

COMMON POSITION (EC) No 6/2003**adopted by the Council on 3 February 2003****with a view to the adoption of the Directive 2003/.../EC of the European Parliament and of the Council of ... concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC**

(2003/C 50 E/03)

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 proposals from the Commission ⁽¹⁾,

Having regard to the Opinion of the European Economic and Social Committee ⁽²⁾,

Having consulted the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

- (1) 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 ⁽⁴⁾ has made significant contributions towards the creation of an internal market for gas.
- (2) Experience in implementing this Directive shows the benefits that may result from the internal market in gas, in terms of efficiency gains, price reductions, higher standards of service and increased competitiveness. However, significant shortcomings and possibilities for improving the functioning of the market remain, notably in ensuring a level playing field in 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.
- (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 and competitive internal market relate to, amongst other things, issues of access to the network, access to storage, tariffication issues, interoperability between systems and different degrees of market opening between Member States.

(7) For competition to function, network access must be non-discriminatory, transparent and fairly priced.

(8) In order to complete the internal gas market, non-discriminatory access to the network of the transmission and distribution system operators is of paramount importance. A transmission or distribution system operator may consist of one or more undertakings.

(9) In case of a gas undertaking performing transmission, distribution, storage or liquefied natural gas (LNG) activities and which is separate in its legal form from those undertakings performing production and/or supply activities, the designated system operators may be the same undertaking owning the infrastructure.

(10) In order to ensure efficient and non-discriminatory network access it is appropriate that the transmission and distribution systems are operated through legally separate entities where vertically integrated undertakings exist. The Commission should assess measures of equivalent effect, developed by Member States to achieve the aim of this requirement, and, where appropriate, submit proposals to amend this Directive.

⁽¹⁾ OJ C 240 E, 28.8.2001, p. 60 and OJ C 227 E, 24.9.2002, p. 393.

⁽²⁾ OJ C 36, 8.2.2002, p. 10.

⁽³⁾ Opinion of the European Parliament of 13 March 2002 (OJ C 47 E, 27.2.2003, p. 367), Council Common Position of 3 February 2003 and Decision of the European Parliament of ... (not yet published in the Official Journal).

⁽⁴⁾ OJ L 204, 21.7.1998, p. 1.

It is also appropriate that the transmission and distribution system operators have effective decision-making rights with respect to assets necessary to maintain and operate and develop networks when the assets in question are owned and operated by vertically integrated undertakings.

It is important however to distinguish between such legal separation and ownership unbundling. Legal separation implies neither a change of ownership of assets and nothing prevents similar or identical employment conditions applying throughout the whole of the vertically integrated undertakings. However, a non-discriminatory decision-making process should be ensured through organisational measures regarding the independence of the decision-makers responsible.

- (11) 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 legal distribution unbundling requirements.
- (12) In order to facilitate the conclusion of contracts by a gas undertaking established in a Member State for the supply of gas to eligible customers in another Member State, Member States and, where appropriate, national regulatory authorities should work towards more homogenous conditions and the same degree of eligibility for the whole of the internal market.
- (13) The existence of effective regulation, carried out by one or more national regulatory authorities, is an important factor in guaranteeing non-discriminatory access to the network. Member States specify the functions, competences and administrative powers of the regulatory authorities. It is important that the regulatory authorities in all Member States share the same minimum set of competences. Those authorities should 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. In order to avoid uncertainty and costly and time consuming disputes, these tariffs should be published prior to their entry into force.
- (14) In order to ensure effective market access for all market players including new entrants, non discriminatory and cost-reflective balancing mechanisms are necessary. As soon as the gas market is sufficiently liquid, this should be achieved through the setting up of transparent market-based mechanisms for the supply and purchase of gas needed in the framework of balancing requirements. In the absence of such a liquid market, national regulatory authorities should play an active role to ensure that balancing tariffs are non-discriminatory and cost-reflective. At the same time, appropriate incentives should be

provided to balance in-put and off-take of gas and not to endanger the system.

- (15) 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 demand-side management measures.
- (16) 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.
- (17) Gas customers should be able to choose their supplier freely. Nonetheless a phased approach should be taken to completing the internal market for 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 their supplier.
- (18) Progressive opening of markets towards full competition should as soon as possible remove differences between Member States. Transparency and certainty in the implementation of this Directive should be ensured.
- (19) Directive 98/30/EC contributes to 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 ancillary services.
- (20) Storage facilities are essential means, amongst other things of implementing public service obligations such as security of supply. This should not lead to distortion of competition or discrimination in the access to storage.
- (21) Further measures should be taken in order to ensure transparent and non-discriminatory tariffs for access to transportation. Those tariffs should be applicable to all users on a non-discriminatory basis. Where a storage facility, linepack or ancillary service operates in a sufficiently competitive market, access could be allowed on the basis of transparent and non-discriminatory market-based mechanisms.

- (22) In the interest of security of supply, the supply/demand balance in individual Member States should be monitored, and monitoring should be 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 gas supply.
- (23) Member States should ensure that, taking into account the necessary quality requirements, biogas and gas from biomass or other types of gas are granted non-discriminatory access to the gas system, provided such access is permanently compatible with the relevant technical rules and safety standards. These rules and standards should ensure, that these gases can technically and safely be injected into, and transported through the natural gas system and should also address the chemical characteristics of these gases.
- (24) 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. It is therefore necessary to take them into account in the planning of supply and transportation capacity of gas undertakings.
- (25) In order to ensure the maintenance of high 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.
- Member States should ensure that when they are connected to the gas system customers are informed about their rights to be supplied with natural gas of a specified quality at reasonable prices. Measures taken by Member States to protect final customers may differ according to households and small and medium-sized enterprises.
- (26) The respect of the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of consumer protection, security of supply, environmental protection and equivalent levels of competition in all Member States. It is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances and subject to the observance of Community law.
- (27) Measures implemented by Member States to achieve the objectives of social and economic cohesion may include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools. These tools may include liability mechanisms to guarantee the necessary investment.
- (28) To the extent to which measures taken by Member States to fulfil public service obligations constitute State aid under Article 87(1) of the Treaty, there is an obligation according to Article 88(3) of the Treaty to notify them to the Commission
- (29) Since the objective of the proposed action, namely the creation of a fully operational internal gas market, 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 at Community level, the Community may adopt measures in accordance with the principle of subsidiarity and proportionality as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (30) In the light of the experience gained with the operation of Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids⁽¹⁾, measures should be taken to ensure homogeneous and non-discriminatory access regimes for transmission, including cross-border flows of gas between Member States. To ensure homogeneity in the treatment of access to the gas networks, also in the case of transit, that Directive should be repealed, without prejudice to the continuity of contracts concluded under the said Directive.
- (31) Given the scope of the amendments that are being made to Directive 98/30/EC, it is desirable, for reasons of clarity and rationalisation, that the provisions in question should be recast.
- (32) This Directive respects the fundamental rights, and observes the principles, recognised in particular by the Charter of Fundamental Rights of the European Union.
- (33) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽²⁾,

