Amendments 161, 175 and 183 seek to reintroduce a possibility of negotiation concerning access to the gas network and allow for reservation of capacities in gas infrastructure. The tariffs or, at least, the methodology used to establish or calculate the tariffs shall be approved by the national regulatory authority prior to their entry into force. Only access on the basis of published tariffs can achieve the objective of non-discrimination.

### **Article 19 - Reciprocity**

Amendment 74 extends the reciprocity principle in electricity. The Commission opposes any changes to the current provisions on reciprocity, which adequately balance competition and market opening objectives.

Amendment 148 deletes the reciprocity principle from the amended gas Directive. This is unacceptable, as Member States with a greater degree of market opening might want to maintain this option until market opening has been completed in all Member States.

### **Article 22 - Regulation**

Amendments 81 and 152 contain a possibility for national regulators to require release of electricity generation and gas and electricity capacity from long-term contracts. Amendment 81 also stipulates that Member States shall ensure that national regulators can impose public service obligations on electricity companies. It also includes a requirement on national regulators to report to national parliaments once a year. These measures have to be left to subsidiarity. The Commission considers that, at least at this stage, it is necessary to monitor progress in creating a competitive internal market prior to deciding on electricity and gas release programs at Community level.

### **Miscellaneous**

Amendment 155 gives Member States two years to implement this Directive. This is unnecessarily long as the basic legislation is in place or under preparation in all Member States

Amendment 87 only repeals the electricity transit Directive, leaving the gas transit Directive in existence and would thus allow for negotiated third party access for transit of gas. The Commission maintains that there should be homogeneity in access regimes, publication requirements and dispute settlement mechanisms for the whole network, including for transit and cross-border transmission within the internal gas market to achieve non-discriminatory access to the network.

Amendments 44 and 80 are too detailed in this Directive which is essentially a framework Directive, and should be left to subsidiarity.

### **C. Developments in the framework of the Council**

Many changes made by the subsequent Presidencies are compatible with parliamentary amendments and need no further explanation. Other changes are largely textual or detailed in nature, and principally serve to clarify the texts..

### **D. European Council Conclusions of Barcelona**

The European Council Conclusions stipulating that all non-household customers should be eligible by 2004 at the latest, have been incorporated in Article 19 (electricity) and Article 18 (gas).

Furthermore, in Article 3(4)electricity and 3(3)gas, the Council Conclusions concerning the protection of remote areas have been taken into account.

The request by the European Council that the European Commission publish a report on progress with the implementation of these Directives on a yearly basis, has been integrated in Articles 26 (electricity) and 28 (gas).

Amended proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Directives 96/92/EC and 98/30/EC concerning rules for the internal markets in electricity and natural gas**

**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2), Article 55 and Article 95 thereof,

Having regard to the proposal from the Commission<sup>1</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>2</sup>,

Having regard to the opinion of the Committee of the Regions<sup>3</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>4</sup>,

Whereas:

- (1) Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity<sup>5</sup> and Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas<sup>6</sup> have made very important contributions towards the creation of internal markets for electricity and gas.
- (2) Experience in implementing those Directives demonstrates the benefits that have begun to result from the internal markets in electricity and gas, in terms of efficiency gains, price reductions, higher standards of service and increased competitiveness. However, important shortcomings and possibilities for improving the functioning of the markets remain, notably in ensuring a level playing field in generation and addressing the risks of predatory behaviour, ensuring non-discriminatory transmission and distribution tariffs, through access to the network on the basis of tariffs published prior to their entry into force, and ensuring that the rights of small and vulnerable customers are protected and that information on fuel sources for electricity generation is disclosed.**

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<sup>1</sup> OJ C

<sup>2</sup> OJ C

<sup>3</sup> OJ C

<sup>4</sup> OJ C

<sup>5</sup> OJ L 27, 30.1.1997, p. 20.

<sup>6</sup> OJ L 204, 21.7.1998, p. 1.

- (3) At its meeting in Lisbon on 23 and 24 March 2000, the European Council called for rapid work to be undertaken to complete the internal market in both electricity and gas sectors and to speed up liberalisation in these sectors with a view to achieving a fully operational internal market. The European Parliament, in its Resolution of 6 July 2000 on the Commission's second report on the state of liberalisation of energy markets, requested the Commission to adopt a detailed timetable for the achievement of accurately defined objectives with a view to gradually but completely liberalising the energy market.
- (4) **The freedoms which the Treaty guarantees European citizens – free movement of goods, freedom to provide services and freedom of establishment – are only possible in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.**
- (5) **In view of the anticipated increase in dependency as regards natural gas consumption, consideration should be given to initiatives and measures to encourage reciprocal arrangements for access to third-country networks and market integration.**
- (6) The main obstacles in arriving at a fully operational internal market are related to issues of access to the network, **network tariffication**, different degrees of market opening between Member States **and different approaches to internalisation of external costs**.
- (7) **For competition to function, network access must be non-discriminatory, transparent and fairly priced. Favourable investment conditions should exist.**
- (8) In order to achieve non-discriminatory access to the network, the independence of the transmission system operator is of paramount importance. The provisions on unbundling should therefore be strengthened. In order to ensure non-discriminatory access to the distribution network, unbundling requirements for the distribution system operator should be introduced for both electricity and gas distribution system operators.
- (9) To avoid imposing a disproportionate financial and administrative burden on small distribution companies, Member States should be able, where necessary, to exempt such companies from the unbundling requirements.
- (10) Further measures should be taken in order to ensure transparent, predictable and non-discriminatory tariffs for access to essential transportation and related infrastructure, including storage and other ancillary facilities. Those tariffs should be applicable to all system users on a non-discriminatory basis.

- (11) In the light of the experience gained with the operation of Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids<sup>7</sup> and Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids<sup>8</sup>, measures should be taken to ensure homogeneous and non-discriminatory access regimes for transmission, including cross-border flows **of gas and electricity** between Member States.
- (12) The **existence of effective regulation, carried out by** national regulatory authorities, is an important feature in guaranteeing non-discriminatory access to the network. Those authorities should at least have the competence to fix or approve **the tariffs, or at least, the methodologies underlying the calculation of** transmission and distribution tariffs and tariffs for access to liquefied natural gas (LNG) facilities. **These tariffs should be published** prior to their entry into force.
- (13) **In order to ensure effective market access for new entrants, non discriminatory and cost-reflective balancing mechanisms are necessary. As soon as the electricity and gas markets are sufficiently liquid, this should be achieved through the setting up of transparent market-based mechanisms for the supply and purchase of electricity and gas needed in the framework of balancing requirements. In the absence of such liquid markets, national regulatory authorities should play an active role to ensure that balancing tariffs are non-discriminatory and cost-reflective.**
- (14) National regulatory authorities should be able to **fix or** approve tariffs, **or the methodologies underlying the calculation of the tariffs,** on the basis of a proposal by the transmission system operator or distribution system operator(s) or LNG system operator, or on the basis of a proposal agreed between these operator(s) and the users of the network. **In carrying out these tasks, national regulatory authorities should ensure that transmission and distribution tariffs are non-discriminatory and cost-reflective, and should take account of the long-term, marginal, avoided network costs from distributed generation and demand-side management measures.**
- (15) The benefits resulting from the internal market should be available to all Community industry and commerce, including small and medium-sized enterprises, and to all Community citizens as quickly as possible, for reasons of **fairness, competitiveness, and indirectly, to create** employment **as a result of the efficiency gains that will be enjoyed by enterprises.**
- (16) Gas and electricity customers should be able to choose their supplier freely. Nonetheless a phased approach should be taken to completing the internal market for electricity and gas, coupled **with a specific deadline,** to enable industry to adjust and ensure that adequate measures and systems are in place to protect the interests of customers and ensure they have a real and effective right to choose supplier.
- (17) Progressive market opening towards full competition should gradually remove differences between Member States. Transparency and certainty in the implementation of this Directive should be ensured.

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<sup>7</sup> OJ L 313, 13.11.1990, p. 30. Directive as last amended by Commission Directive 98/75/EC (OJ L 276, 13.10.1998, p. 9).

<sup>8</sup> OJ L 147, 12.6.1991, p. 37. Directive as last amended by Commission Directive 95/49/EC (OJ L 233, 30.9.1995, p. 86).

- (18) Directive 98/30/EC provides for access to storage as part of the gas system. In the light of the experience gained in implementing the internal market, additional measures should be taken to clarify the provisions for access to storage and other ancillary services and to reinforce the separation of the operation of transmission and distribution systems, and gas storage and LNG facilities.
- (19) Nearly all Member States have chosen to ensure competition in the electricity generation market through a transparent authorisation procedure. However, Member States should have the possibility to ensure security of supply through the launching of a tendering procedure in the event that sufficient electricity generation capacity is not built on the basis of the authorisation procedure.
- (20) In the interest of security of supply, the supply/demand balance in individual Member States should be monitored, **followed by a report on the situation at Community level, taking account of interconnection capacity between areas. Such monitoring should be carried out sufficiently early to enable appropriate measures to be taken** if security of supply is compromised. **The construction and maintenance of the necessary network infrastructure, including interconnection capacity, should contribute to ensuring a stable electricity and gas supply.**
- (21) **Member States should ensure that biogas and gas from biomass is granted non-discriminatory access to the gas system, provided such access is compatible with the relevant technical rules and safety standards.**
- (22) **Long-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 in so far as they do not undermine the objectives of this Directive and are compatible with the Treaty, including competition rules.**
- (23) Member States should ensure that all customers enjoy the right to be supplied with electricity of a specified quality at affordable, **clearly comparable, transparent** and reasonable prices. **Member States should also ensure that all final customers connected to the gas system are informed about their rights to be supplied with natural gas of a specified quality at reasonable prices.** In order to ensure the maintenance of the highest possible standards of public service in the Community, all measures taken by Member States to achieve the objectives of this Directive should be regularly notified to the Commission. The Commission should regularly publish a report analysing measures taken at national level to achieve public service objectives and comparing their effectiveness, with a view to making recommendations as regards measures to be taken at national level to achieve high public service standards.
- (24) The requirement to notify the Commission of any refusal to grant authorisation to construct new generation capacity has proven to be an unnecessary administrative burden and should therefore be dispensed with.
- (25) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of the proposed action, namely the creation of fully operational internal electricity and gas markets, in which fair competition prevails, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved by the Community. This Directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

- (26) To ensure homogeneity in the treatment of access to the electricity and gas networks, also in the case of transit, Directives 90/547/EEC and 91/296/EEC should be repealed.
- (27) Directives 96/92/EC and 98/30/EC should therefore be amended accordingly.
- (28) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union,**

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

**Amendments to Directive 96/92/EC**

Directive 96/92/EC is amended as follows:

- (1) Articles 1, 2 and 3 are replaced by the following:

*“Article 1*

This Directive establishes common rules for the generation, transmission, distribution and supply of electricity. It lays down the rules relating to the organisation and functioning of the electricity sector, access to the market, the criteria and procedures applicable to calls for tender and the granting of authorisations and the operation of systems.

