

COMMON POSITION (EC) No 56/96

adopted by the Council on 25 July 1996

with a view to adopting Directive 96/. . /EC of the European Parliament and of the Council,
of . . ., concerning common rules for the internal market in electricity

(96/C 315/05)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF
THE EUROPEAN UNION,Having regard to the Treaty establishing the European
Community, and in particular Article 57 (2), Article 66
and Article 100a thereof,Having regard to the proposal from the Commission⁽¹⁾,Having regard to the opinion of the Economic and Social
Committee⁽²⁾,Acting in accordance with the procedure laid down in
Article 189b of the Treaty⁽³⁾,

- (1) Whereas it is important to adopt measures to ensure the smooth running of the internal market; whereas the internal market is to comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured;
- (2) Whereas the completion of a competitive electricity market is an important step towards completion of the internal energy market;
- (3) Whereas the provisions of this Directive should not affect the full application of the Treaty, in particular the provisions concerning the internal market and competition;
- (4) Whereas establishment of the internal market in electricity is particularly important in order to increase efficiency in the production, transmission and distribution of this product, while reinforcing security of supply and the competitiveness of the European economy and respecting environmental protection;
- (5) Whereas the internal market in electricity needs to be established gradually, in order to enable the industry to adjust in a flexible and ordered manner

to its new environment and to take account of the
different ways in which electricity systems are
organized at present;

- (6) Whereas the establishment of the internal market in the electricity sector must favour the interconnection and interoperability of systems;
- (7) Whereas Council Directive 90/547/EEC of 29 October 1990 on the transit of electricity through transmission grids⁽⁴⁾ and Council Directive 90/377/EEC of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users⁽⁵⁾, provide for a first phase for the completion of the internal electricity market;
- (8) Whereas it is now necessary to take further measures with a view to establishing the internal market in electricity;
- (9) Whereas, in the internal market, electricity undertakings must be able to operate, without prejudice to compliance with public service obligations, with a view to achieving a competitive market in electricity;
- (10) Whereas Member States, because of the structural differences in the Member States, currently have different systems for regulating the electricity sector;
- (11) Whereas, in accordance with the principle of subsidiarity, general principles providing for a framework must be established at Community level, but their detailed implementation should be left to Member States, thus allowing each Member State to choose the regime which corresponds best to its particular situation;
- (12) Whereas, whatever the nature of the prevailing market organization, access to the system must be open in accordance with this Directive and must lead to equivalent economic results in the Member States and hence to a directly comparable level of opening-up of markets and to a directly comparable degree of access to electricity markets;

⁽¹⁾ OJ No C 65, 14. 3. 1992, p. 4.⁽²⁾ OJ No C 73, 15. 3. 1993, p. 31.⁽³⁾ Opinion of the European Parliament of 17 November 1993 (OJ No C 329, 6. 12. 1993, p. 150), Council common position of 25 July 1996 (not yet published in the Official Journal) and Decision of the European Parliament of . . . (not yet published in the Official Journal).⁽⁴⁾ OJ No L 313, 13. 11. 1990, p. 30. Directive as last amended by Commission Decision 95/162/EC (OJ No L 107, 12. 5. 1995, p. 53).⁽⁵⁾ OJ No L 185, 17. 7. 1990, p. 16. Directive as last amended by Commission Directive 93/87/EEC (OJ No L 277, 10. 11. 1993, p. 32).