⁽¹⁾ 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).

⁽²⁾ OJ L 184, 17.7.1999, p. 23.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope

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, access to the market, the criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas and the operation of systems.

2. The rules established by this Directive for natural gas, including liquefied natural gas (LNG), shall also apply to biogas and gas from biomass or other types of gas in so far as such gases can technically and safely be injected into, and transported through, the natural gas system.

Article 2

Definitions

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 for ensuring 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 for ensuring the long-term ability of the system to meet reasonable demands for the distribution of gas;
7. 'supply' means the sale, including resale, 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, and excluding facilities reserved exclusively for transmission system operators in carrying out their functions;
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-gasification of LNG, and shall include ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system, 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 importation, offloading, and re-gasification of LNG and is responsible for operating a LNG facility;
13. 'system' means any transmission networks, distribution networks, LNG facilities and/or storage facilities owned and/or operated by a natural gas undertaking, including linepack and its facilities supplying ancillary services and those of related undertakings necessary for providing access to transmission, distribution and LNG;

14. 'ancillary services' means all services necessary for access to and the operation of transmission and/or distribution networks and/or LNG facilities and/or storage facilities including load balancing and blending, but excluding facilities reserved exclusively for transmission system operators carrying out their functions;
15. 'linepack' means the storage of gas by compression in gas transmission and distribution systems, but excluding facilities reserved for transmission system operators carrying out their functions;
16. 'interconnected system' means a number of systems which are linked with each other;
17. 'interconnector' means a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of these Member States;
18. 'direct line' means a natural gas pipeline complementary to the interconnected system;
19. 'integrated natural gas undertaking' means a vertically or horizontally integrated undertaking;
20. '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 of 21 December 1989 on the control of concentrations between undertakings⁽¹⁾ and where the undertaking/group concerned is performing at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas;
21. '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;
22. 'related undertakings' means affiliated undertakings, within the meaning of Article 41 of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 44(2)(g) (*) of the Treaty on consolidated accounts⁽²⁾, and/or associated undertakings, within the meaning of Article 33(1) thereof, and/or undertakings which belong to the same shareholders;
23. 'system users' means any natural or legal persons supplying to, or being supplied by, the system;
24. 'customers' means wholesale and final customers of natural gas and natural gas undertakings which purchase natural gas;
25. 'household customers' means customers purchasing natural gas for their own household consumption;
26. 'non-household customers' means customers purchasing natural gas which is not for their own household use;
27. 'final customers' means customers purchasing natural gas for their own use;
28. 'eligible customers' means customers who are free to purchase gas from the supplier of their choice, within the meaning of Article 23 of this Directive;
29. '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;
30. '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;
31. '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;
32. 'security' means both security of supply of natural gas and technical safety;
33. 'new infrastructure' means an infrastructure not completed by the entry into force of this Directive.

CHAPTER II

GENERAL RULES FOR THE ORGANISATION OF THE SECTOR

Article 3

Public service obligations and customer protection

1. Member States shall ensure, on the basis of their institutional organisation and with due regard to 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 these undertakings as regards either rights or obligations.

⁽¹⁾ OJ L 395, 30.12.1989, p. 1. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

^(*) The title of Directive 83/349/EEC has been adjusted to take account of the renumbering of the Articles of the Treaty establishing the European Community in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 54(3)(g).

⁽²⁾ OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

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, including appropriate measures to help them avoid 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. As regards at least household customers these measures shall include those set out in Annex A.

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 the provisions of Article 4 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, inform the Commission of all measures adopted to fulfil 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.

Article 4

Authorisation procedure

1. In circumstances where an authorisation (e.g. licence, permission, concession, consent or approval) is required for the construction or operation of natural-gas facilities, the Member States or any competent authority they designate shall grant authorisations to build and/or operate such facilities, pipelines and associated equipment on their territory, in accordance with paragraphs 2 to 4. Member States or any competent authority they designate may also grant authorisations on the same basis for the supply of natural gas and for wholesale customers.

2. Where Member States have a system of authorisation, they shall lay down objective and non-discriminatory criteria which shall be met by an undertaking applying for an authorisation to build and/or operate natural-gas facilities or applying for an authorisation to supply natural gas. The non-discriminatory criteria and procedures for the granting of authorisations shall be made public.

3. Member States shall ensure that the reasons for any refusal to grant an authorisation are objective and non-discriminatory and are given to the applicant. Reasons for such refusals shall be forwarded to the Commission for information. Member States shall establish a procedure enabling the applicant to appeal against such refusals.

4. For the development of newly supplied areas and efficient operation generally, and without prejudice to Article 24, Member States may decline to grant a further authorisation to build and operate distribution pipeline systems in any particular area once such pipeline systems have been or are proposed to be built in that area and if existing or proposed capacity is not saturated.

Article 5

Monitoring of security of supply

Member States shall ensure the monitoring of security of supply issues. Where Member States consider it appropriate, they may delegate this task to the regulatory authorities referred to in Article 25(1). 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 being planned or under construction, and the quality and level of maintenance of the networks, as well as measures to cover peak demand and to deal with shortfalls of one or more suppliers. 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 shall forward this report to the Commission forthwith.

*Article 6***Technical rules**

Member States shall ensure that technical safety criteria are defined and 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 public. 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 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society Services ⁽¹⁾.