*Article 2*

For the purposes of this Directive:

- 1) "generation" shall mean the production of electricity;
- 2) "producer" shall mean a natural or legal person generating electricity;
- 3) "autoproducer" shall mean a natural or legal person generating electricity essentially for its own use;
- 4) "independent producer" shall mean:
  - (a) a producer who does not carry out electricity transmission or distribution functions in the territory covered by the system where it is established;
  - (b) in Member States in which vertically integrated undertakings do not exist and where a tendering procedure is used, a producer corresponding to the definition of point (a), who may not be exclusively subject to the economic precedence of the interconnected system;
- 5) "transmission" shall mean the transport of electricity on the high-voltage interconnected system with a view to its delivery to final customers or to distributors, **but not including supply;**

- 6) **"transmission system operator" shall mean a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity;**
- 7) "distribution" shall mean the transport of electricity on medium-voltage and low-voltage distribution systems with a view to its delivery to customers, **but not including supply;**
- 8) **"distribution system operator" shall mean a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity;**
- 9) "customers" shall mean wholesale and final customers of electricity;
- 10) "wholesale customers" shall mean any natural or legal persons **who purchase electricity for the purpose of resale inside or outside the system where they are established;**
- 11) "final customer" shall mean a customer purchasing electricity for **his/her** own use;
- 12) **"household customer" shall mean a customer purchasing electricity for his/her own household consumption, excluding commercial or professional activities;**
- 13) "non-**household** customer" shall mean **any natural or legal person purchasing electricity which is not for its own household use and shall include producers and wholesale customers;**
- 14) **"eligible customers" shall mean customers who have access to competitive suppliers of electricity in accordance with this Directive;**
- 15) "interconnectors" shall mean equipment used to link electricity systems;
- 16) "interconnected system" shall mean a number of transmission and distribution systems linked together by means of one or more interconnectors;
- 17) "direct line" shall mean **either an electricity line linking an isolated production site with an isolated customer or an electricity line linking an electricity producer and an electricity supply undertaking to supply directly their own premises, subsidiaries and eligible customers ;**
- 18) "economic precedence" shall mean the ranking of sources of electricity supply in accordance with economic criteria;
- 19) "ancillary services" shall mean all services necessary for the operation of a transmission or distribution system;
- 20) "system user" shall mean any natural or legal person supplying to, or being supplied by, a transmission or distribution system;

- 21) "supply" shall mean the sale of electricity to customers;
- 22) "integrated electricity undertaking" shall mean a vertically or horizontally integrated undertaking;
- 23) "vertically integrated undertaking" shall mean an undertaking **or a group of undertakings whose mutual relationships are defined in Article 3(3) of Council Regulation (EEC) No 4064/89\* and where the undertaking/group concerned is performing at least two or more of the functions of transmission, distribution, generation and supply of electricity ;**
- 24) "horizontally integrated undertaking" shall mean an undertaking performing at least one of the functions of generation for sale, or transmission, or distribution, or supply of electricity, and another non-electricity activity;
- 25) "tendering procedure" shall mean the procedure through which planned additional requirements and replacement capacity are covered by supplies from new or existing generating capacity;
- 26) "long-term planning" shall mean the planning of the need for investment in generation and transmission **and distribution** capacity on a long-term basis, with a view to meeting the demand for electricity of the system and securing supplies to customers;
- 27) "small isolated system" shall mean any system with consumption of less than 2500 GWh in the year 1996, where less than 5% of annual consumption is obtained through interconnection with other systems;
- 28) **"energy imbalance" shall mean the difference between the quantity of electricity notified to the transmission or distribution system operator for injection or withdrawal at one or more given locations over a given time period and the metered quantity of electricity withdrawn or injected at one or more given locations over the same time period;**
- 29) **"security" shall mean both security of supply and provision of electricity, and technical safety;**
- 30) **"energy efficiency/demand-side management" shall mean a global or integrated approach aimed at influencing the amount and timing of electricity consumption in order to reduce primary energy consumption and peak loads by giving precedence to investments in energy efficiency measures, or other measures, such as interruptible supply contracts, over investments to increase generation capacity, if the former are the most effective and economical option, taking into account the positive environmental impact of reduced energy consumption and the security of supply and distribution cost aspects related to it;**
- 31) **"renewable energy sources" shall mean renewable non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases);**

- 32) **"distributed generation" shall mean generation plants connected to the low-voltage distribution system;**
- 33) **"disclosure" shall mean making available in aggregate form commercial information associated with the production of electricity and relating to the sources used to produce electricity, their location, or environmental impact.**

### *Article 3*

1. Member States shall ensure, on the basis of their institutional organisation and with due regard for the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive, with a view to achieving a competitive **and sustainable** market in electricity, and shall not discriminate between these undertakings as regards either rights or obligations.

2. Having **full** regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, **including energy efficiency climate protection**. Such obligations shall be clearly defined, transparent, non-discriminatory and verifiable. In relation to security of supply, **energy efficiency/demand-side management and for the fulfilment of environmental goals**, as referred to in this paragraph Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.

3. Member States shall ensure that all **final** customers enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable prices. **To that end, Member States may appoint a supplier of last resort. Member States shall impose on distribution companies an obligation to connect customers to their grid under terms, conditions and tariffs set in accordance with the procedure laid down in Article 22, 2.**

4. Member States shall take appropriate measures to protect final customers, and shall in particular ensure that there **are adequate safeguards to protect vulnerable customers from disconnection. In this context, Member States may take appropriate measures to protect final customers in remote areas.** They shall ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms. **Member States shall ensure that the eligible customer is effectively able to switch to a new supplier.** These measures shall include, in particular, those set out in the Annex.

**5. Member States shall ensure that electricity suppliers specify in the bills and in all advertising and promotional materials made available to final customers:**

- (a) the percentage contribution of each energy source to the commercial fuel mix for the electricity supplied;**
- (b) the overall fuel mix of the supplier over the preceding year;**

**(c) the relative importance of each energy source with respect to the production of greenhouse gases.**

**With respect to electricity obtained via an electricity exchange, the aggregate figures provided by the exchange over the preceding year may be used.**

6. Member States shall implement appropriate measures to achieve the objectives of social and economic cohesion, environmental protection, **which may include energy efficiency/demand-side management measures and means to combat climate change**, and security of supply. **Such measures may include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools**, for the maintenance and construction of the necessary network infrastructure, including interconnection capacity.

7. Member States may decide not to apply the provisions of Articles 5, 6, 16 and 21 in so far as their application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and in so far as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community. The interests of the Community include, *inter alia*, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.

8. **Member States shall, upon implementation of this Directive, notify the Commission of all measures adopted to fulfil universal service and public service obligations, including consumer protection and environmental protection, and their possible effect on national and international competition, whether or not such measures require a derogation from this Directive. They shall inform the Commission subsequently every two years of any changes to such measures, whether or not they require a derogation from this Directive.**

\*OJ L 257, 21.9.90, p.13.”

(2) Article 4 is deleted.

(3) Articles 5 and 6 are replaced by the following:

#### *"Article 5*

1. For the construction of new generating capacity, Member States shall adopt an authorisation procedure, which shall be conducted in accordance with objective, transparent and non-discriminatory criteria.
2. Member States shall lay down the criteria for the grant of authorisations for the construction of generating capacity in their territory. These criteria may relate to:
  - (a) the safety and security of the electricity system, installations and associated equipment;
  - (b) protection of public health and safety;
  - (c) protection of the environment;
  - (d) land use and siting;
  - (e) use of public ground;

- (f) energy efficiency;
  - (g) the nature of the primary sources;
  - (h) characteristics particular to the applicant, such as technical, economic and financial capabilities;
  - (i) compliance with measures adopted pursuant to Article 3.
3. **Member States shall take appropriate measures to streamline and expedite authorisation procedures for small and/or distributed generation. These measures shall apply to all facilities of less than 15 MW and to all distributed generation.**
4. The authorisation procedures and criteria shall be made public. Applicants shall be informed of the reasons for any refusal to grant an authorisation. The reasons must be objective, non-discriminatory, well founded and duly substantiated. Appeal procedures shall be made available to the applicant.

#### *Article 6*

1. Member States shall ensure the possibility, in the interests of security of supply **and environmental protection**, to tender for new **capacity or energy efficiency/demand-side management measures** on the basis of published criteria. A tendering procedure can, however, only be launched if on the basis of the authorisation procedure the generating capacity being **built or the energy efficiency/demand-side management measures being taken are** not sufficient to ensure security of supply **and to meet environmental targets**.
2. **Member States may ensure the possibility, in the interests of environmental protection and the promotion of infant new technologies, to tender for new capacity on the basis of published criteria. This tender may relate to new capacity or energy efficiency/demand-side management measures. A tendering procedure can, however, only be launched if on the basis of the authorisation procedure the generating capacity being built or the measures being taken are not sufficient to achieve these objectives.**
3. Details of the tendering procedure for means of generating capacity **and energy efficiency/demand-side management measures** shall be published in the Official Journal of the European Communities at least six months prior to the closing date for tenders.

The tender specifications shall be made available to any interested undertaking established in the territory of a Member State so that it has sufficient time in which to submit a tender.

The tender specifications shall contain a detailed description of the contract specifications and of the procedure to be followed by all tenderers and an exhaustive list of criteria governing the selection of tenderers and the award of the contract, **including incentives, such as subsidies**, which are covered by the tender. These specifications may also relate to the fields referred to in Article 5(2).

4. In invitations to tender for the requisite generating capacity, consideration must also be given to electricity supply offers with long-term guarantees from existing generating units, provided that additional requirements can be met in this way.

5. Member States shall designate an authority or a public body or a private body independent of electricity generation, transmission, distribution and supply activities, **which may be a national regulatory authority referred to in Article 22(1)**, to be responsible for the organisation, monitoring and control of the tendering procedure referred to in paragraphs 1 to 4. **Where a transmission system operator is fully independent from other activities not relating to the transmission system in ownership terms, the transmission system operator may be designated as the body responsible for organising, monitoring and controlling the tendering procedure.** This authority or body shall take all necessary steps to ensure confidentiality of the information contained in the tenders.”

(4) The following Article 6a is inserted:

*“Article 6a*

**Member States or the national regulatory authorities referred to in Article 22(1)**, shall ensure the monitoring of security of supply issues. This monitoring shall, in particular, cover the supply/demand balance on the national market, the level of expected future demand and envisaged additional capacity under planning or construction, **and the quality and level of maintenance of the networks**. They shall publish, by 31 July each year at the latest a report outlining the findings resulting from the monitoring of these issues, as well as any measures taken or envisaged to address them and forward this report to the Commission forthwith.”

(5) Article 7 is replaced by the following:

*“Article 7*

1. Member States shall designate or shall require undertakings which own transmission systems to designate, for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance, **one or more** transmission system operators.

2. Member States shall ensure that technical rules establishing the minimum technical design and operational requirements for the connection to the system of generating installations, distribution systems, directly connected consumers' equipment, interconnector circuits and direct lines are developed and published. These requirements shall ensure the interoperability of systems and shall be objective and non-discriminatory. They shall be notified to the Commission in accordance with Article 8 of Council Directive 98/34/EC\*.

**3. For the purposes of this Directive, the transmission system operator shall be responsible for:**

- a) ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity;**
- b) contributing to security of supply through adequate transmission capacity and system reliability;**
- c) managing energy flows on the system, taking into account exchanges with other interconnected systems. To that end, the transmission system operator shall be responsible for ensuring a secure, reliable and efficient electricity system and, in that context, for ensuring the availability of all necessary ancillary services;**
- d) providing to the operator of any other system with which its system is interconnected sufficient information to ensure the secure and efficient operation, co-ordinated development and interoperability of the interconnected system;**
- e) the non-discrimination as between system users or classes of system users, particularly in favour of its subsidiaries or shareholders.**

**4.** Unless the **transmission** system operator is already fully independent from other activities not relating to the transmission system in terms of ownership, the system operator, **within the integrated electricity undertaking**, shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to transmission.

In order to ensure the independence of the transmission system operator, the following minimum criteria shall apply:

- (a) those persons responsible for the management of the transmission system operator may not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, distribution and supply of electricity;
- (b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the transmission system operator are taken into account in a manner that ensures that they are capable of acting independently;
- (c) the transmission system operator must have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to maintain or develop the network;**
- (d) the transmission system operator must establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded. The programme must set out the specific obligations of employees to meet this objective. It must be drawn up and its respect monitored by a compliance officer. An annual report, setting out the measures taken, must be submitted by the compliance officer to the national regulatory authority referred to in Article 22(1) and published**

\*OJ L 204, 21.7.1998, p. 37.”

- (6) The following Article 7a is inserted:

*"Article 7a*

Transmission system operators shall procure the energy they use for the carrying out of their functions according to transparent, non-discriminatory and market based procedures."

- (7) In Article 8, the following paragraphs 5 and 6 are added:

"5. Member States may require transmission system operators **to comply with minimum standards** for the maintenance and development of the transmission system, including interconnection capacity.

6. Rules adopted by transmission system operators for balancing the electricity system shall be objective, transparent and non-discriminatory, including rules for the charging of **system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs,** for the provision of such services by transmission system operators shall **be established pursuant to a methodology compatible with Article 22(2) in a non-discriminatory and cost-reflective way and shall be published.**"

- (8) Articles 9 and 10 are replaced by the following:

*"Article 9*

**Without prejudice to Article 13 or any other legal duty to disclose information,** the transmission system operator must preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, **and shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.**

*Article 10*

1. Member States shall designate or shall require undertakings that own or are responsible for distribution systems to designate one or more distribution system operators. Member States shall ensure that distribution system operators act in accordance with Articles 10(2), 11 and 12.

2. Unless the **distribution** system operator is already fully independent from other activities not relating to the distribution system in terms of ownership, the **distribution** system operator **within the integrated electricity undertaking** shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to distribution.

In order to ensure the independence of the distribution system operator, the following **minimum** criteria shall apply:

(a) those persons responsible for the management of the distribution system operator may not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, transmission and supply of electricity;

(b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;

(c) **the distribution system operator shall have sufficient decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary for the maintenance and development of the network ;**

(d) **the distribution system operator must establish a compliance programme which sets out measures taken to ensure that discriminatory conduct is excluded. The programme must set out the specific obligations of employees to meet this objective. It must be drawn up and its respect monitored by a compliance officer. An annual report, setting out the measures taken, must be submitted by the compliance officer to the national regulatory authority referred to in Article 22(1), and published.**

**This paragraph** shall apply from **1 January 2004**. Member States may decide not to apply this paragraph to integrated electricity undertakings serving less than 100 000 customers.”