- (13) Whereas for some Member States the imposition of public service obligations may be necessary to ensure security of supply and consumer and environmental protection, which, in their view, free competition, left to itself, cannot necessarily guarantee;
- (14) Whereas long-term planning may be one means of carrying out those public service obligations;
- (15) Whereas the Treaty lays down specific rules with regard to restrictions on the free movement of goods and on competition;
- (16) Whereas Article 90 (1) of the Treaty, in particular, obliges the Member States to respect these rules with regard to public undertakings and undertakings which have been granted special or exclusive rights;
- (17) Whereas Article 90 (2) of the Treaty subjects undertakings entrusted with the operation of services of general economic interest to these rules, under specific conditions;
- (18) Whereas the implementation of this Directive will have an impact on the activities of such undertakings;
- (19) Whereas the Member States, when imposing public service obligations on the enterprises of the electricity sector, must therefore respect the relevant rules of the Treaty as interpreted by the Court of Justice;
- (20) Whereas, in establishing the internal market in electricity, full account should be taken of the Community objective of economic and social cohesion, particularly in sectors such as the infrastructures, national or intra-Community, which are used for the transmission of electricity;
- (21) Whereas Decision No 1254/96/EC of the European Parliament and of the Council of 5 June 1996, adopting a series of guidelines on trans-European energy networks⁽¹⁾ has contributed to the development of integrated infrastructures for the transmission of electricity;
- (22) Whereas it is therefore necessary to establish common rules for the production of electricity and the operation of electricity transmission and distribution systems;
- (23) Whereas there are two systems which may be applied for opening up the production market, an authorization procedure or a tendering procedure, and these must operate in accordance with objective, transparent and non-discriminatory criteria;
- (24) Whereas the position of autoproducers and independent producers needs to be taken into consideration within this framework;
- (25) Whereas each transmission system must be subject to central management and control in order to ensure the security, reliability and efficiency of the system in the interests of producers and their customers; whereas a transmission system operator should therefore be designated and entrusted with the operation, maintenance, and, if necessary, development of the system; whereas the transmission system operator must behave in an objective, transparent and non-discriminatory manner;
- (26) Whereas the technical rules for the operation of transmission systems and direct lines must be transparent and must ensure interoperability;
- (27) Whereas objective and non-discriminatory criteria must be established for the dispatching of power stations;
- (28) Whereas, for reasons of environmental protection, priority may be given to the production of electricity from renewable sources;
- (29) Whereas, at the distribution level, customers located in a given area may be granted supply rights and a manager must be designated to manage, maintain and, if necessary, develop each distribution system;
- (30) Whereas, in order to ensure transparency and non-discrimination the transmission function of vertically integrated undertakings should be operated independently from the other activities;
- (31) Whereas a single buyer must operate separately from the generation and distribution activities of vertically integrated undertakings; whereas the flow of information between the single buyer activities and these generation and distribution activities needs to be restricted;
- (32) Whereas the accounts of all integrated electricity undertakings should provide for maximum transparency, in particular to identify possible abuses of a dominant position, consisting, for example, in abnormally high or low tariffs or in discriminatory practices relating to equivalent transactions; whereas, to this end, the accounts must be separate for each activity;
- (33) Whereas it is also necessary to provide for access by the competent authorities to the internal accounts of undertakings with due regard for confidentiality;

⁽¹⁾ OJ No L 161, 29. 6. 1996, p. 147.

- (34) Whereas, owing to the diversity of structures and the special characteristics of systems in Member States, there should be different options for system access operating in accordance with objective, transparent and non-discriminatory criteria;
- (35) Whereas provision should be made for authorizing the construction and use of direct lines;
- (36) Whereas provision must be made for safeguards and dispute settlement procedures;
- (37) Whereas any abuse of a dominant position or any predatory behaviour should be avoided;
- (38) Whereas, as some Member States are liable to experience special difficulties in adjusting their systems, provision should be made for recourse to transitional regimes or derogations, especially for the operation of small isolated systems;
- (39) Whereas this Directive constitutes a further phase of liberalization; whereas, once it has been put into effect, some obstacles to trade in electricity between Member States will nevertheless remain in place; whereas, therefore, proposals for improving the operation of the internal market in electricity may be made in the light of experience; whereas the Commission should therefore report to the Council and the European Parliament on the application of this Directive,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

Scope and definitions

Article 1

This Directive establishes common rules for the production, transmission and distribution of electricity. It lays down the rules relating to the organization and functioning of the electricity sector, access to the market, the criteria and procedures applicable to calls for tender and the granting of authorizations and the operations of systems.