CHAPTER III

TRANSMISSION, STORAGE AND LNG*Article 7***Designation of system operators**

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. Member States shall take the measures necessary to ensure that transmission, storage and LNG system operators act in accordance with Articles 8 to 10.

*Article 8***Tasks of system operators**

1. 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;

- (d) provide system users with the information they need for efficient access to the system.

2. Rules adopted by transmission system operators for balancing the gas transmission 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 25(2) in a non-discriminatory and cost-reflective way and shall be published.

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

4. 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.

*Article 9***Unbundling of transmission system operators**

1. Where the transmission system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to transmission. This requirement shall not imply or result in the requirement to separate the ownership of assets of the transmission network from the vertically integrated undertaking.

2. In order to ensure the independence of the transmission system operator referred to in paragraph 1, 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 shall have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to operate, maintain or develop the network. This should not prevent the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets in a subsidiary are protected;

⁽¹⁾ OJ L 204, 21.7.1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).

(d) the transmission system operator shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The programme shall set out the specific obligations of employees to meet this objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority referred to in Article 25(1) and shall be published.

Article 10

Confidentiality for transmission system operators

1. Without prejudice to Article 16 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 from 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.

CHAPTER IV

DISTRIBUTION AND SUPPLY

Article 11

Designation of distribution system operators

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 12 and 14.

Article 12

Tasks of distribution system operators

1. Each distribution system operator shall operate, maintain and develop under economic conditions a secure, reliable and efficient system, with due regard for 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.

4. Each distribution system operator shall provide system users with the information they need for efficient access to the system.

5. Where distribution system operators are responsible for balancing the gas distribution 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 25(2) in a non-discriminatory and cost-reflective way and shall be published.

Article 13

Unbundling of distribution system operators

1. Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to distribution. This requirement shall not imply or result in the requirement to separate the ownership of assets of the distribution network from the vertically integrated undertaking.

2. In order to ensure the independence of the distribution system operator referred to in paragraph 1 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 shall have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to operate, maintain or develop the network. This should not preclude the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets in a subsidiary are protected;

(d) the distribution system operator shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The programme shall set out the specific obligations of employees to meet this objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority referred to in Article 25(1) and shall be published.

Member States may decide not to apply paragraphs 1 and 2 to integrated natural gas undertakings serving less than 100 000 connected customers.

Article 14

Confidentiality for distribution system operators

1. Without prejudice to Article 16 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 from 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.

Article 15

Combined operator

The rules in Articles 9(1) and Article 13(1) shall not prevent the operation of a combined transmission, LNG, storage and distribution system operator, which is independent in terms of its legal form, organisation and decision making from other activities not relating to transmission LNG, storage and distribution system operations and which meets the following requirements:

(a) those persons responsible for the management of the combined 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 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 combined system operator are taken

into account in a manner that ensures that they are capable of acting independently;

(c) the combined system operator shall have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to operate, maintain or develop the system. This should not preclude the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets in a subsidiary are protected;

(d) the combined system operator shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The programme shall set out the specific obligations of employees to meet this objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority referred to in Article 25(1) and shall be published.

CHAPTER V

UNBUNDLING AND TRANSPARENCY OF ACCOUNTS

Article 16

Right of access to accounts

1. Member States or any competent authority they designate, including the regulatory authorities referred to in Article 25(1) and the dispute settlement authorities referred to in Article 20(3), shall, insofar as necessary to carry out their functions, have right of access to the accounts of natural gas undertakings as set out in Article 17.

2. Member States and any designated competent authority, including the regulatory authorities referred to in Article 25(1) and the dispute settlement authorities, shall preserve the confidentiality of commercially sensitive information. Member States may provide for the disclosure of such information where this is necessary in order for the competent authorities to carry out their functions.

Article 17

Unbundling of accounts

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. Where undertakings benefit from a derogation from this provision on the basis of Article 28(2) and (4), they shall at least keep their internal accounts in accordance with this Article.

2. Natural gas 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 44(2)(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 at their head office.

3. Natural gas undertakings shall, in their internal accounting, keep separate accounts for each of their transmission, distribution, 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 also keep accounts, which may be consolidated, for other gas activities not relating to transmission, distribution, LNG and storage. Until 1 July 2007, 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 other, non-gas activities. The internal accounts shall include a balance sheet and a profit and loss account for each activity.

4. Undertakings shall specify in their internal accounting the rules for the allocation of assets and liabilities, expenditure and income as well as for depreciation, without prejudice to nationally applicable accounting rules, which they follow in drawing up the separate accounts referred to in paragraph 3. These internal rules may be amended only in exceptional cases. Such amendments shall be mentioned and duly substantiated.

5. The annual accounts shall indicate in notes any transaction of a certain size conducted with related undertakings.

CHAPTER VI

ORGANISATION OF ACCESS TO THE SYSTEM

Article 18

Third party access

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

(*) The title of Directive 78/660/EEC has been adjusted to take account of the renumbering of the Articles of the Treaty establishing the European Community in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 54(3)(g).

(1) OJ L 222, 14.8.1978, p. 11. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

tariffs, applicable to all eligible customers, including supply undertakings, 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 regulatory authority referred to in Article 25(1) and that these tariffs — and the methodologies, where only methodologies are approved — 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.

3. The provisions of this Directive shall not prevent the conclusion of long-term contracts in so far as they comply with Community competition rules.

Article 19

Access to storage

1. For the organisation of access to storage facilities and linepack 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 of the procedures referred to in paragraphs 3 and 4. These procedures shall operate in accordance with objective, transparent and non-discriminatory criteria.

2. The provisions of paragraph 1 shall not apply to ancillary services and temporary storage that are related to LNG facilities and are necessary for the re-gasification process and subsequent delivery to the transmission system.

3. 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 linepack, when technically and/or economically necessary for providing efficient access to the system, as well as for the organisation of access to other ancillary services. The parties shall be obliged to negotiate access to storage, linepack and other ancillary services in good faith.

Contracts for access to storage, linepack and other ancillary services 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, linepack and other ancillary services within the first six months following implementation of this Directive and on an annual basis every year thereafter.