(9) The following Article 10a is inserted:

*“Article 10a*

Distribution system operators shall procure the energy they use to cover energy losses and reserve capacity in their system according to transparent, non-discriminatory and market based procedures.”

(10) In Article 11, the following paragraphs 4 and 5 are added:

“4. **Where distribution system operators are responsible for balancing the electricity distribution system, rules adopted by them for that purpose shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by distribution system operators shall be established in accordance with Article 22(2) in a non-discriminatory and cost-reflective way and shall be published.**

5. **When planning the development of the distribution network, energy efficiency/demand-side management measures and/or distributed generation that might supplant the need to upgrade or replace electricity capacity shall be considered by the distribution system operator.”**

- (11) Article 12 is replaced by the following:

*“Article 12*

**Without prejudice to Article 13 or any other legal duty to disclose information**, the distribution system operator must preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, **and shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.”**

- (12) The following Article 12a is inserted:

*“Article 12a*

The rules in Articles 7(4) and 10(4) do not prevent the operation of a combined transmission and distribution system operator, which is fully independent in terms of its legal form, organisation and decision making from other activities not relating to transmission or distribution system operation and which meets the requirements of Article 7(4).”

- (13) Article 13 is replaced by the following:

*“Article 13*

Member States or any competent authority they designate, including the national regulatory authorities referred to in **Article 22(1)** shall have right of access to the accounts of generation, transmission, distribution **and supply** undertakings which they need to consult in carrying out their checks.”

- (14) In Article 14, paragraph 3 is replaced by the following:

“3. Integrated electricity undertakings shall, in their internal accounting, keep separate accounts, for their transmission, distribution, generation **and supply** activities, as they would be required to do if the activities in question were carried out by separate undertakings, with a view to avoiding discrimination, cross-subsidisation and distortion of competition. **They shall keep separate accounts for supply activities for eligible customers and supply activities for non-eligible customers. Revenue from ownership of the transmission/distribution system shall be specified in the accounts. Where appropriate, they shall keep consolidated accounts for other, non-electricity activities. The internal accounts** shall include a balance sheet and a profit and loss account for each activity.

3a. **Member States may decide that companies with an annual production not exceeding 1 TWh are not obliged to publish separate accounts for generation and supply. They shall, at the request of the national regulatory authority referred to in Article 22(1), provide the unbundled accounts to that authority.”**

- (15) Article 15 is deleted.

- (16) Article 16 is replaced by the following:

*“Article 16*

1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. **Member States shall ensure that these tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force by a national regulatory authority referred to in Article 22(1) and that these tariffs are published prior to their entry into force.**

2. The operator of a transmission or distribution system may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3. **Member States shall ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information.”**

(17) Articles 17 and 18 are deleted.

(18) Article 19 is replaced by the following:

*“Article 19*

**1. The eligible customers are the customers, which are free to purchase electricity from the supplier of their choice within the Community. Member States shall ensure that these eligible customers are:**

**a) until 1 January 2004, the eligible customers as specified in article 19(1) to 19(3) of directive 96/92/EC. Member States shall publish by 31 January each year the criteria for the definition of these eligible customers;**

**b) from 1 January 2004 at the latest, all non-household customers;**

**c) from 1 January 2005 at the latest, all customers**

2. To avoid imbalance in the opening of electricity markets:

(a) contracts for the supply of electricity with an eligible customer in the system of another Member State shall not be prohibited if the customer is considered as eligible in both systems involved ;

(b) in cases where transactions as described in point (a) are refused because of the customer being eligible only in one of the two systems, the Commission may oblige, taking into account the situation in the market and the common interest, the refusing party to execute the requested electricity supply at the request of the Member State where the eligible customer is located.”

(19) Article 20 is deleted.

(20) Articles 21 and 22 are replaced by the following:

*“Article 21*

1. Member States shall take the necessary measures to **enable**:
  - (a) all electricity producers and electricity supply **undertakings, established** within their territory to supply their own premises, subsidiaries and eligible customers through a direct line;
  - (b) any eligible customer within their territory to be supplied through a direct line by a producer and supply **undertakings**.
2. Member States shall lay down the criteria for the grant of authorisations for the construction of direct lines in their territory. These criteria must be objective and non-discriminatory.
3. The possibility of supplying electricity through a direct line as referred to in paragraph 1 shall not affect the possibility of contracting electricity in accordance with **Article 16**.
4. Member States may make authorisation to construct a direct line subject either to the refusal of system access on the basis, as appropriate, of **Article 16** or to the opening of a dispute settlement procedure under **Article 22**.
5. Member States may refuse to authorise a direct line if the granting of such an authorisation would obstruct the provisions of Article 3. Duly substantiated reasons must be given for such refusal.

*Article 22*

- 1. Member States shall designate one or more competent bodies as national regulatory authorities. These authorities shall be wholly independent of the interests of the electricity industry. They shall at least be responsible for continuously monitoring the market to ensure non-discrimination, effective competition and the efficient functioning of the market, in particular with respect to:**
  - (a) the level of competition;**
  - (b) the rules on the management and allocation of interconnection capacity, in conjunction with the national regulatory authority or authorities of those Member States with which interconnection exists;**
  - (c) any mechanisms to deal with congested capacity within the national electricity system;**
  - (d) the time taken by transmission and distribution undertakings to make connections and repairs;**
  - (e) the publication of appropriate information by transmission and distribution system operators concerning interconnectors, grid usage and capacity**

allocation to interested parties, taking into account the need to treat non-aggregated information as commercially confidential;

(f) the effective unbundling of accounts, as referred to in Article 14, to ensure there are no cross-subsidies between generation, transmission, distribution and supply activities. For this purpose they shall have access to the accounts;

(g) the terms, conditions and tariffs for connecting new producers of electricity to guarantee that these are objective, transparent and non-discriminatory, in particular taking full account of the benefits of the various renewable energy sources technologies, distributed generation and combined heat and power.

2. The national regulatory authorities shall at least be responsible for fixing, approving or proposing prior to their entry into force, the methodologies used to calculate or establish the terms and conditions for :

(a) connection and access to national networks, including transmission and distribution tariffs;

(b) the provision of balancing services.

3. National regulatory authorities shall have the authority to require transmission and distribution system operators, if necessary, to modify the terms and conditions, tariffs, rules, mechanisms and methodologies referred to in paragraph 2, to ensure that they are reasonable and applied in a non-discriminatory manner.

4. Any party having a complaint against a transmission or distribution system operator with respect to the issues mentioned in paragraphs 1, 2 and 3 may refer the complaint to the national regulatory authority which, acting as dispute settlement authority, shall issue a decision within two months after receipt of the complaint. This period may be extended by two months where additional information is sought by the national regulatory authority. This period may be further extended with the agreement of the complainant. Any appeal against such a decision shall not have suspensive effect.

Where a complaint concerns connection tariffs for major new generation facilities, the two-month period may be extended by the national regulatory authority.

5. Member States shall take measures to ensure that national regulatory authorities are able to carry out their duties referred to in paragraphs 1 to 4 in an efficient and expeditious manner.

6. Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of dominant position, in particular to the detriment of consumers, and any predatory behaviour. These mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.

7. Member States shall ensure that the appropriate measures are taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where confidentiality rules imposed by this Directive have not been respected.

**8. In the event of cross-border disputes, the national regulatory authority shall be the national regulatory authority covering the system operator which refuses use of, or access to, the system.**

**9. Recourse to the national regulatory authority shall be without prejudice to the exercise of rights of appeal under Community law.”**

(21) The following Article 23a is inserted:

*"Article 23a*

Member States shall inform the Commission **every three months** of imports of electricity, **in terms of physical flows**, that have taken place during the previous calendar year from third countries."

(22) Article 24 is replaced by the following:

*"Article 24*

Member States which can demonstrate, after the Directive has been brought into force, that there are substantial problems for the operation of their small isolated systems, may apply for derogations from the relevant provisions of Chapters IV, V, VI, VII, which may be granted to them by the Commission. The latter shall inform the Member States of those applications prior to taking a decision, taking into account respect for confidentiality. This decision shall be published in the Official Journal of the European Communities. This **Article** shall also be applicable to Luxembourg."

(23) Article 25 is deleted.

(24) Article 26 is replaced by the following:

*"Article 26*

1. The Commission shall monitor and review the application of this Directive and submit an overall progress report to the European Parliament and the Council **before the end of the first year following the entry into force of this Directive, and thereafter on an annual basis**.. The report shall at least cover:

**(a) the experience gained and progress made in creating a complete and fully operational internal market in electricity and the obstacles that remain in this respect, including aspects of market dominance, concentration in the market, predatory or anti-competitive behaviour;**

**(b) the extent to which the unbundling and tariffication requirements contained in this Directive have been successful in ensuring fair and non-discriminatory access to the Community's electricity system and equivalent levels of competition, as well as the economic, environmental and social consequences of the opening of the electricity market for customers;**

(c) an examination of issues relating to system capacity levels and security of supply of electricity in the Community, and in particular the existing and projected balance between demand and supply, taking into account the physical capacity for exchanges between areas;

(d) a general assessment of the progress achieved with regard to bilateral relations with third countries which produce and export or transport electricity, including progress in market integration, trade and access to the networks of such third countries;

(e) the need for possible harmonisation requirements that are not linked to the provisions of this Directive.

Where appropriate, this report may include recommendations.

2. Every two years, the report referred to in paragraph 1, shall also cover an analysis of the different measures taken in the Member States to meet public service obligations, together with an examination of the effectiveness of those measures and, in particular their effects on competition in the electricity market. Where appropriate, this report may include recommendations as to the measures to be taken at national level to achieve high public service standards, or measures intended to prevent market foreclosure.”

(25) The Annex, the text of which is set out in Annex I to this Directive, is added.

## *Article 2*

### **Amendments to Directive 98/30/EC**

Directive 98/30/EC is amended as follows:

(1) Articles 1, 2 and 3 are replaced by the following :

#### *“Article 1*

This Directive establishes common rules for the transmission, distribution, supply and storage of natural gas. It lays down the rules relating to the organisation and functioning of the natural gas sector, including liquefied natural gas (LNG), access to the market, the operation of systems, and the criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas. **The rules established by this Directive for natural gas shall also apply to biogas and gas from biomass in so far as such gases can technically and safely be injected into the natural gas system.**

#### *Article 2*

For the purposes of this Directive:

1. “natural gas undertaking” means any natural or legal person carrying out at least one of the following functions: production, transmission, distribution, supply, purchase or storage of natural gas, including LNG, which is responsible for the commercial, technical and/or maintenance tasks related to those functions, but shall not include final customers;

2. “upstream pipeline network” means any pipeline or network of pipelines operated and/or constructed as part of an oil or gas production project, or used to convey natural gas from one or more such projects to a processing plant or terminal or final coastal landing terminal;
3. “transmission” means the transport of natural gas through a high pressure pipeline network other than an upstream pipeline network with a view to its delivery to customers, **but not including supply**;
4. **“transmission system operator” means a natural or legal person who carries out the function of transmission and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and to ensure the long-term ability of the system to meet reasonable demands for the transportation of gas;**
5. “distribution” means the transport of natural gas through local or regional pipeline networks with a view to its delivery to customers, **but not including supply**;
6. **“distribution system operator” means a natural or legal person who carries out the function of distribution and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems, and to ensure the long-term ability of the system to meet reasonable demands for the distribution of gas;**
7. “supply” means the sale of natural gas, including LNG, to customers;
8. “supply undertaking” means any natural or legal person who carries out the function of supply;
9. “storage facility” means a facility used for the stocking of natural gas and owned and/or operated by a natural gas undertaking, including the part of LNG facilities used for storage but excluding the portion used for production operations;
10. “storage **system operator**” means a natural or legal person who carries out the function of storage **and is responsible for operating a storage facility**;
11. “LNG facility” means a terminal which is used for the liquefaction of natural gas or **the importation**, offloading, and re-gaseification of LNG, **but shall not include any part of LNG terminals used for storage**;
12. “LNG system operator” means a natural or legal person who carries out the function of liquefaction of natural gas, or the offloading, storage and re-gaseification of LNG and is responsible for operating a LNG facility;
13. “system” means any transmission networks and/or distribution networks and/or LNG facilities owned and/or operated by a natural gas undertaking, including its facilities supplying ancillary services and those of related undertakings necessary for providing access to transmission and distribution;

