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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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## I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

## REGULATIONS

## REGULATION (EC) No 713/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 13 July 2009

establishing an Agency for the Cooperation of Energy Regulators

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the Opinion of the Committee of the Regions <sup>(2)</sup>,

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

Whereas:

- (1) The Communication of the Commission of 10 January 2007 entitled 'An Energy Policy for Europe' highlighted the importance of completing the internal markets in electricity and natural gas. Improving the regulatory framework at Community level was identified as a key measure to achieve that objective.
- (2) An independent advisory group on electricity and gas, called the European Regulators Group for Electricity and Gas (EREGG) was established by Commission Decision 2003/796/EC <sup>(4)</sup> to facilitate consultation, coordination

and cooperation between the regulatory bodies in Member States, and between those bodies and the Commission, with a view to consolidating the internal markets in electricity and natural gas. That group is composed of representatives of the national regulatory authorities established pursuant to Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity <sup>(5)</sup> and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas <sup>(6)</sup>.

- (3) The work undertaken by the EREGG since its establishment has made a positive contribution to the internal markets in electricity and natural gas. However, it is widely recognised by the sector, and has been proposed by the EREGG itself, that voluntary cooperation between national regulatory authorities should now take place within a Community structure with clear competences and with the power to adopt individual regulatory decisions in a number of specific cases.
- (4) The European Council of 8 and 9 March 2007 invited the Commission to propose measures to set up an independent mechanism for national regulators to cooperate.
- (5) The Member States should cooperate closely, eliminating obstacles to cross-border exchanges of electricity and natural gas with a view to achieving the objectives of Community energy policy. On the basis of the impact assessment of the resource requirements for a central entity, it was concluded that an independent central entity offered a number of long-term advantages over other options. An Agency for the Cooperation of Energy Regulators (the

<sup>(1)</sup> OJ C 211, 19.8.2008, p. 23.

<sup>(2)</sup> OJ C 172, 5.7.2008, p. 55.

<sup>(3)</sup> Opinion of the European Parliament of 18 June 2008 (not yet published in the Official Journal), Council Common Position of 9 January 2009 (OJ C 75 E, 31.3.2009, p. 1) and Position of the European Parliament of 22 April 2009 (not yet published in the Official Journal), Council Decision of 25 June 2009.

<sup>(4)</sup> OJ L 296, 14.11.2003, p. 34.

<sup>(5)</sup> OJ L 176, 15.7.2003, p. 37.

<sup>(6)</sup> OJ L 176, 15.7.2003, p. 57.

- Agency) should be established in order to fill the regulatory gap at Community level and to contribute towards the effective functioning of the internal markets in electricity and natural gas. The Agency should also enable national regulatory authorities to enhance their cooperation at Community level and participate, on a mutual basis, in the exercise of Community-related functions.
- (6) The Agency should ensure that regulatory functions performed by the national regulatory authorities in accordance with Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity <sup>(1)</sup> and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas <sup>(2)</sup> are properly coordinated and, where necessary, completed at the Community level. To that end, it is necessary to guarantee the independence of the Agency from electricity and gas producers, transmission and distribution system operators, whether public or private, and consumers and to ensure the conformity of its actions with Community law, its technical and regulatory capacities and its transparency, amenability to democratic control and efficiency.
- (7) The Agency should monitor regional cooperation between transmission system operators in the electricity and gas sectors as well as the execution of the tasks of the European Network of Transmission System Operators for Electricity (ENTSO for Electricity), and the European Network of Transmission System Operators for Gas (ENTSO for Gas). The involvement of the Agency is essential in order to ensure that the cooperation between transmission system operators proceeds in an efficient and transparent way for the benefit of the internal markets in electricity and natural gas.
- (8) The Agency should monitor, in cooperation with the Commission, the Member States and relevant national authorities, the internal markets in electricity and natural gas and inform the European Parliament, the Commission and national authorities of its findings where appropriate. Those monitoring tasks of the Agency should not duplicate or hamper monitoring by the Commission or national authorities, in particular national competition authorities.
- (9) The Agency has an important role in developing framework guidelines which are non-binding by nature (framework guidelines) with which network codes must be in line. It is also considered appropriate for the Agency, and consistent with its purpose, to have a role in reviewing network codes (both when created and upon modification) to ensure that they are in line with the framework guidelines, before it may recommend them to the Commission for adoption.
- (10) It is appropriate to provide an integrated framework within which national regulatory authorities are able to participate and cooperate. That framework should facilitate the uniform application of the legislation on the internal markets in electricity and natural gas throughout the Community. As regards situations concerning more than one Member State, the Agency should be granted the power to adopt individual decisions. That power should under certain conditions cover technical issues, the regulatory regime for electricity and natural gas infrastructure that connects or that might connect at least two Member States and, as a last resort, exemptions from the internal market rules for new electricity interconnectors and new gas infrastructure located in more than one Member State.
- (11) Since the Agency has an overview of the national regulatory authorities, it should have an advisory role towards the Commission, other Community institutions and national regulatory authorities as regards the issues relating to the purpose for which it was established. It should also be required to inform the Commission where it finds that the cooperation between transmission system operators does not produce the results which are needed or that a national regulatory authority whose decision is not in compliance with the Guidelines does not implement the opinion, recommendation or decision of the Agency appropriately.
- (12) The Agency should also be able to make recommendations to assist regulatory authorities and market players in sharing good practices.
- (13) The Agency should consult interested parties, where appropriate, and provide them with a reasonable opportunity to comment on proposed measures, such as network codes and rules.
- (14) The Agency should contribute to the implementation of the guidelines on trans-European energy networks as laid down in Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks <sup>(3)</sup>, in particular when providing its opinion on the non-binding Community-wide ten-year network development plans (Community-wide network development plans) in accordance with Article 6(3) of this Regulation.
- (15) The Agency should contribute to the efforts of enhancing energy security.
- (16) The structure of the Agency should be adapted to meet the specific needs of energy regulation. In particular, the specific role of the national regulatory authorities needs to be taken fully into account and their independence guaranteed.

<sup>(1)</sup> See page 55 of this Official Journal.

<sup>(2)</sup> See page 94 of this Official Journal.

<sup>(3)</sup> OJ L 262, 22.9.2006, p. 1.

- (17) The Administrative Board should have the necessary powers to establish the budget, check its implementation, draw up internal rules, adopt financial regulations and appoint a Director. A rotation system should be used for the renewal of the members of the Administrative Board who are appointed by the Council so as to ensure a balanced participation of Member States over time. The Administrative Board should act independently and objectively in the public interest and should not seek or follow political instructions.
- (18) The Agency should have the necessary powers to perform its regulatory functions in an efficient, transparent, reasoned and, above all, independent manner. The independence of the Agency from electricity and gas producers and transmission and distribution system operators is not only a key principle of good governance but also a fundamental condition to ensure market confidence. Without prejudice to its members' acting on behalf of their respective national authorities, the Board of Regulators should therefore act independently from any market interest, should avoid conflicts of interests and should not seek or follow instructions or accept recommendations from a government of a Member State, from the Commission or another public or private entity. The decisions of the Board of Regulators should, at the same time, comply with Community law concerning energy, such as the internal energy market, the environment and competition. The Board of Regulators should report its opinions, recommendations and decisions to the Community institutions.
- (19) Where the Agency has decision-making powers, interested parties should, for reasons of procedural economy, be granted a right of appeal to a Board of Appeal, which should be part of the Agency, but independent from its administrative and regulatory structure. In the interest of continuity, the appointment or renewal of the members of the Board of Appeal should allow for partial replacement of the members of the Board of Appeal. The decisions of the Board of Appeal may be subject to appeal before the Court of Justice of the European Communities.
- (20) The Agency should be mainly financed from the general budget of the European Union, by fees and by voluntary contributions. In particular, the resources currently pooled by regulatory authorities for their cooperation at Community level should continue to be available to the Agency. The Community budgetary procedure should remain applicable as far as any subsidies chargeable to the general budget of the European Union are concerned. Moreover, the auditing of accounts should be undertaken by the Court of Auditors in accordance with Article 91 of Commission Regulation (EC, Euratom) No 2343/2002 of 19 November 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities <sup>(1)</sup>.
- (21) After the establishment of the Agency, its budget should be assessed by the budgetary authority on an ongoing basis, with reference to the Agency's workload and performance. The budgetary authority should ensure that the best standards of efficiency are met.
- (22) The Agency should have highly professional staff. In particular, it should benefit from the competence and experience of staff seconded by the national regulatory authorities, the Commission and the Member States. The Staff Regulations of Officials of the European Communities (the Staff Regulations) and the Conditions of employment of other servants of the European Communities (the Conditions of Employment), laid down in Regulation (EEC, Euratom, ECSC) No 259/68 <sup>(2)</sup> and the rules adopted jointly by the European Community institutions for the purpose of applying those regulations should apply to the staff of the Agency. The Administrative Board, in agreement with the Commission, should adopt appropriate implementing rules.
- (23) The Agency should apply the general rules regarding public access to documents held by Community bodies. The Administrative Board should establish the practical measures to protect commercially sensitive data and personal data.
- (24) The Agency should be accountable to the European Parliament, the Council and the Commission, where appropriate.
- (25) Countries which are not members of the Community should be able to participate in the work of the Agency in accordance with appropriate agreements to be concluded by the Community.
- (26) The measures necessary for the implementation of this Regulation 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 <sup>(3)</sup>.
- (27) In particular, the Commission should be empowered to adopt the Guidelines necessary in situations in which the Agency becomes competent to decide upon the terms and conditions for access to and operational security of cross-border infrastructure. Since those measures are of general scope and are designed to amend non-essential elements of this Regulation, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

<sup>(1)</sup> OJ L 357, 31.12.2002, p. 72.

<sup>(2)</sup> OJ L 56, 4.3.1968, p. 1.

<sup>(3)</sup> OJ L 184, 17.7.1999, p. 23.

- (28) The Commission should submit to the European Parliament and to the Council by three years after the first director has taken up his duties, and every four years thereafter, a report on the Agency's specific tasks and the results achieved, accompanied by any appropriate proposals. In that report, the Commission should make suggestions on additional tasks for the Agency.
- (29) Since the objectives of this Regulation, namely the participation and cooperation of national regulatory authorities at Community level, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS REGULATION:

#### CHAPTER I

#### ESTABLISHMENT AND LEGAL STATUS

##### Article 1

##### Subject matter

1. This Regulation establishes an Agency for the Cooperation of Energy Regulators (the Agency).
2. The purpose of the Agency shall be to assist the regulatory authorities referred to in Article 35 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity <sup>(1)</sup> and Article 39 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas <sup>(2)</sup> in exercising, at Community level, the regulatory tasks performed in the Member States and, where necessary, to coordinate their action.
3. Until the premises of the Agency are ready, it will be hosted on Commission premises.

##### Article 2

##### Legal status

1. The Agency shall be a Community body with legal personality.
2. In each Member State, the Agency shall enjoy the most extensive legal capacity accorded to legal persons under national law. It shall, in particular, be able to acquire or dispose of movable and immovable property and be a party to legal proceedings.

<sup>(1)</sup> See page 55 of this Official Journal.

<sup>(2)</sup> See page 94 of this Official Journal.

3. The Agency shall be represented by its Director.

##### Article 3

##### Composition

The Agency shall comprise:

- (a) an Administrative Board, which shall exercise the tasks set out in Article 13;
- (b) a Board of Regulators, which shall exercise the tasks set out in Article 15;
- (c) a Director, who shall exercise the tasks set out in Article 17; and
- (d) a Board of Appeal, which shall exercise the tasks set out in Article 19.

##### Article 4

##### Type of acts of the Agency

The Agency shall:

- (a) issue opinions and recommendations addressed to transmission system operators;
- (b) issue opinions and recommendations addressed to regulatory authorities;
- (c) issue opinions and recommendations addressed to the European Parliament, the Council, or the Commission;
- (d) take individual decisions in the specific cases referred to in Articles 7, 8 and 9; and
- (e) submit to the Commission non-binding framework guidelines (framework guidelines) in accordance with Article 6 of Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity <sup>(3)</sup> and Article 6 of Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks <sup>(4)</sup>.

#### CHAPTER II

#### TASKS

##### Article 5

##### General tasks

The Agency may, upon a request of the European Parliament, the Council or the Commission, or on its own initiative, provide an opinion or a recommendation to the European Parliament, the Council and the Commission on any of the issues relating to the purpose for which it has been established.

<sup>(3)</sup> See page 15 of this Official Journal.

<sup>(4)</sup> See page 36 of this Official Journal.

## Article 6

**Tasks as regards the cooperation of transmission system operators**

1. The Agency shall provide an opinion to the Commission on the draft statutes, list of members and draft rules of procedure of the ENTSO for Electricity in accordance with Article 5(2) of Regulation (EC) No 714/2009 and on those of the ENTSO for Gas in accordance with Article 5(2) of Regulation (EC) No 715/2009.

2. The Agency shall monitor the execution of the tasks of the ENTSO for Electricity in accordance with Article 9 of Regulation (EC) No 714/2009 and of the ENTSO for Gas in accordance with Article 9 of Regulation (EC) No 715/2009.

3. The Agency shall provide an opinion:

- (a) to the ENTSO for Electricity in accordance with Article 8(2) of Regulation (EC) No 714/2009 and to the ENTSO for Gas in accordance with Article 8(2) of Regulation (EC) No 715/2009 on the network codes; and
- (b) to the ENTSO for Electricity in accordance with the first subparagraph of Article 9(2) of Regulation (EC) No 714/2009, and to the ENTSO for Gas in accordance with the first subparagraph of Article 9(2) of Regulation (EC) No 715/2009 on the draft annual work programme, the draft Community-wide network development plan and other relevant documents referred to in Article 8(3) of Regulation (EC) No 714/2009 and Article 8(3) of Regulation (EC) No 715/2009, taking into account the objectives of non-discrimination, effective competition and the efficient and secure functioning of the internal markets in electricity and natural gas.

4. The Agency shall, based on matters of fact, provide a duly reasoned opinion as well as recommendations to the ENTSO for Electricity, the ENTSO for Gas, the European Parliament, the Council and the Commission, where it considers that the draft annual work programme or the draft Community-wide network development plan submitted to it in accordance with the second subparagraph of Article 9(2) of Regulation (EC) No 714/2009 and the second subparagraph of Article 9(2) of Regulation (EC) No 715/2009 do not contribute to non-discrimination, effective competition and the efficient functioning of the market or a sufficient level of cross-border interconnection open to third-party access, or do not comply with the relevant provisions of Directive 2009/72/EC and Regulation (EC) No 714/2009 or Directive 2009/73/EC and Regulation (EC) No 715/2009.

The Agency shall participate in the development of network codes in accordance with Article 6 of Regulation (EC) No 714/2009 and Article 6 of Regulation (EC) No 715/2009.

The Agency shall submit a non-binding framework guideline to the Commission where requested to do so under Article 6(2) of Regulation (EC) No 714/2009 or Article 6(2) of Regulation (EC)

No 715/2009. The Agency shall review the non-binding framework guideline and re-submit it to the Commission where requested to do so under Article 6(4) of Regulation (EC) No 714/2009 or Article 6(4) of Regulation (EC) No 715/2009.

The Agency shall provide a reasoned opinion to the ENTSO for Electricity or the ENTSO for Gas on the network code in accordance with Article 6(7) of Regulation (EC) No 714/2009 or Article 6(7) of Regulation (EC) No 715/2009.

The Agency shall submit the network code to the Commission and may recommend that it be adopted in accordance with Article 6(9) of Regulation (EC) No 714/2009 or Article 6(9) of Regulation (EC) No 715/2009. The Agency shall prepare and submit a draft network code to the Commission where requested to do so under Article 6(10) of Regulation (EC) No 714/2009 or Article 6(10) of Regulation (EC) No 715/2009.

5. The Agency shall provide a duly reasoned opinion to the Commission, in accordance with Article 9(1) of Regulation (EC) No 714/2009 or Article 9(1) of Regulation (EC) No 715/2009, where the ENTSO for Electricity or the ENTSO for Gas has failed to implement a network code elaborated under Article 8(2) of Regulation (EC) No 714/2009 or Article 8(2) of Regulation (EC) No 715/2009 or a network code which has been established in accordance with Article 6(1) to (10) of those Regulations but which has not been adopted by the Commission under Article 6(11) of those Regulations.

6. The Agency shall monitor and analyse the implementation of the network codes and the Guidelines adopted by the Commission in accordance with Article 6(11) of Regulation (EC) No 714/2009 and in Article 6(11) of Regulation (EC) No 715/2009, and their effect on the harmonisation of applicable rules aimed at facilitating market integration as well as on non-discrimination, effective competition and the efficient functioning of the market, and report to the Commission.

7. The Agency shall monitor progress as regards the implementation of projects to create new interconnector capacity.

8. The Agency shall monitor the implementation of the Community-wide network-development plans. If it identifies inconsistencies between such a plan and its implementation, it shall investigate the reasons for those inconsistencies and make recommendations to the transmission system operators, national regulatory authorities or other competent bodies concerned with a view to implementing the investments in accordance with the Community-wide network-development plans.

9. The Agency shall monitor the regional cooperation of transmission system operators referred to in Article 12 of Regulation (EC) No 714/2009 and Article 12 of Regulation (EC) No 715/2009, and take due account of the outcome of that cooperation when formulating its opinions, recommendations and decisions.

## Article 7

**Tasks as regards the national regulatory authorities**

1. The Agency shall adopt individual decisions on technical issues where those decisions are provided for in Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 or Regulation (EC) No 715/2009.

2. The Agency may, in accordance with its work programme or at the request of the Commission, make recommendations to assist regulatory authorities and market players in sharing good practices.

3. The Agency shall provide a framework within which national regulatory authorities can cooperate. It shall promote cooperation between the national regulatory authorities and between regulatory authorities at regional and Community level, and shall take due account of the outcome of such cooperation when formulating its opinions, recommendations and decisions. Where the Agency considers that binding rules on such cooperation are required, it shall make the appropriate recommendations to the Commission.

4. The Agency shall provide an opinion, based on matters of fact, at the request of a regulatory authority or of the Commission, on whether a decision taken by a regulatory authority complies with the Guidelines referred to in Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 or Regulation (EC) No 715/2009 or with other relevant provisions of those Directives or Regulations.

5. Where a national regulatory authority does not comply with the opinion of the Agency as referred to in paragraph 4 within four months from the day of receipt, the Agency shall inform the Commission and the Member State concerned accordingly.

6. When a national regulatory authority encounters, in a specific case, difficulties with the application of Guidelines referred to in Directive 2009/72/EC, Directive 2009/73/EC Regulation (EC) No 714/2009 or Regulation (EC) No 715/2009, it may request the Agency for an opinion. The Agency shall deliver its opinion, after consulting the Commission, within three months of receiving such request.

7. The Agency shall decide on the terms and conditions for access to and operational security of electricity and gas infrastructure connecting or that might connect at least two Member States (cross-border infrastructure), in accordance with Article 8.

## Article 8

**Tasks as regards terms and conditions for access to and operational security of cross-border infrastructure**

1. For cross-border infrastructure, the Agency shall decide upon those regulatory issues that fall within the competence of national regulatory authorities, which may include the terms and conditions for access and operational security, only:

- (a) where the competent national regulatory authorities have not been able to reach an agreement within a period of six months from when the case was referred to the last of those regulatory authorities; or
- (b) upon a joint request from the competent national regulatory authorities.

The competent national regulatory authorities may jointly request that the period referred to in point (a) is extended by a period of up to six months.

When preparing its decision, the Agency shall consult the national regulatory authorities and the transmission system operators concerned and shall be informed of the proposals and observations of all the transmission system operators concerned.

2. The terms and conditions for access to cross-border infrastructure shall include:

- (a) a procedure for capacity allocation;
- (b) a time frame for allocation;
- (c) shared congestion revenues; and
- (d) the levying of charges on the users of the infrastructure referred to in Article 17(1)(d) of Regulation (EC) No 714/2009 or Article 36(1)(d) of Directive 2009/73/EC.

3. Where a case has been referred to the Agency under paragraph 1, the Agency:

- (a) shall provide its decision within a period of 6 months from the day of referral; and
- (b) may, if necessary, provide an interim decision to ensure that security of supply or operational security of the infrastructure in question is protected.

4. The Commission may adopt Guidelines on the situations in which the Agency becomes competent to decide upon the terms and conditions for access to and operational security of cross-border infrastructure. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 32(2) of this Regulation.



5. Where the regulatory issues referred to in paragraph 1 include exemptions within the meaning of Article 17 of Regulation (EC) No 714/2009 or Article 36 of Directive 2009/73/EC, the deadlines provided for in this Regulation shall not be cumulated with the deadlines provided for in those provisions.

#### Article 9

##### Other tasks

1. The Agency may decide on exemptions, as provided for in Article 17(5) of Regulation (EC) No 714/2009. The Agency may also decide on exemptions as provided for in Article 36(4) of Directive 2009/73/EC where the infrastructure concerned is located in the territory of more than one Member State.

2. The Agency shall provide an opinion, upon request by the Commission in accordance with the second subparagraph of Article 3(1) of Regulation (EC) No 714/2009 or the second subparagraph of Article 3(1) of Regulation (EC) No 715/2009, on decisions of national regulatory authorities on certification.

The Agency may, in circumstances clearly defined by the Commission in Guidelines adopted pursuant to Article 18 of Regulation (EC) No 714/2009 or Article 23 of Regulation (EC) No 715/2009 and on issues related to the purpose for which it has been established, be commissioned with additional tasks which do not involve decision-making powers.

#### Article 10

##### Consultations and transparency

1. In carrying out its tasks, in particular in the process of developing framework guidelines in accordance with Article 6 of Regulation (EC) No 714/2009 or Article 6 of Regulation (EC) No 715/2009 and in the process of proposing amendments of network codes under Article 7 of either of those Regulations, the Agency shall consult extensively and at an early stage with market participants, transmission system operators, consumers, end-users and, where relevant, competition authorities, without prejudice to their respective competence, in an open and transparent manner, in particular when its tasks concern transmission system operators.

2. The Agency shall ensure that the public and any interested parties are, where appropriate, given objective, reliable and easily accessible information, in particular with regard to the results of its work.

All documents and minutes of consultation meetings conducted during the development of framework guidelines in accordance with Article 6 of Regulation (EC) No 714/2009 or Article 6 of Regulation (EC) No 715/2009, or during the amendment of network codes under Article 7 of either of those Regulations shall be made public.

3. Before adopting framework guidelines in accordance with Article 6 of Regulation (EC) No 714/2009 or Article 6 of Regulation (EC) No 715/2009, or proposing amendments to network codes under Article 7 of either of those Regulations, the Agency shall indicate how the observations received during the consultation have been taken into account and shall provide reasons where those observations have not been followed.

4. The Agency shall make public, on its own website, at least the agenda, the background documents and, where appropriate, the minutes of the meetings of the Administrative Board, of the Board of Regulators and of the Board of Appeal.

#### Article 11

##### Monitoring and reporting on the electricity and natural gas sectors

1. The Agency, in close cooperation with the Commission, the Member States and the relevant national authorities including the national regulatory authorities and without prejudice to the competences of competition authorities, shall monitor the internal markets in electricity and natural gas, in particular the retail prices of electricity and natural gas, access to the network including access of electricity produced from renewable energy sources, and compliance with the consumer rights laid down in Directive 2009/72/EC and Directive 2009/73/EC.

2. The Agency shall make public an annual report on the results of the monitoring provided for in paragraph 1. In that report, it shall identify any barriers to the completion of the internal markets in electricity and natural gas.

3. When making public its annual report, the Agency may submit to the European Parliament and to the Commission an opinion on the measures that could be taken to remove the barriers referred to in paragraph 2.

#### CHAPTER III

##### ORGANISATION

#### Article 12

##### Administrative Board

1. The Administrative Board shall comprise nine members. Each member shall have an alternate. Two members and their alternates shall be appointed by the Commission, two members and their alternates shall be appointed by the European Parliament and five members and their alternates shall be appointed by the Council. No Member of the European Parliament shall be a member of the Administrative Board. The term of office of the members of the Administrative Board and their alternates shall be four years, renewable once. For the first mandate, the term of office of half of the members of the Administrative Board and their alternates shall be six years.

2. The Administrative Board shall appoint its Chairman and its Vice-Chairman from among its members. The Vice-Chairman shall automatically replace the Chairman if the latter is not in a position to perform his duties. The term of office of the Chairman and of the Vice-Chairman shall be two years, renewable once. The term of office of the Chairman and that of the Vice-Chairman shall expire when they cease to be members of the Administrative Board.