4. In the case of regulated access Member States 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, linepack and other ancillary services, on the basis of published tariffs and/or other terms and obligations for use of that storage and linepack, when technically and/or economically necessary for providing efficient access to the system, as well as for the organisation of access to other ancillary services. 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.

Article 20

Access to upstream pipeline networks

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 33.

2. The access referred to in paragraph 1 shall be provided in a manner determined by the Member State in accordance with the relevant legal instruments. Member States shall apply the objectives of fair and open access, achieving a competitive market in natural gas and avoiding any abuse of a dominant position, taking into account security and regularity of supplies, capacity which is or can reasonably be made available, and environmental protection. The following may be taken into account:

- (a) the need to refuse access where there is an incompatibility of technical specifications which cannot be reasonably overcome;
- (b) the need to avoid difficulties which cannot be reasonably overcome and could prejudice the efficient, current and planned future production of hydrocarbons, including that from fields of marginal economic viability;
- (c) the need to respect the duly substantiated reasonable needs of the owner or operator of the upstream pipeline network for the transport and processing of gas and the interests of all other users of the upstream pipeline network or relevant processing or handling facilities who may be affected; and
- (d) the need to apply their laws and administrative procedures, in conformity with Community law, for the grant of authorisation for production or upstream development.

3. Member States shall ensure that they have in place dispute-settlement arrangements, including an authority independent of the parties with access to all relevant information, to enable disputes relating to access to upstream pipeline networks to be settled expeditiously, taking into account the criteria in paragraph 2 and the number of parties which may be involved in negotiating access to such networks.

4. In the event of cross-border disputes, the dispute-settlement arrangements for the Member State having jurisdiction over the upstream pipeline network which refuses access shall be applied. Where, in cross-border disputes, more than one Member State covers the network concerned, the Member States concerned shall consult with a view to ensuring that the provisions of this Directive are applied consistently.

Article 21

Refusal of access

1. Natural gas undertakings may refuse access to the system on the basis of lack of capacity or where the access to the system would prevent them from carrying out the public-service obligations referred to in Article 3(2) which are assigned to them or on the basis of serious economic and financial difficulties with take-or-pay contracts having regard to the criteria and procedures set out in Article 27 and the alternative chosen by the Member State in accordance with paragraph 1 of that Article. Duly substantiated reasons shall be given for such a refusal.

2. Member States may take the measures necessary to ensure that the natural gas undertaking refusing access to the system on the basis of lack of capacity or a lack of connection makes the necessary enhancements as far as it is economic to do so or when a potential customer is willing to pay for them. In circumstances where Member States apply Article 4(4), Member States shall take such measures.

Article 22

New infrastructure

1. Major new gas infrastructures, i.e. interconnectors between Member States, LNG and storage facilities, may, upon request, be exempted from the provisions of Articles 18, 19, 20, and 25(2), (3) and (4) under the following conditions:

- (a) the investment must enhance competition in gas supply and enhance security of supply;
- (b) the level of risk attached to the investment is such that the investment would not take place unless an exemption was granted;

- (c) the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;
- (d) charges are levied on users of that infrastructure;
- (e) the exemption is not detrimental to competition or the effective functioning of the internal gas market, or the efficient functioning of the regulated system to which the infrastructure is connected.

2. Paragraph 1 shall apply also to significant increases of capacity in existing infrastructures and to modifications of such infrastructures which enable the development of new sources of gas supply.

3. (a) The regulatory authority referred to in Article 25 may, on a case-by-case basis, decide on the exemption referred to in paragraphs 1 and 2. However, Member States may provide that the regulatory authorities shall submit, for formal decision, to the relevant body in the Member State its opinion on the request for an exemption. This opinion shall be published together with the decision.

(b) (i) The exemption may cover all or parts of, respectively, the new infrastructure, the existing infrastructure with significantly increased capacity or the modification of the existing infrastructure.

(ii) In deciding to grant an exemption consideration shall be given, on a case-by-case basis, to the need to impose conditions regarding the duration of the exemption and non-discriminatory access to the interconnector.

(iii) When deciding on the conditions in this subparagraph account shall, in particular, be taken of the duration of contracts, additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances.

(c) When granting an exemption the relevant authority may decide upon the rules and mechanisms for management and allocation of capacity insofar as this does not prevent the implementation of long term contracts.

(d) The exemption decision, including any conditions referred to in (b), shall be duly reasoned and published.

(e) In the case of an interconnector any exemption decision shall be taken after consultation with the other Member States or regulatory authorities concerned.

4. The exemption decision shall be notified, without delay, by the competent authority 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.

In particular, the information shall contain:

(a) the detailed reasons on the basis of which the regulatory authority, or Member State, granted the exemption, including the financial information justifying the need for the exemption;

(b) the analysis undertaken of the effect on competition and the effective functioning of the internal gas market resulting from the grant of the exemption;

(c) the reasons for the time period and the share of the total capacity of the gas infrastructure in question for which the exemption is granted;

(d) in case the exemption relates to an interconnector, the result of the consultation with the Member States concerned or regulatory authorities;

(e) the contribution of the infrastructure to the diversification of gas supply.

Within two months after receiving a notification, the Commission may request that the regulatory authority or the Member State concerned amend or withdraw the decision to grant an exemption. The two-month period may be extended by one additional month where additional information is sought by the Commission.

If the regulatory authority or Member State concerned does not comply with the request within a period of four weeks, a final decision shall be taken in accordance with the procedure referred to in Article 30(2).

The Commission shall preserve the confidentiality of commercially sensitive information.

Article 23

Market opening and reciprocity

1. Member States shall ensure that the eligible customers are:

(a) until 1 July 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 July 2004, at the latest, all non-household customers;

(c) from 1 July 2007, all customers.

2. 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, taking into account the situation in the market and the common interest, oblige the refusing party to execute the requested supply, at the request of one of the Member States of the two systems.

Article 24

Direct lines

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 21 or to the opening of a dispute-settlement procedure under Article 25.