14. “ancillary services” means all services necessary for the operation of transmission and/or distribution networks and/or LNG facilities including storage facilities and equivalent flexibility instruments, load balancing and blending;
15. **"flexibility instrument" means any instrument, which may help balance the gas demand load of customers with gas supply and includes storage facilities, flexibility in the LNG chain and linepack;**
16. “interconnected system” means a number of systems which are linked with each other;
17. “direct line” means a natural gas pipeline complementary to the interconnected system;
18. “integrated natural gas undertaking” means a vertically or horizontally integrated undertaking;
19. “vertically integrated undertaking” means a natural gas undertaking **or a group of undertakings whose mutual relationships are defined in Article 3(3) of Council Regulation (EEC) No 4064/89 and where the undertaking/group concerned is** performing at least two or more of the functions of transmission, distribution, production, supply and storage of natural gas ;
20. “horizontally integrated undertaking” means an undertaking performing at least one of the functions of production, transmission, distribution, supply or storage of natural gas, and a non-gas activity;
21. “related undertaking” means affiliated undertakings, within the meaning of Article 41 of the Seventh Council Directive, 83/349/EEC, and/or associated undertakings, within the meaning of Article 33(1) thereof, and/or undertakings which belong to the same shareholders;
22. “system user” means any natural or legal person supplying to, or being supplied by, the system;
23. “customers” means wholesale and final customers of natural gas and natural gas undertakings which purchase natural gas;
24. **"household customer" means a customer purchasing natural gas for his/her own household consumption;**
25. **"non-household customer" means a customer purchasing natural gas which is not for its own household use;**
26. “final customer” means a customer purchasing natural gas for his/her own use;
27. **"eligible customer" means a customer who is free to purchase gas from the supplier of his or her choice, in the meaning of Article 18;**
28. “wholesale customers” **means any natural or legal persons other than transmission system operators and distribution system operators who purchase natural gas for the purpose of resale** inside or outside the system where they are established;

29. “long-term planning” means the planning of supply and transportation capacity of natural gas undertakings on a long-term basis with a view to meeting the demand for natural gas of the system, diversification of sources and securing supplies to customers;
30. “emergent market” means a Member State in which the first commercial supply of its first long-term natural gas supply contract was made not more than 10 years earlier;
31. “security **of supply**” means both **security of supply of natural gas, and technical safety**;
32. **"energy imbalance" means the difference between the quantity of gas notified to the transmission or distribution system operator for injection or withdrawal at one or more given locations over a given time period and the metered quantity of gas withdrawn or injected at one or more given locations over the same time period.**

### *Article 3*

1. Member States shall ensure, on the basis of their institutional organisation and with due regard for the principle of subsidiarity, that, without prejudice to paragraph 2, natural gas undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive **and sustainable** market in natural gas, and shall not discriminate between such undertakings as regards either rights or obligations.
2. Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on natural gas undertakings, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, **including energy efficiency and climate protection**. Such obligations shall be clearly defined, transparent, non-discriminatory and verifiable. **In relation to security of supply, and the fulfilment of environmental goals, including energy efficiency**, Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.
3. Member States shall take appropriate measures to protect final customers and to ensure high levels of consumer protection, and shall, **in particular, ensure that there are adequate safeguards to protect vulnerable customers from disconnection. In this context, they may take appropriate measures to protect customers in remote areas who are connected to the gas system. Member States may appoint a supplier of last resort for customers connected to the gas network.** They shall ensure high levels of consumer protection, particularly with respect to transparency regarding general contractual terms and conditions, general information and dispute settlement mechanisms. **Member States shall ensure that the eligible customer is effectively able to switch to a new supplier.** These measures shall include, in particular, those set out in the Annex.

4. Member States shall implement appropriate measures to achieve the objectives of social and economic cohesion, environmental protection, **which may include means to combat climate change,** and security of supply. **Such measures may include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools,** for the maintenance and construction of necessary network infrastructure, including interconnection capacity.
5. Member States may decide not to apply Article 5 with respect to distribution insofar as their application would obstruct, in law or in fact, the performance of the obligations imposed on natural gas undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community. The interests of the Community include, inter alia, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.
6. **Member States shall, upon implementation of this Directive, notify the Commission of all measures adopted to achieve public service obligations, including consumer and environmental protection, and their possible effect on national and international competition, whether or not such measures require a derogation from the provisions of this Directive. They shall notify the Commission subsequently every two years of any changes to such measures, whether or not they require a derogation from this Directive.”**

(2) The following Article 4a is inserted:

*“Article 4a*

**Member States or the national regulatory authorities referred to in Article 22(1),** shall ensure the monitoring of security of supply issues. This monitoring shall, in particular, cover the supply/demand balance on the national market, the level of expected future demand and available supplies, envisaged additional capacity under planning or construction, **and the quality and level of maintenance of the networks.** The competent authorities shall publish, by 31 July each year at the latest a report outlining the findings resulting from the monitoring of these issues, as well as any measures taken or envisaged to address them and forward this report to the Commission forthwith.”

(3) Articles 5, 6 and 7 are replaced by the following:

*“Article 5*

Member States shall ensure that technical rules establishing the minimum technical design and operational requirements for the connection to the system of LNG facilities, storage facilities, other transmission or distribution systems, and direct lines, are developed and made available.

These technical rules shall ensure the interoperability of systems and shall be objective and non-discriminatory. They shall be notified to the Commission in accordance with Article 8 of Council Directive **98/34/EC** of **22 June 1998**\*.

## Article 6

Member States shall take the measures necessary to ensure that transmission, storage and LNG **system operators** act in accordance with Articles 7 and 8.

## Article 7

1. Member States shall designate or shall require natural gas undertakings which own transmission, storage or LNG facilities to designate, for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance, one or more system operators.

2. Each transmission, storage and/or LNG system operator shall:

**a) operate, maintain and develop under economic conditions secure, reliable and efficient transmission, storage and/or LNG facilities, with due regard to the environment;**

**b) refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;**

**c) provide any other transmission system operator, any other storage system operator, any other LNG system operator and/or any distribution system operator, sufficient information to ensure that the transport and storage of natural gas may take place in a manner compatible with the secure and efficient operation of the interconnected system.**

Rules **adopted by transmission system operators** for balancing the gas system shall be **objective**, transparent and non-discriminatory, **including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs,** for the provision of such services by transmission system operators shall be established **pursuant to a methodology compatible with Article 22(2) in a non-discriminatory and cost-reflective way and shall be published.**

\*OJ L 204, 21.7.1998, p.37.

(4) The following Articles 7a and 7b are inserted:

### “Article 7a

1. Member States may require transmission system operators **to comply with minimum standards** for the maintenance and development of the transmission system, including interconnection capacity.

2. Unless the transmission system operator is already fully independent from other activities not relating to the transmission system in terms of ownership, the system operator, **within the integrated natural gas undertaking,** shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to transmission.

In order to ensure the independence of the transmission system operator, the following **minimum** criteria shall apply:

- a) those persons responsible for the management of the transmission **system operator** may not participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production, distribution and supply of natural gas;
- b) appropriate measures must be taken to ensure that the **professional** interests of persons responsible for the management of the transmission system operator are taken into account in a manner that ensures that they are capable of acting independently;
- c) **the transmission system operator must have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to maintain or develop the network;**
- d) **the transmission system operator must establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded. The programme must set out the specific obligations of employees to meet this objective. It must be drawn up and its respect monitored by a compliance officer. An annual report, setting out the measures taken, must be submitted by the compliance officer to the national regulatory authority referred to in Article 22(1) and published.**

#### *Article 7b*

Transmission system operators shall procure the energy they use for the carrying out of their functions according to transparent, non-discriminatory and market based procedures."

- (5) Articles 8 to 11 are replaced by the following:

#### *“Article 8*

- 1. Without prejudice to Article 12 or any other legal duty to disclose information, each transmission, storage and/or LNG **system operator** shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, **and shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.**
- 2. Transmission **system operators** shall not, in the context of sales or purchases of natural gas by related undertakings, abuse commercially sensitive information obtained from third parties in the context of providing or negotiating access to the system.

#### *Article 9*

**Member States shall designate or shall require undertakings which own or are responsible for distribution systems to designate, for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance, one or more distribution system operators and shall ensure that those operators act in accordance with Articles 10 and 11.**

## Article 10

1. Each distribution **system operator** shall operate, maintain and develop under economic conditions a secure, reliable and efficient system, with due regard to the environment.
2. In any event, the distribution **system operator** shall not discriminate between system users or classes of system users, particularly in favour of its related undertakings.
3. Each distribution **system operator** shall provide any other distribution **system operator**, and/or any transmission, **and/or LNG system operator**, and/or storage **system operator** with sufficient information to ensure that the transport **and storage** of natural gas takes place in a manner compatible with the secure and efficient operation of the interconnected system. **These rules shall also apply to biogas and gas from biomass in so far as such gases can technically and safely be injected into the natural gas system.**
4. Unless the **distribution** system operator is already fully independent from other activities not relating to the distribution system in terms of ownership, the distribution system operator **within the integrated natural gas undertaking** shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to distribution.

In order to ensure the independence of the distribution system operator the following minimum criteria shall apply:

(a) those persons responsible for the management of the distribution system operator may not participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production, transmission and supply of natural gas;

(b) appropriate measures must be taken to ensure that the professional interests of persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;

**(c) the distribution system operator must have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to maintain or develop the network;**

**(d) the distribution system operator must establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded. The programme must set out the specific obligations of employees to meet this objective. It must be drawn up and its respect monitored by a compliance officer. An annual report, setting out the measures taken, must be submitted by the compliance officer to the national regulatory authority referred to in Article 22(1) and published.**

This paragraph shall apply from 1 January 2004. Member States may decide not to apply this paragraph to integrated natural gas undertakings serving less than 100 000 customers at that date.

5. Where distribution system operators are responsible for balancing the gas system, rules adopted by them for that purpose shall be objective, transparent and non-discriminatory, including rules for the charging of system users for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by system operators shall be established pursuant to a methodology compatible with Article 22(2) in a non-discriminatory and cost-reflective way and shall be published.

*Article 11*

1. Without prejudice to Article 12 or any other legal duty to disclose information, each distribution **system operator** shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, **and shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.**
  2. Distribution **system operators** shall not, in the context of sales or purchases of natural gas by related undertakings, abuse commercially sensitive information obtained from third parties in the context of providing or negotiating access to the system.”
- (6) The following Article 11a is inserted:

*“Article 11a*

The rules in Articles 7a (2) and Article 10 (4) do not prevent the operation of a combined transmission, **LNG, storage** and distribution system operator, which is fully independent in terms of its legal form, organisation and decision making from other activities not relating to transmission **LNG, storage and** distribution **system operations.**”

- (7) Article 12 is replaced by the following:

*“Article 12*

Member States or any competent authority they designate, including the national regulatory authorities referred to in Article 22(1) and the dispute settlement authorities referred to in Article 23(3), shall have right of access to the accounts of natural gas undertakings as set out in Article 13 which they need to consult in carrying out their functions. Member States and any designated competent authority, **including the national regulatory authorities referred to in Article 22(1)** and the dispute settlement authorities, shall preserve the confidentiality of commercially sensitive information. Member States may introduce exceptions to the principle of confidentiality where this is necessary in order for the competent authorities to carry out their functions.”

(8) Article 13 is amended as follows:

(a) Paragraph 1 is replaced by the following:

“1. Member States shall take the necessary steps to ensure that the accounts of natural gas undertakings are kept in accordance with paragraphs 2 to 5 of this Article. **Where companies benefit from a derogation from this provision on the basis of Article 26(3), they shall at least keep their internal accounts in accordance with this Article.**”

(b) Paragraph 3 is replaced by the following:

“3. Integrated natural gas undertakings shall, in their internal accounting, keep separate accounts for their transmission, distribution, supply, LNG and storage activities, as they would be required to do if the activities in question were carried out by separate undertakings, with a view to avoiding discrimination, cross-subsidisation and distortion of competition. **They shall keep separate accounts for supply activities for eligible customers and supply activities for non-eligible customers. Revenue from ownership of the transmission/distribution network shall be specified in the accounts.** Where appropriate, they shall keep consolidated accounts for non-gas activities. These internal accounts shall include a balance sheet and a profit and loss account for each activity.”

(9) Articles 14 and 15 are replaced by the following:

#### *"Article 14*

1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and LNG facilities based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. **Member States shall ensure that these tariffs, or the methodologies underlying their calculation shall be approved prior to their entry into force by a national regulatory authority referred to in Article 22(1) and that these tariffs are published prior to their entry into force.**
2. Transmission system operators shall, if necessary for the purpose of carrying out their functions including in relation to cross-border transmission, have access to the network of other transmission system operators.