Article 2

For the purposes of this Directive:

1. *Generation* shall mean the production of electricity;
2. *Producer* shall mean a legal or natural person generating electricity;
3. *Autoproducer* shall mean a legal or natural person generating electricity essentially for his own use;
4. (a) *Independent producer* shall mean a producer who does not carry out electricity transmission or distribution functions in the territory covered by the system where he is established;
- (b) in Member States in which vertically integrated undertakings do not exist and where a tendering procedure is used, independent producers are those, 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;
6. *Distribution* shall mean the transport of electricity on medium-voltage and low-voltage distribution systems with a view to its delivery to customers;
7. *Customers* shall mean wholesale or final customers of electricity and distribution companies;
8. *Wholesale customers* shall mean any natural or legal persons, if the Member States recognize their existence, who purchase or sell electricity and who do not carry out transmission, generation or distribution functions inside or outside the system where they are established;
9. *Final customer* shall mean a customer buying electricity for his own use;
10. *Interconnectors* shall mean equipment used to link electricity systems;
11. *Interconnected system* shall mean a number of transmission and distribution systems linked together by means of one or more interconnectors;
12. *Direct line* shall mean an electricity line complementary to the interconnected system;
13. *Economic precedence* shall mean the ranking of sources of electricity supply in accordance with economic criteria;
14. *Ancillary services* shall mean all services necessary for the operation of a transmission or distribution system;
15. *System user* shall mean any legal or natural person supplying to, or being supplied by, a transmission or distribution system;
16. *Supply* shall mean the delivery and/or sale of electricity to customers;

17. *Integrated electricity undertaking* shall mean a vertically or horizontally integrated undertaking;
18. *Vertically integrated undertaking* shall mean an undertaking performing two or more of the functions of generation, transmission and distribution of electricity;
19. *Horizontally integrated undertaking* shall mean an undertaking performing at least one of the functions of generation for sale, or transmission or distribution of electricity, and another non-electricity activity;
20. *Tendering procedure* shall mean the procedure through which planned additional requirements and replacement capacity are covered by supplies from new or existing generating capacity;
21. *Long-term planning* shall mean the planning of the need for investment in generation and transmission capacity on a long-term basis, with a view to meeting the demand for electricity of the system and securing supplies to customers;
22. *Single buyer* shall mean any legal person who, within the system where he is established, is responsible for the unified management of the transmission system and/or for centralized electricity purchasing and selling;
23. *Small isolated system* shall mean any system with consumption of less than 2 500 GWh in the year 1996, where less than 5 % of annual consumption is obtained through interconnection with other systems.

CHAPTER II

General rules for the organization of the sector

Article 3

1. Member States shall ensure, on the basis of their institutional organization 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 market in electricity, and shall not discriminate between these undertakings as regards either rights or obligations. The two approaches to system access referred to in Articles 17 and 18 must lead to equivalent economic results and hence to a directly comparable level of opening up of markets and to a directly comparable degree of access to electricity markets.

2. Having full regard to the relevant provisions of the Treaty, in particular Article 90 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 to environmental protection. Such obligations must be clearly defined, transparent, non-discriminatory and verifiable; they, and any revision thereof, shall be published and notified to the Commission by Member States without delay. As a means of carrying out the abovementioned public service obligations, Member States which so wish may introduce the implementation of long-term planning.

3. Member States may decide not to apply the provisions in Articles 5, 6, 17, 18 and 21 in so far as the application of these provisions would obstruct the performance, in law or in fact, of the obligations imposed on electricity utilities 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 interest of the Community. The interest of the Community includes, *inter alia*, the competition with regard to eligible customers according to this Directive and Article 90 of the Treaty.