Article 25

Regulatory authorities

1. Member States shall designate one or more competent bodies with the function of regulatory authorities. These authorities shall be wholly independent of the interests of the gas industry. They shall at least be responsible for ensuring non-discrimination, effective competition and the efficient functioning of the market, by at least monitoring in particular:

- (a) the rules on the management and allocation of interconnection capacity, in conjunction with the regulatory authority or authorities of those Member States with which interconnection exists;
- (b) any mechanisms to deal with congested capacity within the national gas system;
- (c) the time taken by transmission and distribution system operators to make connections and repairs;
- (d) 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;

- (e) the effective unbundling of accounts as referred to in Article 17, to ensure there are no cross-subsidies between transmission, distribution, storage, LNG and supply activities;
- (f) the access conditions to storage, linepack and to other ancillary services as provided for in Article 19.

2. The regulatory authorities shall be responsible for fixing or approving prior to their entry into force, at least 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. Notwithstanding paragraph 2, Member States may provide that the regulatory authorities shall submit, for formal decision, to the relevant body in the Member State the tariffs or at least the methodologies referred to in that paragraph as well as the modifications referred to in paragraph 4.

These tariffs or the methodologies or modifications thereto shall be published together with the decision on formal adoption.

4. 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 paragraphs 1, 2 and 3, to ensure that they are proportionate and applied in a non-discriminatory manner.

5. Any party having a complaint against a transmission, LNG or distribution system operator with respect to the issues mentioned in paragraphs 1, 2 and 4 and in Article 19 may refer the complaint to the 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 regulatory authorities. This period may be extended with the agreement of the complainant. Such a decision shall have binding effect unless and until overruled on appeal.

6. Any party who is affected and who has a right to complain concerning a decision on methodologies taken pursuant to paragraphs 2, 3 or 4 or, where the regulatory authority has a duty to consult, concerning the proposed methodologies, may, at the latest within two months, or a shorter time period as provided by Member States, following publication of the decision or proposal for a decision, submit a complaint for review. Such a complaint shall not have suspensive effect.

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

8. Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a 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.

9. 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.

10. In the event of cross-border disputes, the deciding regulatory authority shall be the regulatory authority which has jurisdiction in respect of the system operator, which refuses use of, or access to, the system.

11. Complaints referred to in paragraphs 5 and 6 shall be without prejudice to the exercise of rights of appeal under Community and national law.

CHAPTER VII

FINAL PROVISIONS

Article 26

Safeguard measures

1. In the event of a sudden crisis in the energy market or 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.

2. Such measures shall cause the least possible disturbance to the functioning of the internal market and shall not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

3. 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, insofar as they distort competition and adversely affect trade in a manner which is at variance with the common interest.

Article 27

Derogations in relation to take-or-pay commitments

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 18 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 of presenting 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 eight 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 procedure referred to in Article 30(2).

The Commission shall preserve the confidentiality of commercially sensitive information.

3. When deciding on the derogations referred to in paragraph 1, the Member State, or the designated competent authority, and the Commission shall take into account, in particular, the following criteria:

- (a) the objective of achieving a competitive gas market;
- (b) the need to fulfil public-service obligations and to ensure security of supply;
- (c) the position of the natural gas undertaking in the gas market and the actual state of competition in this market;
- (d) the seriousness of the economic and financial difficulties encountered by natural gas undertakings and transmission undertakings or eligible customers;
- (e) the dates of signature and terms of the contract or contracts in question, including the extent to which they allow for market changes;

- (f) the efforts made to find a solution to the problem;
- (g) the extent to which, when accepting the take-or-pay commitments in question, the undertaking could reasonably have foreseen, having regard to the provisions of this Directive, that serious difficulties were likely to arise;
- (h) the level of connection of the system with other systems and the degree of interoperability of these systems; and
- (i) the effects the granting of a derogation would have on the correct application of this Directive as regards the smooth functioning of the internal natural gas market.

A decision on a request for a derogation concerning take-or-pay contracts concluded before the entry into force of this Directive should not lead to a situation in which it is impossible to find economically viable alternative outlets. Serious difficulties shall in any case be deemed not to exist when the sales of natural gas do not fall below the level of minimum offtake guarantees contained in gas-purchase take-or-pay contracts or in so far as the relevant gas-purchase take-or-pay contract can be adapted or the natural gas undertaking is able to find alternative outlets.

4. Natural gas undertakings which have not been granted a derogation as referred to in paragraph 1 shall not refuse, or shall no longer refuse, access to the system because of take-or-pay commitments accepted in a gas purchase contract. Member States shall ensure that the relevant provisions of Chapter VI namely Articles 18 to 25 are complied with.

5. Any derogation granted under the above provisions shall be duly substantiated. The Commission shall publish the decision in the *Official Journal of the European Communities*.

6. The Commission shall, within five years of the entry into force of this Directive, submit a review report on the experience gained from the application of this Article, so as to allow the European Parliament and the Council to consider, in due course, the need to adjust it.

Article 28

Emergent and isolated markets

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 Articles 4, 9, 23 and/or 24 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 may derogate from Articles 4, 7, 8(1) and (2), 9, 11, 12(5), 13, 17, 18, 23(1) and/or 24 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. On the date at which the derogation referred to in paragraph 2 expires, the definition of eligible customers shall result in an opening of the market equal to at least 33 % of the total annual gas consumption of the national gas market. Two years thereafter, Art 23(1)(b) shall apply, and three years thereafter, Article 23(1)(c). Until Article 23(1)(b) applies the Member State referred to in paragraph 2 may decide not to apply Article 18 as far as ancillary services and temporary storage for the re-gasification process and its subsequent delivery to the transmission system are concerned.

4. 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 and major distribution 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, Article 8(1) and (2), Article 9, Article 11, Article 12(5), Article 13, Article 17, Article 18, Article 23(1) and/or Article 24 for developments within this area.

5. The Commission may grant the derogation referred to in paragraph 4, taking into account, in particular, the following criteria:

- the need for infrastructure investments, which would not be economic to operate in a competitive market environment,
- the level and pay-back prospects of investments required,
- the size and maturity of the gas system in the area concerned,
- the prospects for the gas market concerned,
- the geographical size and characteristics of the area or region concerned, and socio-economic and demographic factors.