#### *Article 15*

1. For the organisation of access to storage and equivalent flexibility instruments when technically and/or economically necessary for providing efficient access to the system for the supply of customers, as well as for the organisation of access to ancillary services, Member States may choose either or both procedures referred to in paragraphs 2 and 3. These procedures shall operate in accordance with objective, transparent and non-discriminatory criteria.
2. In the case of negotiated access, Member States shall take the necessary measures for natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system to be able to negotiate access **to storage and equivalent flexibility instruments, when technically and/or economically**

**necessary for providing efficient access to the system. The parties shall be obliged to negotiate access to storage and equivalent flexibility instruments in good faith.**

Contracts for access **to storage and equivalent flexibility instruments** shall be negotiated with the relevant **storage** system operator or natural gas undertakings. Member States shall require **storage system operators** and natural gas undertakings to publish their main commercial conditions **for the use of storage and equivalent flexibility instruments within the first year following implementation of this Directive and on an annual basis every year thereafter.**

3. Member States opting for a procedure of regulated access shall take the necessary measures to give natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system a right **to access to storage and equivalent flexibility instruments,** on the basis of published tariffs and/or other terms and obligations for use of **that storage and equivalent flexibility instruments, when technically and/or economically necessary for providing efficient access to the system.** This right of access for eligible customers may be given by enabling them to enter into supply contracts with competing natural gas undertakings other than the owner and/or operator of the system or a related undertaking."
- (10) Article 16 is deleted.
- (11) Articles 18, 19 and 20 are replaced by the following:

*" Article 18*

**The eligible customers are the customers, which are free to purchase gas from the supply undertaking of their choice within the Community. Member States shall ensure that these eligible customers are:**

- a) **until 1 January 2004, the eligible customers as specified in Article 18 of Directive 98/30/EC. Member States shall publish by 31 January each year the criteria for the definition of these eligible customers;**
- b) **from 1 January 2004 at the latest, all non-household customers;**
- c) **from 1 January 2005, all customers.**

*Article 19*

To avoid imbalance in the opening of gas markets:

- (a) contracts for the supply with an eligible customer in the system of another Member State shall not be prohibited if the customer is eligible in both systems involved;
- (b) in cases where transactions as described in point (a) are refused because the customer is eligible in only one of the two systems, the Commission may oblige, taking into account the situation in the market and the common interest, the refusing party to execute the requested supply, at the request of the Member State where the eligible customer is located.

## Article 20

1. Member States shall take the necessary measures to enable:
    - (a) natural gas undertakings established within their territory to supply the eligible customers through a direct line;
    - (b) any such eligible customer within their territory to be supplied through a direct line by natural gas undertakings.
  2. In circumstances where an authorisation (e. g. licence, permission, concession, consent or approval) is required for the construction or operation of direct lines, the Member States or any competent authority they designate shall lay down the criteria for the grant of authorisations for the construction or operation of such lines in their territory. These criteria shall be objective, transparent and non-discriminatory.
  3. Member States may make authorisations to construct a direct line subject either to the refusal of system access on the basis of Article 17 or to the opening of a dispute settlement procedure under Article 22.”
- (12) Article 21 is deleted.
- (13) Article 22 is replaced by the following:

## "Article 22

- 1. Member States shall designate one or more competent bodies as national regulatory authorities. These authorities shall be wholly independent of the interests of the gas industry. They shall at least be responsible for continuously monitoring the market to ensure non-discrimination, effective competition and the efficient functioning of the market, in particular with respect to:**
  - (a) the level of competition;**
  - (b) the rules on the management and allocation of interconnection capacity, in conjunction with the national regulatory authority or authorities of those Member States with which interconnection exists;**
  - (c) any mechanisms to deal with congested capacity within the national gas system;**
  - (d) the time taken by transmission and distribution system operators to make connections and repairs;**
  - (e) the publication of appropriate information by transmission and distribution system operators concerning interconnectors, grid usage and capacity allocation to interested parties, taking into account the need to treat non-aggregated information as commercially confidential;**
  - (f) the effective unbundling of accounts as referred to in Article 13, to ensure there are no cross-subsidies between transmission, distribution, storage, LNG and supply activities;**
  - (g) the access conditions to storage and equivalent flexibility instruments, as provided for in Article 15, paragraphs 2 and 3.**
- 2. The national regulatory authorities shall at least be responsible for fixing or approving prior to their entry into force, the methodologies used to calculate or establish the terms and conditions for :**

**(a) connection and access to national networks, including transmission and distribution tariffs and terms, conditions and tariffs for access to LNG facilities;**

**(b) the provision of balancing services.**

**3. National regulatory authorities shall have the authority to require transmission, LNG and distribution system operators, if necessary, to modify the terms and conditions, including tariffs and methodologies referred to in paragraph 2, to ensure that they are reasonable and applied in a non-discriminatory manner.**

**4. Any party having a complaint against a transmission, LNG or distribution system operator with respect to the issues mentioned in paragraphs 1, 2 and 3 and in Article 15 may refer the complaint to the national regulatory authority which, acting as dispute settlement authority, shall issue a decision within two months after receipt of the complaint. This period may be extended by two months where additional information is sought by the national regulatory authorities. This period may be extended further with the agreement of the complainant. Any appeal against such a decision shall not have suspensive effect.**

5. Member States shall take measures to ensure that national regulatory authorities are able to carry out their duties referred to in paragraphs 1 to 4 in an efficient and expeditious manner.

6. Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of dominant position, in particular to the detriment of consumers, and any predatory behaviour. These mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.

7. Member States shall ensure that the appropriate measures are taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where confidentiality rules imposed by this Directive have not been respected.

**8 In the event of cross-border disputes, the national regulatory authority shall be the national regulatory authority covering the system operator, which refuses use of, or access to, the system.**

**9. Recourse to the national regulatory authority shall be without prejudice to the exercise of rights of appeal under Community law.”**

(14) In Article 23, paragraph 1 is replaced by the following:

“1. Member States shall take the necessary measures to ensure that natural gas undertakings and **eligible** customers, wherever they are located, are able to obtain access to upstream pipeline networks, including facilities supplying technical services incidental to such access, in accordance with this Article, except for the parts of such networks and facilities which are used for local production operations at the site of a field where the gas is produced. The measures shall be notified to the Commission in accordance with the provisions of Article 29.”

(15) In Article 25, paragraphs 1 and 2 are replaced by the following:

- “1. If a natural gas undertaking encounters, or considers it would encounter, serious economic and financial difficulties because of its take-or-pay commitments accepted in one or more gas-purchase contracts, an application for a temporary derogation from Article 15 may be sent to the Member State concerned or the designated competent authority. Applications shall, according to the choice of Member States, be presented on a case-by-case basis either before or after refusal of access to the system. Member States may also give the natural gas undertaking the choice to present an application either before or after refusal of access to the system. Where a natural gas undertaking has refused access, the application shall be presented without delay. The applications shall be accompanied by all relevant information on the nature and extent of the problem and on the efforts undertaken by the natural gas undertaking to solve the problem.

If alternative solutions are not reasonably available, and taking into account the provisions of paragraph 3, the Member State or the designated competent authority may decide to grant a derogation.

2. The Member State, or the designated competent authority, shall notify the Commission without delay of its decision to grant a derogation, together with all the relevant information with respect to the derogation. This information may be submitted to the Commission in an aggregated form, enabling the Commission to reach a well-founded decision. Within four weeks of its receipt of this notification, the Commission may request that the Member State or the designated competent authority concerned amend or withdraw the decision to grant a derogation.

If the Member State or the designated competent authority concerned does not comply with this request within a period of four weeks, a final decision shall be taken expeditiously in accordance with the advisory procedure of Article 3 of Council Decision 1999/468/EC\*.

The Commission shall preserve the confidentiality of commercially sensitive information.

\*L 184, 17.7.1999, p.23.”

- (16) In Article 26, paragraphs 1, 2 and 3 are replaced by the following:

- “1. Member States not directly connected to the interconnected system of any other Member State and having only one main external supplier may derogate from Article 4, Article 18 and/or Article 20 of this Directive. A supply undertaking having a market share of more than 75 % shall be considered to be a main supplier. This derogation shall automatically expire from the moment when at least one of these conditions no longer applies. Any such derogation shall be notified to the Commission.
2. A Member State, qualifying as an emergent market, which because of the implementation of this Directive would experience substantial problems, not associated with the contractual take-or-pay commitments referred to in Article 25, may derogate from Article 4, Article 18 and/or Article 20 of this Directive. This derogation shall automatically expire from the moment when the Member State no longer qualifies as an emergent market. Any such derogation shall be notified to the Commission.

3. Where implementation of this Directive would cause substantial problems in a geographically limited area of a Member State, in particular concerning the development of the transmission infrastructure, and with a view to encouraging investments, the Member State may apply to the Commission for a temporary derogation from Article 4, Article 7(1), 7(3), 7a(2), Article 9(1), Article 10(4), 10(5), Article 13, Article 14(1), Article 18 and/or Article 20 for developments within this area.”
- (17) Article 27 is deleted.
- (18) Article 28 is replaced by the following:

*“Article 28*

**1. The Commission shall monitor and review the application of this Directive and submit an overall progress report to the European Parliament and the Council before the end of the first year following the entry into force of this Directive, and thereafter on an annual basis. The report shall at least cover:**

**(a) the experience gained and progress made in creating a complete and fully operational internal market in natural gas and the obstacles that remain in this respect including aspects of market dominance, concentration in the market, predatory or anti-competitive behaviour;**

**(b) the extent to which the unbundling and tariffication requirements contained in this Directive have been successful in ensuring fair and non-discriminatory access to the Community’s gas system and equivalent levels of competition, as well as the economic, environmental and social consequences of the opening of the gas market for customers;**

**(c) an examination of issues relating to system capacity levels and security of supply of natural gas in the Community, and in particular the existing and projected balance between demand and supply, taking into account the physical capacity for exchanges between areas;**

**(d) a general assessment of the progress achieved with regard to bilateral relations with third countries which produce and export or transport natural gas, including progress in market integration, trade and access to the networks of such third countries;**

**(e) the need for possible harmonisation requirements which are not linked to the provisions of this Directive.**

**Where appropriate, this report may include recommendations.**

- 2. Every two years, the report referred to in paragraph 1 shall also cover an analysis of the different measures taken in Member States to meet public service obligations, together with an examination of the effectiveness of those measures, and in particular their effects on competition in the gas market. Where appropriate, the report may include recommendations as to the measures to be taken at national level to achieve high public service standards or measures intended to prevent market foreclosure.”**

(19) The Annex, the text of which is set out in Annex II to this Directive, is added.

### *Article 3*

Directives 90/547/EEC and 91/296/EEC are repealed with effect from 1 January 2003.

### *Article 4*

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive **[at .... ]** at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

### *Article 5*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

### *Article 6*

This Directive is addressed to the Member States.

Done at Brussels, [...]

*For the European Parliament*  
*The President*  
[...]

*For the Council*  
*The President*  
[...]

## **ANNEX I**

### **"Annex**

#### **(Article 3)**

Without prejudice to Community rules on consumer protection, in particular Directives 97/7/EC of the European Parliament and of the Council<sup>9</sup> and Council Directive 93/13/EC<sup>10</sup>, the measures referred to in Article 3 are:

Member States shall ensure that final customers:

- (a) have a right to a contract with their electricity service provider that specifies:
  - the identity and address of the supplier;
  - services provided, the service quality levels offered, as well as the time for the initial connection;
  - the types of maintenance service offered;
  - the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained;
  - the duration of the contract, the conditions for renewal and termination of services and of the contract, the existence of any right of withdrawal;
  - any compensation and the refund arrangements which apply if contracted service quality levels are not met; and
  - the method of initiating procedures for settlement of disputes in accordance with point (e).

**Conditions shall be fair and well-known in advance. In any case, this information should be provided prior to the conclusion of the contract. Where contracts are concluded through intermediaries, the above information shall also be provided prior to the conclusion of the contract.**

- (b) are given adequate notice of any intention to modify contractual conditions. Final customers shall be informed about their right of withdrawal when the notice is given. Service providers shall notify their subscribers directly of any increase in charges, at an appropriate time no later than one normal billing period after the increase comes into effect. Member States shall ensure that household customers are free to withdraw from contracts if they do not accept the new conditions, notified to them by their electricity service provider.
- (c) receive transparent information on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of electricity services.
- d) are offered a full choice of payment methods, free of charge. General terms and conditions shall be fair and transparent. They shall be given in clear and comprehensible language. Final customers shall be protected against unfair or misleading selling methods.**

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<sup>9</sup> OJ L 144, 4.6.1997, p. 19.

<sup>10</sup> OJ L 95, 21.4.1993, p. 29.