3. The meetings of the Administrative Board shall be convened by its Chairman. The Chairman of the Board of Regulators, or the nominee of the Board of Regulators, and the Director shall participate, without the right to vote, in the deliberations unless the Administrative Board decides otherwise as regards the Director. The Administrative Board shall meet at least twice a year in ordinary session. It shall also meet at the initiative of its Chairman, at the request of the Commission or at the request of at least a third of its members. The Administrative Board may invite any person who may have a relevant opinion to attend its meetings in the capacity of an observer. The members of the Administrative Board may, subject to its rules of procedure, be assisted by advisers or experts. The Administrative Board's secretarial services shall be provided by the Agency.

4. Decisions of the Administrative Board shall be adopted on the basis of a two-thirds majority of the members present, unless provided otherwise in this Regulation. Each member of the Administrative Board or alternate shall have one vote.

5. The rules of procedure shall set out in greater detail:

- (a) the arrangements governing voting, in particular the conditions on the basis of which one member may act on behalf of another and also, where appropriate, the rules governing quorums; and
- (b) the arrangements governing the rotation applicable to the renewal of the members of the Administrative Board who are appointed by the Council so as to ensure a balanced participation of Member States over time.

6. A member of the Administrative Board shall not be a member of the Board of Regulators.

7. The members of the Administrative Board shall undertake to act independently and objectively in the public interest, without seeking or following any political instructions. For that purpose, each member shall make a written declaration of commitments and a written declaration of interests indicating either the absence of any interest which may be considered prejudicial to his independence or any direct or indirect interest which might be considered prejudicial to his independence. Those declarations shall be made public annually.

### Article 13

#### Tasks of the Administrative Board

1. The Administrative Board shall, after having consulted the Board of Regulators and obtained its favourable opinion in accordance with Article 15(2), appoint the Director in accordance with Article 16(2).

2. The Administrative Board shall formally appoint the members of the Board of Regulators in accordance with Article 14(1).

3. The Administrative Board shall formally appoint the members of the Board of Appeal in accordance with Article 18(1) and (2).

4. The Administrative Board shall ensure that the Agency carries out its mission and performs the tasks assigned to it in accordance with this Regulation.

5. The Administrative Board shall adopt, before 30 September each year, after consulting the Commission and after having received approval by the Board of Regulators in accordance with Article 15(3), the work programme of the Agency for the coming year and shall transmit it to the European Parliament, the Council and the Commission. The work programme shall be adopted without prejudice to the annual budgetary procedure and shall be made public.

6. The Administrative Board shall adopt and, if necessary, revise a multi-annual programme. That revision shall be based on an evaluation report, made by an independent external expert at the request of the Administrative Board. Those documents shall be made public.

7. The Administrative Board shall exercise its budgetary powers in accordance with Articles 21 to 24.

8. The Administrative Board shall decide, after having obtained the agreement of the Commission, whether to accept any legacies, donations or grants from other Community sources or any voluntary contribution from the Member States or from the regulatory authorities. The opinion that the Administrative Board shall deliver pursuant to Article 24(5) shall explicitly address the sources of funding set out in this paragraph.

9. The Administrative Board, in consultation with the Board of Regulators, shall exercise disciplinary authority over the Director.

10. The Administrative Board shall, where necessary, draw up the Agency's implementing rules for giving effect to the Staff Regulations pursuant to Article 28(2).

11. The Administrative Board shall adopt practical measures regarding the right of access to the documents of the Agency, in accordance with Article 30.

12. The Administrative Board shall adopt and publish the annual report on the activities of the Agency, on the basis of the draft annual report referred to in Article 17(8), and shall transmit that report to the European Parliament, the Council, the Commission, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions by 15 June of each year. The annual report on the activities of the Agency shall contain an independent section, approved by the Board of Regulators, concerning the regulatory activities of the Agency during the year considered.

13. The Administrative Board shall adopt and publish its own rules of procedure.

#### Article 14

### Board of Regulators

1. The Board of Regulators shall comprise:
  - (a) senior representatives of the regulatory authorities, in accordance with Article 35(1) of Directive 2009/72/EC and Article 39(1) of Directive 2009/73/EC, and one alternate per Member State from the current senior staff of those authorities;
  - (b) one non-voting representative of the Commission.

Only one representative per Member State from the national regulatory authority may be admitted to the Board of Regulators.

Each national regulatory authority shall be responsible for nominating the alternate from current staff of the national regulatory authority.

2. The Board of Regulators shall elect a Chairman and a Vice-Chairman from among its members. The Vice-Chairman shall replace the Chairman if the latter is not in a position to perform his duties. The term of office of the Chairman and of the Vice-Chairman shall be two-and-a-half years and shall be renewable. In any event, however, the term of office of the Chairman and that of the Vice-Chairman shall expire when they cease to be members of the Board of Regulators.

3. The Board of Regulators shall act by a two-thirds majority of its members present. Each member or alternate shall have one vote.

4. The Board of Regulators shall adopt and publish its Rules of procedure, which shall set out in greater detail the arrangements governing voting, in particular the conditions on the basis of which one member may act on behalf of another and also, where appropriate, the rules governing quorums. The rules of procedure may provide for specific working methods for the consideration of issues arising in the context of regional cooperation initiatives.

5. When carrying out the tasks conferred upon it by this Regulation and without prejudice to its members acting on behalf of their respective regulatory authority, the Board of Regulators shall act independently and shall not seek or follow instructions from any government of a Member State, from the Commission, or from another public or private entity.

6. The secretarial services of the Board of Regulators shall be provided by the Agency.

#### Article 15

### Tasks of the Board of Regulators

1. The Board of Regulators shall provide opinions to the Director on the opinions, recommendations and decisions referred to in Articles 5, 6, 7, 8 and 9 that are considered for adoption. In addition, the Board of Regulators, within its field of competence, shall provide guidance to the Director in the execution of his tasks.

2. The Board of Regulators shall deliver an opinion to the Administrative Board on the candidate to be appointed as Director in accordance with Article 13(1) and Article 16(2). The Board of Regulators shall reach that decision on the basis of a three-quarters majority of its members.

3. The Board of Regulators shall, in accordance with Article 13(5) and Article 17(6) and in line with the preliminary draft budget established in accordance with Article 23(1), approve the work programme of the Agency for the coming year and present it by 1 September of each year for adoption by the Administrative Board.

4. The Board of Regulators shall approve the independent section on regulatory activities of the annual report, in accordance with Article 13(12) and Article 17(8).

5. The European Parliament may invite, while fully respecting his independence, the chairman of the Board of Regulators or his deputy to make a statement before its competent committee and answer questions put by the members of that committee.

#### Article 16

### Director

1. The Agency shall be managed by its Director, who shall act in accordance with the guidance referred to in the second sentence of Article 15(1) and, where provided for in this Regulation, the opinions of the Board of Regulators. Without prejudice to the respective roles of the Administrative Board and the Board of Regulators in relation to the tasks of the Director, the Director shall neither seek nor follow any instruction from any government, from the Commission, or from any other public or private entity.

2. The Director shall be appointed by the Administrative Board following a favourable opinion of the Board of Regulators, on the basis of merit as well as skills and experience relevant to the energy sector, from a list of at least three candidates proposed by the Commission, following a public call for expression of interest. Before appointment, the candidate selected by the Administrative Board may be invited to make a statement before the competent committee of the European Parliament and to answer questions put by its members.

3. The Director's term of office shall be five years. In the course of the nine months preceding the end of that period, the Commission shall undertake an assessment. In the assessment, the Commission shall examine in particular:

- (a) the performance of the Director;
- (b) the Agency's duties and requirements in the coming years.

The assessment concerning point (b) shall be carried out with the assistance of an independent external expert.

4. The Administrative Board, acting on a proposal from the Commission, after having consulted and given the utmost consideration to the assessment and the opinion of the Board of Regulators on that assessment and only in those cases where it can be justified by the duties and requirements of the Agency, may extend once the term of office of the Director by no more than three years.

5. The Administrative Board shall inform the European Parliament of its intention to extend the Director's term of office. Within one month before the extension of his term of office, the Director may be invited to make a statement before the competent committee of the Parliament and to answer questions put by the members of that committee.

6. If his term of office is not extended, the Director shall remain in office until the appointment of his successor.

7. The Director may be removed from office only upon a decision of the Administrative Board, after having obtained a favourable opinion of the Board of Regulators. The Administrative Board shall reach that decision on the basis of a three-quarters majority of its members.

8. The European Parliament and the Council may call upon the Director to submit a report on the performance of his duties. The European Parliament may also invite the Director to make a statement before its competent committee and answer questions put by the members of that committee.

#### Article 17

### Tasks of the Director

1. The Director shall be responsible for representing the Agency and shall be in charge of its management.

2. The Director shall prepare the work of the Administrative Board. He shall participate, without having the right to vote, in the work of the Administrative Board.

3. The Director shall adopt and publish the opinions, recommendations and decisions referred to in Articles 5, 6, 7, 8 and 9, that have received a favourable opinion of the Board of Regulators.

4. The Director shall be responsible for implementing the annual work programme of the Agency under the guidance of the Board of Regulators and under the administrative control of the Administrative Board.

5. The Director shall take the necessary measures, notably as regards adopting internal administrative instructions and publishing notices, to ensure the functioning of the Agency in accordance with this Regulation.

6. Each year the Director shall prepare a draft work programme of the Agency for the following year, and shall submit it to the Board of Regulators, to the European Parliament and to the Commission by 30 June of that year.

7. The Director shall draw up a preliminary draft budget of the Agency pursuant to Article 23(1) and shall implement the budget of the Agency pursuant to Article 24.

8. Each year the Director shall prepare a draft annual report with an independent section on the regulatory activities of the Agency and a section on financial and administrative matters.

9. With regard to the staff of the Agency, the Director shall exercise the powers provided for in Article 28(3).

#### Article 18

### Board of Appeal

1. The Board of Appeal shall comprise six members and six alternates selected from among current or former senior staff of the national regulatory authorities, competition authorities or other national or Community institutions with relevant experience in the energy sector. The Board of Appeal shall designate its Chairman. The decisions of the Board of Appeal shall be adopted on the basis of a qualified majority of at least four of its six members. The Board of Appeal shall be convened when necessary.

2. The members of the Board of Appeal shall be formally appointed by the Administrative Board, on a proposal from the Commission, following a public call for expression of interest, and after consultation of the Board of Regulators.

3. The term of office of the members of the Board of Appeal shall be five years. That term shall be renewable. The members of the Board of Appeal shall be independent in making their decisions. They shall not be bound by any instructions. They shall not perform any other duties in the Agency, in its Administrative Board or in its Board of Regulators. A member of the Board of Appeal shall not be removed during his term of office, unless he has been found guilty of serious misconduct, and the Administrative Board, after consulting the Board of Regulators, takes a decision to that effect.

4. Members of the Board of Appeal shall not take part in any appeal proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties to the proceedings, or if they participated in the decision under appeal.

5. A member of the Board of Appeal shall inform the Board in the event that he, for one of the reasons referred to in paragraph 4 or for any other reason, considers that a fellow member should not take part in any appeal proceedings. Any party to the appeal proceedings may object to the participation of a member of the Board of Appeal on any of the grounds referred to in paragraph 4, or if suspected of bias. Such an objection shall be inadmissible if it is based on the nationality of a member or if, while being aware of a reason for objecting, the objecting party to the appeal proceedings has taken a procedural step in the appeal proceedings other than objecting to the composition of the Board of Appeal.

6. The Board of Appeal shall decide on the action to be taken in the cases specified in paragraphs 4 and 5 without the participation of the member concerned. For the purpose of taking that decision, the member concerned shall be replaced on the Board of Appeal by his alternate. If the alternate finds himself in a similar situation to that of the member, the Chairman shall designate a replacement from among the available alternates.

7. The members of the Board of Appeal shall undertake to act independently and in the public interest. For that purpose, they shall make a written declaration of commitments and a written declaration of interests indicating either the absence of any interest which may be considered prejudicial to their independence or any direct or indirect interest which might be considered prejudicial to their independence. Those declarations shall be made public annually.

#### Article 19

#### Appeals

1. Any natural or legal person, including national regulatory authorities, may appeal against a decision referred to in Articles 7, 8 or 9 which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.

2. The appeal, together with the statement of grounds, shall be filed in writing at the Agency within two months of the day of notification of the decision to the person concerned, or, in the absence thereof, within two months of the day on which the Agency published its decision. The Board of Appeal shall decide upon the appeal within two months of the lodging of the appeal.

3. An appeal lodged pursuant to paragraph 1 shall not have suspensory effect. The Board of Appeal may, however, if it considers that circumstances so require, suspend the application of the contested decision.

4. If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded. It shall invite the parties as often as necessary to the appeal proceedings to file observations on notifications issued by itself or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make an oral presentations.

5. The Board of Appeal may, in accordance with this Article, exercise any power which lies within the competence of the Agency, or it may remit the case to the competent body of the Agency. The latter shall be bound by the decision of the Board of Appeal.

6. The Board of Appeal shall adopt and publish its rules of procedure.

7. The decisions taken by the Board of Appeal shall be published by the Agency.

#### Article 20

#### Actions before the Court of First Instance and the Court of Justice

1. An action may be brought before the Court of First Instance or the Court of Justice, in accordance with Article 230 of the Treaty, contesting a decision taken by the Board of Appeal or, in cases where no right lies before the Board of Appeal, by the Agency.

2. In the event that the Agency fails to take a decision, proceedings for failure to act may be brought before the Court of First Instance or the Court of Justice in accordance with Article 232 of the Treaty.

3. The Agency shall be required to take the necessary measures to comply with the judgment of the Court of First Instance or the Court of Justice.

#### CHAPTER IV

#### FINANCIAL PROVISIONS

#### Article 21

#### Budget of the Agency

1. The revenues of the Agency shall comprise, in particular:

- (a) a subsidy from the Community, entered in the general budget of the European Union (Commission Section);

- (b) fees paid to the Agency pursuant to Article 22;
  - (c) voluntary contributions from the Member States or from the regulatory authorities, under Article 13(8); and
  - (d) legacies, donations or grants under Article 13(8).
2. The Agency's expenditure shall cover staff, administrative, infrastructure, and operational expenses.
  3. The Agency's revenue and expenditure shall be in balance.
  4. All Agency revenue and expenditure shall be the subject of forecasts for each financial year, coinciding with the calendar year, and shall be entered in its budget.

#### Article 22

##### Fees

1. Fees shall be due to the Agency for requesting an exemption decision pursuant to Article 9(1).
2. The fees referred to in paragraph 1 shall be set by the Commission.

#### Article 23

##### Establishment of the budget

1. By 15 February each year, the Director shall draw up a preliminary draft budget covering the operational expenditure and the programme of work anticipated for the following financial year, and shall forward that preliminary draft budget to the Administrative Board, together with a list of provisional posts. Each year, the Administrative Board shall, on the basis of the preliminary draft budget prepared by the Director, make an estimate of revenue and expenditure of the Agency for the following financial year. That estimate, including a draft establishment plan, shall be transmitted by the Administrative Board to the Commission by 31 March. Prior to adoption of the estimate, the draft prepared by the Director shall be transmitted to the Board of Regulators, which may deliver a reasoned opinion on the draft.
2. The estimate referred to in paragraph 1 shall be transmitted by the Commission to the European Parliament and to the Council (the budgetary authority), together with the preliminary draft general budget of the European Union.
3. On the basis of the estimate, the Commission shall enter into the preliminary draft general budget of the European Union the forecasts it considers necessary in respect of the establishment plan and the amount of the grant to be charged to the general budget of the European Union in accordance with Article 272 of the Treaty.
4. The budgetary authority shall adopt the establishment plan for the Agency.

5. The budget of the Agency shall be drawn up by the Administrative Board. It shall become final after the final adoption of the general budget of the European Union. Where necessary, it shall be adjusted accordingly.

6. The Administrative Board shall, without delay, notify the budgetary authority of its intention to implement any project which may have significant financial implications for the funding of the budget of the Agency, in particular any project relating to property such as the rental or purchase of buildings. The Administrative Board shall also inform the Commission of its intention. If either branch of the budgetary authority intends to issue an opinion, it shall, within two weeks of receipt of the information on the project, notify the Agency of its intention thereof. In the absence of a reply, the Agency may proceed with the planned project.

#### Article 24

##### Implementation and control of the budget

1. The Director shall act as authorising officer and shall implement the Agency's budget.
2. By 1 March following the completion of each financial year, the Agency accounting officer shall forward to the Commission's accounting officer and the Court of Auditors the provisional accounts, accompanied by the report on budgetary and financial management over the financial year. The Agency's accounting officer shall also send the report on budgetary and financial management to the European Parliament and the Council by 31 March of the following year. The Commission's accounting officer shall then consolidate the provisional accounts of the institutions and decentralised bodies in accordance with Article 128 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities <sup>(1)</sup> (the Financial Regulation).
3. By 31 March following the completion of each financial year, the Commission's accounting officer shall forward the provisional accounts of the Agency, accompanied by the report on budgetary and financial management over the financial year, to the Court of Auditors. The report on budgetary and financial management over the financial year shall also be forwarded to the European Parliament and the Council.
4. After receiving the observations of the Court of Auditors on the provisional accounts of the Agency in accordance with the provisions of Article 129 of the Financial Regulation, the Director, acting on his own responsibility, shall draw up the final accounts of the Agency and transmit them, for opinion, to the Administrative Board.
5. The Administrative Board shall deliver an opinion on the final accounts of the Agency.
6. The Director shall transmit the final accounts, accompanied by the opinion of the Administrative Board, by 1 July following the completion of the financial year, to the European Parliament, the Council, the Commission and the Court of Auditors.
7. The final accounts shall be published.

<sup>(1)</sup> OJ L 248, 16.9.2002, p. 1.

8. The Director shall send the Court of Auditors a reply to the latter's observations by 15 October. He shall also send a copy of that reply to the Administrative Board and the Commission.

9. The Director shall submit to the European Parliament, at the latter's request and as provided for in Article 146(3) of the Financial Regulation, any information necessary for the smooth application of the discharge procedure for the financial year in question.

10. The European Parliament, following a recommendation by the Council, acting by qualified majority, shall, before 15 May of the year N + 2, grant a discharge to the Director for the implementation of the budget for the financial year N.

#### Article 25

##### Financial rules

The financial rules applicable to the Agency shall be drawn up by the Administrative Board after consulting the Commission. Those rules may deviate from Regulation (EC, Euratom) No 2343/2002 if the specific operational needs for the functioning of the Agency so require and only with the prior agreement of the Commission.

#### Article 26

##### Anti-fraud measures

1. For the purposes of combating fraud, corruption and any other illegal activity, the provisions of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) <sup>(1)</sup> shall apply to the Agency without any restriction.

2. The Agency shall accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF) <sup>(2)</sup> and shall immediately adopt appropriate provisions for all staff of the Agency.

3. The funding decisions and the agreements and the implementing instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may, if need be, carry out on-the-spot checks on the beneficiaries of monies disbursed by the Agency as well as on the staff responsible for allocating those monies.

#### CHAPTER V

##### GENERAL PROVISIONS

#### Article 27

##### Privileges and immunities

The Protocol on Privileges and Immunities of the European Communities shall apply to the Agency.

<sup>(1)</sup> OJ L 136, 31.5.1999, p. 1.

<sup>(2)</sup> OJ L 136, 31.5.1999, p. 15.

#### Article 28

##### Staff

1. The Staff Regulations, the Conditions of Employment and the rules adopted jointly by the European Community institutions for the purpose of applying the Staff Regulations and the Conditions of Employment shall apply to the staff of the Agency, including its Director.

2. The Administrative Board, in agreement with the Commission, shall adopt appropriate implementing rules, in accordance with Article 110 of the Staff Regulations.

3. In respect of its staff, the Agency shall exercise the powers conferred on the appointing authority by the Staff Regulations and on the authority entitled to conclude contracts by the Conditions of Employment.

4. The Administrative Board may adopt provisions to allow national experts from Member States to be employed on secondment at the Agency.

#### Article 29

##### Liability of the Agency

1. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its staff in the performance of their duties. The Court of Justice shall have jurisdiction in any dispute over the remedying of such damage.

2. The personal financial liability and disciplinary liability of Agency staff towards the Agency shall be governed by the relevant provisions applying to the staff of the Agency.

#### Article 30

##### Access to documents

1. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents <sup>(3)</sup> shall apply to documents held by the Agency.

2. The Administrative Board shall adopt practical measures for applying Regulation (EC) No 1049/2001 by 3 March 2010.

3. Decisions taken by the Agency pursuant to Article 8 of Regulation (EC) No 1049/2001 may be the subject of a complaint to the Ombudsman or of proceedings before the Court of Justice, in accordance with the conditions laid down in Articles 195 and 230 of the Treaty respectively.

<sup>(3)</sup> OJ L 145, 31.5.2001, p. 43.

*Article 31***Participation of third countries**

1. The Agency shall be open to the participation of third countries which have concluded agreements with the Community whereby they have adopted and are applying Community law in the field of energy and, if relevant, in the fields of environment and competition.
2. Under the relevant provisions of those agreements, arrangements shall be made specifying, in particular, the nature, scope and procedural aspects of the involvement of those countries in the work of the Agency, including provisions relating to financial contributions and to staff.

*Article 32***Committee**

1. The Commission shall be assisted by a committee.
2. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

*Article 33***Language arrangements**

1. The provisions of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community <sup>(1)</sup> shall apply to the Agency.
2. The Administrative Board shall decide on the internal language arrangements for the Agency.
3. The translation services required for the functioning of the Agency shall be provided by the Translation Centre for the Bodies of the European Union.

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

Done at Brussels, 13 July 2009.

*For the European Parliament*  
The President  
H.-G. PÖTTERING

*For the Council*  
The President  
E. ERLANDSSON

## CHAPTER VI

**FINAL PROVISIONS***Article 34***Evaluation**

1. The Commission, with the assistance of an independent external expert, shall carry out an evaluation of the activities of the Agency. That evaluation shall cover the results achieved by the Agency and its working methods, in relation with its objective, mandate and tasks defined in this Regulation and in its annual work programmes. The evaluation shall be based on extensive consultation in accordance with Article 10.
2. The Commission shall submit the evaluation referred to in paragraph 1 to the Agency's Board of Regulators. The Board of Regulators shall issue recommendations regarding changes to this Regulation, the Agency and its working methods to the Commission, which may forward those recommendations, together with its own opinion as well as any appropriate proposal, to the European Parliament and the Council.
3. The first evaluation shall be presented by the Commission to the European Parliament and the Council by three years after the first Director has taken up his duties. The Commission shall subsequently present an evaluation at least every four years.

*Article 35***Entry into force and transitory measures**

1. This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.
2. Articles 5 to 11 shall apply from 3 March 2011.

<sup>(1)</sup> OJ 17, 6.10.1958, p. 385.



**REGULATION (EC) No 714/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of 13 July 2009**

**on conditions for access to the network for cross-border exchanges in electricity  
and repealing Regulation (EC) No 1228/2003**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the Committee of the Regions <sup>(2)</sup>,

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

Whereas:

- (1) The internal market in electricity, which has been progressively implemented since 1999, aims to deliver real choice for all consumers in the Community, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices and higher standards of service, and to contribute to security of supply and sustainability.
- (2) Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity <sup>(4)</sup> and Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity <sup>(5)</sup> have made significant contributions towards the creation of such an internal market in electricity.
- (3) However, at present, there are obstacles to the sale of electricity on equal terms, without discrimination or disadvantage in the Community. In particular, non-discriminatory network access and an equally effective level of regulatory supervision do not yet exist in each Member State, and isolated markets persist.

<sup>(1)</sup> OJ C 211, 19.8.2008, p. 23.

<sup>(2)</sup> OJ C 172, 5.7.2008, p. 55.

<sup>(3)</sup> Opinion of the European Parliament of 18 June 2008 (not yet published in the Official Journal), Council Common Position of 9 January 2009 (OJ C 75 E, 31.3.2009, p. 16) and Position of the European Parliament of 22 April 2009 (not yet published in the Official Journal), Council Decision of 25 June 2009.

<sup>(4)</sup> OJ L 176, 15.7.2003, p. 37.

<sup>(5)</sup> OJ L 176, 15.7.2003, p. 1.

(4) The Communication of the Commission of 10 January 2007 entitled 'An Energy Policy for Europe' highlighted the importance of completing the internal market in electricity and creating a level playing field for all electricity undertakings in the Community. The Communications of the Commission of 10 January 2007 entitled 'Prospects for the internal gas and electricity market' and 'Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)' demonstrated that the present rules and measures neither provide the necessary framework nor provide for the creation of interconnection capacities to achieve the objective of a well-functioning, efficient and open internal market.