(a) For gas infrastructure other than distribution infrastructure a derogation may be granted only if no gas infrastructure has been established in this area, or has been so established for less than 10 years. The temporary derogation may not exceed 10 years from the time gas is first supplied in the area.

(b) For distribution infrastructure a derogation may be granted for a time period which may not exceed 20 years for the distribution infrastructure from the time gas is first supplied through the said system in the area.

6. Luxembourg may benefit from a derogation from Articles 8(3) and 9 for a period of five years from 1 July 2004. Such a derogation shall be reviewed before the end of the five-year period and any decision to renew the derogation for another five years shall be taken in accordance with the procedure referred to in Article 30(2). Any such derogation shall be notified to the Commission.

7. The Commission shall inform the Member States of applications made under paragraph 4 prior to taking a decision pursuant to paragraph 5, taking into account respect for confidentiality. This decision, as well as the derogations referred to in paragraphs 1 and 2, shall be published in the Official Journal of the European Union.

8. Greece may derogate from Articles 4, 11, 12, 13, 18, 23 and/or 24 of this Directive for the geographical areas and time periods specified in the licences issued by it, prior to 15 March 2002 and in accordance with Directive 98/30/EC, for the development and exclusive exploitation of distribution networks in certain geographical areas.

Article 29

Review Procedure

In the event that the report referred to in Article 31(3) reaches the conclusion whereby, given the effective manner in which network access has been carried out in a Member State — which gives rise to fully effective, non-discriminatory and unhindered network access —, the Commission concludes that certain obligations imposed by this Directive on undertakings (including those with respect to legal unbundling for distribution system operators) are not proportionate to the objective pursued, the Member State in question may submit a request to the Commission for exemption from the requirement in question.

The request shall be notified, without delay, by the Member State to the Commission, together with all the relevant information necessary to demonstrate that the conclusion reached in the report on effective network access being ensured will be maintained.

Within three months of its receipt of a notification, the Commission shall adopt an opinion with respect to the request by the Member State concerned, and where appropriate, submit proposals to the European Parliament and to the Council to amend the relevant provisions of the Directive or provide for other appropriate means.

Article 30

Committee

1. The Commission shall be assisted by a Committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. The Committee shall adopt its rules of procedure.

Article 31

Reporting

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 cover at least:

- (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 derogations granted under this Directive, including implementation of the derogation provided for in Article 13(2) with a view to a possible revision of the threshold;
- (c) 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;
- (d) 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 and the development of storage (including the question of the proportionality of market regulation in this field);
- (e) special attention will be given to the measures taken in Member States to cover peak demand and to deal with shortfalls of one or more suppliers;
- (f) 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;
- (g) 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.

3. The Commission shall, no later than 1 January 2006, submit to the European Parliament and Council, a detailed report outlining progress in creating the internal gas market. The report shall, in particular, consider:

- the existence of non-discriminatory network access;
- effective regulation;
- the development of interconnection infrastructure, the conditions of transit, and the security of supply situation in the Community;
- the extent to which the full benefits of the opening of the market are accruing to small enterprises and households, notably with respect to public service standards;
- the extent to which markets are in practice open to effective competition;
- the extent to which customers are actually switching suppliers and renegotiating tariffs;
- price developments, including supply prices, in relation to the degree of the opening of markets;
- whether effective and non-discriminatory third party access to gas storage exists when technically and/or economically necessary for providing efficient access to the system;
- the experience gained in the application of the Directive as far as the effective independence of system operators in vertically integrated undertakings is concerned and whether other measures in addition to functional independence and separation of accounts have been developed which have effects equivalent to legal unbundling.

Where appropriate, the Commission shall submit proposals to the European Parliament and the Council, in particular to guarantee high public service standards.

Where appropriate, the Commission shall submit proposals to the European Parliament and the Council, in particular to ensure full and effective independence of distribution system operators before 1 July 2007.

Article 32

Repeals

1. Directive 91/296/EEC shall be repealed with effect from 1 July 2004, without prejudice to contracts concluded pursuant to Article 3(1) of Directive 91/296/EEC, which shall continue to be valid and to be implemented under the terms of the said Directive.

2. Directive 98/30/EC shall be repealed from 1 July 2004, without prejudice to the obligations of Member States concerning the deadlines for transposition and application of the said Directive. References made to the repealed Directive shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex B.

Article 33

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 July 2004. They shall forthwith inform the Commission thereof.

2. Member States may postpone the implementation of Article 13(1) until 1 July 2007.

3. When Member States adopt these measures, 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 34

Entry into force

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

Article 35

Addressees

This Directive is addressed to the Member States.

Done at ...

For the European Parliament
The President

For the Council
The President

ANNEX A

Measures on consumer protection

Without prejudice to Community rules on consumer protection, in particular Directives 97/7/EC of the European Parliament and of the Council ⁽¹⁾ and Council Directive 93/13/EC ⁽²⁾, the measures referred to in Article 3 are to ensure that customers:

- (a) have a right to a contract with their gas service provider that specifies:
- the identity and address of the supplier;
 - the services provided, the service quality levels offered, as well as the time for the initial connection;
 - if offered, 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 (f).

Conditions shall be fair and well known in advance. In any case, this information should be provided prior to the conclusion or confirmation 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 and are 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 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 wide choice of payment methods. Any difference in terms and conditions shall reflect the costs to the supplier of the different payment systems. General terms and conditions shall be fair and transparent. They shall be given in clear and comprehensible language. Customers shall be protected against unfair or misleading selling methods.
- (e) shall not be charged for changing supplier.
- (f) 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 ⁽³⁾.
- (g) connected to the gas system are informed about their rights to be supplied, under the national legislation applicable, with natural gas of a specified quality at reasonable prices.

⁽¹⁾ OJ L 144, 4.6.1997, p. 19.

⁽²⁾ OJ L 95, 21.4.1993, p. 29.

⁽³⁾ OJ L 115, 17.4.1998, p. 31.