CHAPTER III

Generation

Article 4

For the construction of new generating capacity, Member States may choose between an authorization procedure and/or a tendering procedure. Authorization and tendering must be conducted in accordance with objective, transparent and non-discriminatory criteria.

Article 5

1. Where they opt for the authorization procedure, Member States shall lay down the criteria for the grant of authorizations 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 the environment;
- (c) land use and siting;
- (d) use of public ground;
- (e) energy efficiency;
- (f) the nature of the primary sources;
- (g) characteristics particular to the applicant, such as technical, economic and financial capabilities;
- (h) the provisions of Article 3.

2. The detailed criteria and procedures shall be made public.

3. Applicants shall be informed of the reasons, which must be objective and non-discriminatory, for any refusal to grant an authorization; the reasons must be well founded and duly substantiated; they shall be forwarded to the Commission for information. Appeal procedures must be made available to the applicant.

Article 6

1. Where they opt for the tendering procedure, Member States or any other competent body designated by the Member State concerned shall draw up an inventory of new means of production, including replacement capacity, on the basis of the regular estimate referred to in paragraph 2. The inventory shall take account of the need for interconnection of systems. The requisite capacity shall be allocated by means of a tendering procedure in accordance with the procedure laid down in this Article.

2. The transmission system operator or any other competent authority designated by the Member State concerned shall draw up and publish under State supervision, at least every two years, a regular estimate of the generating and transmission capacity which is likely to be connected to the system, of the need for interconnectors with other systems, of potential transmission capacity and of the demand for electricity. The estimate shall cover a period defined by each Member State.

3. Details of the tendering procedure for means of production 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. These specifications may also relate to the fields referred to in Article 5 (1).

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 and distribution activities responsible for the organization, monitoring and control

of the tendering procedure. This authority or body shall take all necessary steps to ensure confidentiality of the information contained in the tenders.

6. However, it must be possible for autoproducers and independent producers to obtain authorization, on the basis of objective, transparent and non-discriminatory criteria as laid down in Articles 4 and 5, in Member States which have opted for the tendering procedure.

CHAPTER IV

Transmission system operation

Article 7

1. Member States shall designate or shall require the 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, a system operator, responsible for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and its interconnectors with other systems, in order to guarantee security of supply.

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 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations⁽¹⁾.

3. The system operator shall be responsible for managing energy flows on the system, taking into account exchanges with other interconnected systems. To that end, the 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.

4. The system operator shall provide to the operator of any other system with which its system is interconnected sufficient information to ensure the secure and efficient operation, coordinated development and interoperability of the interconnected system.

5. The system operator shall not discriminate between system users or classes of system users, particularly in favour of its subsidiaries or shareholders.

⁽¹⁾ OJ No L 109, 26. 4. 1983, p. 8. Directive as last amended by the 1994 Act of Accession.

6. Unless the transmission system is already independent from generation and distribution activities, the system operator shall be independent, at least in management terms, from other activities not relating to the transmission system.

Article 8

1. The transmission system operator shall be responsible for dispatching the generating installations in its area and for determining the use of interconnectors with other systems.

2. Without prejudice to the supply of electricity on the basis of contractual obligations, including those which derive from the tendering specifications, the dispatching of generating installations and the use of interconnectors shall be determined on the basis of criteria which may be approved by the Member State and which must be objective, published and applied in a non-discriminatory manner which ensures the proper functioning of the internal market in electricity. They shall take into account the economic precedence of electricity from available generating installations or interconnector transfers and the technical constraints on the system.

3. A Member State may require the system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.

4. A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.

Article 9

The transmission system operator must preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business.

CHAPTER V

Distribution system operation

Article 10

1. Member States may impose on distribution companies an obligation to supply customers located in a given area. The tariff for such supplies may be regulated, for instance to ensure equal treatment of the customers concerned.

2. Member States shall designate or shall require undertakings which own or are responsible for distribution systems to designate a system operator responsible for operating, ensuring the maintenance and, if necessary, developing the distribution system in a given area and its interconnectors with other systems.