- (e) benefit from transparent, simple and inexpensive procedures for dealing with their complaints. Such procedures shall enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation. They should follow, wherever possible, the principles set out in Commission Recommendation 98/257/EC<sup>11</sup>.

**(f) are informed about their rights regarding universal service."**

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<sup>11</sup> OJ L 115, 17.4.1998, p. 31.

## **ANNEX II**

### "Annex

Without prejudice to Community rules on consumer protection, in particular Directives 97/7/EC of the European Parliament and of the Council<sup>12</sup> and Council Directive 93/13/EC<sup>13</sup>, the measures referred to in Article 3 are:

Member States shall ensure that final customers :

- (a) have a right to a contract with their gas service provider that specifies:
  - the identity and address of the supplier;
  - services provided, the service quality levels offered, as well as the time for the initial connection;
  - the types of maintenance service offered;
  - the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained;
  - the duration of the contract, the conditions for renewal and termination of services and of the contract, the existence of any right of withdrawal;
  - any compensation and the refund arrangements which apply if contracted service quality levels are not met; and
  - the method of initiating procedures for settlement of disputes in accordance with point (e).

**Conditions shall be fair and well-known in advance. In any case, this information should be provided prior to the conclusion of the contract. Where contracts are concluded through intermediaries, the above information shall also be provided prior to the conclusion of the contract.**

- (b) are given adequate notice of any intention to modify contractual conditions. **Customers shall be informed about their right of withdrawal when the notice is given. Service providers shall notify their subscribers directly of any increase in charges, at an appropriate time no later than one normal billing period after the increase comes into effect.** Member States shall ensure that final customers are free to withdraw from contracts if they do not accept the new conditions, notified to them by their gas service provider.
- (c) receive transparent information on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of gas services.
- (d) are offered **a full choice of payment methods free of charge. General terms and conditions shall be fair and transparent. They shall be given in clear and comprehensible language. Final customers shall be protected against unfair or misleading selling methods.**

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<sup>12</sup> OJ L 144, 4.6.1997, p. 19.

<sup>13</sup> OJ L 95, 21.4.1993, p. 29.

- (e) benefit from transparent, simple and inexpensive procedures are made available for dealing with their complaints. Such procedures shall enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation. They should follow, wherever possible, the principles set out in Commission Recommendation 98/257/EC<sup>14</sup>.
- (f) **connected to the gas system are informed about their rights to be supplied with natural gas of a specified quality at reasonable prices.**

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<sup>14</sup> OJ L 115, 17.4.1998, p. 31.

## **EXPLANATORY MEMORANDUM**

### **A. Principles**

1. On 13 March 2001, the Commission submitted a proposal for a European Parliament and Council Regulation on conditions for access to the network for cross-border exchanges in electricity.
2. During its 13 March 2002 Plenary Session the European Parliament approved, subject to a number of amendments, the Commission's proposal for a European Parliament and Council Regulation on conditions for access to the network for cross-border exchanges in electricity. The Economic and Social Committee supports the proposal as well. The Committee of the Regions has not expressed itself on the proposal.
3. Discussion in the framework of the Council started in September 2001 and have led to changes proposed to the Commission proposal by successive Presidencies. Many of these changes are helpful clarifications and are acceptable to the Commission and compatible with the amendments suggested by Parliament with which the Commission can agree. They have been partly inspired by the outcome of the eighth European Electricity Regulatory Forum of 21-22 February 2002.
4. In the light of these developments, the Commission amends its proposal, pursuant to Article 250(2) of the Treaty.

### **B. European Parliament amendments**

The European Parliament agrees with the main elements of the Commission's proposal but has formulated a number of amendments. Out of the 34 amendments adopted (amendments 1-35, except amendment 11), the Commission has accepted 6 (amendments 1, 6, 8, 10, 12 and 14) in the form proposed by the Parliament or with some redrafting. Two amendments were accepted in part (amendments 3 and 4) and 10 Amendments were accepted in principle (18, 21, 27-34). The remaining 16 were rejected.

#### **Amendments accepted in part**

##### **Amendment 3**

The amendment concerns the recital stating that there should be no specific network access charges on exporters and importers and suggests some clearer wording, which is an improvement. However, the Commission cannot accept to state that charges shall not be "transaction based" since this term is ambiguous and has been interpreted in the past by interested parties in contradicting manners.

##### **Amendment 4**

The first part of the amendment aims at further clarifying the first sentence of recital 12, which the Commission accepts. In contrast, the second part is diluting the idea that available capacity of interconnecting lines should be set "at maximum" by replacing "at maximum" by a somewhat vaguer formula, leaving space for interpretation. The Commission sees not need for such a modification.

## **Amendments accepted in principle**

### **Amendment 18**

This amendment concerns the treatment of so-called “merchant interconnectors” in the Regulation, i.e. an interconnector where the investor must recover all costs by rents resulting from the usage of the interconnector itself and cannot rely on charges made for the use of the networks linked by the interconnector. The idea of the amendment is to exclude such interconnectors from the strict rules contained in the Regulation on how rents stemming from the allocation of interconnector capacities shall be used. The argument is that whilst these rules are suitable for existing interconnectors they may be too restrictive for merchant interconnectors in that they limit considerably profit perspectives and would thus deter potential investors.

The substance of the amendment can be accepted. However, the procedure for the exclusion of certain interconnectors from the rules in question needs to be reinforced: such an exclusion should only be time-limited, but renewable, and should not only require agreement of the national regulatory authorities concerned but also of the Commission, to ensure that the Community’s interest as a whole is taken into account.

Recital (14) has been adapted to reflect the amendments made to the text.

### **Amendments 21 and 27-33**

Amendments 27-33 suggest setting up a Committee of European Energy Regulators, which would have an advisory status and would have respective advisory competencies. The Commission accepts the substance of this amendment. However, following similar examples in other policy fields<sup>1</sup>, the Commission intends to create the Group through a Commission decision and not, as suggested by Parliament, in the Regulation. The Group would deal with issues related to the Regulation, Directive 96/92 (The Electricity Directive) and Directive 98/30/EC (The Gas Directive).

The measures envisaged by the Commission also cover the idea of amendment 21, which suggests a provision whereby the Council of European Energy Regulators would assist the Commission in implementing the Regulation.

### **Amendment 34**

This amendment suggests a monitoring and reporting requirement for the Commission and can be accepted in substance. However, from an institutional point of view, the purpose of the report cannot be to enable Parliament and Council to consider further necessary provisions, as suggested in the text of the amendment. It is for the Commission to accompany the report with appropriate proposals and/or recommendations on further measures, if necessary.

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<sup>1</sup> For instance Directive of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)

## **Rejected amendments**

### **Amendments 2 and 13**

These amendments suggest to specify in the text of the Regulation, in recital 10 and Article 4(2), that national network access charges on generators (“G” charges) shall be “harmonised”. These amendments cannot be accepted, for two main reasons:

- It is inappropriate to state in directly applicable Community legislation that certain national rules “shall” be harmonised without stating how such harmonisation should be made, both in substance and procedural terms.
- When harmonising national charges, one should not only look at charges on generators but look at the tariff structure as a whole, taking into account all specificities of the national networks concerned.

Therefore, the approach to harmonisation adopted in the Commission proposal is appropriate and sufficient: Article 7 (2) of the Regulation provides for harmonisation of charges on generators and consumers (load) in guidelines to be adopted under comitology.

### **Amendments 5, 7, 16, 20, 22, 23, 24, 25**

These amendments seeking to take out all references to “national regulatory authorities” in the Regulation, suggesting to chose a more neutral terminology, such as “competent authority”. It is Commission policy that all Member States should designate one or several regulatory authorities and this is reflected in the revised version of Article 22 of Directive 96/92, as proposed in the directive amending the electricity and gas directives. These authorities are supposed to play a key role in the context of the implementation of the Regulation. Accepting these amendments could also be viewed in contradiction with the creation of an advisory body made up of national regulators, suggested in Parliament amendments, which the Commission supports (see above amendments 21 and 27-33).

### **Amendments 9 and 15**

These two amendments suggest to exempt embedded generation, i.e. generation directly connected to the distribution network, from certain network charges under national tariffication systems. Embedded generation must be treated appropriately under national tariffication systems, taking into account the principles of non-discrimination and cost-reflectiveness, which are contained in Art. 4 (1) of the Regulation and, with regard to the most important case in practice – electricity from renewable energy sources – in Art. 7(6) of Directive 2001/77 on the promotion of electricity produced from renewable energy sources. However, it would not be appropriate to exclude embedded generation from the outset, on a general basis, from certain charges, thereby excluding a case-by-case treatment.

### **Amendment 17**

The amendment suggests allowing operators of interconnectors to use rents resulting from the allocation of interconnector capacities to compensate market operators for capacity curtailments, in addition to the three manners of permissible usage contained in the Article. However, unlike the latter three manners of usage, there is a legal obligation to make such compensation payments. These payments form part of the cost of the operation of the interconnector. They are already taken into account when establishing the available rents

resulting from capacity allocation and are therefore irrelevant when it comes to define how such rents may be used.

#### Amendment 19

The amendment suggests that the regulatory committee procedure foreseen in the Regulation would be applicable only for four years and that after this period the issue would be reconsidered by Parliament and Council, on the basis of a Commission proposal. The Commission does not see a necessity for such a clause, also in view of the highly technical nature of the issues dealt with under the national regulatory committee procedure. The Commission will of course provide for the highest possible level of transparency vis-à-vis the European Parliament in the context of the comitology procedure foreseen in the regulation, in line with the agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC on the comitology procedure.

#### Amendment 26

This amendment deals with the interpretation of rules contained in Directive 96/92 (Electricity Directive) and these rules have no relevance for cross-border exchanges of electricity. It is unclear for what reasons Parliament has voted this amendment in the context of the Regulation.

#### Amendment 35

The amendment suggests linking the entry into force of the Regulation to the entry into force of the directive amending the existing gas and electricity directives. The promotion of cross-border trade is however necessary in any event, irrespective of the adoption of the suggested amendments to the current electricity directive.

### **C. Changes made to reflect developments in the Council**

A large number of the changes made to the initial text to reflect developments in the Council are clarification of or additions to the wording of provisions, without changing their substance.

More substantial changes are, however, the following

- In the initial Commission proposal the inter transmission system operator compensation mechanism (Article 3) was based on the concept of “transit flows” of electricity, whereas in the amended proposal the concept is “cross-border flows”. Work undertaken in the context of the European Electricity Regulator Forum has demonstrated that this concept is likely to produce results that are more cost-reflective.
- Article 3 (2) provided for compensation payments to be made by exporting and/or importing transmission system operators. This has been changed to exporting and importing transmission system operators
- In Article 3(6) the description of the method to calculate “costs of transits” (now: costs of cross-border flows, see above) has been further detailed. This changes reflects the outcome of the 8<sup>th</sup> European Electricity Regulatory Forum.

- In Article 4(4) it is now stated clearly that export/import tariffs are excluded, provided that appropriate and efficient locational signals are in place. In the initial proposal the concept of locational signals formed already part of the provision, through a reference to paragraph 2 of Article 4.

The substance of the two Articles dealing with Comitology Committees (Articles 12 and 13) has remained unchanged. However, the two Articles have merged into one Article 12.

Amended proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on conditions for access to the network for cross-border exchanges in electricity**

**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission<sup>2</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>3</sup>,

Having regard to the opinion of the Committee of the Regions<sup>4</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>5</sup>,

Whereas:

- (1) Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity<sup>6</sup> constituted an important step in the completion of the internal market in electricity.
- (2) At its meeting in Lisbon on 23 and 24 March 2000, the European Council called for rapid work to be undertaken to complete the internal market in both the electricity and gas sectors and to speed up liberalisation in these sectors with a view to achieving a fully operational internal market in these areas.
- (3) The creation of a real internal electricity market should be promoted through an intensification of trade in electricity, which is currently underdeveloped compared to other sectors of the economy.

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<sup>2</sup> OJ C

<sup>3</sup> OJ C

<sup>4</sup> OJ C

<sup>5</sup> OJ C

<sup>6</sup> OJ L 27, 30.1.1997, p. 20. Directive as amended by Directive .../.../EC (OJ L ..., ..., p. ...).