ANNEX B

Correlation table

Directive 98/30/EC	This Directive
Article 1	Article 1 Scope
Article 2	Article 2 Definitions
Article 3	Article 3 PSOs and Customer protection
Article 4	Article 4 Authorisation procedure
—	Article 5 Monitoring of security of supply
Article 5	Article 6 Technical rules
Article 6	Article 7 Designation of TSOs
Article 7	Article 8 Tasks of TSOs
—	Article 9 Unbundling of TSOs
Article 8	Article 10 Confidentiality for TSOs
Article 9(1)	Article 11 Designation of DSOs
Article 10	Article 12 Tasks of DSOs
—	Article 13 Unbundling of DSOs
Article 11	Article 14 Confidentiality for DSOs
—	Article 15 Combined operator
Article 12	Article 16 Right of access to accounts
Article 13	Article 17 Unbundling of accounts
Article 14-16	Article 18 Third Party Access
—	Article 19 Access to storage
Article 23	Article 20 Access to upstream pipeline networks
Article 17	Article 21 Refusal of access
—	Article 22 New infrastructure
Articles 18 and 19	Article 23 Market opening and reciprocity
Article 20	Article 24 Direct lines
Articles 21(2)-(3) and 22	Article 25 Regulatory authorities
Article 24	Article 26 Safeguard measures
Article 25	Article 27 Derogations in relation to take-or-pay commitments
Article 26	Article 28 Emergent and Isolated Markets
—	Article 29 Review procedure
—	Article 30 Committee
Articles 27 and 28	Article 31 Reporting
—	Article 32 Repeals
Article 29	Article 33 Implementation
Article 30	Article 34 Entry into force
Article 31	Article 35 Addressees
	ANNEX A Measures on consumer protection

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 2 May 2001, the Commission presented a proposal for a Directive amending Directives 96/92/EC and 98/30/EC ⁽¹⁾, based on Articles 47(2), 55 and 95 of the Treaty.
2. The Economic and Social Committee delivered its Opinion ⁽²⁾ on 3 October 2001. The Committee of the Regions decided not to deliver an Opinion.
3. The European Parliament adopted its Opinion ⁽³⁾ at first reading on 13 March 2002, approving 157 amendments, of which 90 amendments related to electricity and 67 to gas. In the light of this opinion, the Commission presented a modified proposal on 10 June 2002 ⁽⁴⁾.
4. On 3rd February 2003, the Council adopted its Common Position in accordance with Article 251 of the Treaty.

II. OBJECTIVE OF THE PROPOSAL

5. The proposal, which is part of a package, together with the Regulation on conditions for access to the network for cross-border exchanges in electricity, contains 'quantitative' provisions with regard to a full opening of the markets to all customers by 1 January 2005, as well as 'qualitative' provisions relating to the unbundling of transmission and distribution undertakings, third party access and access to gas storage, regulatory authorities, public service obligations and consumer protection.

III. ANALYSIS OF THE COMMON POSITION

6. The Council considered it more effective and coherent with Directives 96/92/EC and 98/30/EC to recast the provisions of both Directives, as also suggested by the Parliament.
7. The main elements of the common position are the following:

- (a) *Public Service Obligations (PSO) and protection of final customers (Art. 3 and Annex A; Art. 31(2) and (3))*

The Council retained, as a general principle, the protection of final customers and ensuring a high level of consumer protection. Examples of measures contributing to high standards of consumer protection and information are presented in an Annex (Annex A), which is mandatory for household customers. While public service requirements can be interpreted on a national basis, they have to be implemented in a transparent and non-discriminatory way. PSOs shall also be the subject of a detailed Commission report.

- (b) *Unbundling of transmission system operators (TSO) (Art. 9) and unbundling of distribution system operators (DSO) (Art. 13, 29 and 33(2))*

Transmission and distribution system operators (TSO/DSO) should be independent, in terms of their legal form as well as their organisation and decision making, from activities not relating to transmission, respectively, distribution. Moreover, TSO/DSOs have to fulfil four criteria on functional independence (compliance, managerial independence, etc.). However, functional independence regarding decision-making rights of the unbundled operator should not prevent some form of co-ordination between the parent company and its subsidiaries.

DSOs serving 100 000 customers or less may be exempted from these provisions; the Commission will also review this threshold in the framework of its reporting exercise. Besides Member States may postpone (Art. 33) the implementation of legal unbundling for DSOs until full market opening.

⁽¹⁾ OJ C 240 E, 28.8.2001 p. 60.

⁽²⁾ OJ C 36, 8.2.2002, p. 10.

⁽³⁾ OJ C 47 E, 27.2.2003, p. 367.

⁽⁴⁾ OJ C 227 E, 24.9.2002, p. 393.

Furthermore, in the context of the review procedure provided for in Art. 29, a Member State may, under certain conditions related to the manner in which it has carried out network access, request to the Commission to be exempted from requirements such as the legal unbundling for DSOs. This request may lead to the Commission submitting proposals to the Parliament and Council to amend the relevant provisions of the Directive or provide for other appropriate means.

(c) *Access to storage (Art. 19 and 31(3))*

Along the lines of the Commission's proposal, access to storage, linepack and ancillary services may be organised on the basis of either negotiated access or regulated access (with published tariffs), while noting (recital 21) that, where the market is sufficiently competitive, access to storage/linepack/ancillary services could rely on market-based instruments.

Regarding LNG facilities, the text now ensures that a modicum of access, at published tariffs, is ensured to ancillary services and temporary storage exclusively in relation to LNG activities. At the same time, the text clarifies in which circumstances access to storage may be limited and recalls the important role of storage facilities to implement e.g. security of supply (recital 20).

The Commission will review third party access to gas storage in its detailed report to be submitted no later than 1 January 2006.

(d) *Market opening (Art. 23, 28(2) and (3), and 31(3)) and implementation (Art. 33)*

The Council followed the two-step opening proposed by the Commission, with 2004 for all non-household customers as set by the Barcelona European Council, and 2007 for all customers. Moreover the text provides for a progressive opening of the market for Member States still qualifying as emergent markets (Art. 28).

By 1 January 2006 the Commission is due to produce a detailed report addressing i.a. public service issues as well as various issues related to the implementation and consequences of the market opening.

The Directive shall be implemented not later than 1 July 2004.