3. Member States shall ensure that the system operator acts in accordance with Articles 11 and 12.

Article 11

1. The distribution system operator shall maintain a secure, reliable and efficient electricity distribution system in its area, with due regard for the environment.

2. In any event it must not discriminate between system users or classes of system users, particularly in favour of its subsidiaries or shareholders.

3. A Member State may require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.

Article 12

The distribution system operator must preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business.

CHAPTER VI

Unbundling and transparency of accounts

Article 13

Member States or any competent authority they designate as well as the dispute settlement authorities referred to in Article 20 (3) shall have right of access to the accounts of generation, transmission or distribution undertakings which they need to consult in carrying out their checks.

Article 14

1. Member States shall take the necessary steps to ensure that the accounts of electricity undertakings are kept in accordance with paragraphs 2 to 5.

2. Electricity undertakings, whatever their system of ownership or legal form, shall draw up, submit to audit

and publish their annual accounts in accordance with the rules of national law concerning the annual accounts of limited liability companies adopted pursuant to the fourth Council Directive, 78/660/EEC, of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies⁽¹⁾. Undertakings which are not legally obliged to publish their annual accounts shall keep a copy of these at the disposal of the public in their head office.

3. Integrated electricity undertakings shall, in their internal accounting, keep separate accounts for their generation, transmission and distribution activities, and, where appropriate, consolidated accounts for other non-electricity 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-subsidization and distortion of competition. They shall have included a balance sheet and a profit and loss account for each activity in notes to their accounts.

4. Undertakings shall specify in notes to the annual accounts the rules for the allocation of assets and liabilities and expenditure and income which they follow in drawing up the separate accounts referred to in paragraph 3. These rules may be amended only in exceptional cases. Such amendments must be mentioned in the notes and must be duly substantiated.

5. The annual accounts shall indicate in notes any transaction of a certain size conducted with affiliated undertakings, within the meaning of Article 41 of the seventh Council Directive, 83/349/EEC, of 13 June 1983 based on Article 54 (3) (g) of the Treaty on consolidated accounts⁽²⁾, or with associated undertakings, within the meaning of Article 33 (1) thereof, or, with undertakings which belong to the same shareholders.

Article 15

1. Member States which designate as a single buyer a vertically integrated electricity undertaking or part of a vertically integrated electricity undertaking shall lay down provisions requiring the single buyer to operate separately from the generation and distribution activities of the integrated undertaking.

2. Member States shall ensure that there is no flow of information between the single buyer activities of vertically integrated electricity undertakings and their generation and distribution activities, except for the information necessary to conduct the single buyer responsibilities.

⁽¹⁾ OJ No L 222, 14. 8. 1978, p. 11. Directive as last amended by the 1994 Act of Accession.

⁽²⁾ OJ No L 193, 18. 7. 1983, p. 1. Directive as last amended by the 1994 Act of Accession.

CHAPTER VII

Organization of access to the system

Article 16

For the organization of access to the system Member States may choose between the procedures referred to in Article 17 and/or in Article 18. Both sets of procedure shall operate in accordance with objective, transparent and non-discriminatory criteria.

Article 17

1. In the case of negotiated access to the system Member States shall take the necessary measures for electricity producers and, where Member States authorize their existence, supply undertakings and eligible customers either inside or outside the territory covered by the system to be able to negotiate access to the system so as to conclude supply contracts with each other on the basis of voluntary commercial agreements.

2. Where an eligible customer is connected to the distribution system, access to the system must be the subject of negotiation with the relevant distribution system operator and, if necessary, with the transmission system operator concerned.

3. To promote transparency and facilitate negotiations for access to the system, system operators must publish an indicative range of prices for use of the transmission and distribution systems in the first year following implementation of this Directive. As far as possible, the indicative prices published for subsequent years should be based on the average price agreed in negotiations in the previous 12-month period.