(5) In addition to thoroughly implementing the existing regulatory framework, the regulatory framework for the internal market in electricity set out in Regulation (EC) No 1228/2003 should be adapted in line with those communications.

(6) In particular, increased cooperation and coordination among transmission system operators is required to create network codes for providing and managing effective and transparent access to the transmission networks across borders, and to ensure coordinated and sufficiently forward-looking planning and sound technical evolution of the transmission system in the Community, including the creation of interconnection capacities, with due regard to the environment. Those network codes should be in line with framework guidelines, which are non-binding in nature (framework guidelines) and which are developed by the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators <sup>(6)</sup> (the Agency). The Agency should have a role in reviewing, based on matters of fact, draft network codes, including their compliance with the framework guidelines, and it should be enabled to recommend them for adoption by the Commission. The Agency should assess proposed amendments to the network codes and it should be enabled to recommend them for adoption by the Commission. Transmission system operators should operate their networks in accordance with those network codes.

(7) In order to ensure optimal management of the electricity transmission network and to allow trading and supplying electricity across borders in the Community, a European

<sup>(6)</sup> See page 1 of this Official Journal.

- Network of Transmission System Operators for Electricity (the ENTSO for Electricity), should be established. The tasks of the ENTSO for Electricity should be carried out in compliance with Community competition rules which remain applicable to the decisions of the ENTSO for Electricity. The tasks of the ENTSO for Electricity should be well-defined and its working method should ensure efficiency, transparency and the representative nature of the ENTSO for Electricity. The network codes prepared by the ENTSO for Electricity are not intended to replace the necessary national network codes for non-cross-border issues. Given that more effective progress may be achieved through an approach at regional level, transmission system operators should set up regional structures within the overall cooperation structure, whilst ensuring that results at regional level are compatible with network codes and non-binding ten-year network development plans at Community level. Member States should promote cooperation and monitor the effectiveness of the network at regional level. Cooperation at regional level should be compatible with progress towards a competitive and efficient internal market in electricity.
- (8) All market participants have an interest in the work expected of the ENTSO for Electricity. An effective consultation process is therefore essential and existing structures that are set up to facilitate and streamline the consultation process, such as the Union for the Coordination of Transmission of Electricity, national regulators or the Agency, should play an important role.
- (9) In order to ensure greater transparency regarding the entire electricity transmission network in the Community, the ENTSO for Electricity should draw up, publish and regularly update a non-binding Community-wide ten-year network development plan (Community-wide network development plan). Viable electricity transmission networks and necessary regional interconnections, relevant from a commercial or security of supply point of view, should be included in that network development plan.
- (10) This Regulation should lay down basic principles with regard to tarification and capacity allocation, whilst providing for the adoption of Guidelines detailing further relevant principles and methodologies, in order to allow rapid adaptation to changed circumstances.
- (11) In an open, competitive market, transmission system operators should be compensated for costs incurred as a result of hosting cross-border flows of electricity on their networks by the operators of the transmission systems from which cross-border flows originate and the systems where those flows end.
- (12) Payments and receipts resulting from compensation between transmission system operators should be taken into account when setting national network tariffs.
- (13) The actual amount payable for cross-border access to the system can vary considerably, depending on the transmission system operator involved and as a result of differences in the structure of the tarification systems applied in Member States. A certain degree of harmonisation is therefore necessary in order to avoid distortions of trade.
- (14) A proper system of long-term locational signals is necessary, based on the principle that the level of the network access charges should reflect the balance between generation and consumption of the region concerned, on the basis of a differentiation of the network access charges on producers and/or consumers.
- (15) It would not be appropriate to apply distance-related tariffs or, provided appropriate locational signals are in place, a specific tariff to be paid only by exporters or importers in addition to the general charge for access to the national network.
- (16) The precondition for effective competition in the internal market in electricity is non-discriminatory and transparent charges for network use including interconnecting lines in the transmission system. The available capacity of those lines should be set at the maximum levels consistent with the safety standards of secure network operation.
- (17) It is important to avoid distortion of competition resulting from the differing safety, operational and planning standards used by transmission system operators in Member States. Moreover, there should be transparency for market participants concerning available transfer capacities and the security, planning and operational standards that affect the available transfer capacities.
- (18) Market monitoring undertaken over recent years by the national regulatory authorities and by the Commission has shown that current transparency requirements and rules on access to infrastructure are not sufficient to secure a genuine, well-functioning, open and efficient internal market in electricity.
- (19) Equal access to information on the physical status and efficiency of the system is necessary to enable all market participants to assess the overall demand and supply situation and identify the reasons for movements in the wholesale price. This includes more precise information on electricity generation, supply and demand including forecasts, network and interconnection capacity, flows and maintenance, balancing and reserve capacity.

- (20) To enhance trust in the market, its participants need to be sure that those engaging in abusive behaviour can be subject to effective, proportionate and dissuasive penalties. The competent authorities should be given the competence to investigate effectively allegations of market abuse. To that end, it is necessary that competent authorities have access to data that provides information on operational decisions made by supply undertakings. In the electricity market, many relevant decisions are made by the generators, which should keep information in relation thereto available to and easily accessible by the competent authorities for a fixed period of time. The competent authorities should, furthermore, regularly monitor the compliance of the transmission system operators with the rules. Small generators with no real ability to distort the market should be exempt from that obligation.
- (21) There should be rules on the use of revenues flowing from congestion-management procedures, unless the specific nature of the interconnector concerned justifies an exemption from those rules.
- (22) The management of congestion problems should provide correct economic signals to transmission system operators and market participants and should be based on market mechanisms.
- (23) Investments in major new infrastructure should be promoted strongly while ensuring the proper functioning of the internal market in electricity. In order to enhance the positive effect of exempted direct current interconnectors on competition and security of supply, market interest during the project-planning phase should be tested and congestion-management rules should be adopted. Where direct current interconnectors are located in the territory of more than one Member State, the Agency should handle as a last resort the exemption request in order to take better account of its cross-border implications and to facilitate its administrative handling. Moreover, given the exceptional risk profile of constructing those exempt major infrastructure projects, undertakings with supply and production interests should be able to benefit from a temporary derogation from the full unbundling rules for the projects concerned. Exemptions granted under Regulation (EC) No 1228/2003 continue to apply until the scheduled expiry date as decided in the granted exemption decision.
- (24) To ensure the smooth functioning of the internal market in electricity, provision should be made for procedures which allow the adoption of decisions and Guidelines with regard, inter alia, to tariffication and capacity allocation by the Commission whilst ensuring the involvement of Member States' regulatory authorities in that process, where appropriate through their European association. Regulatory authorities, together with other relevant authorities in the Member States, have an important role to play in contributing to the proper functioning of the internal market in electricity.
- (25) National regulatory authorities should ensure compliance with the rules contained in this Regulation and the Guidelines adopted pursuant thereto.
- (26) The Member States and the competent national authorities should be required to provide relevant information to the Commission. Such information should be treated confidentially by the Commission. Where necessary, the Commission should have an opportunity to request relevant information directly from undertakings concerned, provided that the competent national authorities are informed.
- (27) Member States should lay down rules on penalties applicable to infringements of the provisions of this Regulation and ensure that they are implemented. Those penalties must be effective, proportionate and dissuasive.
- (28) The measures necessary for the implementation of this Regulation 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 <sup>(1)</sup>.
- (29) In particular, the Commission should be empowered to establish or adopt the Guidelines necessary for providing the minimum degree of harmonisation required to achieve the aims of this Regulation. Since those measures are of general scope and are designed to amend non-essential elements of this Regulation, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.
- (30) Since the objective of this Regulation, namely the provision of a harmonised framework for cross-border exchanges of electricity, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- (31) Given the scope of the amendments that are being made herein to Regulation (EC) No 1228/2003, it is desirable, for reasons of clarity and rationalisation, that the provisions in question should be recast by bringing them all together in a single text in a new Regulation,

HAVE ADOPTED THIS REGULATION:

#### *Article 1*

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

This Regulation aims at:

- (a) setting fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal market in electricity, taking into account the particular characteristics

<sup>(1)</sup> OJ L 184, 17.7.1999, p. 23.

of national and regional markets. This will involve the establishment of a compensation mechanism for cross-border flows of electricity and the setting of harmonised principles on cross-border transmission charges and the allocation of available capacities of interconnections between national transmission systems;

- (b) facilitating the emergence of a well-functioning and transparent wholesale market with a high level of security of supply in electricity. It provides for mechanisms to harmonise the rules for cross-border exchanges in electricity.

## Article 2

### Definitions

1. For the purpose of this Regulation, the definitions contained in Article 2 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity <sup>(1)</sup> apply, with the exception of the definition of 'interconnector' which shall be replaced by the following:

— 'interconnector' means a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States.

2. The following definitions shall apply:

- (a) 'regulatory authorities' means the regulatory authorities referred to in Article 35(1) of Directive 2009/72/EC;
- (b) 'cross-border flow' means a physical flow of electricity on a transmission network of a Member State that results from the impact of the activity of producers and/or consumers outside that Member State on its transmission network;
- (c) 'congestion' means a situation in which an interconnection linking national transmission networks cannot accommodate all physical flows resulting from international trade requested by market participants, because of a lack of capacity of the interconnectors and/or the national transmission systems concerned;
- (d) 'declared export' means the dispatch of electricity in one Member State on the basis of an underlying contractual arrangement to the effect that the simultaneous corresponding take-up (declared import) of electricity will take place in another Member State or a third country;
- (e) 'declared transit' means a circumstance where a declared export of electricity occurs and where the nominated path for the transaction involves a country in which neither the dispatch nor the simultaneous corresponding take-up of the electricity will take place;

(f) 'declared import' means the take-up of electricity in a Member State or a third country simultaneously with the dispatch of electricity (declared export) in another Member State;

(g) 'new interconnector' means an interconnector not completed by 4 August 2003.

For the purpose of the inter-transmission system operator compensation mechanism referred to in Article 13 only, where transmission networks of two or more Member States form part, in whole or in part, of a single control block, the control block as a whole shall be considered as forming part of the transmission network of one of the Member States concerned, in order to avoid flows within control blocks being considered as cross-border flows under point (b) of the first subparagraph of this paragraph and giving rise to compensation payments under Article 13. The regulatory authorities of the Member States concerned may decide which of the Member States concerned shall be that of which the control block as a whole is to be considered to form part.

## Article 3

### Certification of transmission system operators

1. The Commission shall examine any notification of a decision on the certification of a transmission system operator as laid down in Article 10(6) of Directive 2009/72/EC as soon as it is received. Within two months of the day of receipt of such notification, the Commission shall deliver its opinion to the relevant national regulatory authority as to its compatibility with Article 10(2) or Article 11, and Article 9 of Directive 2009/72/EC.

When preparing the opinion referred to in the first subparagraph, the Commission may request the Agency to provide its opinion on the national regulatory authority's decision. In such a case, the two-month period referred to in the first subparagraph shall be extended by two further months.

In the absence of an opinion by the Commission within the periods referred to in the first and second subparagraphs, the Commission shall be deemed not to raise objections to the regulatory authority's decision.

2. Within two months of receiving an opinion of the Commission, the national regulatory authority shall adopt its final decision regarding the certification of the transmission system operator, taking the utmost account of that opinion. The regulatory authority's decision and the Commission's opinion shall be published together.

3. At any time during the procedure, regulatory authorities and/or the Commission may request from a transmission system operator and/or an undertaking performing any of the functions of generation or supply any information relevant to the fulfilment of their tasks under this Article.

4. Regulatory authorities and the Commission shall preserve the confidentiality of commercially sensitive information.

<sup>(1)</sup> See page 55 of this Official Journal.

5. The Commission may adopt Guidelines setting out the details of the procedure to be followed for the application of paragraphs 1 and 2 of this Article. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(2).

6. Where the Commission has received notification of the certification of a transmission system operator under Article 9(10) of Directive 2009/72/EC, the Commission shall take a decision relating to certification. The regulatory authority shall comply with the Commission decision.

#### Article 4

### European network of transmission system operators for electricity

All transmission system operators shall cooperate at Community level through the ENTSO for Electricity, in order to promote the completion and functioning of the internal market in electricity and cross-border trade and to ensure the optimal management, coordinated operation and sound technical evolution of the European electricity transmission network.

#### Article 5

### Establishment of the ENTSO for Electricity

1. By 3 March 2011, the transmission system operators for electricity shall submit to the Commission and to the Agency the draft statutes, a list of members and draft rules of procedure, including the rules of procedures on the consultation of other stakeholders, of the ENTSO for Electricity to be established.

2. Within two months of the day of the receipt, the Agency, after formally consulting the organisations representing all stakeholders, in particular the system users, including customers, shall provide an opinion to the Commission on the draft statutes, list of members and draft rules of procedure.

3. The Commission shall deliver an opinion on the draft statutes, list of members and draft rules of procedures taking into account the opinion of the Agency provided for in paragraph 2 and within three months of the day of the receipt of the opinion of the Agency.

4. Within three months of the day of receipt of the Commission's opinion, the transmission system operators shall establish the ENTSO for Electricity and adopt and publish its statutes and rules of procedure.

#### Article 6

### Establishment of network codes

1. The Commission shall, after consulting the Agency, the ENTSO for Electricity and the other relevant stakeholders, establish an annual priority list identifying the areas set out in Article 8(6) to be included in the development of network codes.

2. The Commission shall request the Agency to submit to it within a reasonable period of time not exceeding six months a non-binding framework guideline (framework guideline) setting out clear and objective principles, in accordance with Article 8(7), for the development of network codes relating to the areas identified in the priority list. Each framework guideline shall contribute to non-discrimination, effective competition and the efficient functioning of the market. Upon a reasoned request from the Agency, the Commission may extend that period.

3. The Agency shall formally consult the ENTSO for Electricity and the other relevant stakeholders in regard to the framework guideline, during a period of no less than two months, in an open and transparent manner.

4. If the Commission considers that the framework guideline does not contribute to non-discrimination, effective competition and the efficient functioning of the market, it may request the Agency to review the framework guideline within a reasonable period of time and re-submit it to the Commission.

5. If the Agency fails to submit or re-submit a framework guideline within the period set by the Commission under paragraphs 2 or 4, the Commission shall elaborate the framework guideline in question.

6. The Commission shall request the ENTSO for Electricity to submit a network code which is in line with the relevant framework guideline, to the Agency within a reasonable period of time not exceeding 12 months.

7. Within a period of three months of the day of the receipt of a network code, during which the Agency may formally consult the relevant stakeholders, the Agency shall provide a reasoned opinion to the ENTSO for Electricity on the network code.

8. The ENTSO for Electricity may amend the network code in the light of the opinion of the Agency and re-submit it to the Agency.

9. When the Agency is satisfied that the network code is in line with the relevant framework guideline, the Agency shall submit the network code to the Commission and may recommend that it be adopted within a reasonable time period. The Commission shall provide reasons in the event that it does not adopt that network code.

10. Where the ENTSO for Electricity has failed to develop a network code within the period of time set by the Commission under paragraph 6, the Commission may request the Agency to prepare a draft network code on the basis of the relevant framework guideline. The Agency may launch a further consultation in the course of preparing a draft network code under this paragraph. The Agency shall submit a draft network code prepared under this paragraph to the Commission and may recommend that it be adopted.

11. The Commission may adopt, on its own initiative, where the ENTSO for Electricity has failed to develop a network code, or the Agency has failed to develop a draft network code as referred to in paragraph 10 of this Article, or upon recommendation of the Agency under paragraph 9 of this Article, one or more network codes in the areas listed in Article 8(6).

Where the Commission proposes to adopt a network code on its own initiative, the Commission shall consult the Agency, the ENTSO for Electricity and all relevant stakeholders in regard to the draft network code during a period of no less than two months. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(2).

12. This Article shall be without prejudice to the Commission's right to adopt and amend the Guidelines as laid down in Article 18.

#### Article 7

##### Amendments of network codes

1. Draft amendments to any network code adopted under Article 6 may be proposed to the Agency by persons who are likely to have an interest in that network code, including the ENTSO for Electricity, transmission system operators, system users and consumers. The Agency may also propose amendments on its own initiative.

2. The Agency shall consult all stakeholders in accordance with Article 10 of Regulation (EC) No 713/2009. Following that process, the Agency may make reasoned proposals for amendments to the Commission, explaining how such proposals are consistent with the objectives of the network codes set out in Article 6(2).

3. The Commission may adopt, taking account of the Agency's proposals, amendments to any network code adopted under Article 6. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(2).

4. Consideration of proposed amendments under the procedure set out in Article 23(2) shall be limited to consideration of the aspects related to the proposed amendment. Those proposed amendments are without prejudice to other amendments which the Commission may propose.

#### Article 8

##### Tasks of the ENTSO for Electricity

1. The ENTSO for Electricity shall elaborate network codes in the areas referred to in paragraph 6 of this Article upon a request addressed to it by the Commission in accordance with Article 6(6).

2. The ENTSO for Electricity may elaborate network codes in the areas set out in paragraph 6 with a view to achieving the objectives set out in Article 4 where those network codes do not relate to areas covered by a request addressed to it by the Commission. Those network codes shall be submitted to the Agency for an opinion. That opinion shall be duly taken into account by the ENTSO for Electricity.

3. The ENTSO for Electricity shall adopt:

- (a) common network operation tools to ensure coordination of network operation in normal and emergency conditions, including a common incidents classification scale, and research plans;
- (b) a non-binding Community-wide ten-year network development plan, (Community-wide network development plan), including a European generation adequacy outlook, every two years;
- (c) recommendations relating to the coordination of technical cooperation between Community and third-country transmission system operators;
- (d) an annual work programme;
- (e) an annual report;
- (f) annual summer and winter generation adequacy outlooks.

4. The European generation adequacy outlook referred to in point (b) of paragraph 3 shall cover the overall adequacy of the electricity system to supply current and projected demands for electricity for the next five-year period as well as for the period between five and 15 years from the date of that outlook. The European generation adequacy outlook shall build on national generation adequacy outlooks prepared by each individual transmission system operator.

5. The annual work programme referred to in point (d) of paragraph 3 shall contain a list and description of the network codes to be prepared, a plan on coordination of operation of the network, and research and development activities, to be realised in that year, and an indicative calendar.

6. The network codes referred to in paragraphs 1 and 2 shall cover the following areas, taking into account, if appropriate, regional specificities:

- (a) network security and reliability rules including rules for technical transmission reserve capacity for operational network security;
- (b) network connection rules;
- (c) third-party access rules;
- (d) data exchange and settlement rules;
- (e) interoperability rules;
- (f) operational procedures in an emergency;
- (g) capacity-allocation and congestion-management rules;
- (h) rules for trading related to technical and operational provision of network access services and system balancing;

- (i) transparency rules;
- (j) balancing rules including network-related reserve power rules;
- (k) rules regarding harmonised transmission tariff structures including locational signals and inter-transmission system operator compensation rules; and
- (l) energy efficiency regarding electricity networks.

7. The network codes shall be developed for cross-border network issues and market integration issues and shall be without prejudice to the Member States' right to establish national network codes which do not affect cross-border trade.

8. The ENTSO for Electricity shall monitor and analyse the implementation of the network codes and the Guidelines adopted by the Commission in accordance with Article 6(11), and their effect on the harmonisation of applicable rules aimed at facilitating market integration. The ENTSO for Electricity shall report its findings to the Agency and shall include the results of the analysis in the annual report referred to in point (e) of paragraph 3 of this Article.

9. The ENTSO for Electricity shall make available all information required by the Agency to fulfil its tasks under Article 9(1).

10. The ENTSO for Electricity shall adopt and publish a Community-wide network development plan every two years. The Community-wide network development plan shall include the modelling of the integrated network, scenario development, a European generation adequacy outlook and an assessment of the resilience of the system.

The Community-wide network development plan shall, in particular:

- (a) build on national investment plans, taking into account regional investment plans as referred to in Article 12(1), and, if appropriate, Community aspects of network planning including the guidelines for trans-European energy networks in accordance with Decision No 1364/2006/EC of the European Parliament and of the Council <sup>(1)</sup>;
- (b) regarding cross-border interconnections, also build on the reasonable needs of different system users and integrate long-term commitments from investors referred to in Article 8 and Articles 13 and 22 of Directive 2009/72/EC; and
- (c) identify investment gaps, notably with respect to cross-border capacities.

In regard to point (c) of the second subparagraph, a review of barriers to the increase of cross-border capacity of the network arising from different approval procedures or practices may be annexed to the Community-wide network development plan.

<sup>(1)</sup> OJ L 262, 22.9.2006, p. 1.

11. The Agency shall provide an opinion on the national ten-year network development plans to assess their consistency with the Community-wide network development plan. If the Agency identifies inconsistencies between a national ten-year network development plan and the Community-wide network development plan, it shall recommend amending the national ten-year network development plan or the Community-wide network development plan as appropriate. If such national ten-year network development plan is elaborated in accordance with Article 22 of Directive 2009/72/EC, the Agency shall recommend that the competent national regulatory authority amend the national ten-year network development plan in accordance with Article 22(7) of that Directive and inform the Commission thereof.

12. Upon request of the Commission, the ENTSO for Electricity shall give its views to the Commission on the adoption of the Guidelines as laid down in Article 18.

#### Article 9

#### Monitoring by the Agency

1. The Agency shall monitor the execution of the tasks referred to in Article 8(1), (2) and (3) of the ENTSO for Electricity and report to the Commission.

The Agency shall monitor the implementation by the ENTSO for Electricity of network codes elaborated under Article 8(2) and network codes which have been developed in accordance with Article 6(1) to (10) but which have not been adopted by the Commission under Article 6(11). Where the ENTSO for Electricity has failed to implement such network codes, the Agency shall request the ENTSO for Electricity to provide a duly reasoned explanation as to why it has failed to do so. The Agency shall inform the Commission of that explanation and provide its opinion thereon.

The Agency shall monitor and analyse the implementation of the network codes and the Guidelines adopted by the Commission as laid down in Article 6(11), and their effect on the harmonisation of applicable rules aimed at facilitating market integration as well as on non-discrimination, effective competition and the efficient functioning of the market, and report to the Commission.

2. The ENTSO for Electricity shall submit the draft Community-wide network development plan, the draft annual work programme, including the information regarding the consultation process, and the other documents referred to in Article 8(3) to the Agency for its opinion.

Within two months from the day of receipt, the Agency shall provide a duly reasoned opinion as well as recommendations to the ENTSO for Electricity and to the Commission where it considers that the draft annual work programme or the draft Community-wide network development plan submitted by the ENTSO for Electricity do not contribute to non-discrimination, effective competition, the efficient functioning of the market or a sufficient level of cross-border interconnection open to third-party access.

### Article 10

#### Consultations

1. While preparing the network codes, the draft Community-wide network development plan and the annual work programme referred to in Article 8(1), (2) and (3), the ENTSO for Electricity shall conduct an extensive consultation process, at an early stage and in an open and transparent manner, involving all relevant market participants, and, in particular, the organisations representing all stakeholders, in accordance with the rules of procedure referred to in Article 5(1). That consultation shall also involve national regulatory authorities and other national authorities, supply and generation undertakings, system users including customers, distribution system operators, including relevant industry associations, technical bodies and stakeholder platforms. It shall aim at identifying the views and proposals of all relevant parties during the decision-making process.

2. All documents and minutes of meetings related to the consultations referred to in paragraph 1 shall be made public.

3. Before adopting the annual work programme and the network codes referred to in Article 8(1), (2) and (3), the ENTSO for Electricity shall indicate how the observations received during the consultation have been taken into consideration. It shall provide reasons where observations have not been taken into account.

### Article 11

#### Costs

The costs related to the activities of the ENTSO for Electricity referred to in Articles 4 to 12 shall be borne by the transmission system operators and shall be taken into account in the calculation of tariffs. Regulatory authorities shall approve those costs only if they are reasonable and proportionate.

### Article 12

#### Regional cooperation of transmission system operators

1. Transmission system operators shall establish regional cooperation within the ENTSO for Electricity to contribute to the activities referred to in Article 8(1), (2) and (3). In particular, they shall publish a regional investment plan every two years, and may take investment decisions based on that regional investment plan.

2. Transmission system operators shall promote operational arrangements in order to ensure the optimum management of the network and shall promote the development of energy exchanges, the coordinated allocation of cross-border capacity through non-discriminatory market-based solutions, paying due attention to the specific merits of implicit auctions for short-term allocations, and the integration of balancing and reserve power mechanisms.