- (4) Fair, cost-reflective, transparent and directly applicable rules, **taking account of a comparison between efficient network operators from structurally comparable areas and** completing the provisions of Directive 96/92/EC, should be introduced with regard to cross-border tarification and the allocation of available interconnection capacities, in order to ensure effective access to transmission systems for the purpose of cross-border transactions.
- (5) In its Conclusions, the Energy Council of 30 May 2000 invited the Commission, Member States and national regulatory authorities/administrations to ensure a rapid introduction of a robust tarification system and methodology to allocate available *interconnection capacity* for the longer term.
- (6) The European Parliament, in its Resolution of 6 July 2000 on the Commission's second report on the state of liberalisation of energy markets, called for conditions for using networks in Member States that do not hamper cross-border trade in electricity and called on the Commission to submit specific proposals geared to overcoming all the existing barriers to intra-Community trade.
- (7) This Regulation should lay down basic principles with regard to tarification and capacity allocation, whilst providing for the adoption of guidelines detailing further relevant principles and methodologies, in order to allow rapid adaptation to changed circumstances.
- (8) In an open, competitive market, transmission system operators should be compensated for costs incurred as a result of hosting ~~transit~~ **cross-border flows** of electricity on their networks by the operators of the transmission systems from which **cross-border flows** ~~transits originate or and for which they are destined~~ **the systems where those flows end.**
- (9) Payments and receipts resulting from compensation between transmission system operators should be taken into account when setting national network tariffs.
- (10) The actual amount payable for cross-border access to the system can vary considerably, depending on the transmission system operators involved and as a result of differences in the structure of the tarification systems applied in Member States. A certain degree of harmonisation is therefore necessary in order to avoid distortions of trade.
- (11) It would not be appropriate to apply distance-related tariffs, or, **provided appropriate locational signals are in place**, a specific tariff to be paid only by exporters or importers **in addition to the general charge for access to the national network.**
- (12) **The precondition for effective competition in the internal market is non-discriminatory and transparent charges for network use including interconnecting lines in the transmission system.** ~~Competition on the internal market can only truly develop if access to the lines interconnecting the different national systems is granted in a non-discriminatory and transparent way.~~ The available capacities of these lines should be set at the maximum complying with the safety standards of secure network operation. Any discrimination in the allocation of available capacities should be shown not to unreasonably distort or hinder the development of trade.

- (13) There should be transparency for market actors concerning available transfer capacities and the security, planning and operational standards that affect the available transfer capacities.
- (14) **There should be rules on the use** of revenues flowing from congestion-management procedures, **unless the specific nature of the interconnector concerned justifies a time-limited exemption from these rules** ~~should not constitute a source of extra profit for the transmission system operators.~~
- (15) It should be possible to deal with congestion problems in various ways as long as the methods used provide correct economic signals to transmission system operators and market parties and are based on market mechanisms.
- (16) To ensure the smooth functioning of the internal market, provision should be made for procedures which allow the adoption of decisions and guidelines with regard to tariffication and capacity allocation by the Commission whilst ensuring the involvement of Member States' regulatory authorities in this process.
- (17) **The Member States and the competent national** authorities should be required to provide relevant information to the Commission. Such information should be treated confidentially by the Commission. Where necessary, the Commission should have the possibility to request relevant information directly from undertakings concerned.
- (18) National regulatory authorities should ensure compliance with the rules contained in this Regulation and the guidelines adopted on the basis of this Regulation.
- (19) Member States should lay down rules on penalties applicable to infringements of the provisions of this Regulation and ensure that they are implemented. Those penalties must be effective, proportionate and dissuasive.
- (20) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of the proposed action, namely the provision of a harmonised framework for cross-border exchanges of electricity, cannot be achieved by the Member States and can therefore, by reason of the scale and effect of the action, be better achieved by the Community. This Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.
- (21) In accordance with Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>7</sup>, measures for the implementation of this Regulation should be adopted by use of the regulatory procedure provided for in Article 5 of Decision 1999/468/EC, or by use of the advisory procedure provided for in Article 3 of that Decision, according to the nature of the measures to be adopted.

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<sup>7</sup> OJ L 184, 17.7.1999, p. 23.

HAVE ADOPTED THIS REGULATION:

## *Article 1*

### **Subject-matter and scope**

This Regulation aims at stimulating cross-border exchanges in electricity and thus competition within the internal electricity market, through the establishment of a compensation mechanism for ~~transit~~ **cross-border flows** of electricity and the setting of harmonised principles on cross-border transmission charges and the allocation of available capacities of interconnections between national transmission systems.

## *Article 2*

### **Definitions**

1. For the purpose of this Regulation, the definitions contained in Article 2 of Directive 96/92/EC shall apply.
2. The following definitions shall also apply:
  - (a) **"cross-border flow"** means a physical flow of electricity ~~hosted on the transmission system of a Member State, which was neither produced nor is destined for consumption in that Member State, including transit flows which are commonly denominated as "loop flows" or "parallel flows";~~ **on a transmission network of a Member State that results from the activity of either generators or consumers outside of that Member State;**
  - (b) "congestion" means a situation in which an interconnection linking national transmission networks, cannot accommodate all transactions resulting from international trade by market operators, due to a lack of capacity **of the interconnectors and/or the national transmission systems concerned;**
  - (c) **"export" of electricity means the dispatch of electricity in one Member State with the understanding that the simultaneous corresponding take-up ("import") of electricity will take place in another Member State or a third country.**

## *Article 3*

### **Inter transmission system operator compensation mechanism**

1. Transmission system operators shall receive compensation for costs incurred as a result of hosting ~~transit~~ **cross-border** flows of electricity on their network.
2. The compensation referred to in paragraph 1 shall be paid by the operators of national transmission systems from which **cross-border** ~~transit~~ flows originate and/or the systems where those flows end.

3. Compensation payments shall be made on a regular basis with regard to a given period of time in the past. *Ex-post* adjustments of compensation paid shall be made where necessary to reflect actual costs incurred **and recognised**.

The first period of time with regard to which compensation payments shall be made shall be determined in the guidelines referred to in Article 7.

4. Acting in accordance with the procedure referred to in Article **12(4)**, the Commission shall decide on the amounts of compensation payments payable.
5. The amounts of ~~transit~~ **cross-border** flows hosted and the amounts of ~~transit~~ **cross-border** flows **designated as** originating and/or ending in national transmission systems shall be determined on the basis of the physical flows of electricity actually measured in a given period of time.
6. The costs incurred as a result of hosting ~~transit~~ **cross-border** flows shall be established on the basis of the forward looking long-run average incremental costs (~~reflecting costs and benefits that a network bears from hosting transit flows compared to the costs it would bear in the absence of such flows~~), **taking into account losses, investment in new infrastructure and an appropriate proportion of the cost of existing infrastructure, as far as existing infrastructure was built to transmit cross-border flows. When establishing the costs incurred, standard-costing methodologies shall be used. Benefits that a network incurs as a result of hosting cross-border flows shall be taken into account.**

#### Article 4

##### Charges for access to networks

1. Charges applied by ~~national~~ network-operators for access to national networks shall be **transparent and** reflect actual costs incurred **in so far as they correspond**, ~~and shall be transparent, approximated to those of an efficient~~ **and structurally comparable** network operator and applied in a non-discriminatory manner. They shall not be distance-related.
2. Generators and consumers (load) may be charged for access to national networks. The proportion of the total amount of the network charges borne by generators shall be lower than the proportion borne by consumers. Where appropriate, the level of the tariffs applied to generators and/or consumers shall provide locational signals, and take into account the amount of network losses and congestion caused.
3. Payments and receipts resulting from the inter-transmission system operator compensation mechanism shall be taken into account when setting the charges for network access. Actual payments made and received as well as payments expected for future periods of time, estimated on the basis of past periods, shall be taken into account.
4. ~~Subject to paragraph 2,~~ **Providing that appropriate and efficient locational signals are in place, in accordance with paragraph 2,** charges for access to national networks applied to generators and consumers shall be applied independently of the country of destination and respectively origin of the electricity, as specified in the underlying commercial arrangement. ~~Exporters and importers shall not be charged any specific charge in addition to the general charge for access to national networks.~~

**This shall be without prejudice to charges on exports and imports resulting from congestion management referred to in Article 6 .**

5. There shall be no specific network charge on individual transactions for transits of electricity. ~~covered by the inter-transmission system operator compensation mechanism.~~

#### *Article 5*

##### **Provision of information on interconnection capacities**

1. **Transmission system operators shall put in place** co-ordination and information exchange mechanisms ~~shall be put in place by transmission system operators~~ to ensure the security of the networks in the context of congestion management.
2. The safety, operational and planning standards used by transmission system operators shall be made public. This publication shall include a general scheme for the calculation of the total transfer capacity and the transmission reliability margin based upon the electrical and physical features of the network. Such schemes shall be subject to the approval of the ~~national~~ national regulatory authorities, **referred to in Article 22 of Directive 96/92/EC.**
3. Transmission system operators shall publish estimates of available transfer capacity for each day, indicating any available transfer capacity already reserved. These publications shall be made at specified time intervals before the day of transport and shall include, in any case, week-ahead and month-ahead estimates, ~~The data published shall include~~ **as well as** a quantitative indication of the expected reliability of the available capacity.

#### *Article 6*

##### **General principles of congestion management**

1. Network congestion problems shall be addressed with non-discriminatory market based solutions which give efficient economic signals to the market participants and transmission system operators involved.
2. Transaction curtailment procedures shall only be used in emergency situations where the transmission system operator must act in an expeditious manner and redispatching or countertrading is not possible. **Any such procedure shall be applied in a non-discriminatory manner.**

**Except in cases of “force-majeur”**, market participants who have been allocated capacity shall be compensated for any curtailment ~~of this capacity~~.

3. The maximum capacity of the interconnections shall be made available to market participants, complying with safety standards of secure network operation.
4. **Market participants shall inform the transmission system operators concerned a reasonable time ahead of the relevant operational period whether they intend to use allocated capacity.** Any allocated capacity that will not be used shall be reattributed to the market, **in an open, transparent and non-discriminatory manner.**

5. Transmission system operators shall, as far as technically possible, net the capacity requirements of any power flows in opposite direction over the congested interconnection line in order to use this line to its maximum capacity. ~~In any event,~~ **Having full regard to network security**, transactions that relieve the congestion shall never be denied.
6. Any ~~rents~~ revenues resulting from the allocation of interconnection capacities **which exceed a reasonable return on investment** shall be used for one or more of the following purposes:
- (a) guaranteeing the actual availability of the allocated capacity;
  - (b) network investments maintaining or increasing interconnection capacities;
  - (c) reduction of network charges.

~~These rents may be put into a fund that is managed by transmission system operators. They shall not constitute a source of extra profit for the transmission system operators.~~

- 7. The national regulatory authorities referred to in Article 22 of Directive 96/92/EC, of those Member States linked by any interconnector may, on a case by case basis and in common, decide that an interconnector shall be subject to a time-limited exemption from paragraph 6. The exemption shall be renewable.**

**An interconnector exempt from the provisions of paragraph 6 shall remain subject to the provisions of Article 22 Directive 96/92/EC and the Competition Rules of the EC Treaty.**

- 8. In order to be eligible for an exemption referred to in paragraph 7, an interconnector must fulfil the following conditions:**

- (a) it is owned by a natural or legal person which is separate at least in terms or its legal form from the transmission system operators whose systems that interconnector links;**
- (b) charges are levied on specific users of the interconnector;**
- (c) at no time since the implementation of Directive 96/92/EC, any part of the capital or operating costs of the interconnector has been recovered from any component of charges made for the use of transmission or distribution systems linked by the interconnector;**

**An exemption shall be excluded where Community or national legislation prohibits parties, other than the two transmission and/or distribution system operators concerned, from constructing a new interconnector between the two transmission or distribution systems concerned.**

**An exemption shall normally only apply to direct current interconnectors.**

9. The decision and the conditions relating to the award of an exemption shall be published and notified without delay to the Commission, together with all the relevant information with respect to the decision. This information may be submitted to the Commission in aggregate form, enabling the Commission to reach a well founded decision. Within four weeks of receipt of this notification, the Commission may request that the national regulatory authority concerned amend or withdraw the decision to grant an exemption.

If the national regulatory authorities concerned do not comply with this request within a period of four weeks, the Commission shall expeditiously take a final decision in accordance with procedure referred to in Article 12 (2) of this Regulation.

The Commission shall preserve the confidentiality of commercially sensitive information.