4. Member States may also opt for a regulated system of access procedure, giving eligible customers a right of access, on the basis of published tariffs for use of transmission and distribution systems, that is at least equivalent, in terms of access to the system, to the other procedures for access referred to in this Chapter.

5. The operator of the transmission or distribution system concerned may refuse access where he lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3.

Article 18

1. In the case of the single buyer procedure, Member States shall designate a legal person to be the single buyer within the territory covered by the system operator. Member States shall take the necessary measures for:

- (i) the publication of a non-discriminatory tariff for the use of the transmission and distribution system;
- (ii) eligible customers to be free to conclude supply contracts to cover their own needs with producers and, where Member States authorize their existence, with supply undertakings outside the territory covered by the system;
- (iii) eligible customers to be free to conclude supply contracts to cover their own needs with producers inside the territory covered by the system;
- (iv) independent producers to negotiate access to the system with the transmission and distribution systems operators so as to conclude supply contracts with eligible customers outside the system, on the basis of a voluntary commercial agreement.

2. The single buyer may be obliged to purchase the electricity contracted by an eligible customer from a producer inside or outside the territory covered by the system at a price which is equal to the sale price offered by the single buyer to eligible customers minus the price of the published tariff referred to in paragraph 1 (i).

3. If the purchase obligation under paragraph 2 is not imposed on the single buyer, Member States shall take the necessary measures to ensure that the supply contracts referred to in paragraph 1 (ii) and 1 (iii) are either implemented via access to the system on the basis of the published tariff referred to in paragraph 1 (i) or via negotiated access to the system according to the conditions of Article 17. In the latter case there would be no obligation for the single buyer to publish a non-discriminatory tariff for the use of the transmission and distribution system.

4. The single buyer may refuse access to the system and may refuse to purchase electricity from eligible customers where he lacks the necessary transmission or distribution capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3.

Article 19

1. Member States shall take the necessary measures to ensure an opening of their electricity markets, so that contracts under the conditions stated in Article 17 and 18 can be concluded at least up to a significant level, to be notified to the Commission on an annual basis.

The share of the national market shall be calculated on the basis of the Community share of electricity consumed by final consumers consuming more than 40 GWh per year (on a consumption site basis and including autoproduction).

The average Community share shall be calculated by the Commission on the basis of information regularly provided by Member States to the Commission. The Commission shall publish this average Community share defining the degree of market opening in the *Official Journal of the European Communities* before 1 November each year will all appropriate information clarifying the calculation.

2. The share of the national market, as referred to in paragraph 1, will be progressively increased over a period of six years. This increase will be calculated by reducing the Community consumption threshold of 40 GWh, as mentioned in paragraph 1, from 40 GWh to a level of 20 GWh annual electricity consumption three years after the entry into force of this Directive and to a level of 9 GWh annual electricity consumption six years after the entry into force of this Directive.

3. Member States shall specify those customers inside their territory representing the shares as specified under paragraphs 1 and 2 which have the legal capacity to contract electricity in accordance with Articles 17 and 18, given that all final consumers consuming more than 100 GWh per year (on a consumption site basis and including autoproduction) must be included in the above category.

Distribution companies, if not already specified as eligible customers under this paragraph, will have the legal capacity to contract under the conditions of Articles 17 and 18 for the volume of electricity being consumed by their customers designated as eligible within their distribution system, to supply those customers.

4. Member States shall publish by 30 January each year the criteria for the definition of eligible customers, which are able to conclude contracts under the conditions stated in Articles 17 and 18. This information, together with all other appropriate information to justify the fulfilment of market opening under paragraph 1, will be sent to the Commission to be published in the *Official Journal of the European Communities*. The Commission may request a Member State to modify its specifications, as mentioned in paragraph 3, if they create obstacles to the correct application of this Directive as regards the good functioning of the internal electricity market. If the Member State concerned does not follow this request within a period of three months, a final decision will be taken in accordance with procedure I of Article 2 of Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽¹⁾.