3. For the purposes of achieving the goals set in paragraphs 1 and 2 of this Article, the geographical area covered by each regional cooperation structure may be defined by the Commission, taking into account existing regional cooperation structures. Each Member State shall be allowed to promote cooperation in more than one geographical area. The measure referred to in the first sentence, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(2).

For that purpose, the Commission shall consult the Agency and the ENTSO for Electricity.

### Article 13

#### Inter-transmission system operator compensation mechanism

1. Transmission system operators shall receive compensation for costs incurred as a result of hosting cross-border flows of electricity on their networks.

2. The compensation referred to in paragraph 1 shall be paid by the operators of national transmission systems from which cross-border flows originate and the systems where those flows end.

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

The first period of time for which compensation payments shall be made shall be determined in the Guidelines referred to in Article 18.

4. The Commission shall decide on the amounts of compensation payments payable. That measure, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(2).

5. The magnitude of cross-border flows hosted and the magnitude of cross-border flows designated as originating and/or ending in national transmission systems shall be determined on the basis of the physical flows of electricity actually measured during a given period of time.

6. The costs incurred as a result of hosting cross-border flows shall be established on the basis of the forward-looking long-run average incremental costs, taking into account losses, investment in new infrastructure, and an appropriate proportion of the cost of existing infrastructure, in so far as such infrastructure is used for the transmission of cross-border flows, in particular taking into account the need to guarantee security of supply. When establishing the costs incurred, recognised standard-costing methodologies shall be used. Benefits that a network incurs as a result of hosting cross-border flows shall be taken into account to reduce the compensation received.



*Article 14***Charges for access to networks**

1. Charges applied by network operators for access to networks shall be transparent, take into account the need for network security and reflect actual costs incurred insofar as they correspond to those of an efficient and structurally comparable network operator and are applied in a non-discriminatory manner. Those charges shall not be distance-related.
2. Where appropriate, the level of the tariffs applied to producers and/or consumers shall provide locational signals at Community level, and take into account the amount of network losses and congestion caused, and investment costs for infrastructure.
3. When setting the charges for network access, the following shall be taken into account:
  - (a) payments and receipts resulting from the inter-transmission system operator compensation mechanism;
  - (b) actual payments made and received as well as payments expected for future periods of time, estimated on the basis of past periods.
4. Setting the charges for network access under this Article shall be without prejudice to charges on declared exports and declared imports resulting from congestion management referred to in Article 16.
5. There shall be no specific network charge on individual transactions for declared transits of electricity.

*Article 15***Provision of information**

1. Transmission system operators shall put in place coordination and information exchange mechanisms to ensure the security of the networks in the context of congestion management.
2. The safety, operational and planning standards used by transmission system operators shall be made public. The information published shall include a general scheme for the calculation of the total transfer capacity and the transmission reliability margin based upon the electrical and physical features of the network. Such schemes shall be subject to the approval of the regulatory authorities.
3. Transmission system operators shall publish estimates of available transfer capacity for each day, indicating any available transfer capacity already reserved. Those publications shall be made at specified intervals before the day of transport and shall include, in any event, week-ahead and month-ahead estimates, as well as a quantitative indication of the expected reliability of the available capacity.

4. Transmission system operators shall publish relevant data on aggregated forecast and actual demand, on availability and actual use of generation and load assets, on availability and use of the networks and interconnections, and on balancing power and reserve capacity. For availability and actual use of small generation and load units, aggregated estimate data may be used.

5. The market participants concerned shall provide the transmission system operators with the relevant data.

6. Generation undertakings which own or operate generation assets, where at least one generation asset has an installed capacity of at least 250 MW, shall keep at the disposal of the national regulatory authority, the national competition authority and the Commission, for five years all hourly data per plant that is necessary to verify all operational dispatching decisions and the bidding behaviour at power exchanges, interconnection auctions, reserve markets and over-the-counter-markets. The per-plant and per hour information to be stored shall include, but shall not be limited to, data on available generation capacity and committed reserves, including allocation of those committed reserves on a per-plant level, at the times the bidding is carried out and when production takes place.

*Article 16***General principles of congestion management**

1. Network congestion problems shall be addressed with non-discriminatory market-based solutions which give efficient economic signals to the market participants and transmission system operators involved. Network congestion problems shall preferentially be solved with non-transaction based methods, i.e. methods that do not involve a selection between the contracts of individual market participants.

2. Transaction curtailment procedures shall only be used in emergency situations where the transmission system operator must act in an expeditious manner and re-dispatching or countertrading is not possible. Any such procedure shall be applied in a non-discriminatory manner.

Except in cases of force majeure, market participants who have been allocated capacity shall be compensated for any curtailment.

3. The maximum capacity of the interconnections and/or the transmission networks affecting cross-border flows shall be made available to market participants, complying with safety standards of secure network operation.

4. Market participants shall inform the transmission system operators concerned a reasonable time in advance of the relevant operational period whether they intend to use allocated capacity. Any allocated capacity that will not be used shall be reattributed to the market, in an open, transparent and non-discriminatory manner.

5. Transmission system operators shall, as far as technically possible, net the capacity requirements of any power flows in opposite direction over the congested interconnection line in order to use that line to its maximum capacity. Having full regard to network security, transactions that relieve the congestion shall never be denied.

6. Any revenues resulting from the allocation of interconnection shall be used for the following purposes:

- (a) guaranteeing the actual availability of the allocated capacity; and/or
- (b) maintaining or increasing interconnection capacities through network investments, in particular in new interconnectors.

If the revenues cannot be efficiently used for the purposes set out in points (a) and/or (b) of the first subparagraph, they may be used, subject to approval by the regulatory authorities of the Member States concerned, up to a maximum amount to be decided by those regulatory authorities, as income to be taken into account by the regulatory authorities when approving the methodology for calculating network tariffs and/or fixing network tariffs.

The rest of revenues shall be placed on a separate internal account line until such time as it can be spent on the purposes set out in points (a) and/or (b) of the first subparagraph. The regulatory authority shall inform the Agency of the approval referred to in the second subparagraph.

#### Article 17

##### New interconnectors

1. New direct current interconnectors may, upon request, be exempted, for a limited period of time, from the provisions of Article 16(6) of this Regulation and Articles 9, 32 and Article 37(6) and (10) of Directive 2009/72/EC under the following conditions:

- (a) the investment must enhance competition in electricity supply;
- (b) the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted;
- (c) the interconnector 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 interconnector will be built;
- (d) charges are levied on users of that interconnector;

(e) since the partial market opening referred to in Article 19 of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity <sup>(1)</sup>, no part of the capital or operating costs of the interconnector has been recovered from any component of charges made for the use of transmission or distribution systems linked by the interconnector; and

(f) the exemption must not be to the detriment of competition or the effective functioning of the internal market in electricity, or the efficient functioning of the regulated system to which the interconnector is linked.

2. Paragraph 1 shall also apply, in exceptional cases, to alternating current interconnectors provided that the costs and risks of the investment in question are particularly high when compared with the costs and risks normally incurred when connecting two neighbouring national transmission systems by an alternating current interconnector.

3. Paragraph 1 shall also apply to significant increases of capacity in existing interconnectors.

4. The decision on the exemption under paragraphs 1, 2 and 3 shall be taken on a case-by-case basis by the regulatory authorities of the Member States concerned. An exemption may cover all or part of the capacity of the new interconnector, or of the existing interconnector with significantly increased capacity.

Within two months from the date on which the request for exemption was received by the last of the regulatory authorities concerned, the Agency may submit an advisory opinion to those regulatory authorities which could provide a basis for their decision.

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. When deciding those conditions, account shall, in particular, be taken of additional capacity to be built or the modification of existing capacity, the time-frame of the project and national circumstances.

Before granting an exemption, the regulatory authorities of the Member States concerned shall decide upon the rules and mechanisms for management and allocation of capacity. Congestion-management rules shall include the obligation to offer unused capacity on the market and users of the facility shall be entitled to trade their contracted capacities on the secondary market. In the assessment of the criteria referred to in points (a), (b) and (f) of paragraph 1, the results of the capacity-allocation procedure shall be taken into account.

Where all the regulatory authorities concerned have reached agreement on the exemption decision within six months, they shall inform the Agency of that decision.

<sup>(1)</sup> OJ L 27, 30.1.1997, p. 20.

The exemption decision, including any conditions referred to in the second subparagraph of this paragraph, shall be duly reasoned and published.

5. The decision referred to in paragraph 4 shall be taken by the Agency:

- (a) where all the regulatory authorities concerned have not been able to reach an agreement within six months from the date the exemption was requested before the last of those regulatory authorities; or
- (b) upon a joint request from the regulatory authorities concerned.

Before taking such a decision, the Agency shall consult the regulatory authorities concerned and the applicants.

6. Notwithstanding paragraphs 4 and 5, Member States may provide for the regulatory authority or the Agency, as the case may be, to submit, for formal decision, to the relevant body in the Member State, its opinion on the request for an exemption. That opinion shall be published together with the decision.

7. A copy of every request for exemption shall be transmitted for information without delay by the regulatory authorities to the Agency and to the Commission on receipt. The decision shall be notified, without delay, by the regulatory authorities concerned or by the Agency (notifying bodies), to the Commission, together with all the relevant information with respect to the decision. That 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 exemption was granted or refused, 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 market in electricity resulting from the grant of the exemption;
- (c) the reasons for the time period and the share of the total capacity of the interconnector in question for which the exemption is granted; and
- (d) the result of the consultation of the regulatory authorities concerned.

8. Within a period of two months from the day following receipt of notification under paragraph 7, the Commission may take a decision requesting the notifying bodies to amend or withdraw the decision to grant an exemption. That two-month period may be extended by an additional period of two months where further information is sought by the Commission. That additional period shall begin on the day following receipt of the complete information. The initial two-month period may also be extended by consent of both the Commission and the notifying bodies.

When the requested information is not provided within the period set out in the request, the notification shall be deemed to be withdrawn unless, before the expiry of that period, either the period is extended by consent of both the Commission and the notifying bodies, or the notifying bodies, in a duly reasoned statement, inform the Commission that they consider the notification to be complete.

The notifying bodies shall comply with a Commission decision to amend or withdraw the exemption decision within one month and shall inform the Commission accordingly.

The Commission shall preserve the confidentiality of commercially sensitive information.

The Commission's approval of an exemption decision shall expire two years after the date of its adoption in the event that construction of the interconnector has not yet started by that date, and five years after the date of its adoption if the interconnector has not become operational by that date, unless the Commission decides that any delay is due to major obstacles beyond the control of the person to whom the exemption has been granted.

9. The Commission may adopt Guidelines for the application of the conditions laid down in paragraph 1 of this Article and set out the procedure to be followed for the application of paragraphs 4, 7 and 8 of this Article. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(2).

#### *Article 18*

#### **Guidelines**

1. Where appropriate, Guidelines relating to the inter-transmission system operator compensation mechanism shall specify, in accordance with the principles set out in Articles 13 and 14:

- (a) details of the procedure for determining which transmission system operators are liable to pay compensation for cross-border flows including as regards the split between the operators of national transmission systems from which cross-border flows originate and the systems where those flows end, in accordance with Article 13(2);
- (b) details of the payment procedure to be followed, including the determination of the first period for which compensation is to be paid, in accordance with the second subparagraph of Article 13(3);
- (c) details of methodologies for determining the cross-border flows hosted for which compensation is to be paid under Article 13, in terms of both quantity and type of flows, and the designation of the magnitudes of such flows as originating and/or ending in transmission systems of individual Member States, in accordance with Article 13(5);

- (d) details of the methodology for determining the costs and benefits incurred as a result of hosting cross-border flows, in accordance with Article 13(6);
- (e) details of the treatment in the context of the inter-transmission system operator compensation mechanism of electricity flows originating or ending in countries outside the European Economic Area; and
- (f) the participation of national systems which are interconnected through direct current lines, in accordance with Article 13.

2. Guidelines may also determine appropriate rules leading to a progressive harmonisation of the underlying principles for the setting of charges applied to producers and consumers (load) under national tariff systems, including the reflection of the inter-transmission system operator compensation mechanism in national network charges and the provision of appropriate and efficient locational signals, in accordance with the principles set out in Article 14.

The Guidelines shall make provision for appropriate and efficient harmonised locational signals at Community level.

Any such harmonisation shall not prevent Member States from applying mechanisms to ensure that network access charges borne by consumers (load) are comparable throughout their territory.

3. Where appropriate, Guidelines providing the minimum degree of harmonisation required to achieve the aim of this Regulation shall also specify:

- (a) details relating to provision of information, in accordance with the principles set out in Article 15;
- (b) details of rules for the trading of electricity;
- (c) details of investment incentive rules for interconnector capacity including locational signals;
- (d) details of the areas listed in Article 8(6).

For that purpose, the Commission shall consult the Agency and the ENTSO for Electricity.

4. Guidelines on the management and allocation of available transmission capacity of interconnections between national systems are laid down in Annex I.

5. The Commission may adopt Guidelines on the issues listed in paragraphs 1, 2 and 3 of this Article. It may amend the Guidelines referred to in paragraph 4 of this Article, in accordance with the principles set out in Articles 15 and 16, in particular so as to include detailed Guidelines on all capacity-allocation methodologies applied in practice and to ensure that congestion-management mechanisms evolve in a manner compatible with the objectives of the internal market. Where appropriate, in the course of such amendments common rules on minimum safety

and operational standards for the use and operation of the network, as referred to in Article 15(2) shall be established. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(2).

When adopting or amending Guidelines, the Commission shall:

- (a) ensure that the Guidelines provide the minimum degree of harmonisation required to achieve the aims of this Regulation and do not go beyond what is necessary for that purpose; and
- (b) indicate what actions it has taken with respect to the conformity of rules in third countries, which form part of the Community electricity system, with the Guidelines in question.

When adopting Guidelines under this Article for the first time, the Commission shall ensure that they cover in a single draft measure at least the issues referred to in points (a) and (d) of paragraph 1 and in paragraph 2.

#### Article 19

### Regulatory authorities

The regulatory authorities, when carrying out their responsibilities, shall ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 18. Where appropriate to fulfil the aims of this Regulation the regulatory authorities shall cooperate with each other, with the Commission and the Agency in compliance with Chapter IX of Directive 2009/72/EC.

#### Article 20

### Provision of information and confidentiality

1. Member States and the regulatory authorities shall, on request, provide to the Commission all information necessary for the purposes of Article 13(4) and Article 18.

In particular, for the purposes of Article 13(4) and (6), regulatory authorities shall, on a regular basis, provide information on the actual costs incurred by national transmission system operators, as well as data and all relevant information relating to the physical flows in transmission system operators' networks and the cost of the networks.

The Commission shall fix a reasonable time limit within which the information is to be provided, taking into account the complexity of the information required and the urgency with which the information is needed.

2. If the Member State or the regulatory authority concerned does not provide the information referred to in paragraph 1 within the given time-limit pursuant to paragraph 1 of this Article, the Commission may request all information necessary for the purpose of Article 13(4) and Article 18 directly from the undertakings concerned.

When sending a request for information to an undertaking, the Commission shall at the same time forward a copy of the request to the regulatory authorities of the Member State in whose territory the seat of the undertaking is situated.

3. In its request for information under paragraph 1, the Commission shall state the legal basis of the request, the time-limit within which the information is to be provided, the purpose of the request, and the penalties provided for in Article 22(2) for supplying incorrect, incomplete or misleading information. The Commission shall fix a reasonable time-limit taking into account the complexity of the information required and the urgency with which the information is needed.

4. The owners of the undertakings or their representatives and, in the case of legal persons, the persons authorised to represent them by law or by their instrument of incorporation, shall supply the information requested. Where lawyers duly authorised so to act supply the information on behalf of their clients, the client shall remain fully responsible in the event that the information supplied is incomplete, incorrect or misleading.

5. Where an undertaking does not provide the information requested within the time-limit fixed by the Commission or supplies incomplete information, the Commission may by decision require the information to be provided. That decision shall specify what information is required and fix an appropriate time-limit within which it is to be supplied. It shall indicate the penalties provided for in Article 22(2). It shall also indicate the right to have the decision reviewed by the Court of Justice of the European Communities.

The Commission shall, at the same time, send a copy of its decision to the regulatory authorities of the Member State within the territory of which the person is resident or the seat of the undertaking is situated.

6. The information referred to in paragraphs 1 and 2 shall be used only for the purposes of Article 13(4) and Article 18.

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

#### Article 21

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

This Regulation shall be without prejudice to the rights of Member States to maintain or introduce measures that contain more detailed provisions than those set out herein or in the Guidelines referred to in Article 18.

#### Article 22

### Penalties

1. Without prejudice to paragraph 2, the Member States shall lay down rules on penalties applicable to infringements of the

provisions of this Regulation and shall take all measures necessary to ensure that those provisions are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify the Commission by 1 July 2004 of those rules corresponding to the provisions laid down in Regulation (EC) No 1228/2003 and shall notify the Commission without delay of any subsequent amendment affecting them. They shall notify the Commission of those rules not corresponding to the provisions laid down in Regulation (EC) No 1228/2003 by 3 March 2011 and shall notify the Commission without delay of any subsequent amendment affecting them.

2. The Commission may, by decision, impose on undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently, they supply incorrect, incomplete or misleading information in response to a request made pursuant to Article 20(3) or fail to supply information within the time-limit fixed by a decision adopted pursuant to the first subparagraph of Article 20(5).

In setting the amount of a fine, the Commission shall have regard to the gravity of the failure to comply with the requirements of the first subparagraph.

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

#### Article 23

### Committee procedure

1. The Commission shall be assisted by the committee set up by Article 46 of Directive 2009/72/EC.

2. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

#### Article 24

### Commission report

The Commission shall monitor the implementation of this Regulation. In its report under Article 47(6) of Directive 2009/72/EC, the Commission shall also report on the experience gained in the application of this Regulation. In particular the report shall examine to what extent this Regulation has been successful in ensuring non-discriminatory and cost-reflective network access conditions for cross border exchanges of electricity in order to contribute to customer choice in a well-functioning internal market in electricity and to long-term security of supply, as well as to what extent effective locational signals are in place. If necessary, the report shall be accompanied by appropriate proposals and/or recommendations.

*Article 25***Repeal**

Regulation (EC) No 1228/2003 shall be repealed from 3 March 2011. References made to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.

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

Done at Brussels, 13 July 2009.

*For the European Parliament*  
*The President*  
H.-G. PÖTTERING

*Article 26***Entry into force**

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

It shall apply from 3 March 2011.

*For the Council*  
*The President*  
E. ERLANDSSON

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## ANNEX I

**GUIDELINES ON THE MANAGEMENT AND ALLOCATION OF AVAILABLE TRANSFER CAPACITY OF INTERCONNECTIONS BETWEEN NATIONAL SYSTEMS****1. General Provisions**

- 1.1. Transmission system operators (TSOs) shall endeavour to accept all commercial transactions, including those involving cross-border trade.
- 1.2. When there is no congestion, there shall be no restriction of access to the interconnection. Where this is usually the case, there need be no permanent general allocation procedure for access to a cross-border transmission service.
- 1.3. Where scheduled commercial transactions are not compatible with secure network operation, the TSOs shall alleviate congestion in compliance with the requirements of network operational security while endeavouring to ensure that any associated costs remain at an economically efficient level. Curative re-dispatching or countertrading shall be envisaged in case lower cost measures cannot be applied.
- 1.4. If structural congestion appears, appropriate congestion-management methods and arrangements defined and agreed upon in advance shall be implemented immediately by the TSOs. The congestion-management methods shall ensure that the physical power flows associated with all allocated transmission capacity comply with network security standards.
- 1.5. The methods adopted for congestion management shall give efficient economic signals to market participants and TSOs, promote competition and be suitable for regional and Community-wide application.
- 1.6. No transaction-based distinction shall be applied in congestion management. A particular request for transmission service shall be denied only when the following cumulative conditions are fulfilled:
  - (a) the incremental physical power flows resulting from the acceptance of that request imply that secure operation of the power system may no longer be guaranteed, and
  - (b) the monetary value of the request in the congestion-management procedure is lower than all other requests intended to be accepted for the same service and conditions.
- 1.7. When defining appropriate network areas in and between which congestion management is to apply, TSOs shall be guided by the principles of cost-effectiveness and minimisation of negative impacts on the internal market in electricity. Specifically, TSOs shall not limit interconnection capacity in order to solve congestion inside their own control area, save for the abovementioned reasons and reasons of operational security <sup>(1)</sup>. If such a situation occurs, this shall be described and transparently presented by the TSOs to all the system users. Such a situation shall be tolerated only until a long-term solution is found. The methodology and projects for achieving the long-term solution shall be described and transparently presented by the TSOs to all the system users.
- 1.8. When balancing the network inside the control area through operational measures in the network and through re-dispatching, the TSO shall take into account the effect of those measures on neighbouring control areas.
- 1.9. By 1 January 2008, mechanisms for the intra-day congestion management of interconnector capacity shall be established in a coordinated way and under secure operational conditions, in order to maximise opportunities for trade and to provide for cross-border balancing.

<sup>(1)</sup> Operational security means 'keeping the transmission system within agreed security limits'.

- 1.10. The national regulatory authorities shall regularly evaluate the congestion-management methods, paying particular attention to compliance with the principles and rules established in this Regulation and those Guidelines and with the terms and conditions set by the regulatory authorities themselves under those principles and rules. Such evaluation shall include consultation of all market participants and dedicated studies.

## 2. Congestion-management methods

- 2.1. Congestion-management methods shall be market-based in order to facilitate efficient cross-border trade. For that purpose, capacity shall be allocated only by means of explicit (capacity) or implicit (capacity and energy) auctions. Both methods may coexist on the same interconnection. For intra-day trade continuous trading may be used.
- 2.2. Depending on competition conditions, the congestion-management mechanisms may need to allow for both long and short-term transmission capacity allocation.
- 2.3. Each capacity-allocation procedure shall allocate a prescribed fraction of the available interconnection capacity plus any remaining capacity not previously allocated and any capacity released by capacity holders from previous allocations.
- 2.4. TSOs shall optimise the degree to which capacity is firm, taking into account the obligations and rights of the TSOs involved and the obligations and rights of market participants, in order to facilitate effective and efficient competition. A reasonable fraction of capacity may be offered to the market at a reduced degree of firmness, but the exact conditions for transport over cross-border lines shall, at all times, be made known to market participants.
- 2.5. The access rights for long and medium-term allocations shall be firm transmission capacity rights. They shall be subject to the use-it-or-lose-it or use-it-or-sell-it principles at the time of nomination.
- 2.6. TSOs shall define an appropriate structure for the allocation of capacity between different timeframes. This may include an option for reserving a minimum percentage of interconnection capacity for daily or intra-daily allocation. Such an allocation structure shall be subject to review by the respective regulatory authorities. In drawing up their proposals, the TSOs shall take into account:
- (a) the characteristics of the markets;
  - (b) the operational conditions, such as the implications of netting firmly declared schedules;
  - (c) the level of harmonisation of the percentages and timeframes adopted for the different capacity-allocation mechanisms in place.
- 2.7. Capacity allocation shall not discriminate between market participants that wish to use their rights to make use of bilateral supply contracts or to bid into power exchanges. The highest value bids, whether implicit or explicit in a given timeframe, shall be successful.
- 2.8. In regions where forward financial electricity markets are well developed and have shown their efficiency, all interconnection capacity may be allocated through implicit auctioning.
- 2.9. Other than in the case of new interconnectors which benefit from an exemption under Article 7 of Regulation (EC) No 1228/2003 or Article 17 of this Regulation, establishing reserve prices in capacity-allocation methods shall not be allowed.
- 2.10. In principle, all potential market participants shall be permitted to participate in the allocation process without restriction. To avoid creating or aggravating problems related to the potential use of dominant position of any market player, the relevant regulatory and/or competition authorities, where appropriate, may impose restrictions in general or on an individual company on account of market dominance.
- 2.11. Market participants shall firmly nominate their use of the capacity to the TSOs by a defined deadline for each timeframe. That deadline shall be such that TSOs are able to reassign unused capacity for reallocation in the next relevant timeframe — including intra-day sessions.



- 2.12. Capacity shall be freely tradable on a secondary basis, provided that the TSO is informed sufficiently in advance. Where a TSO refuses any secondary trade (transaction), this must be clearly and transparently communicated and explained to all the market participants by that TSO and notified to the regulatory authority.
- 2.13. The financial consequences of failure to honour obligations associated with the allocation of capacity shall be attributed to those who are responsible for such a failure. Where market participants fail to use the capacity that they have committed to use, or, in the case of explicitly auctioned capacity, fail to trade on a secondary basis or give the capacity back in due time, they shall lose the rights to such capacity and pay a cost-reflective charge. Any cost-reflective charges for the non-use of capacity shall be justified and proportionate. Likewise, if a TSO does not fulfil its obligation, it shall be liable to compensate the market participant for the loss of capacity rights. No consequential losses shall be taken into account for that purpose. The key concepts and methods for the determination of liabilities that accrue upon failure to honour obligations shall be set out in advance in respect of the financial consequences, and shall be subject to review by the relevant national regulatory authority or authorities.