#### *Article 7*

#### **Guidelines**

1. Where appropriate, the Commission shall, acting in accordance with the procedure referred to in Article 12 (2), adopt and amend guidelines on the following issues ~~with regard~~ **relating** to the inter-transmission system operator compensation mechanism, in accordance with the principles set out in Article 3:
  - (a) details of the determination of the transmission system operators liable to pay compensations for ~~transit~~ **cross-border** flows, in accordance with Article 3(2);
  - (b) details of the payment procedure to be followed, including the determination of the first period of time for which compensations are to be paid, in accordance with the second subparagraph of Article 3(3);
  - (c) details of methodologies to determine ~~the amount of transits hosted and exports/imports of electricity made~~ **the quantity of cross-border flows hosted and the designation of the amounts of such flows as originating and/or ending in national transmission systems of individual Member States**, in accordance with Article 3(5);
  - (d) details of the methodology to determine the costs incurred as a result of hosting ~~transits of electricity~~ **cross-border flows**, in accordance with Article 3(6);
  - (e) details of the treatment in the context of the inter-TSO compensation mechanism of electricity flows originating or ending in countries outside the EEA;**
  - ~~(ef)~~ the participation of national systems which are interconnected through direct current lines, in accordance with Article 3.
2. The guidelines shall also determine ~~details of~~ **the appropriate rules leading to a progressive** harmonisation of the charges applied to generators and consumers (load) under national tariff systems, **including the reflection of the inter-TSO compensation mechanism in national network charges**, in accordance with the principles set out in Article 4(2).

3. Where appropriate, the Commission shall, acting in accordance with the procedure referred to in Article 12(2), amend the guidelines on the management and allocation of available transfer capacity of interconnections between national systems set out in the Annex, in accordance with the principles set out in Articles 5 and 6. Where appropriate, in the course of such amendments common rules on minimum safety and operational standards for the use and operation of the network, as referred to in Article 5(2) shall be set.

#### *Article 8*

#### **National regulatory authorities**

National regulatory authorities, **referred to in Article 22 of Directive 96/92/EC<sup>8</sup>, shall have the responsibility that tariffs for the access to the network** and methodologies for congestion management are set and applied in accordance with this Regulation and the guidelines adopted pursuant to Article 7.

#### *Article 9*

#### **Provision of information and confidentiality**

1. Member States and national regulatory authorities, **referred to in Article 22 of Directive 96/92/EC<sup>9</sup>**, shall, on request, provide to the Commission all information necessary for the purpose of Articles 3(4) and 7.  
  
In particular, for the purpose of Article 3(4) **and 3 (6)**, national regulatory authorities shall provide on a regular basis costs actually incurred by national **data and all relevant information relating to the physical flows in transmission system operators' networks and the cost of the network**, ~~associated with hosting transit flows as well as the amount of exports and imports made in a given period. They shall also provide the relevant data and information used for the calculation of those figures.~~
2. Member States shall ensure that national regulatory authorities and administrations are able and entitled to provide the information required pursuant to paragraph 1.
3. The Commission may also request all information necessary for the purpose of Article 3(4) and 7 directly from undertakings **concerned** and associations of undertakings.

When sending a request for information to an undertaking or an association of undertakings, the Commission shall at the same time forward a copy of the request to the **national regulatory authorities**, established pursuant to Article 22 (1) of Directive 96/92/EC, of the Member State in whose territory the seat of the undertaking or the association of undertakings is situated.

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<sup>8</sup> Directive as amended by Directive .../.../EC (OJ L ..., ..., p. ...)

<sup>9</sup> Directive as amended by Directive .../.../EC (OJ L ..., ..., p. ...)

4. In its request for information, the Commission shall state the legal basis of the request, the time-limit within which the information is to be provided, the purpose of the request, and also the penalties provided for in Article 11(2) for supplying incorrect, incomplete and misleading information. **The Commission shall fix a reasonable time limit taking into account the complexity of the information required and the urgency with which the information is needed.**
5. The owners of the undertakings or their representatives and, in the case of legal persons, companies of firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested. Lawyers duly authorised to act may supply the information on behalf of their clients, in which case the client shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.
6. Where an undertaking or association of undertakings does not provide the information requested within the time-limit fixed by the Commission or supplies incomplete information, the Commission shall by decision require the information to be provided. The decision shall specify what information is required and fix an appropriate time-limit within which it is to be supplied. It shall indicate the penalties provided for in Article 11(2). It shall also indicate the right to have the decision reviewed by the Court of Justice of the European Communities.

The Commission shall at the same time send a copy of its decision to the **national** regulatory authorities referred to in ~~in the second subparagraph of paragraph 3~~ **Article 22 (1) of Directive 96/92/EC of** the Member State within the territory of which the residence of the person or the seat of the undertaking or the association of undertakings is situated.

7. Information collected pursuant to this Regulation shall be used only for the purposes of Articles 3(4) and 7.

The Commission shall not disclose information acquired pursuant to this Regulation of the kind covered by the obligation of professional secrecy.

#### *Article 10*

#### **Right of Member States to provide for more detailed measures**

This Regulation **shall be** without prejudice to the rights of Member States to maintain or introduce measures that contain more detailed provisions than those set out in this Regulation and the guidelines referred to in Article 7.

#### *Article 11*

#### **Penalties**

1. The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by [indicate date] at the latest and shall notify it without delay of any subsequent amendment affecting them.

2. The Commission may by decision impose on undertakings or associations of undertakings fines not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently, they supply incorrect, incomplete or misleading information in response to a request made pursuant to Article 9(3) or fail to supply information within the time-limit fixed by a decision adopted pursuant to the first subparagraph of Article 9(6).

In setting the amount of a fine, regard shall be had both to the gravity and to the duration of the infringement.

3. Penalties provided for pursuant to paragraph 1 and decisions taken pursuant to paragraph 2 shall not be of criminal law nature.

#### *Article 12*

##### **Regulatory Committee**

1. The Commission shall be assisted by a Committee composed of the representatives of the Member States and chaired by the representative of the Commission.
2. Where reference is made to this paragraph, ~~the regulatory procedure laid down in Articles 5 and 7 of Decision 1999/468/EC shall apply, in compliance with Article 7 and~~ **having regard to the provisions of** Article 8 thereof.
3. The period provided for in Article 5(6) of Decision 1999/468/EC shall be ~~two~~ **set at three** months.
4. **Where reference is made to this paragraph, the regulatory procedure laid down in Articles 3 and 7 of Decision 1999/468/EC shall apply, in compliance with Article 7 and having regard to the provisions of Article 8 thereof.**

#### *Article 13*

##### **Advisory committee**

1. ~~The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission.~~
2. ~~Where reference is made to this paragraph, the advisory procedure laid down in Article 3 of Decision 1999/468/EC shall apply, in compliance with Article 7 and Article 8 thereof.~~

#### **Article 13**

##### **Commission Report**

**The Commission shall monitor the implementation of this Regulation. It shall submit to the European Parliament and the Council no more than three years after the entry into force of this Regulation a report on the experience gained in its application .In particular the report shall examine to what extent the Regulation has been successful in ensuring non-discriminatory and cost-reflective network access conditions for cross border exchanges of electricity in order to contribute to customer choice in a well**

**functioning internal market and to long-term security of supply. If necessary, the report shall be accompanied by appropriate proposals and/or recommendations.**

*Article 14*

**Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

It shall apply from [indicate date].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament*

*For the Council*

*The President*

*The President*

## **ANNEX**

### **Guidelines on the management and allocation of available transfer capacity of interconnections between national systems**

#### **General**

1. Congestion management method(s) implemented by Member States should deal with short-run congestion in an economically efficient manner whilst simultaneously providing signals or incentives for efficient network and generation investment in the right locations.
- ~~2. In order to minimise the negative impact of congestion on trade, the current network should be used at the maximum capacity that complies with the safety standards of secure network operation.~~
- ~~3.~~2. The TSOs should provide non-discriminatory and transparent standards, which describe which congestion management methods they will apply under which circumstances. These standards, together with the security standards, should be described in open and publicly available documents.
- ~~4.~~3. Different treatment of the different types of cross-border transactions, whether they are physical bilateral contracts or bids into foreign organised markets, should be kept to a minimum when designing the rules of specific methods for congestion management. The method for allocating scarce transmission capacity must be transparent. Any differences in how transactions are treated must be shown not to distort or hinder the development of competition.
- ~~5.~~4. Price signals that result from congestion management systems should be directional.
- ~~6. Every effort should be made to net the capacity requirements of any power flows in opposite direction over the congested tie line in order to use the congested tie line to its maximum capacity. In any adopted congestion management scheme, transactions that relieve the congestion should never be denied.~~
- ~~7. Any unused capacity must become available to other agents (the use it or lose it principle). This may be implemented by devising notification procedures.~~
- ~~8. Any rents resulting from the allocation of interconnection capacities may be used for redispatching or counter trading in order to comply with the firmness of the capacity that was allocated to market parties. In principle, any remaining rents should be spent on network investments for relieving the congestion or on reducing the total network tariff. TSOs may manage these funds, but cannot retain them.~~
- ~~9.~~5. TSOs should offer transmission capacity to the market as 'firm' as possible. A reasonable fraction of the capacity may be offered to the market under condition of decreased firmness, but at all times the exact conditions for transport over cross-border lines should be made known to market parties.

- ~~10.6.~~ Considering the fact that the European continental network is a highly meshed network and that the use of interconnection lines has an effect on the power flows on at least two sides of a national border, national Regulators shall ensure that no congestion management procedure with significant effects on power flows in other networks, be devised unilaterally.

#### **Position of long-term contracts**

1. Priority access rights to an interconnection capacity can not be assigned to those contracts which violate Articles 81 and 82 of the EC Treaty.
2. Existing long-term contracts shall have no pre-emption rights when they come up for renewal.

#### **Provision of information**

1. TSOs should implement appropriate coordination and information exchange mechanisms to guarantee security of the network.
2. TSOs should publish all relevant data concerning the cross-border total transfer capacities. In addition to the winter and summer ATC values, estimates of transfer capacity for each day should be published by the TSOs at several time intervals before the day of transport. At least accurate week-ahead estimates should be made available to the market and the TSOs should also endeavour to provide month-ahead information. A description of the firmness of the data should be included.
3. The TSOs should publish a general scheme for calculation of the total transfer capacity and the transmission reliability margin based upon the electrical and physical realities of the network. Such a scheme should be subject to approval by the regulators of the involved Member States concerned. The safety standards and the operational and planning standards should form an integral part of the information that TSOs should publish in open and public documents.

#### **~~Preferred~~ Principles governing methods for congestion management**

- ~~1. Network congestion problems should in principle be addressed with market-based solutions. More specifically, congestion management solutions are preferred which give appropriate price signals to the market parties and the TSOs involved.~~
- ~~2.~~1. Network congestion problems should preferentially be solved with non-transaction based methods, i.e. methods that do not involve a selection between the contracts of individual market parties.
- ~~3.~~2. The system of market splitting, as used in the Nordpool area, is the congestion management procedure that, in principle, best meets this requirement.
- ~~4.~~3. In the short term, however, methods for congestion management in Continental Europe that may be used are implicit and explicit auctions and cross-border coordinated redispatching.

- 5.4. Cross-border coordinated redispatching or counter trading may be used jointly by the concerned TSOs. The costs that TSOs incur in counter-trading and redispatching must, however, be at an efficient level.
- ~~6. Transaction curtailment, following pre-established priority rules, should be left only for emergency situations where the TSOs must act in an expeditious manner and redispatching is not possible.~~
- 7.5. The possible merits of a combination of market splitting for solving ‘permanent’ congestion and counter trading for solving temporary congestion should be immediately explored as a more permanent approach to congestion management.

### **Guidelines for explicit auctions**

1. The auction system must be designed in such a way that all available capacity is being offered to the market. This may be done by organising a composite auction in which capacities are auctioned for differing duration and with different characteristics (e.g. with respect to the expected reliability of the available capacity in question).
2. Total interconnection capacity should be offered in a series of auctions, which, for instance, might be held on a yearly, monthly, weekly, daily and intra-daily basis, according to the needs of the markets involved. Each of these auctions should allocate a prescribed fraction of the available transfer capacity plus any remaining capacity that was not allocated in previous auctions.
3. The explicit auction procedures should be prepared in close collaboration between the national regulatory authority and the TSO concerned and designed in such a way as to allow bidders to participate also in the daily sessions of any organised market (i.e. power exchange) in the countries involved.
4. The power flows in both directions over congested tie lines should in principle be netted in order to maximise the transport capacity in the direction of the congestion. However, the procedure for netting of flows should comply with safe operation of the power system.
5. In order to offer as much capacity to the market as possible, the financial risks related to the netting of flows, should be attributed to those parties causing those risks to materialise.
6. Any auction procedure adopted should be capable of sending directional price signals to market participants. Transports in a direction opposite the dominant power flow relieve the congestion and should therefore result in additional transport capacity over the congested tie line.
7. In order not to risk creating or aggravating problems related to any dominant position of market player(s), capping of the amount of capacity that can be bought/possessed/used by any single market player in an auction should be seriously considered by the competent regulatory authorities in the design of an auction mechanisms.

8. To promote the creation of liquid electricity markets, capacity bought at an auction should be freely tradeable ~~before the moment of notification~~, until it is notified to the TSO that the capacity bought will be used.