5. To avoid imbalance in the opening of electricity markets during the period referred to in Article 26:

⁽¹⁾ OJ No L 197, 18. 7. 1987, p. 33.

- (a) contracts for the supply of electricity under the provisions of Articles 17 and 18 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 subparagraph (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.

In parallel with the procedure and the timetable provided for in Article 26, and not later than after half of the period provided for in the same Article, the Commission will review the application of subparagraph (b) of the first subparagraph on the basis of market developments taking into account the common interest. In the light of experience gained, the Commission will evaluate this situation and report on possible imbalance in the opening of electricity markets with regard to this paragraph.

Article 20

1. Member States shall take the necessary measures to enable:
- (i) independent producers and autoproducers to negotiate access to the system so as to supply their own premises and subsidiaries in the same Member State or in another Member State by means of the interconnected system;
- (ii) producers located outside the territory covered by the system to conclude a supply contract following a call for tender for new generating capacity, and to have access to the system to perform the contract.
2. Member States shall ensure that the parties negotiate in good faith and that none of them abuses its negotiating position by preventing the successful outcome of negotiations.
3. Member States shall designate a competent authority, which must be independent of the parties, to settle disputes relating to the contracts and negotiations in question. In particular, this authority must settle disputes concerning contracts, negotiations and refusal of access or refusal to purchase.
4. In the event of cross-border disputes, the dispute settlement authority shall be the dispute settlement authority covering the system of the single buyer or the system operator which refuses use of, or access to, the system.
5. Recourse to this authority shall be without prejudice to the exercise of rights of appeal under Community law.

Article 21

1. Member States shall take measures under the procedures and rights referred to in Article 17 and 18 to enable:
- all electricity producers and electricity supply undertakings, where Member States authorize their existence, established within their territory to supply their own premises, subsidiaries and eligible customers through a direct line,
 - any eligible customer within their territory to be supplied through a direct line by a producer and supply undertakings, where such suppliers are authorized by Member States.
2. Member States shall lay down the criteria for the grant of authorizations for the construction of direct lines in their territory. These criteria must be objective and non-discriminatory.
3. The supply possibilities through a direct line as referred to in paragraph 1 do not modify the possibilities to contract electricity in accordance with Articles 17 and 18.
4. Member States may make authorization to construct a direct line subject either to the refusal of system access on the basis, as appropriate, of Article 17 (5) or Article 18 (4) or to the opening of a dispute settlement procedure under Article 20.
5. Member States may refuse to authorize a direct line if the granting of such an authorization would obstruct the provisions of Article 3. Duly substantiated reasons must be given for such refusal.

Article 22

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 86 thereof.

CHAPTER VIII

Final provisions

Article 23

In the event of a sudden crisis in the energy market and where the physical safety or security of persons, apparatus or installations or system integrity is threatened, a Member State may temporarily take the necessary safeguard measures.

Such measures must cause the least possible disturbance in the functioning of the internal market and must not be

wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

The Member State concerned shall without delay notify these measures to the other Member States, and to the Commission, which may decide that the Member State concerned must amend or abolish such measures, in so far as they distort competition and adversely affect trade in a manner which is at variance with the common interest.

Article 24

1. Those Member States in which commitments or guarantees of operation given before the entry into force of this Directive may not be honoured on account of the provisions of this Directive may apply for a transitional regime which may be granted to them by the Commission, taking into account, among other things, the size of the system concerned, the level of interconnection of the system and the structure of its electricity industry. The Commission shall inform the Member States of those applications before it takes a decision, taking into account the respect of confidentiality. This decision shall be published in the *Official Journal of the European Communities*.

2. The transitional regime shall be of limited duration and shall be linked to expiry of the commitments or guarantees referred to in paragraph 1. The transitional regime may cover derogations from Chapters IV, VI and VII of this Directive. Applications for a transitional regime must be notified to the Commission no later than one year after the entry into force of this Directive.