### 3. Coordination

- 3.1. Capacity allocation at an interconnection shall be coordinated and implemented using common allocation procedures by the TSOs involved. In cases where commercial exchanges between two countries (TSOs) are expected to affect physical flow conditions in any third-country (TSO) significantly, congestion-management methods shall be coordinated between all the TSOs so affected through a common congestion-management procedure. National regulatory authorities and TSOs shall ensure that no congestion-management procedure with significant effects on physical electric power flows in other networks is devised unilaterally.
- 3.2. A common coordinated congestion-management method and procedure for the allocation of capacity to the market at least annually, monthly and day-ahead shall be applied by 1 January 2007 between countries in the following regions:
  - (a) Northern Europe (i.e. Denmark, Sweden, Finland, Germany and Poland),
  - (b) North-West Europe (i.e. Benelux, Germany and France),
  - (c) Italy (i.e. Italy, France, Germany, Austria, Slovenia and Greece),
  - (d) Central Eastern Europe (i.e. Germany, Poland, Czech Republic, Slovakia, Hungary, Austria and Slovenia),
  - (e) South-West Europe (i.e. Spain, Portugal and France),
  - (f) UK, Ireland and France,
  - (g) Baltic states (i.e. Estonia, Latvia and Lithuania).

At an interconnection involving countries belonging to more than one region, the congestion-management method applied may differ in order to ensure the compatibility with the methods applied in the other regions to which those countries belong. In that case, the relevant TSOs shall propose the method which shall be subject to review by the relevant regulatory authorities.

- 3.3. The regions referred to in point 2.8. may allocate all interconnection capacity through day-ahead allocation.
- 3.4. Compatible congestion-management procedures shall be defined in all those seven regions with a view to forming a truly integrated internal market in electricity. Market participants shall not be confronted with incompatible regional systems.
- 3.5. With a view to promoting fair and efficient competition and cross-border trade, coordination between TSOs within the regions set out in point 3.2. shall include all the steps from capacity calculation and optimisation of allocation to secure operation of the network, with clear assignments of responsibility. Such coordination shall include, in particular:
  - (a) the use of a common transmission model dealing efficiently with interdependent physical loop-flows and having regard to discrepancies between physical and commercial flows,

- (b) allocation and nomination of capacity to deal efficiently with interdependent physical loop-flows,
  - (c) identical obligations on capacity holders to provide information on their intended use of the capacity, i.e. nomination of capacity (for explicit auctions),
  - (d) identical timeframes and closing times,
  - (e) identical structure for the allocation of capacity among different timeframes (for example, 1 day, 3 hours, 1 week, etc.) and in terms of blocks of capacity sold (amount of power in MW, MWh, etc.),
  - (f) consistent contractual framework with market participants,
  - (g) verification of flows to comply with the network security requirements for operational planning and for real-time operation,
  - (h) accounting and settlement of congestion-management actions.
- 3.6. Coordination shall also include the exchange of information between TSOs. The nature, time and frequency of information exchange shall be compatible with the activities set out in point 3.5 and the functioning of the electricity markets. That information exchange shall, in particular, enable the TSOs to make the best possible forecast of the global network situation in order to assess the flows in their network and the available interconnection capacities. Any TSO collecting information on behalf of other TSOs shall give back to the participating TSO the results of the collection of data.

#### **4. Timetable for market operations**

- 4.1. The allocation of the available transmission capacity shall take place sufficiently in advance. Prior to each allocation, the involved TSOs shall, jointly, publish the capacity to be allocated, taking into account where appropriate the capacity released from any firm transmission rights and, where relevant, associated netted nominations, along with any time periods during which the capacity will be reduced or not available (for the purpose of maintenance, for example).
- 4.2. Having full regard to network security, the nomination of transmission rights shall take place sufficiently in advance, before the day-ahead sessions of all the relevant organised markets and before the publication of the capacity to be allocated under the day-ahead or intra-day allocation mechanism. Nominations of transmission rights in the opposite direction shall be netted in order to make efficient use of the interconnection.
- 4.3. Successive intra-day allocations of available transmission capacity for day D shall take place on days D-1 and D, after the issuing of the indicated or actual day-ahead production schedules.
- 4.4. When preparing day-ahead network operation, the TSOs shall exchange information with neighbouring TSOs, including their forecast network topology, the availability and forecasted production of generation units, and load flows in order to optimise the use of the overall network through operational measures in compliance with the rules for secure network operation.

#### **5. Transparency**

- 5.1. TSOs shall publish all relevant data related to network availability, network access and network use, including a report on where and why congestion exists, the methods applied for managing the congestion and the plans for its future management.
- 5.2. TSOs shall publish a general description of the congestion-management method applied under different circumstances for maximising the capacity available to the market, and a general scheme for the calculation of the interconnection capacity for the different timeframes, based upon the electrical and physical realities of the network. Such a scheme shall be subject to review by the regulatory authorities of the Member States concerned.
- 5.3. The congestion management and capacity-allocation procedures in use, together with the times and procedures for applying for capacity, a description of the products offered and the obligations and rights of both the TSOs and the party obtaining the capacity, including the liabilities that accrue upon failure to honour obligations, shall be described in detail and made available in a transparent manner to all potential network users by TSOs.

- 5.4. The operational and planning security standards shall form an integral part of the information that TSOs publish in an open and public document. That document shall also be subject to review of the national regulatory authorities.
- 5.5. TSOs shall publish all relevant data concerning cross-border trade on the basis of the best possible forecast. In order to fulfil that obligation the market participants concerned shall provide the TSOs with the relevant data. The manner in which such information is published shall be subject to review by the regulatory authorities. TSOs shall publish at least:
- (a) annually: information on the long-term evolution of the transmission infrastructure and its impact on cross-border transmission capacity;
  - (b) monthly: month- and year-ahead forecasts of the transmission capacity available to the market, taking into account all relevant information available to the TSO at the time of the forecast calculation (for example, impact of summer and winter seasons on the capacity of lines, maintenance of the network, availability of production units, etc.);
  - (c) weekly: week-ahead forecasts of the transmission capacity available to the market, taking into account all relevant information available to the TSOs at the time of calculation of the forecast, such as the weather forecast, planned network maintenance work, availability of production units, etc.;
  - (d) daily: day-ahead and intra-day transmission capacity available to the market for each market time unit, taking into account all netted day-ahead nominations, day-ahead production schedules, demand forecasts and planned network maintenance work;
  - (e) total capacity already allocated, by market time unit, and all relevant conditions under which that capacity may be used (for example, auction clearing price, obligations on how to use the capacity, etc.), so as to identify any remaining capacity;
  - (f) allocated capacity as soon as possible after each allocation, as well as an indication of prices paid;
  - (g) total capacity used, by market time unit, immediately after nomination;
  - (h) as closely as possible to real time: aggregated realised commercial and physical flows, by market time unit, including a description of the effects of any corrective actions taken by the TSOs (such as curtailment) for solving network or system problems;
  - (i) ex-ante information on planned outages and ex-post information for the previous day on planned and unplanned outages of generation units larger than 100 MW.
- 5.6. All relevant information shall be available for the market in due time for the negotiation of all transactions (such as the time of negotiation of annual supply contracts for industrial customers or the time when bids have to be sent into organised markets).
- 5.7. The TSO shall publish the relevant information on forecast demand and on generation according to the timeframes referred to in points 5.5 and 5.6. The TSO shall also publish the relevant information necessary for the cross-border balancing market.
- 5.8. When forecasts are published, the ex post realised values for the forecast information shall also be published in the time period following that to which the forecast applies or at the latest on the following day (D + 1).
- 5.9. All information published by the TSOs shall be made freely available in an easily accessible form. All data shall also be accessible through adequate and standardised means of information exchange, to be defined in close cooperation with market participants. The data shall include information on past time periods with a minimum of two years, so that new market entrants may also have access to such data.
- 5.10. TSOs shall exchange regularly a set of sufficiently accurate network and load flow data in order to enable load flow calculations for each TSO in their relevant area. The same set of data shall be made available to the regulatory authorities and to the Commission upon request. The regulatory authorities and the Commission shall ensure the confidential treatment of that set of data, by themselves and by any consultant carrying out analytical work for them on the basis of those data.

**6. Use of congestion income**

- 6.1. Congestion-management procedures associated with a pre-specified timeframe may generate revenue only in the event of congestion which arises for that timeframe, except in the case of new interconnectors which benefit from an exemption under Article 7 of Regulation (EC) No 1228/2003 or Article 17 of this Regulation. The procedure for the distribution of those revenues shall be subject to review by the regulatory authorities and shall neither distort the allocation process in favour of any party requesting capacity or energy nor provide a disincentive to reduce congestion.
  - 6.2. National regulatory authorities shall be transparent regarding the use of revenues resulting from the allocation of interconnection capacity.
  - 6.3. The congestion income shall be shared among the TSOs involved in accordance with criteria agreed between the TSOs involved and reviewed by the respective regulatory authorities.
  - 6.4. TSOs shall clearly establish beforehand the use they will make of any congestion income they may obtain and report on the actual use of that income. Regulatory authorities shall verify that such use complies with this Regulation and those Guidelines and that the total amount of congestion income resulting from the allocation of interconnection capacity is devoted to one or more of the three purposes set out in Article 16(6) of this Regulation.
  - 6.5. On an annual basis, and by 31 July each year, the regulatory authorities shall publish a report setting out the amount of revenue collected for the 12-month period up to 30 June of the same year and the use made of the revenues in question, together with verification that that use complies with this Regulation and those Guidelines and that the total amount of congestion income is devoted to one or more of the three prescribed purposes.
  - 6.6. The use of congestion income for investment to maintain or increase interconnection capacity shall preferably be assigned to specific predefined projects which contribute to relieving the existing associated congestion and which may also be implemented within a reasonable time, particularly as regards the authorisation process.
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## ANNEX II

## CORRELATION TABLE

| Regulation (EC) No 1228/2003 | This Regulation |
|------------------------------|-----------------|
| Article 1                    | Article 1       |
| Article 2                    | Article 2       |
| —                            | Article 3       |
| —                            | Article 4       |
| —                            | Article 5       |
| —                            | Article 6       |
| —                            | Article 7       |
| —                            | Article 8       |
| —                            | Article 9       |
| —                            | Article 10      |
| —                            | Article 11      |
| —                            | Article 12      |
| Article 3                    | Article 13      |
| Article 4                    | Article 14      |
| Article 5                    | Article 15      |
| Article 6                    | Article 16      |
| Article 7                    | Article 17      |
| Article 8                    | Article 18      |
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**REGULATION (EC) No 715/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**of 13 July 2009**  
**on conditions for access to the natural gas transmission networks and repealing Regulation (EC)**  
**No 1775/2005**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the Committee of the Regions <sup>(2)</sup>,

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

Whereas:

- (1) The internal market in natural gas, which has been progressively implemented since 1999, aims to deliver real choice for all consumers in the Community, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices and higher standards of service, and to contribute to security of supply and sustainability.
- (2) Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas <sup>(4)</sup> and Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks <sup>(5)</sup> have made significant contributions towards the creation of such an internal market in natural gas.
- (3) Experience gained in the implementation and monitoring of a first set of Guidelines for Good Practice, adopted by the European Gas Regulatory Forum (the Madrid Forum) in 2002, demonstrates that in order to ensure the full implementation of the rules set out in those guidelines in all Member States, and in order to provide a minimum guarantee of equal market access conditions in practice, it is necessary to provide for them to become legally enforceable.

(4) A second set of common rules entitled 'the Second Guidelines for Good Practice' was adopted at the meeting of the Madrid Forum on 24 and 25 September 2003 and the purpose of this Regulation is to lay down, on the basis of those guidelines, basic principles and rules regarding network access and third party access services, congestion management, transparency, balancing and the trading of capacity rights.

(5) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas <sup>(6)</sup> provides for the possibility of a combined transmission and distribution system operator. The rules set out in this Regulation do not therefore require modification of the organisation of national transmission and distribution systems that are consistent with the relevant provisions of that Directive.

(6) High-pressure pipelines linking up local distributors to the gas network which are not primarily used in the context of local distribution are included in the scope of this Regulation.

(7) It is necessary to specify the criteria according to which tariffs for access to the network are determined, in order to ensure that they fully comply with the principle of non-discrimination and the needs of a well-functioning internal market and take fully into account the need for system integrity and reflect the actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including appropriate return on investments, and, where appropriate, taking account of the benchmarking of tariffs by the regulatory authorities.

(8) In calculating tariffs for access to networks, it is important to take account of the actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator, and are transparent, as well as of the need to provide appropriate return on investments and incentives to construct new infrastructure, including special regulatory treatment for new investments as provided for in Directive 2009/73/EC. In that respect, and in particular if effective pipeline-to-pipeline competition exists, the benchmarking of tariffs by the regulatory authorities will be a relevant consideration.

(9) The use of market-based arrangements, such as auctions, to determine tariffs has to be compatible with the provisions laid down in Directive 2009/73/EC.

<sup>(1)</sup> OJ C 211, 19.8.2008, p. 23.

<sup>(2)</sup> OJ C 172, 5.7.2008, p. 55.

<sup>(3)</sup> Opinion of the European Parliament of 9 July 2008 (not yet published in the Official Journal), Council Common Position of 9 January 2009 (OJ C 75 E, 31.3.2009, p. 38) and Position of the European Parliament of 22 April 2009 (not yet published in the Official Journal). Council Decision of 25 June 2009.

<sup>(4)</sup> OJ L 176, 15.7.2003, p. 57.

<sup>(5)</sup> OJ L 289, 3.11.2005, p. 1.

<sup>(6)</sup> See page 94 of this Official Journal.

- (10) A common minimum set of third-party access services is necessary to provide a common minimum standard of access in practice throughout the Community, to ensure that third party access services are sufficiently compatible and to allow the benefits accruing from a well-functioning internal market in natural gas to be exploited.
- (11) At present, there are obstacles to the sale of gas on equal terms, without discrimination or disadvantage in the Community. In particular, non-discriminatory network access and an equally effective level of regulatory supervision do not yet exist in each Member State, and isolated markets persist.
- (12) A sufficient level of cross-border gas interconnection capacity should be achieved and market integration fostered in order to complete the internal market in natural gas.
- (13) The Communication of the Commission of 10 January 2007 entitled 'An Energy Policy for Europe' highlighted the importance of completing the internal market in natural gas and creating a level playing field for all natural gas undertakings in the Community. The Communications of the Commission of 10 January 2007 entitled 'Prospects for the internal gas and electricity market' and 'Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)' demonstrated that the present rules and measures neither provide the necessary framework nor provide for the creation of interconnection capacities to achieve the objective of a well-functioning, efficient and open internal market.
- (14) In addition to thoroughly implementing the existing regulatory framework, the regulatory framework for the internal market in natural gas set out in Regulation (EC) No 1775/2005 should be adapted in line with those communications.
- (15) In particular, increased cooperation and coordination among transmission system operators is required to create network codes for providing and managing effective and transparent access to the transmission networks across borders, and to ensure coordinated and sufficiently forward looking planning and sound technical evolution of the transmission system in the Community, including the creation of interconnection capacities, with due regard to the environment. The network codes should be in line with framework guidelines which are non-binding in nature (framework guidelines) and which are developed by the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators<sup>(1)</sup> (the Agency). The Agency should have a role in reviewing, based on matters of fact, draft network codes, including their compliance with the framework guidelines, and it should be enabled to recommend them for adoption by the Commission. The Agency should assess proposed amendments to the network codes and it should be enabled to recommend them for adoption by the Commission. Transmission system operators should operate their networks in accordance with those network codes.
- (16) In order to ensure optimal management of the gas transmission network in the Community a European Network of Transmission System Operators for Gas (the ENTSO for Gas), should be established. The tasks of the ENTSO for Gas should be carried out in compliance with Community competition rules which remain applicable to the decisions of the ENTSO for Gas. The tasks of the ENTSO for Gas should be well-defined and its working method should ensure efficiency, transparency and the representative nature of the ENTSO for Gas. The network codes prepared by the ENTSO for Gas are not intended to replace the necessary national network codes for non cross-border issues. Given that more effective progress may be achieved through an approach at regional level, transmission system operators should set up regional structures within the overall cooperation structure, whilst ensuring that results at regional level are compatible with network codes and non-binding ten-year network development plans at Community level. Cooperation within such regional structures presupposes effective unbundling of network activities from production and supply activities. In the absence of such unbundling, regional cooperation between transmission system operators gives rise to a risk of anti-competitive conduct. Member States should promote cooperation and monitor the effectiveness of the network operations at regional level. Cooperation at regional level should be compatible with progress towards a competitive and efficient internal market in gas.
- (17) All market participants have an interest in the work expected of the ENTSO for Gas. An effective consultation process is therefore essential and existing structures set up to facilitate and streamline the consultation process, such as the European Association for the Streamlining of Energy Exchange, national regulators or the Agency should play an important role.
- (18) In order to ensure greater transparency regarding the development of the gas transmission network in the Community, the ENTSO for Gas should draw up, publish and regularly update a non-binding Community-wide ten-year network development plan (Community-wide network development plan). Viable gas transmission networks and necessary regional interconnections, relevant from a commercial or security of supply point of view, should be included in that network development plan.

(<sup>1</sup>) See page 1 of this Official Journal.

- (19) To enhance competition through liquid wholesale markets for gas, it is vital that gas can be traded independently of its location in the system. The only way to do this is to give network users the freedom to book entry and exit capacity independently, thereby creating gas transport through zones instead of along contractual paths. The preference for entry-exit systems to facilitate the development of competition was already expressed by most stakeholders at the 6th Madrid Forum on 30 and 31 October 2002. Tariffs should not be dependent on the transport route. The tariff set for one or more entry points should therefore not be related to the tariff set for one or more exit points, and vice versa.
- (20) References to harmonised transport contracts in the context of non-discriminatory access to the network of transmission system operators do not mean that the terms and conditions of the transport contracts of a particular system operator in a Member State must be the same as those of another transmission system operator in that Member State or in another Member State, unless minimum requirements are set which must be met by all transport contracts.
- (21) There is substantial contractual congestion in the gas networks. The congestion-management and capacity-allocation principles for new or newly negotiated contracts are therefore based on the freeing-up of unused capacity by enabling network users to sublet or resell their contracted capacities and the obligation of transmission system operators to offer unused capacity to the market, at least on a day-ahead and interruptible basis. Given the large proportion of existing contracts and the need to create a true level playing field between users of new and existing capacity, those principles should be applied to all contracted capacity, including existing contracts.
- (22) Although physical congestion of networks is, at present, rarely a problem in the Community, it may become one in the future. It is important, therefore, to provide the basic principle for the allocation of congested capacity in such circumstances.
- (23) Market monitoring undertaken over recent years by the national regulatory authorities and by the Commission has shown that current transparency requirements and rules on access to infrastructure are not sufficient to secure a genuine, well-functioning, open and efficient internal market in gas.
- (24) Equal access to information on the physical status and efficiency of the system is necessary to enable all market participants to assess the overall demand and supply situation and to identify the reasons for movements in the wholesale price. This includes more precise information on supply and demand, network capacity, flows and maintenance, balancing and availability and usage of storage. The importance of that information for the functioning of the market requires alleviating existing limitations to publication for confidentiality reasons.
- (25) Confidentiality requirements for commercially sensitive information are, however, particularly relevant where data of a commercially strategic nature for the company are concerned, where there is only one single user for a storage facility, or where data are concerned regarding exit points within a system or subsystem that is not connected to another transmission or distribution system but to a single industrial final customer, where the publication of such data would reveal confidential information as to the production process of that customer.
- (26) To enhance trust in the market, its participants need to be sure that those engaging in abusive behaviour can be subjected to effective, proportionate and dissuasive penalties. The competent authorities should be given the competence to investigate effectively allegations of market abuse. To that end, it is necessary that competent authorities have access to data that provides information on operational decisions made by supply undertakings. In the gas market, all those decisions are communicated to the system operators in the form of capacity reservations, nominations and realised flows. System operators should keep information in relation thereto available to and easily accessible by the competent authorities for a fixed period of time. The competent authorities should, furthermore, regularly monitor the compliance of the transmission system operators with the rules.
- (27) Access to gas storage facilities and liquefied natural gas (LNG) facilities is insufficient in some Member States, and therefore the implementation of the existing rules needs to be improved. Monitoring by the European Regulators' Group for Electricity and Gas concluded that the voluntary guidelines for good third-party access practice for storage system operators, agreed by all stakeholders at the Madrid Forum, are being insufficiently applied and therefore need to be made binding.
- (28) Non-discriminatory and transparent balancing systems for gas, operated by transmission system operators, are important mechanisms, particularly for new market entrants which may have more difficulty balancing their overall sales portfolio than companies already established within a relevant market. It is therefore necessary to lay down rules to ensure that transmission system operators operate such mechanisms in a manner compatible with non-discriminatory, transparent and effective access conditions to the network.
- (29) The trading of primary capacity rights is an important part of developing a competitive market and creating liquidity. This Regulation should therefore lay down basic rules relating to such trading.



- (30) National regulatory authorities should ensure compliance with the rules contained in this Regulation and the Guidelines adopted pursuant thereto.
- (31) In the Guidelines annexed to this Regulation, specific detailed implementing rules are defined on the basis of the Second Guidelines for Good Practice. Where appropriate, those rules will evolve over time, taking into account the differences of national gas systems.
- (32) When proposing to amend the Guidelines annexed to this Regulation, the Commission should ensure prior consultation of all relevant parties concerned with the Guidelines, represented by the professional organisations, and of the Member States within the Madrid Forum.
- (33) The Member States and the competent national authorities should be required to provide relevant information to the Commission. Such information should be treated confidentially by the Commission.
- (34) This Regulation and the Guidelines adopted in accordance with it are without prejudice to the application of the Community rules on competition.
- (35) The measures necessary for the implementation of this Regulation 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 <sup>(1)</sup>.
- (36) In particular, the Commission should be empowered to establish or adopt the Guidelines necessary for providing the minimum degree of harmonisation required to achieve the aims of this Regulation. Since those measures are of general scope and are designed to amend non-essential elements of this Regulation, *inter alia* by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.
- (37) Since the objective of this Regulation, namely the setting of fair rules for access conditions to natural gas transmission networks, storage and LNG facilities cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- (38) Given the scope of the amendments that are being made herein to Regulation (EC) No 1775/2005, it is desirable, for reasons of clarity and rationalisation, that the provisions in question should be recast by bringing them all together in a single text in a new Regulation,

HAVE ADOPTED THIS REGULATION:

### Article 1

#### Subject matter and scope

This Regulation aims at:

- (a) setting non-discriminatory rules for access conditions to natural gas transmission systems taking into account the special characteristics of national and regional markets with a view to ensuring the proper functioning of the internal market in gas;
- (b) setting non-discriminatory rules for access conditions to LNG facilities and storage facilities taking into account the special characteristics of national and regional markets; and
- (c) facilitating the emergence of a well-functioning and transparent wholesale market with a high level of security of supply in gas and providing mechanisms to harmonise the network access rules for cross-border exchanges in gas.

The objectives referred to in the first subparagraph shall include the setting of harmonised principles for tariffs, or the methodologies underlying their calculation, for access to the network, but not to storage facilities, the establishment of third-party access services and harmonised principles for capacity-allocation and congestion-management, the determination of transparency requirements, balancing rules and imbalance charges, and the facilitation of capacity trading.

This Regulation, with the exception of Article 19(4), shall apply only to storage facilities falling under Article 33(3) or (4) of Directive 2009/73/EC.

The Member States may establish an entity or body set up in compliance with Directive 2009/73/EC for the purpose of carrying out one or more functions typically attributed to the transmission system operator, which shall be subject to the requirements of this Regulation. That entity or body shall be subject to certification in accordance with Article 3 of this Regulation and shall be subject to designation in accordance with Article 10 of Directive 2009/73/EC.

### Article 2

#### Definitions

1. For the purpose of this Regulation, the following definitions apply:

- 1) 'transmission' means the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply;

<sup>(1)</sup> OJ L 184, 17.7.1999, p. 23.