(e) *Regulatory authorities (Art. 25)*

The common position, whilst confirming the Barcelona conclusions that it is left to Member States to define the institutional arrangements appropriate to carry out the regulatory tasks, clarified the formulation of Art. 25(1) by stating that the independent regulatory authorities are 'at least responsible for ensuring non-discrimination, effective competition and the efficient functioning of the market, by at least monitoring' various rules and conditions listed in the Commission proposal. They are also responsible for approving *ex-ante* at least the methodologies underlying the terms and conditions for connection and access to networks and for balancing services, and have the authority to require *ex-post* modifications of these terms and conditions.

The text also clarified the provisions (Art. 25(5) and (6)) concerning the prompt handling of complaints by administrative bodies.

(f) *New infrastructure (Art. 22)*

In the same spirit as the provision featuring in the proposal for a Regulation on cross-border exchanges in electricity, the Council included detailed provisions (Art. 22) whereby new major gas infrastructures or significant modifications to existing ones would be, totally or partially, exempted from Art. 18 on third party access, Art. 19 on access to storage, and Art. 25(2) and (3) on prior approval of terms and conditions for access. This exemption would take place under restrictive conditions and be subject to the Commission control.

(g) *Unbundling of accounts (Art. 17)*

Gas undertakings have to keep separate accounts for their transmission, distribution, LNG and storage activities, and for other gas activities. Supply activities to eligible and to non-eligible customers shall be separated in the accounts of these undertakings until full market opening.

(h) *Exemptions (Art. 28(5) and (8))*

Further to exemptions already granted under Directive 98/30/EC (e.g. for 'Emergent and Isolated markets' and 'Take-or-pay commitments') the common position introduces the possibility of time-limited exemptions for distribution infrastructure in specific geographical areas.

The Commission is invited to review regularly all the derogations granted under this Directive in the framework of its reporting exercise.

IV. AMENDMENTS ACCEPTED

8. The Council accepted the following amendments, some of them in substance, partially or in principle. Although the Parliament adopted some of these amendments in relation to the Electricity proposal the Council was of the view that they were also relevant to the Gas one.

Title:

Amendment 91: split the proposed Directive in two separate legal acts

Recitals:

Amendment 2: reference to the Charter of Fundamental Rights (recital 32)

Amendment 92: consequent to division of proposal

Amendment 93 and 98: list obstacles impeding the functioning of the energy market (Recitals 2 and 5)

Amendment 97: stresses the calls for rapid work for the completion of the internal market in energy from the European Council and the European Parliament (Recital 3)

Amendment 7: stresses the non-discriminatory character of network access (Recital 7)

Amendment 22: is a consequence to amendment 1 (Recital 29)

Amendment 94: stresses that free choice of suppliers is only possible in a fully open market (Recital 4)

Amendments 95 and 96: importance of access to third country networks (Recital 5)

Amendment 99: independence of system operators (Recital 8)

Amendment 100: exempting small distribution companies from administrative burden (Recital 11)

Amendment 101: transparent and non-discriminatory tariffs for the access to networks need further measures to be taken by Member States (Recital 21)

Amendments 103 and 104: importance and tasks of regulatory authorities (Recitals 13 and 15)

Amendment 105: benefits resulting from the internal market should contribute to indirectly create employment as a result of the efficiency gains enjoyed by enterprises (Recital 16)

Amendments 106 and 107: progressive market opening (Recitals 17 and 18)

Amendment 109: stresses the need for monitoring of the supply/demand balance in order to allow appropriate measures to be taken (Recital 22)

Amendment 108: need for clarification on access for storage (Recital 19)

Amendments 110 and 117: network access for biogas and gas from biomass (Recital 23)

Amendment 111: importance of long-term take-or pay contracts (Recital 24)

Amendment 112: information of customers' right to be supplied (Recital 25)

Articles:

- Amendment 116: consequence of Amendment 1 (Art. 1 both Directives)
- Amendment 118: extends the scope to biogas and gas from biomass (Art. 1)
- Amendment 34: definition of eligible customer (Art. 2(28))
- Amendments 119 and 120: definition of storage and LNG facilities (Art. 2(9), (10) and (11))
- Amendment 123: definition of security (Art. 2(32))
- Amendment 125: addition of the objective of achieving a sustainable gas market (Art. 3(1)); extension of public service obligations (Art. 3(2))
- Amendment 42 (partially): measures to protect vulnerable customers (Art. 3(3))
- Amendment 126: possibility for eligible customers to switch to a new supplier (Art.3(3))
- Amendment 127 and 128: notification of possible competition effect of PSOs-related measures, and Commission reporting (Art. 3(6) and 31(2))
- Amendment 130 (partially) and 132: monitoring of security of supply covers also the quality and level of maintenance of the networks (Art. 5) and Commission reporting (Art. 31(1))
- Amendment 61: independence of a system operator which is part of a vertically integrated undertaking (Art. 9)
- Amendment 137 (partially): specifies the decision-making rights of TSOs (Art. 9(2)(c), 13(2)(c) and 15(c))
- Amendment 162: Member States may require TSOs to comply with minimum standards for the system (Art. 8(3))
- Amendments 59 and 135 (partially): criteria for terms and conditions for balancing the transmission system (Art. 8(2))
- Amendment 66: specifies the right of access to accounts (Art. 16(1))
- Amendments 149 and 184: specify tasks of regulatory authorities (Art. 25(1)-(3))
- Amendments 150 and 151: power of regulatory authorities to require from operators the modification of terms and conditions (Art. 25(4)); efficient handling of complaints (Art. 25(5) and (6))
- Amendments 85, 86 and 153: Commission reporting requirements (Art. 31(1))
- Amendments 129, 158, 159 and 160 (in substance): information to be provided to customers (Annex A)

V. AMENDMENTS NOT INTEGRATED

9. The Council considered that amendments 98, 108, 121, 122, 124, 131, 133, 138, 139, 142, 183, 161 and 175, 145, 146, 148, 152, 155 were either not in coherence with the proposed Gas Directive, too restrictive, not within the scope of the Directive, or were already covered by existing provisions, and decided therefore not to integrate them in its common position. The Commission has rejected notably amendments 91 (and consequential amendments), 95, 96, 121, 122, 133, 138, 139, 142, 146, 148, 152, 155, 161, 175, 183.
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