3. 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 the respect of confidentiality. This decision shall be published in the *Official Journal of the European Communities*. This paragraph shall also be applicable to Luxembourg.

Article 25

1. The Commission shall submit a report to the Council and the European Parliament, before the end of the first year following entry into force of this Directive, on harmonization requirements which are not linked to the provisions of this Directive. If necessary, the Commission shall attach to the report any harmonization

proposals necessary for the effective operation of the internal electricity market.

2. The Council and the European Parliament shall give their views on such proposals within two years of their submission.

Article 26

The Commission shall review the application of this Directive and submit a report on the experience gained on the functioning of the internal electricity market and the implementation of the general rules mentioned in Article 3 in order to allow the European Parliament and the Council, in the light of experience gained, to consider, in due time, the possibility of a further opening of the market which would be effective nine years after the entry into force of the Directive taking into account the coexistence of systems referred to in Articles 17 and 18.

Article 27

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than ...⁽¹⁾. They shall forthwith inform the Commission thereof.

2. Belgium, Greece and Ireland may, due to the technical specificities of their electricity systems, dispose of an additional period of respectively one year, two years and one year to apply the obligations ensuing from this Directive. These Member States, when making use of this option, shall inform the Commission thereof.

3. When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 28

This Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities*.

Article 29

This Directive is addressed to the Member States.

Done at ...

For the European Parliament
The President

For the Council
The President

⁽¹⁾ Two years after the date of entry into force of this Directive.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 24 February 1992 the Commission forwarded to the Council a proposal concerning common rules for the internal market in electricity based on Article 100a of the EC Treaty.
2. The opinions of the Economic and Social Committee and the European Parliament were delivered on 27 January and 17 November 1993, respectively.
3. On 11 February 1994 the Commission forwarded an amended proposal to the Council and the European Parliament.
4. At its meeting on 25 July 1996, the Council adopted its common position pursuant to Article 189b of the Treaty.

II. OBJECTIVES

5. The purpose of the proposal for a Directive is to take a further step towards the completion of the internal market in electricity by establishing common rules for the production, transmission and distribution of electricity. It lays down the rules relating to the organization and functioning of the electricity sector, access to the market, the criteria and procedures applicable to calls for tender and the granting of authorizations and the operation of systems.

III. ANALYSIS OF THE COMMON POSITION

6. The Council reached an agreement on the text of the common position on the basis of the following general outline:
 - (a) it has been agreed to pursue a Directive for the internal market in electricity separated from the internal market in gas;
 - (b) the internal market in electricity shall initially be subject to a gradual market opening over nine years;
 - (c) Member States may invoke either a tendering procedure or an authorization procedure when granting licences to construct new generation capacity;
 - (d) Member States may invoke either the 'negotiated third party access' or the 'single buyer' systems to grant access to the grids;
 - (e) all issues related to public service obligations have been referred to Article 3;
 - (f) with due regard to the principle of subsidiarity, Member States have been given a larger role in the implementation provisions.
7. The Council has been able to adopt a large part of the amendments requested by the European Parliament.
 - (a) The Council has, verbatim or in substance, adopted amendments 3, 7, 11, 13, 14, 15, 16, 22, 24, 25, 28, 33, 34, 40, 41, 48, 51, 60, 62, 63, 64, 66, 76, 77, 79, 83, 85, 88, 89, 91, 92, 97, 236, 237 and 238 which were taken up by the Commission.

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- (b) The Council has, furthermore, been able to adopt verbatim or in substance, amendments 9, 10, 17, 20, 26, 45, 46, 55, 65, 68, 80, 81, 86, 96, 101, 222 and 231 which were not taken up by the Commission.
 - (c) The Council has not been able to adopt amendments 35, 43, 58, 61, 69, 71, 75, 78, 87, 90, 107 and 108 which were taken up by the Commission.
 - (d) The Council has finally followed the Commission's amended proposal by not adopting the other amendments proposed by the European Parliament.
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