- 2) 'transport contract' means a contract which the transmission system operator has concluded with a network user with a view to carrying out transmission;
  - 3) 'capacity' means the maximum flow, expressed in normal cubic meters per time unit or in energy unit per time unit, to which the network user is entitled in accordance with the provisions of the transport contract;
  - 4) 'unused capacity' means firm capacity which a network user has acquired under a transport contract but which that user has not nominated by the deadline specified in the contract;
  - 5) 'congestion management' means management of the capacity portfolio of the transmission system operator with a view to optimal and maximum use of the technical capacity and the timely detection of future congestion and saturation points;
  - 6) 'secondary market' means the market of the capacity traded otherwise than on the primary market;
  - 7) 'nomination' means the prior reporting by the network user to the transmission system operator of the actual flow that the network user wishes to inject into or withdraw from the system;
  - 8) 're-nomination' means the subsequent reporting of a corrected nomination;
  - 9) 'system integrity' means any situation in respect of a transmission network including necessary transmission facilities in which the pressure and the quality of the natural gas remain within the minimum and maximum limits laid down by the transmission system operator, so that the transmission of natural gas is guaranteed from a technical standpoint;
  - 10) 'balancing period' means the period within which the off-take of an amount of natural gas, expressed in units of energy, must be offset by every network user by means of the injection of the same amount of natural gas into the transmission network in accordance with the transport contract or the network code;
  - 11) 'network user' means a customer or a potential customer of a transmission system operator, and transmission system operators themselves in so far as it is necessary for them to carry out their functions in relation to transmission;
  - 12) 'interruptible services' means services offered by the transmission system operator in relation to interruptible capacity;
  - 13) 'interruptible capacity' means gas transmission capacity that may be interrupted by the transmission system operator in accordance with the conditions stipulated in the transport contract;
  - 14) 'long-term services' means services offered by the transmission system operator with a duration of one year or more;
  - 15) 'short-term services' means services offered by the transmission system operator with a duration of less than one year;
  - 16) 'firm capacity' means gas transmission capacity contractually guaranteed as uninterruptible by the transmission system operator;
  - 17) 'firm services' mean services offered by the transmission system operator in relation to firm capacity;
  - 18) 'technical capacity' means the maximum firm capacity that the transmission system operator can offer to the network users, taking account of system integrity and the operational requirements of the transmission network;
  - 19) 'contracted capacity' means capacity that the transmission system operator has allocated to a network user by means of a transport contract;
  - 20) 'available capacity' means the part of the technical capacity that is not allocated and is still available to the system at that moment;
  - 21) 'contractual congestion' means a situation where the level of firm capacity demand exceeds the technical capacity;
  - 22) 'primary market' means the market of the capacity traded directly by the transmission system operator;
  - 23) 'physical congestion' means a situation where the level of demand for actual deliveries exceeds the technical capacity at some point in time;
  - 24) 'LNG facility capacity' means capacity at an LNG terminal for the liquefaction of natural gas or the importation, offloading, ancillary services, temporary storage and re-gasification of LNG;
  - 25) 'space' means the volume of gas which a user of a storage facility is entitled to use for the storage of gas;
  - 26) 'deliverability' means the rate at which the storage facility user is entitled to withdraw gas from the storage facility;
  - 27) 'injectability' means the rate at which the storage facility user is entitled to inject gas into the storage facility;
  - 28) 'storage capacity' means any combination of space, injectability and deliverability.
2. Without prejudice to the definitions in paragraph 1 of this Article, the definitions contained in Article 2 of Directive 2009/73/EC, which are relevant for the application of this Regulation, also apply, with the exception of the definition of transmission in point 3 of that Article.
- The definitions in points 3 to 23 of paragraph 1 of this Article in relation to transmission apply by analogy in relation to storage and LNG facilities.

*Article 3***Certification of transmission system operators**

1. The Commission shall examine any notification of a decision on the certification of a transmission system operator as laid down in Article 10(6) of Directive 2009/73/EC as soon as it is received. Within two months of the day of receipt of such notification, the Commission shall deliver its opinion to the relevant national regulatory authority in regard to its compatibility with Article 10(2) or Article 11, and Article 9 of Directive 2009/73/EC.

When preparing the opinion referred to in the first subparagraph, the Commission may request the Agency to provide its opinion on the national regulatory authority's decision. In such a case, the two-month period referred to in the first subparagraph shall be extended by two further months.

In the absence of an opinion by the Commission within the periods referred to in the first and second subparagraphs, the Commission shall be deemed not to raise objections against the regulatory authority's decision.

2. Within two months of receiving an opinion of the Commission, the national regulatory authority shall adopt its final decision regarding the certification of the transmission system operator, taking the utmost account of that opinion. The regulatory authority's decision and the Commission's opinion shall be published together.

3. At any time during the procedure regulatory authorities and/or the Commission may request from a transmission system operator and/or an undertaking performing any of the functions of production or supply any information relevant to the fulfilment of their tasks under this Article.

4. Regulatory authorities and the Commission shall preserve the confidentiality of commercially sensitive information.

5. The Commission may adopt Guidelines setting out the details of the procedure to be followed for the application of paragraphs 1 and 2 of this Article. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 28(2).

6. Where the Commission has received notification of the certification of a transmission system operator under Article 9(10) of Directive 2009/73/EC, the Commission shall take a decision relating to certification. The regulatory authority shall comply with the Commission decision.

*Article 4***European network of transmission system operators for gas**

All transmission system operators shall cooperate at Community level through the ENTSO for Gas, in order to promote the completion and functioning of the internal market in natural gas and cross-border trade and to ensure the optimal management, coordinated operation and sound technical evolution of the natural gas transmission network.

*Article 5***Establishment of the ENTSO for Gas**

1. By 3 March 2011, the transmission system operators for gas shall submit to the Commission and to the Agency the draft statutes, a list of members and draft rules of procedure, including the rules of procedures on the consultation of other stakeholders, of the ENTSO for Gas to be established.

2. Within two months of the day of the receipt, the Agency, after formally consulting the organisations representing all stakeholders, in particular the system users including customers, shall provide an opinion to the Commission on the draft statutes, list of members and draft rules of procedure.

3. The Commission shall deliver an opinion on the draft statutes, list of members and draft rules of procedures taking into account the opinion of the Agency provided for in paragraph 2 and within three months of the day of the receipt of the opinion of the Agency.

4. Within three months of the day of receipt of the Commission's opinion, the transmission system operators shall establish the ENTSO for Gas, adopt and publish its statutes and rules of procedure.

*Article 6***Establishment of network codes**

1. The Commission shall, after consulting the Agency, the ENTSO for Gas and the other relevant stakeholders establish an annual priority list identifying the areas set out in Article 8(6) to be included in the development of network codes.

2. The Commission shall request the Agency to submit to it within a reasonable period of time not exceeding six months a non-binding framework guideline (framework guideline) setting out clear and objective principles, in accordance with Article 8(7), for the development of network codes relating to the areas identified in the priority list. Each framework guideline shall contribute to non-discrimination, effective competition and the efficient functioning of the market. Upon a reasoned request from the Agency, the Commission may extend that period.

3. The Agency shall formally consult the ENTSO for Gas and the other relevant stakeholders in regard to the framework guideline, during a period of no less than two months, in an open and transparent manner.

4. If the Commission considers that the framework guideline does not contribute to non-discrimination, effective competition and the efficient functioning of the market, it may request the Agency to review the framework guideline within a reasonable period of time and re-submit it to the Commission.

5. If the Agency fails to submit or re-submit a framework guideline within the period set by the Commission under paragraphs 2 or 4, the Commission shall elaborate the framework guideline in question.

6. The Commission shall request the ENTSO for Gas to submit a network code which is in line with the relevant framework guideline, to the Agency within a reasonable period of time not exceeding 12 months.

7. Within a period of three months after the day of receipt of a network code, during which the Agency may formally consult the relevant stakeholders, the Agency shall provide a reasoned opinion to the ENTSO for Gas on the network code.

8. The ENTSO for Gas may amend the network code in the light of the opinion of the Agency and re-submit it to the Agency.

9. Once the Agency is satisfied that the network code is in line with the relevant framework guideline, the Agency shall submit the network code to the Commission and may recommend that it be adopted within a reasonable time period. The Commission shall provide reasons in the event that it does not adopt that network code.

10. Where the ENTSO for Gas has failed to develop a network code within the period of time set by the Commission under paragraph 6, the Commission may request the Agency to prepare a draft network code on the basis of the relevant framework guideline. The Agency may launch a further consultation in the course of preparing a draft network code under this paragraph. The Agency shall submit a draft network code prepared under this paragraph to the Commission and may recommend that it be adopted.

11. The Commission may adopt, on its own initiative where the ENTSO for Gas has failed to develop a network code, or the Agency has failed to develop a draft network code as referred to in paragraph 10 of this Article, or upon recommendation of the Agency under paragraph 9 of this Article, one or more network codes in the areas listed in Article 8(6).

Where the Commission proposes to adopt a network code on its own initiative, the Commission shall consult the Agency, the ENTSO for Gas and all relevant stakeholders in regard to the draft network code during a period of no less than two months. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 28(2).

12. This Article shall be without prejudice to the Commission's right to adopt and amend the Guidelines as laid down in Article 23.

#### Article 7

##### Amendments of network codes

1. Draft amendments to any network code adopted under Article 6 may be proposed to the Agency by persons who are likely to have an interest in that network code, including the ENTSO for Gas, transmission system operators, network users and consumers. The Agency may also propose amendments of its own initiative.

2. The Agency shall consult all stakeholders in accordance with Article 10 of Regulation (EC) No 713/2009. Following this process, the Agency may make reasoned proposals for amendments to the Commission, explaining how such proposals are consistent with the objectives of the network codes set out in Article 6(2) of this Regulation.

3. The Commission may adopt, taking account of the Agency's proposals, amendments to any network code adopted under Article 6. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 28(2).

4. Consideration of proposed amendments under the procedure set out in Article 28(2) shall be limited to consideration of the aspects related to the proposed amendment. Those proposed amendments are without prejudice to other amendments which the Commission may propose.

#### Article 8

##### Tasks of the ENTSO for Gas

1. The ENTSO for Gas shall elaborate network codes in the areas referred to in paragraph 6 of this Article upon a request addressed to it by the Commission in accordance with Article 6(6).

2. The ENTSO for Gas may elaborate network codes in the areas set out in paragraph 6 with a view to achieving the objectives set out in Article 4 where those network codes do not relate to areas covered by a request addressed to it by the Commission. Those network codes shall be submitted to the Agency for an opinion. That opinion shall be duly taken into account by the ENTSO for Gas.

3. The ENTSO for Gas shall adopt:

- (a) common network operation tools to ensure coordination of network operation in normal and emergency conditions, including a common incidents classification scale, and research plans;
- (b) a non-binding Community-wide ten-year network development plan (Community-wide network development plan), including a European supply adequacy outlook, every two years;
- (c) recommendations relating to the coordination of technical cooperation between Community and third-country transmission system operators;
- (d) an annual work programme;
- (e) an annual report;
- (f) annual summer and winter supply outlooks.

4. The European supply adequacy outlook referred to in point (b) of paragraph 3 shall cover the overall adequacy of the gas system to supply current and projected demands for gas for the next five-year period as well as for the period between five and 10 years from the date of that outlook. The European supply adequacy outlook shall build on national supply outlooks prepared by each individual transmission system operator.

5. The annual work programme referred to in point (d) of paragraph 3 shall contain a list and description of the network codes to be prepared, a plan on coordination of operation of the network, and research and development activities, to be realised in that year, and an indicative calendar.

6. The network codes referred to in paragraphs 1 and 2 shall cover the following areas, taking into account, if appropriate, regional special characteristics:

- (a) network security and reliability rules;
- (b) network connection rules;
- (c) third-party access rules;
- (d) data exchange and settlement rules;
- (e) interoperability rules;
- (f) operational procedures in an emergency;
- (g) capacity-allocation and congestion-management rules;
- (h) rules for trading related to technical and operational provision of network access services and system balancing;
- (i) transparency rules;
- (j) balancing rules including network-related rules on nominations procedure, rules for imbalance charges and rules for operational balancing between transmission system operators' systems;
- (k) rules regarding harmonised transmission tariff structures; and
- (l) energy efficiency regarding gas networks.

7. The network codes shall be developed for cross-border network issues and market integration issues and shall be without prejudice to the Member States' right to establish national network codes which do not affect cross-border trade.

8. The ENTSO for Gas shall monitor and analyse the implementation of the network codes and the Guidelines adopted by the Commission in accordance with Article 6(11), and their effect on the harmonisation of applicable rules aimed at facilitating market integration. The ENTSO for Gas shall report its findings to the Agency and shall include the results of the analysis in the annual report referred to in point (e) of paragraph 3 of this Article.

9. The ENTSO for Gas shall make available all information required by the Agency to fulfil its tasks under Article 9(1).

10. The ENTSO for Gas shall adopt and publish a Community-wide network development plan referred to in point (b) of paragraph 3 every two years. The Community-wide network development plan shall include the modelling of the integrated network, scenario development, a European supply adequacy outlook and an assessment of the resilience of the system.

The Community-wide network development plan shall, in particular:

- (a) build on national investment plans, taking into account regional investment plans as referred to in Article 12(1), and, if appropriate, Community aspects of network planning, including the guidelines for trans-European energy networks in accordance with Decision No 1364/2006/EC of the European Parliament and of the Council (1);
- (b) regarding cross-border interconnections, also build on the reasonable needs of different network users and integrate long-term commitments from investors referred to in Articles 14 and 22 of Directive 2009/73/EC; and
- (c) identify investment gaps, notably with respect to cross-border capacities.

In regard to point (c) of the second subparagraph, a review of barriers to the increase of cross-border capacity of the network arising from different approval procedures or practices may be annexed to the Community-wide network development plan.

11. The Agency shall review national ten-year network development plans to assess their consistency with the Community-wide network development plan. If the Agency identifies inconsistencies between a national ten-year network development plan and the Community-wide network development plan, it shall recommend amending the national ten-year network development plan or the Community-wide network development plan as appropriate. If such national ten-year network development plan is elaborated in accordance with Article 22 of Directive 2009/73/EC, the Agency shall recommend that the competent national regulatory authority amend the national ten-year network development plan in accordance with Article 22(7) of that Directive and inform the Commission thereof.

12. Upon request of the Commission, the ENTSO for Gas shall give its views to the Commission on the adoption of the Guidelines as laid down in Article 23.

#### Article 9

#### Monitoring by the Agency

1. The Agency shall monitor the execution of the tasks referred to in Article 8(1), (2) and (3) of the ENTSO for Gas and report to the Commission.

(1) OJ L 262, 22.9.2006, p. 1.

The Agency shall monitor the implementation by the ENTSO for Gas of network codes elaborated under Article 8(2) and network codes which have been developed in accordance with Article 6(1) to (10) but which have not been adopted by the Commission under Article 6(11). Where the ENTSO for Gas has failed to implement such network codes, the Agency shall request the ENTSO for Gas to provide a duly reasoned explanation as to why it has failed to do so. The Agency shall inform the Commission of that explanation and provide its opinion thereon.

The Agency shall monitor and analyse the implementation of the network codes and the Guidelines adopted by the Commission as laid down in Article 6(11), and their effect on the harmonisation of applicable rules aimed at facilitating market integration as well as on non-discrimination, effective competition and the efficient functioning of the market, and report to the Commission.

2. The ENTSO for Gas shall submit the draft Community-wide network development plan, the draft annual work programme, including the information regarding the consultation process and the other documents referred to in Article 8(3), to the Agency for its opinion.

Within two months from the day of receipt, the Agency shall provide a duly reasoned opinion as well as recommendations to the ENTSO for Gas and to the Commission where it considers that the draft annual work programme or the draft Community-wide network development plan submitted by the ENTSO for Gas do not contribute to non-discrimination, effective competition, the efficient functioning of the market or a sufficient level of cross-border interconnection open to third-party access.

#### Article 10

##### Consultations

1. While preparing the network codes, the draft Community-wide network development plan and the annual work programme referred to in Article 8(1), (2) and (3), the ENTSO for Gas shall conduct an extensive consultation process, at an early stage and in an open and transparent manner, involving all relevant market participants, and, in particular, the organisations representing all stakeholders, in accordance with the rules of procedure referred to in Article 5(1). That consultation shall also involve national regulatory authorities and other national authorities, supply and production undertakings, network users including customers, distribution system operators, including relevant industry associations, technical bodies and stakeholder platforms. It shall aim at identifying the views and proposals of all relevant parties during the decision-making process.

2. All documents and minutes of meetings related to the consultations referred to in paragraph 1 shall be made public.

3. Before adopting the annual work programme and the network codes referred to in Article 8(1), (2) and (3), the ENTSO for Gas shall indicate how the observations received during the consultation have been taken into consideration. It shall provide reasons where observations have not been taken into account.

#### Article 11

##### Costs

The costs related with the activities of the ENTSO for Gas referred to in Articles 4 to 12 shall be borne by the transmission system operators and shall be taken into account in the calculation of tariffs. Regulatory authorities shall approve those costs only if they are reasonable and proportionate.

#### Article 12

##### Regional cooperation of transmission system operators

1. Transmission system operators shall establish regional cooperation within the ENTSO for Gas to contribute to the tasks referred to in Article 8(1), (2) and (3). In particular, they shall publish a regional investment plan every two years, and may take investment decisions based on that regional investment plan.

2. Transmission system operators shall promote operational arrangements in order to ensure the optimum management of the network and shall promote the development of energy exchanges, the coordinated allocation of cross-border capacity through non-discriminatory market-based solutions, paying due attention to the specific merits of implicit auctions for short-term allocations and the integration of balancing mechanisms.

3. For the purposes of achieving the goals set in paragraphs 1 and 2, the geographical area covered by each regional cooperation structure may be defined by the Commission, taking into account existing regional cooperation structures. Each Member State shall be allowed to promote cooperation in more than one geographical area. The measure referred to in the first sentence, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 28(2).

For that purpose, the Commission shall consult the Agency and the ENTSO for Gas.

#### Article 13

##### Tariffs for access to networks

1. Tariffs, or the methodologies used to calculate them, applied by the transmission system operators and approved by the regulatory authorities pursuant to Article 41(6) of Directive 2009/73/EC, as well as tariffs published pursuant to Article 32(1) of that Directive, shall be transparent, take into account the need for system integrity and its improvement and reflect the actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including an appropriate return on investments, and, where appropriate, taking account of the benchmarking of tariffs by the regulatory authorities. Tariffs, or the methodologies used to calculate them, shall be applied in a non-discriminatory manner.

Member States may decide that tariffs may also be determined through market-based arrangements, such as auctions, provided that such arrangements and the revenues arising therefrom are approved by the regulatory authority.

Tariffs, or the methodologies used to calculate them, shall facilitate efficient gas trade and competition, while at the same time avoiding cross-subsidies between network users and providing incentives for investment and maintaining or creating interoperability for transmission networks.

Tariffs for network users shall be non-discriminatory and set separately for every entry point into or exit point out of the transmission system. Cost-allocation mechanisms and rate setting methodology regarding entry points and exit points shall be approved by the national regulatory authorities. By 3 September 2011, the Member States shall ensure that, after a transitional period, network charges shall not be calculated on the basis of contract paths.

2. Tariffs for network access shall neither restrict market liquidity nor distort trade across borders of different transmission systems. Where differences in tariff structures or balancing mechanisms would hamper trade across transmission systems, and notwithstanding Article 41(6) of Directive 2009/73/EC, transmission system operators shall, in close cooperation with the relevant national authorities, actively pursue convergence of tariff structures and charging principles, including in relation to balancing.

#### Article 14

##### **Third-party access services concerning transmission system operators**

1. Transmission system operators shall:
  - (a) ensure that they offer services on a non-discriminatory basis to all network users;
  - (b) provide both firm and interruptible third-party access services. The price of interruptible capacity shall reflect the probability of interruption;
  - (c) offer to network users both long and short-term services.

In regard to point (a) of the first subparagraph, where a transmission system operator offers the same service to different customers, it shall do so under equivalent contractual terms and conditions, either using harmonised transport contracts or a common network code approved by the competent authority in accordance with the procedure laid down in Article 41 of Directive 2009/73/EC.

2. Transport contracts signed with non-standard start dates or with a shorter duration than a standard annual transport contract shall not result in arbitrarily higher or lower tariffs that do not reflect the market value of the service, in accordance with the principles laid down in Article 13(1).

3. Where appropriate, third-party access services may be granted subject to appropriate guarantees from network users with respect to the creditworthiness of such users. Such guarantees shall not constitute undue market-entry barriers and shall be non-discriminatory, transparent and proportionate.

#### Article 15

##### **Third-party access services concerning storage and LNG facilities**

1. LNG and storage system operators shall:
  - (a) offer services on a non-discriminatory basis to all network users that accommodate market demand; in particular, where an LNG or storage system operator offers the same service to different customers, it shall do so under equivalent contractual terms and conditions;
  - (b) offer services that are compatible with the use of the interconnected gas transport systems and facilitate access through cooperation with the transmission system operator; and
  - (c) make relevant information public, in particular data on the use and availability of services, in a time-frame compatible with the LNG or storage facility users' reasonable commercial needs, subject to the monitoring of such publication by the national regulatory authority.
2. Each storage system operator shall:
  - (a) provide both firm and interruptible third-party access services; the price of interruptible capacity shall reflect the probability of interruption;
  - (b) offer to storage facility users both long and short-term services; and
  - (c) offer to storage facility users both bundled and unbundled services of storage space, injectability and deliverability.
3. LNG and storage facility contracts shall not result in arbitrarily higher tariffs in cases in which they are signed:
  - (a) outside a natural gas year with non-standard start dates; or
  - (b) with a shorter duration than a standard LNG and storage facility contract on an annual basis.
4. Where appropriate, third-party access services may be granted subject to appropriate guarantees from network users with respect to the creditworthiness of such users. Such guarantees shall not constitute undue market-entry barriers and shall be non-discriminatory, transparent and proportionate.

5. Contractual limits on the required minimum size of LNG facility capacity and storage capacity shall be justified on the basis of technical constraints and shall permit smaller storage users to gain access to storage services.

#### Article 16

##### **Principles of capacity-allocation mechanisms and congestion-management procedures concerning transmission system operators**

1. The maximum capacity at all relevant points referred to in Article 18(3) shall be made available to market participants, taking into account system integrity and efficient network operation.
2. The transmission system operator shall implement and publish non-discriminatory and transparent capacity-allocation mechanisms, which shall:
  - (a) provide appropriate economic signals for the efficient and maximum use of technical capacity, facilitate investment in new infrastructure and facilitate cross-border exchanges in natural gas;
  - (b) be compatible with the market mechanisms including spot markets and trading hubs, while being flexible and capable of adapting to evolving market circumstances; and
  - (c) be compatible with the network access systems of the Member States.
3. The transmission system operator shall implement and publish non-discriminatory and transparent congestion-management procedures which facilitate cross-border exchanges in natural gas on a non-discriminatory basis and which shall be based on the following principles:
  - (a) in the event of contractual congestion, the transmission system operator shall offer unused capacity on the primary market at least on a day-ahead and interruptible basis; and
  - (b) network users who wish to re-sell or sublet their unused contracted capacity on the secondary market shall be entitled to do so.

In regard to point (b) of the first subparagraph, a Member State may require notification or information of the transmission system operator by network users.

4. In the event that physical congestion exists, non-discriminatory, transparent capacity-allocation mechanisms shall be applied by the transmission system operator or, as appropriate, by the regulatory authorities.

5. Transmission system operators shall regularly assess market demand for new investment. When planning new investments, transmission system operators shall assess market demand and take into account security of supply.

#### Article 17

##### **Principles of capacity-allocation mechanisms and congestion-management procedures concerning storage and LNG facilities**

1. The maximum storage and LNG facility capacity shall be made available to market participants, taking into account system integrity and operation.
2. LNG and storage system operators shall implement and publish non-discriminatory and transparent capacity-allocation mechanisms which shall:
  - (a) provide appropriate economic signals for the efficient and maximum use of capacity and facilitate investment in new infrastructure;
  - (b) be compatible with the market mechanism including spot markets and trading hubs, while being flexible and capable of adapting to evolving market circumstances; and
  - (c) be compatible with the connected network access systems.
3. LNG and storage facility contracts shall include measures to prevent capacity-hoarding, by taking into account the following principles, which shall apply in cases of contractual congestion:
  - (a) the system operator must offer unused LNG facility and storage capacity on the primary market without delay; for storage facilities this must be at least on a day-ahead and interruptible basis;
  - (b) LNG and storage facility users who wish to re-sell their contracted capacity on the secondary market must be entitled to do so.

#### Article 18

##### **Transparency requirements concerning transmission system operators**

1. The transmission system operator shall make public detailed information regarding the services it offers and the relevant conditions applied, together with the technical information necessary for network users to gain effective network access.
2. In order to ensure transparent, objective and non-discriminatory tariffs and facilitate efficient utilisation of the gas network, transmission system operators or relevant national authorities shall publish reasonably and sufficiently detailed information on tariff derivation, methodology and structure.
3. For the services provided, each transmission system operator shall make public information on technical, contracted and available capacities on a numerical basis for all relevant points including entry and exit points on a regular and rolling basis and in a user-friendly and standardised manner.



4. The relevant points of a transmission system on which the information is to be made public shall be approved by the competent authorities after consultation with network users.

5. The transmission system operator shall always disclose the information required by this Regulation in a meaningful, quantifiably clear and easily accessible manner and on a non-discriminatory basis.

6. The transmission system operator shall make public *ex-ante* and *ex-post* supply and demand information, based on nominations, forecasts and realised flows in and out of the system. The national regulatory authority shall ensure that all such information is made public. The level of detail of the information that is made public shall reflect the information available to the transmission system operator.

The transmission system operator shall make public measures taken as well as costs incurred and revenue generated to balance the system.

The market participants concerned shall provide the transmission system operator with the data referred to in this Article.

#### Article 19

##### Transparency requirements concerning storage facilities and LNG facilities

1. LNG and storage system operators shall make public detailed information regarding the services it offers and the relevant conditions applied, together with the technical information necessary for LNG and storage facility users to gain effective access to the LNG and storage facilities.

2. For the services provided, LNG and storage system operators shall make public information on contracted and available storage and LNG facility capacities on a numerical basis on a regular and rolling basis and in a user-friendly standardised manner.

3. LNG and storage system operators shall always disclose the information required by this Regulation in a meaningful, quantifiably clear and easily accessible way and on a non-discriminatory basis.

4. LNG and storage system operators shall make public the amount of gas in each storage or LNG facility, or group of storage facilities if that corresponds to the way in which the access is offered to system users, inflows and outflows, and the available storage and LNG facility capacities, including for those facilities exempted from third-party access. That information shall also be communicated to the transmission system operator, which shall make it public on an aggregated level per system or subsystem defined by the relevant points. The information shall be updated at least daily.

In cases in which a storage system user is the only user of a storage facility, the storage system user may submit to the national regulatory authority a reasoned request for confidential treatment of the data referred to in the first subparagraph. Where the national regulatory authority comes to the conclusion that such a request is justified, taking into account, in particular, the need to balance the interest of legitimate protection of business secrets, the disclosure of which would negatively affect the overall commercial strategy of the storage user, with the objective of creating a competitive internal gas market, it may allow the storage system operator not to make public the data referred to in the first subparagraph, for a duration of up to one year.

The second subparagraph shall apply without prejudice to the obligations of communication to and publication by the transmission system operator referred to in the first subparagraph, unless the aggregated data are identical to the individual storage system data for which the national regulatory authority has approved non-publication.

5. In order to ensure transparent, objective and non-discriminatory tariffs and facilitate efficient utilisation of the infrastructures, the LNG and storage facility operators or relevant regulatory authorities shall make public sufficiently detailed information on tariff derivation, the methodologies and the structure of tariffs for infrastructure under regulated third-party access.

#### Article 20

##### Record keeping by system operators

Transmission system operators, storage system operators and LNG system operators shall keep at the disposal of the national authorities, including the national regulatory authority, the national competition authority and the Commission, all information referred to in Articles 18 and 19, and in Part 3 of Annex I for a period of five years.

#### Article 21

##### Balancing rules and imbalance charges

1. Balancing rules shall be designed in a fair, non-discriminatory and transparent manner and shall be based on objective criteria. Balancing rules shall reflect genuine system needs taking into account the resources available to the transmission system operator. Balancing rules shall be market-based.

2. In order to enable network users to take timely corrective action, the transmission system operator shall provide sufficient, well-timed and reliable on-line based information on the balancing status of network users.

The information provided shall reflect the level of information available to the transmission system operator and the settlement period for which imbalance charges are calculated.

No charge shall be made for the provision of information under this paragraph.

3. Imbalance charges shall be cost-reflective to the extent possible, whilst providing appropriate incentives on network users to balance their input and off-take of gas. They shall avoid cross-subsidisation between network users and shall not hamper the entry of new market entrants.

Any calculation methodology for imbalance charges as well as the final tariffs shall be made public by the competent authorities or the transmission system operator, as appropriate.

4. Member States shall ensure that transmission system operators endeavour to harmonise balancing regimes and streamline structures and levels of balancing charges in order to facilitate gas trade.

#### Article 22

### Trading of capacity rights

Each transmission, storage and LNG system operator shall take reasonable steps to allow capacity rights to be freely tradable and to facilitate such trade in a transparent and non-discriminatory manner. Every such operator shall develop harmonised transport, LNG facility and storage contracts and procedures on the primary market to facilitate secondary trade of capacity and shall recognise the transfer of primary capacity rights where notified by system users.

The harmonised transport, LNG facility and storage contracts and procedures shall be notified to the regulatory authorities.

#### Article 23

### Guidelines

1. Where appropriate, Guidelines providing the minimum degree of harmonisation required to achieve the aims of this Regulation shall specify:

- (a) details of third-party access services, including the character, duration and other requirements of those services, in accordance with Articles 14 and 15;
- (b) details of the principles underlying capacity-allocation mechanisms and on the application of congestion-management procedures in the event of contractual congestion, in accordance with Articles 16 and 17;
- (c) details of the provision of information, definition of the technical information necessary for network users to gain effective access to the system and the definition of all relevant points for transparency requirements, including the information to be published at all relevant points and the time schedule for the publication of that information, in accordance with Articles 18 and 19;
- (d) details of tariff methodology related to cross-border trade of natural gas, in accordance with Article 13;

(e) details relating to the areas listed in Article 8(6).

For that purpose, the Commission shall consult the Agency and the ENTSO for Gas.

2. Guidelines on the issues listed in points (a), (b) and (c) of paragraph 1 are laid down in Annex I with respect to transmission system operators.

The Commission may adopt Guidelines on the issues listed in paragraph 1 of this Article and amend the Guidelines referred to in points (a), (b) and (c) thereof. Those measures, designed to amend non-essential elements of this Regulation, inter alia by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 28(2).

3. The application and amendment of Guidelines adopted pursuant to this Regulation shall reflect differences between national gas systems, and shall, therefore, not require uniform detailed terms and conditions of third-party access at Community level. They may, however, set minimum requirements to be met to achieve non-discriminatory and transparent network access conditions necessary for an internal market in natural gas, which may then be applied in the light of differences between national gas systems.

#### Article 24

### Regulatory authorities

When carrying out their responsibilities under this Regulation, the regulatory authorities shall ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 23.

Where appropriate, they shall cooperate with each other, with the Commission and the Agency in compliance with Chapter VIII of Directive 2009/73/EC.

#### Article 25

### Provision of information

Member States and the regulatory authorities shall, on request, provide to the Commission all information necessary for the purposes of Article 23.

The Commission shall set a reasonable time limit within which the information is to be provided, taking into account the complexity of the information required and the urgency with which the information is needed.

#### Article 26

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

This Regulation shall be without prejudice to the rights of Member States to maintain or introduce measures that contain more detailed provisions than those set out herein or in the Guidelines referred to in Article 23.

*Article 27***Penalties**

1. The Member States shall lay down rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that those provisions are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify the Commission by 1 July 2006 of those rules corresponding to the provisions laid down in Regulation (EC) No 1775/2005 and shall notify the Commission without delay of any subsequent amendment affecting them. They shall notify the Commission of those rules not corresponding to the provisions laid down in Regulation (EC) No 1775/2005 by 3 September 2009 and shall notify the Commission without delay of any subsequent amendment affecting them.

2. Penalties provided for pursuant to paragraph 1 shall not be of a criminal law nature.

*Article 28***Committee procedure**

1. The Commission shall be assisted by the committee set up by Article 51 of Directive 2009/73/EC.

2. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

*Article 29***Commission report**

The Commission shall monitor the implementation of this Regulation. In its report under Article 52(6) of Directive 2009/73/EC, the Commission shall also report on the experience gained in the application of this Regulation. In particular, the report shall examine to what extent this Regulation has been successful in ensuring non-discriminatory and cost-reflective network access conditions for gas transmission networks in order to contribute to customer choice in a well-functioning internal market and to long-term security of supply. If necessary, the report shall be accompanied by appropriate proposals and/or recommendations.

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

Done at Brussels, 13 July 2009.

*For the European Parliament*  
The President  
H.-G. PÖTTERING

*Article 30***Derogations and exemptions**

This Regulation shall not apply to:

- (a) natural gas transmission systems situated in Member States for the duration of derogations granted under Article 49 of Directive 2009/73/EC;
- (b) major new infrastructure, i.e. interconnectors, LNG and storage facilities, and significant increases of capacity in existing infrastructure and modifications of such infrastructure which enable the development of new sources of gas supply referred to in Article 36(1) and (2) of Directive 2009/73/EC which are exempt from the provisions of Articles 9, 14, 32, 33, 34 or Article 41(6), (8) and (10) of that Directive as long as they are exempt from the provisions referred to in this subparagraph, with the exception of Article 19(4) of this Regulation; or
- (c) natural gas transmission systems which have been granted derogations under Article 48 of Directive 2009/73/EC.

As regards point (a) of the first subparagraph, Member States that have been granted derogations under Article 49 of Directive 2009/73/EC may apply to the Commission for a temporary derogation from the application of this Regulation, for a period of up to two years from the date on which the derogation referred to in that point expires.

*Article 31***Repeal**

Regulation (EC) No 1775/2005 shall be repealed from 3 March 2011. References made to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.

*Article 32***Entry into force**

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

It shall apply from 3 September 2009.

*For the Council*  
The President  
E. ERLANDSSON

## ANNEX I

## GUIDELINES ON

**1. Third-party access services concerning transmission system operators**

1. Transmission system operators shall offer firm and interruptible services down to a minimum period of one day.
2. Harmonised transport contracts and common network codes shall be designed in a manner that facilitates trading and re-utilisation of capacity contracted by network users without hampering capacity release.
3. Transmission system operators shall develop network codes and harmonised contracts following proper consultation with network users.
4. Transmission system operators shall implement standardised nomination and re-nomination procedures. They shall develop information systems and electronic communication means to provide adequate data to network users and to simplify transactions, such as nominations, capacity contracting and transfer of capacity rights between network users.
5. Transmission system operators shall harmonise formalised request procedures and response times according to best industry practice with the aim of minimising response times. They shall provide for online screen-based capacity booking and confirmation systems and nomination and re-nomination procedures no later than 1 July 2006 after consultation with the relevant network users.
6. Transmission system operators shall not separately charge network users for information requests and transactions associated with their transport contracts and which are carried out according to standard rules and procedures.
7. Information requests that require extraordinary or excessive expenses such as feasibility studies may be charged separately, provided the charges can be duly substantiated.
8. Transmission system operators shall cooperate with other transmission system operators in coordinating the maintenance of their respective networks in order to minimise any disruption of transmission services to network users and transmission system operators in other areas and in order to ensure equal benefits with respect to security of supply including in relation to transit.
9. Transmission system operators shall publish at least annually, by a predetermined deadline, all planned maintenance periods that might affect network users' rights from transport contracts and corresponding operational information with adequate advance notice. This shall include publishing on a prompt and non-discriminatory basis any changes to planned maintenance periods and notification of unplanned maintenance, as soon as that information becomes available to the transmission system operator. During maintenance periods, transmission system operators shall publish regularly updated information on the details of and expected duration and effect of the maintenance.
10. Transmission system operators shall maintain and make available to the competent authority upon request a daily log of the actual maintenance and flow disruptions that have occurred. Information shall also be made available on request to those affected by any disruption.

**2. Principles of capacity-allocation mechanisms and congestion-management procedures concerning transmission system operators and their application in the event of contractual congestion**

- 2.1. *Principles of capacity-allocation mechanisms and congestion-management procedures concerning transmission system operators*
  1. Capacity-allocation mechanisms and congestion-management procedures shall facilitate the development of competition and liquid trading of capacity and shall be compatible with market mechanisms including spot markets and trading hubs. They shall be flexible and capable of adapting to evolving market circumstances.
  2. Those mechanisms and procedures shall take into account the integrity of the system concerned as well as security of supply.

3. Those mechanisms and procedures shall neither hamper the entry of new market participants nor create undue barriers to market entry. They shall not prevent market participants, including new market entrants and companies with a small market share, from competing effectively.
4. Those mechanisms and procedures shall provide appropriate economic signals for efficient and maximum use of technical capacity and facilitate investment in new infrastructure.
5. Network users shall be advised about the type of circumstance that could affect the availability of contracted capacity. Information on interruption should reflect the level of information available to the transmission system operator.
6. Should difficulties in meeting contractual delivery obligations arise due to system integrity reasons, transmission system operators should notify network users and seek a non-discriminatory solution without delay.

Transmission system operators shall consult network users regarding procedures prior to their implementation and agree them with the regulatory authority.

#### 2.2. Congestion-management procedures in the event of contractual congestion

1. In the event that contracted capacity goes unused, transmission system operators shall make that capacity available on the primary market on an interruptible basis via contracts of differing duration, as long as that capacity is not offered by the relevant network user on the secondary market at a reasonable price.
  2. Revenues from released interruptible capacity shall be split according to rules laid down or approved by the relevant regulatory authority. Those rules shall be compatible with the requirement of an effective and efficient use of the system.
  3. A reasonable price for released interruptible capacity may be determined by the relevant regulatory authorities taking into account the specific circumstances prevailing.
  4. Where appropriate, transmission system operators shall make reasonable endeavours to offer at least parts of the unused capacity to the market as firm capacity.
3. **Definition of the technical information necessary for network users to gain effective access to the system, the definition of all relevant points for transparency requirements and the information to be published at all relevant points and the time schedule according to which that information shall be published**

#### 3.1. Definition of the technical information necessary for network users to gain effective access to the system

Transmission system operators shall publish at least the following information about their systems and services:

- (a) a detailed and comprehensive description of the different services offered and their charges;
- (b) the different types of transport contracts available for those services and, as applicable, the network code and/or the standard conditions outlining the rights and responsibilities of all network users including harmonised transport contracts and other relevant documents;
- (c) the harmonised procedures applied when using the transmission system, including the definition of key terms;
- (d) provisions on capacity allocation, congestion management, and anti-hoarding and re-utilisation procedures;
- (e) the rules applicable to capacity trade on the secondary market as regards the transmission system operator;
- (f) if applicable, the flexibility and tolerance levels included in transport and other services without separate charge, as well as any flexibility offered in addition thereto and the corresponding charges;

- (g) a detailed description of the gas system of the transmission system operator indicating all relevant points interconnecting its system with that of other transmission system operators and/or gas infrastructure such as liquefied natural gas (LNG) and infrastructure necessary for providing ancillary services as defined by Article 2 point 14 of Directive 2009/73/EC;
- (h) information on gas quality and pressure requirements;
- (i) the rules applicable for connection to the system operated by the transmission system operator;
- (j) any information, in a timely manner, as regards proposed and/or actual changes to the services or conditions, including the items listed in points (a) to (i).

### 3.2. *Definition of all relevant points for transparency requirements*

Relevant points shall include at least:

- (a) all entry points to a network operated by a transmission system operator;
- (b) the most important exit points and exit zones covering at least 50 % of total exit capacity of the network of a given transmission system operator, including all exit points or exit zones covering more than 2 % of total exit capacity of the network;
- (c) all points connecting different networks of transmission system operators;
- (d) all points connecting the network of a transmission system operator with an LNG terminal;
- (e) all essential points within the network of a given transmission system operator including points connecting to gas hubs. All points are considered essential which, based on experience, are likely to experience physical congestion;
- (f) all points connecting the network of a given transmission system operator to infrastructure necessary for providing ancillary services as defined by Article 2, point 14 of Directive 2009/73/EC.

### 3.3. *Information to be published at all relevant points and the time schedule according to which that information should be published*

1. At all relevant points, transmission system operators shall publish the following information about the capacity situation down to daily periods on the Internet on a regular/rolling basis and in a user-friendly standardised manner:
  - (a) the maximum technical capacity for flows in both directions;
  - (b) the total contracted and interruptible capacity; and
  - (c) the available capacity.
2. For all relevant points, transmission system operators shall publish available capacities for a period of at least 18 months ahead and shall update that information at least every month or more frequently, if new information becomes available.
3. Transmission system operators shall publish daily updates of availability of short-term services (day-ahead and week-ahead) based, inter alia, on nominations, prevailing contractual commitments and regular long-term forecasts of available capacities on an annual basis for up to ten years for all relevant points.
4. Transmission system operators shall publish historical maximum and minimum monthly capacity utilisation rates and annual average flows at all relevant points for the past three years on a rolling basis.
5. Transmission system operators shall keep a daily log of actual aggregated flows for at least three months.
6. Transmission system operators shall keep effective records of all capacity contracts and all other relevant information in relation to calculating and providing access to available capacities, to which relevant national authorities shall have access to fulfil their duties.

7. Transmission system operators shall provide user-friendly instruments for calculating tariffs for the services available and for verifying on-line the capacity available.
  8. Where transmission system operators are unable to publish information in accordance with points 1, 3 and 7, they shall consult their relevant national authorities and set up an action plan for implementation as soon as possible, but no later than 31 December 2006.
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## ANNEX II

## CORRELATION TABLE

| Regulation (EC) No 1775/2005 | This Regulation |
|------------------------------|-----------------|
| Article 1                    | Article 1       |
| Article 2                    | Article 2       |
| —                            | Article 3       |
| —                            | Article 4       |
| —                            | Article 5       |
| —                            | Article 6       |
| —                            | Article 7       |
| —                            | Article 8       |
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## DIRECTIVES

## DIRECTIVE 2009/72/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 13 July 2009

concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the Committee of the Regions <sup>(2)</sup>,

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

Whereas:

- (1) The internal market in electricity, which has been progressively implemented throughout the Community since 1999, aims to deliver real choice for all consumers of the European Union, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices, and higher standards of service, and to contribute to security of supply and sustainability.
- (2) Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity <sup>(4)</sup> has made a significant contribution towards the creation of such an internal market in electricity.
- (3) The freedoms which the Treaty guarantees the citizens of the Union — inter alia, the free movement of goods, the

freedom of establishment and the freedom to provide services — are achievable only in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.

- (4) However, at present, there are obstacles to the sale of electricity on equal terms and without discrimination or disadvantages in the Community. In particular, non-discriminatory network access and an equally effective level of regulatory supervision in each Member State do not yet exist.
- (5) A secure supply of electricity is of vital importance for the development of European society, the implementation of a sustainable climate change policy, and the fostering of competitiveness within the internal market. To that end, cross-border interconnections should be further developed in order to secure the supply of all energy sources at the most competitive prices to consumers and industry within the Community.
- (6) A well-functioning internal market in electricity should provide producers with the appropriate incentives for investing in new power generation, including in electricity from renewable energy sources, paying special attention to the most isolated countries and regions in the Community's energy market. A well-functioning market should also provide consumers with adequate measures to promote the more efficient use of energy for which a secure supply of energy is a precondition.
- (7) The Communication of the Commission of 10 January 2007 entitled 'An Energy Policy for Europe' highlighted the importance of completing the internal market in electricity and of creating a level playing field for all electricity undertakings established in the Community. The Communications of the Commission of 10 January 2007 entitled 'Prospects for the internal gas and electricity market' and 'Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)' showed that the present rules and measures do not provide the necessary framework for achieving the objective of a well-functioning internal market.

<sup>(1)</sup> OJ C 211, 19.8.2008, p. 23.

<sup>(2)</sup> OJ C 172, 5.7.2008, p. 55.

<sup>(3)</sup> Opinion of the European Parliament of 18 June 2008 (not yet published in the Official Journal), Council Common Position of 9 January 2009 (OJ C 70 E, 24.3.2009, p. 1) and Position of the European Parliament of 22 April 2009 (not yet published in the Official Journal). Council Decision of 25 June 2009.

<sup>(4)</sup> OJ L 176, 15.7.2003, p. 37.

- (8) In order to secure competition and the supply of electricity at the most competitive price, Member States and national regulatory authorities should facilitate cross-border access for new suppliers of electricity from different energy sources as well as for new providers of power generation.
- (9) Without effective separation of networks from activities of generation and supply (effective unbundling), there is an inherent risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks.
- (10) The rules on legal and functional unbundling as provided for in Directive 2003/54/EC have not, however, led to effective unbundling of the transmission system operators. At its meeting on 8 and 9 March 2007, the European Council therefore invited the Commission to develop legislative proposals for the 'effective separation of supply and generation activities from network operations'.
- (11) Only the removal of the incentive for vertically integrated undertakings to discriminate against competitors as regards network access and investment can ensure effective unbundling. Ownership unbundling, which implies the appointment of the network owner as the system operator and its independence from any supply and production interests, is clearly an effective and stable way to solve the inherent conflict of interests and to ensure security of supply. For that reason, the European Parliament, in its resolution of 10 July 2007 on prospects for the internal gas and electricity market <sup>(1)</sup> referred to ownership unbundling at transmission level as the most effective tool by which to promote investments in infrastructure in a non-discriminatory way, fair access to the network for new entrants and transparency in the market. Under ownership unbundling, Member States should therefore be required to ensure that the same person or persons are not entitled to exercise control over a generation or supply undertaking and, at the same time, exercise control or any right over a transmission system operator or transmission system. Conversely, control over a transmission system or transmission system operator should preclude the possibility of exercising control or any right over a generation or supply undertaking. Within those limits, a generation or supply undertaking should be able to have a minority shareholding in a transmission system operator or transmission system.
- (12) Any system for unbundling should be effective in removing any conflict of interests between producers, suppliers and transmission system operators, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime and should not create an overly onerous regulatory regime for national regulatory authorities.
- (13) The definition of the term 'control' is taken from Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) <sup>(2)</sup>.
- (14) Since ownership unbundling requires, in some instances, the restructuring of undertakings, Member States that decide to implement ownership unbundling should be granted additional time to apply the relevant provisions. In view of the vertical links between the electricity and gas sectors, the unbundling provisions should apply across the two sectors.
- (15) Under ownership unbundling, to ensure full independence of network operation from supply and generation interests and to prevent exchanges of any confidential information, the same person should not be a member of the managing boards of both a transmission system operator or a transmission system and an undertaking performing any of the functions of generation or supply. For the same reason, the same person should not be entitled to appoint members of the managing boards of a transmission system operator or a transmission system and to exercise control or any right over a generation or supply undertaking.
- (16) The setting up of a system operator or a transmission operator that is independent from supply and generation interests should enable a vertically integrated undertaking to maintain its ownership of network assets whilst ensuring effective separation of interests, provided that such independent system operator or such independent transmission operator performs all the functions of a system operator and detailed regulation and extensive regulatory control mechanisms are put in place.
- (17) Where, on 3 September 2009, an undertaking owning a transmission system is part of a vertically integrated undertaking, Member States should therefore be given a choice between ownership unbundling and setting up a system operator or transmission operator which is independent from supply and generation interests.
- (18) To preserve fully the interests of the shareholders of vertically integrated undertakings, Member States should have the choice of implementing ownership unbundling either by direct divestiture or by splitting the shares of the integrated undertaking into shares of the network undertaking and shares of the remaining supply and generation undertaking, provided that the requirements resulting from ownership unbundling are complied with.

<sup>(1)</sup> OJ C 175 E, 10.7.2008, p. 206.

<sup>(2)</sup> OJ L 24, 29.1.2004, p. 1.

- (19) The full effectiveness of the independent system operator or independent transmission operator solutions should be ensured by way of specific additional rules. The rules on the independent transmission operator provide an appropriate regulatory framework to guarantee fair competition, sufficient investment, access for new market entrants and the integration of electricity markets. Effective unbundling through the independent transmission operator provisions should be based on a pillar of organisational measures and measures relating to the governance of transmission system operators and on a pillar of measures relating to investment, connecting new production capacities to the network and market integration through regional cooperation. The independence of the transmission operator should also, *inter alia*, be ensured through certain 'cooling-off' periods during which no management or other relevant activity giving access to the same information as could have been obtained in a managerial position is exercised in the vertically integrated undertaking. The independent transmission operator model of effective unbundling is in line with the requirements laid down by the European Council at its meeting on 8 and 9 March 2007.
- (20) In order to develop competition in the internal market in electricity, large non-household customers should be able to choose their suppliers and enter into contracts with several suppliers to secure their electricity requirements. Such customers should be protected against exclusivity clauses the effect of which is to exclude competing or complementary offers.
- (21) A Member State has the right to opt for full ownership unbundling in its territory. Where a Member State has exercised that right, an undertaking does not have the right to set up an independent system operator or an independent transmission operator. Furthermore, an undertaking performing any of the functions of generation or supply cannot directly or indirectly exercise control or any right over a transmission system operator from a Member State that has opted for full ownership unbundling.
- (22) Under this Directive different types of market organisation will exist in the internal market in electricity. The measures that Member States could take in order to ensure a level playing field should be based on overriding requirements of general interest. The Commission should be consulted on the compatibility of the measures with the Treaty and Community law.
- (23) The implementation of effective unbundling should respect the principle of non-discrimination between the public and private sectors. To that end, the same person should not be able to exercise control or any right, in violation of the rules of ownership unbundling or the independent system operator option, solely or jointly, over the composition, voting or decision of the bodies of both the transmission system operators or the transmission systems and the generation or supply undertakings. With regard to ownership unbundling and the independent system operator solution, provided that the Member State in question is able to demonstrate that the requirement is complied with, two separate public bodies should be able to control generation and supply activities on the one hand and transmission activities on the other.
- (24) Fully effective separation of network activities from supply and generation activities should apply throughout the Community to both Community and non-Community undertakings. To ensure that network activities and supply and generation activities throughout the Community remain independent from each other, regulatory authorities should be empowered to refuse certification to transmission system operators that do not comply with the unbundling rules. To ensure the consistent application of those rules across the Community, the regulatory authorities should take utmost account of the Commission's opinion when the former take decisions on certification. To ensure, in addition, respect for the international obligations of the Community, and solidarity and energy security within the Community, the Commission should have the right to give an opinion on certification in relation to a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries.
- (25) The security of energy supply is an essential element of public security and is therefore inherently connected to the efficient functioning of the internal market in electricity and the integration of the isolated electricity markets of Member States. Electricity can reach the citizens of the Union only through the network. Functioning electricity markets and, in particular, the networks and other assets associated with electricity supply are essential for public security, for the competitiveness of the economy and for the well-being of the citizens of the Union. Persons from third countries should therefore be allowed to control a transmission system or a transmission system operator only if they comply with the requirements of effective separation that apply inside the Community. Without prejudice to the international obligations of the Community, the Community considers that the electricity transmission system sector is of high importance to the Community and therefore additional safeguards are necessary regarding the preservation of the security of supply of energy to the Community to avoid any threats to public order and public security in the Community and the welfare of the citizens of the Union. The security of supply of energy to the Community requires, in particular, an assessment of the independence of network operation, the level of the Community's and individual Member States' dependence on energy supply from third countries, and the treatment of both domestic and foreign trade and investment in energy in a particular third country. Security of supply

should therefore be assessed in the light of the factual circumstances of each case as well as the rights and obligations arising under international law, in particular the international agreements between the Community and the third country concerned. Where appropriate the Commission is encouraged to submit recommendations to negotiate relevant agreements with third countries addressing the security of supply of energy to the Community or to include the necessary issues in other negotiations with those third countries.

- (26) Non-discriminatory access to the distribution network determines downstream access to customers at retail level. The scope for discrimination as regards third-party access and investment, however, is less significant at distribution level than at transmission level where congestion and the influence of generation or supply interests are generally greater than at distribution level. Moreover, legal and functional unbundling of distribution system operators was required, pursuant to Directive 2003/54/EC, only from 1 July 2007 and its effects on the internal market in electricity still need to be evaluated. The rules on legal and functional unbundling currently in place can lead to effective unbundling provided they are more clearly defined, properly implemented and closely monitored. To create a level playing field at retail level, the activities of distribution system operators should therefore be monitored so that they are prevented from taking advantage of their vertical integration as regards their competitive position on the market, in particular in relation to household and small non-household customers.
- (27) Member States should encourage the modernisation of distribution networks, such as through the introduction of smart grids, which should be built in a way that encourages decentralised generation and energy efficiency.
- (28) In the case of small systems it may be necessary that the provision of ancillary services is ensured by transmission system operators interconnected with small systems.
- (29) To avoid imposing a disproportionate financial and administrative burden on small distribution system operators, Member States should be able, where necessary, to exempt the undertakings concerned from the legal distribution unbundling requirements.
- (30) Where a closed distribution system is used to ensure the optimal efficiency of an integrated energy supply requiring specific operational standards, or a closed distribution system is maintained primarily for the use of the owner of the system, it should be possible to exempt the distribution system operator from obligations which would

constitute an unnecessary administrative burden because of the particular nature of the relationship between the distribution system operator and the users of the system. Industrial, commercial or shared services sites such as train station buildings, airports, hospitals, large camping sites with integrated facilities or chemical industry sites can include closed distribution systems because of the specialised nature of their operations.

- (31) Authorisation procedures should not lead to an administrative burden disproportionate to the size and potential impact of electricity producers. Unduly lengthy authorisation procedures may constitute a barrier to access for new market entrants.
- (32) Further measures should be taken in order to ensure transparent and non-discriminatory tariffs for access to networks. Those tariffs should be applicable to all system users on a non-discriminatory basis.
- (33) Directive 2003/54/EC introduced a requirement for Member States to establish regulators with specific competences. However, experience shows that the effectiveness of regulation is frequently hampered through a lack of independence of regulators from government, and insufficient powers and discretion. For that reason, at its meeting on 8 and 9 March 2007, the European Council invited the Commission to develop legislative proposals providing for further harmonisation of the powers and strengthening of the independence of national energy regulators. It should be possible for those national regulatory authorities to cover both the electricity and the gas sectors.
- (34) Energy regulators need to be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly, and to be fully independent from any other public or private interests. This precludes neither judicial review nor parliamentary supervision in accordance with the constitutional laws of the Member States. In addition, approval of the budget of the regulator by the national legislator does not constitute an obstacle to budgetary autonomy. The provisions relating to the autonomy in the implementation of the allocated budget of the regulatory authority should be implemented in the framework defined by national budgetary law and rules. While contributing to the independence of the national regulatory authority from any political or economic interest through an appropriate rotation scheme, it should be possible for Member States to take due account of the availability of human resources and of the size of the board.
- (35) 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 electricity market is sufficiently liquid, this

should be achieved through the setting up of transparent market-based mechanisms for the supply and purchase of electricity, 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 the in-put and off-take of electricity and not to endanger the system. Transmission system operators should facilitate participation of final customers and final customers' aggregators in reserve and balancing markets.

(36) 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 on the basis of a proposal agreed between those operator(s) and the users of the network. In carrying out those tasks, national regulatory authorities should ensure that transmission and distribution tariffs are non-discriminatory and cost-reflective, and should take account of the long-term, marginal, avoided network costs from distributed generation and demand-side management measures.

(37) Energy regulators should have the power to issue binding decisions in relation to electricity undertakings and to impose effective, proportionate and dissuasive penalties on electricity undertakings which fail to comply with their obligations or to propose that a competent court impose such penalties on them. Energy regulators should also be granted the power to decide, irrespective of the application of competition rules, on appropriate measures ensuring customer benefits through the promotion of effective competition necessary for the proper functioning of the internal market in electricity. The establishment of virtual power plants — electricity release programmes whereby electricity undertakings are obliged to sell or to make available a certain volume of electricity or to grant access to part of their generation capacity to interested suppliers for a certain period of time — is one of the possible measures that can be used to promote effective competition and ensure the proper functioning of the market. Energy regulators should also be granted the power to contribute to ensuring high standards of universal and public service in compliance with market opening, to the protection of vulnerable customers, and to the full effectiveness of consumer protection measures. Those provisions should be without prejudice to both the Commission's powers concerning the application of competition rules including the examination of mergers with a Community dimension, and the rules on the internal market such as the free movement of capital. The independent body to which a party affected by the decision of a national regulator has a right

to appeal could be a court or other tribunal empowered to conduct a judicial review.

(38) Any harmonisation of the powers of national regulatory authorities should include the powers to provide incentives to electricity undertakings, and to impose effective, proportionate and dissuasive penalties on electricity undertakings or to propose that a competent court impose such penalties. Moreover, regulatory authorities should have the power to request relevant information from electricity undertakings, make appropriate and sufficient investigations and settle disputes.

(39) The internal market in electricity suffers from a lack of liquidity and transparency hindering the efficient allocation of resources, risk hedging and new entry. There is a need for enhancement of competition and security of supply through facilitated integration of new power plants into the electricity network in all Member States, in particular encouraging new market entrants. Trust in the market, its liquidity and the number of market participants needs to increase, and, therefore, regulatory oversight of undertakings active in the supply of electricity needs to be increased. Such requirements should be without prejudice to, and compatible with, existing Community law in relation to the financial markets. Energy regulators and financial market regulators need to cooperate in order to enable each other to have an overview over the markets concerned.

(40) Prior to the adoption by the Commission of Guidelines defining further the record-keeping requirements, the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators <sup>(1)</sup> (the 'Agency'), and the Committee of European Securities Regulators (the 'CESR'), established by Commission Decision 2009/77/EC <sup>(2)</sup>, should confer and advise the Commission in regard to their content. The Agency and the CESR should also cooperate to investigate further and advise on whether transactions in electricity supply contracts and electricity derivatives should be subject to pre- or post-trade transparency requirements and, if so, what the content of those requirements should be.

(41) Member States or, where a Member State has so provided, the regulatory authority, should encourage the development of interruptible supply contracts.

(42) All Community industry and commerce, including small and medium-sized enterprises, and all citizens of the Union that enjoy the economic benefits of the internal market

<sup>(1)</sup> See page 1 of this Official Journal.

<sup>(2)</sup> OJ L 25, 29.1.2009, p. 18.

should also be able to enjoy high levels of consumer protection, and in particular household customers and, where Member States deem it appropriate, small enterprises should also be able to enjoy public service guarantees, in particular with regard to security of supply and reasonable tariffs, for reasons of fairness, competitiveness and, indirectly, to create employment. Those customers should also have access to choice, fairness, representation and dispute settlement mechanisms.

- (43) Nearly all Member States have chosen to ensure competition in the electricity generation market through a transparent authorisation procedure. However, Member States should ensure the possibility to contribute to security of supply through the launching of a tendering procedure or an equivalent procedure in the event that sufficient electricity generation capacity is not built on the basis of the authorisation procedure. Member States should have the possibility, in the interests of environmental protection and the promotion of new infant technologies, of tendering for new capacity on the basis of published criteria. Such new capacity includes, *inter alia*, electricity from renewable energy sources and combined heat and power.
- (44) In the interests of security of supply, the balance between supply and demand in individual Member States should be monitored, and such 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 electricity supply. The maintenance and construction of the necessary network infrastructure, including interconnection capacity and decentralised electricity generation, are important elements in ensuring a stable electricity supply.
- (45) Member States should ensure that household customers and, where Member States deem it appropriate, small enterprises, enjoy the right to be supplied with electricity of a specified quality at clearly comparable, transparent and reasonable prices. In order to ensure the maintenance of the high standards of public service in the Community, all measures taken by Member States to achieve the objective 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 take the necessary measures to protect vulnerable customers in the context of

the internal market in electricity. Such measures may differ according to the particular circumstances in the Member States in question and may include specific measures relating to the payment of electricity bills, or more general measures taken in the social security system. Where universal service is also provided to small enterprises, measures to ensure that such universal service is provided may differ according to whether they are aimed at household customers or small enterprises.

- (46) Respect for 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 respect of Community law.
- (47) It should be possible for Member States to appoint a supplier of last resort. That supplier may be the sales division of a vertically integrated undertaking, which also performs the functions of distribution, provided that it meets the unbundling requirements of this Directive.
- (48) It should be possible for measures implemented by Member States to achieve the objectives of social and economic cohesion to include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools. Such tools may include liability mechanisms to guarantee the necessary investment.
- (49) 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 under Article 88(3) of the Treaty to notify them to the Commission.
- (50) The public service requirements, including as regards the universal service, and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers, especially vulnerable ones, are able to benefit from competition and fair prices. The public service requirements should be defined at national level, taking into account national circumstances; Community law should, however, be respected by the Member States. The citizens of the Union and, where Member States deem it appropriate, small enterprises, should be able to enjoy public service obligations, in particular with regard

- to security of supply, and reasonable prices. A key aspect of supplying customers is access to objective and transparent consumption data. Thus, consumers should have access to their consumption data and associated prices and services costs so that they can invite competitors to make an offer based on those data. Consumers should also have the right to be properly informed about their energy consumption. Prepayments should reflect the likely consumption of electricity and different payment systems should be non-discriminatory. Information on energy costs provided to consumers frequently enough will create incentives for energy savings because it will give customers direct feedback on the effects of investment in energy efficiency and change of behaviour. In this respect, full implementation of Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services<sup>(1)</sup> will help consumers to reduce their energy costs.
- (51) Consumer interests should be at the heart of this Directive and quality of service should be a central responsibility of electricity undertakings. Existing rights of consumers need to be strengthened and guaranteed, and should include greater transparency. Consumer protection should ensure that all consumers in the wider remit of the Community benefit from a competitive market. Consumer rights should be enforced by Member States or, where a Member State has so provided, the regulatory authorities.
- (52) Clear and comprehensible information should be made available to consumers concerning their rights in relation to the energy sector. The Commission should establish, after consulting relevant stakeholders including Member States, national regulatory authorities, consumer organisations and electricity undertakings, an accessible, user-friendly energy consumer checklist providing consumers with practical information about their rights. That checklist should be provided to all consumers and should be made publicly available.
- (53) Energy poverty is a growing problem in the Community. Member States which are affected and which have not yet done so should therefore develop national action plans or other appropriate frameworks to tackle energy poverty, aiming at decreasing the number of people suffering such situation. In any event, Member States should ensure the necessary energy supply for vulnerable customers. In doing so, an integrated approach, such as in the framework of social policy, could be used and measures could include
- social policies or energy efficiency improvements for housing. At the very least, this Directive should allow national policies in favour of vulnerable customers.
- (54) Greater consumer protection is guaranteed by the availability of effective means of dispute settlement for all consumers. Member States should introduce speedy and effective complaint handling procedures.
- (55) It should be possible to base the introduction of intelligent metering systems on an economic assessment. Should that assessment conclude that the introduction of such metering systems is economically reasonable and cost-effective only for consumers with a certain amount of electricity consumption, Member States should be able to take this into account when implementing intelligent metering systems.
- (56) Market prices should give the right incentives for the development of the network and for investing in new electricity generation.
- (57) Promoting fair competition and easy access for different suppliers and fostering capacity for new electricity generation should be of the utmost importance for Member States in order to allow consumers to take full advantage of the opportunities of a liberalised internal market in electricity.
- (58) With a view to creating an internal market in electricity, Member States should foster the integration of their national markets and the cooperation of system operators at Community and regional level, also incorporating isolated systems forming electricity islands that persist in the Community.
- (59) The development of a true internal market in electricity, through a network connected across the Community, should be one of the main goals of this Directive and regulatory issues on cross-border interconnections and regional markets should, therefore, be one of the main tasks of the regulatory authorities, in close cooperation with the Agency where relevant.
- (60) Securing common rules for a true internal market and a broad supply of electricity accessible to all should also be one of the main goals of this Directive. To that end, undistorted market prices would provide an incentive for cross-border interconnections and for investments in new power generation while leading, in the long term, to price convergence.
- (61) Regulatory authorities should also provide information on the market to permit the Commission to exercise its role of observing and monitoring the internal market in electricity and its short, medium and long-term evolution,

<sup>(1)</sup> OJ L 114, 27.4.2006, p. 64.

including aspects such as generation capacity, different sources of electricity generation, transmission and distribution infrastructure, quality of service, cross-border trade, congestion management, investments, wholesale and consumer prices, market liquidity and environmental and efficiency improvements. National regulatory authorities should report to the competition authorities and the Commission those Member States in which prices impair competition and proper functioning of the market.

(62) Since the objective of this Directive, namely the creation of a fully operational internal electricity market, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity 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.

(63) Under Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity <sup>(1)</sup>, the Commission may adopt Guidelines to achieve the necessary degree of harmonisation. Such Guidelines, which constitute binding implementing measures, are, also with regard to certain provisions of this Directive, a useful tool which can be adapted quickly where necessary.

(64) 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 <sup>(2)</sup>.

(65) In particular, the Commission should be empowered to adopt the Guidelines necessary for providing the minimum degree of harmonisation required to achieve the aim of this Directive. Since those measures are of general scope and are designed to amend non-essential elements of this Directive, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

(66) In accordance with point 34 of the Interinstitutional Agreement on better law-making <sup>(3)</sup>, Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, illustrating, as far as possible, the correlation between this Directive and the transition measures, and to make them public.

(67) Given the scope of the amendments made to Directive 2003/54/EC herein, it is desirable, for reasons of clarity and rationalisation, that the provisions in question should be recast by bringing them all together in a single text in a new Directive.

(68) This Directive respects the fundamental rights, and observes the principles, recognised in particular by the Charter of Fundamental Rights of the European Union,

HAVE ADOPTED THIS DIRECTIVE:

## CHAPTER I

### SUBJECT MATTER, SCOPE AND DEFINITIONS

#### Article 1

#### Subject matter and scope

This Directive establishes common rules for the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the Community. It lays down the rules relating to the organisation and functioning of the electricity sector, open access to the market, the criteria and procedures applicable to calls for tenders and the granting of authorisations and the operation of systems. It also lays down universal service obligations and the rights of electricity consumers and clarifies competition requirements.

#### Article 2

#### Definitions

For the purposes of this Directive, the following definitions apply:

1. 'generation' means the production of electricity;
2. 'producer' means a natural or legal person generating electricity;
3. 'transmission' means the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but does not include supply;
4. 'transmission system operator' means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity;
5. 'distribution' means the transport of electricity on high-voltage, medium-voltage and low-voltage distribution systems with a view to its delivery to customers, but does not include supply;

<sup>(1)</sup> See page 15 of this Official Journal.

<sup>(2)</sup> OJ L 184, 17.7.1999, p. 23.

<sup>(3)</sup> OJ C 321, 31.12.2003, p. 1.



6. 'distribution system operator' means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity;
7. 'customer' means a wholesale or final customer of electricity;
8. 'wholesale customer' means a natural or legal person purchasing electricity for the purpose of resale inside or outside the system where he is established;
9. 'final customer' means a customer purchasing electricity for his own use;
10. 'household customer' means a customer purchasing electricity for his own household consumption, excluding commercial or professional activities;
11. 'non-household customer' means a natural or legal persons purchasing electricity which is not for their own household use and includes producers and wholesale customers;
12. 'eligible customer' means a customer who is free to purchase electricity from the supplier of his choice within the meaning of Article 33;
13. 'interconnector' means equipment used to link electricity systems;
14. 'interconnected system' means a number of transmission and distribution systems linked together by means of one or more interconnectors;
15. 'direct line' means either an electricity line linking an isolated generation site with an isolated customer or an electricity line linking an electricity producer and an electricity supply undertaking to supply directly their own premises, subsidiaries and eligible customers;
16. 'economic precedence' means the ranking of sources of electricity supply in accordance with economic criteria;
17. 'ancillary service' means a service necessary for the operation of a transmission or distribution system;
18. 'system user' means a natural or legal person supplying to, or being supplied by, a transmission or distribution system;
19. 'supply' means the sale, including resale, of electricity to customers;
20. 'integrated electricity undertaking' means a vertically or horizontally integrated undertaking;
21. 'vertically integrated undertaking' means an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity;
22. 'related undertaking' means affiliated undertakings, within the meaning of Article 41 of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 44(2)(g) (\*) of the Treaty on consolidated accounts (1), and/or associated undertakings, within the meaning of Article 33(1) of that Directive, and/or undertakings which belong to the same shareholders;
23. 'horizontally integrated undertaking' means an undertaking performing at least one of the functions of generation for sale, or transmission, or distribution, or supply of electricity, and another non-electricity activity;
24. 'tendering procedure' means the procedure through which planned additional requirements and replacement capacity are covered by supplies from new or existing generating capacity;
25. 'long-term planning' means the planning of the need for investment in generation and transmission and distribution capacity on a long-term basis, with a view to meeting the demand of the system for electricity and securing supplies to customers;
26. 'small isolated system' means any system with consumption of less than 3 000 GWh in the year 1996, where less than 5 % of annual consumption is obtained through interconnection with other systems;
27. 'micro isolated system' means any system with consumption less than 500 GWh in the year 1996, where there is no connection with other systems;
28. 'security' means both security of supply and provision of electricity, and technical safety;
29. 'energy efficiency/demand-side management' means a global or integrated approach aimed at influencing the amount and timing of electricity consumption in order to reduce primary energy consumption and peak loads by giving precedence to investments in energy efficiency measures, or other measures, such as interruptible supply contracts, over investments to increase generation capacity, if the former are the most effective and economical option, taking into account the positive environmental impact of reduced energy consumption and the security of supply and distribution cost aspects related to it;

(\*) 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).

(1) OJ L 193, 18.7.1983, p. 1.

30. 'renewable energy sources' means renewable non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydro-power, biomass, landfill gas, sewage treatment plant gas and biogases);
31. 'distributed generation' means generation plants connected to the distribution system;
32. 'electricity supply contract' means a contract for the supply of electricity, but does not include an electricity derivative;
33. 'electricity derivative' means a financial instrument specified in points 5, 6 or 7 of Section C of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments <sup>(1)</sup>, where that instrument relates to electricity;
34. 'control' means rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
- (a) ownership or the right to use all or part of the assets of an undertaking;
  - (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking;
35. 'electricity undertaking' means any natural or legal person carrying out at least one of the following functions: generation, transmission, distribution, supply, or purchase of electricity, which is responsible for the commercial, technical or maintenance tasks related to those functions, but does not include final customers.

## 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, electricity undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in electricity, and shall not discriminate between those undertakings as regards either rights or obligations.

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

3. Member States shall ensure that all household customers, and, where Member States deem it appropriate, small enterprises (namely enterprises with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million), enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices. To ensure the provision of universal service, Member States may appoint a supplier of last resort. Member States shall impose on distribution companies an obligation to connect customers to their network under terms, conditions and tariffs set in accordance with the procedure laid down in Article 37(6). Nothing in this Directive shall prevent Member States from strengthening the market position of the household, small and medium-sized consumers by promoting the possibilities of voluntary aggregation of representation for that class of consumers.

The first subparagraph shall be implemented in a transparent and non-discriminatory way and shall not impede the opening of the market provided for in Article 33.

4. Member States shall ensure that all customers are entitled to have their electricity provided by a supplier, subject to the supplier's agreement, regardless of the Member State in which the supplier is registered, as long as the supplier follows the applicable trading and balancing rules. In this regard, Member States shall take all measures necessary to ensure that administrative procedures do not discriminate against supply undertakings already registered in another Member State.

5. Member States shall ensure that:

- (a) where a customer, while respecting contractual conditions, wishes to change supplier, the change is effected by the operator(s) concerned within three weeks; and
- (b) customers are entitled to receive all relevant consumption data.

Member States shall ensure that the rights referred to in points (a) and (b) are granted to customers in a non-discriminatory manner as regards cost, effort or time.

<sup>(1)</sup> OJ L 145, 30.4.2004, p. 1.

6. Where financial compensation, other forms of compensation and exclusive rights which a Member State grants for the fulfilment of the obligations set out in paragraphs 2 and 3 are provided, this shall be done in a non-discriminatory and transparent way.

7. Member States shall take appropriate measures to protect final customers, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers. In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied. In particular, they shall take measures to protect final customers in remote areas. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is in fact able easily to switch to a new supplier. As regards at least household customers, those measures shall include those set out in Annex I.

8. Member States shall take appropriate measures, such as formulating national energy action plans, providing benefits in social security systems to ensure the necessary electricity supply to vulnerable customers, or providing for support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty. Such measures shall not impede the effective opening of the market set out in Article 33 or market functioning and shall be notified to the Commission, where relevant, in accordance with the provisions of paragraph 15 of this Article. Such notification may also include measures taken within the general social security system.

9. Member States shall ensure that electricity suppliers specify in or with the bills and in promotional materials made available to final customers:

- (a) the contribution of each energy source to the overall fuel mix of the supplier over the preceding year in a comprehensible and, at a national level, clearly comparable manner;
- (b) at least the reference to existing reference sources, such as web pages, where information on the environmental impact, in terms of at least CO<sub>2</sub> emissions and the radioactive waste resulting from the electricity produced by the overall fuel mix of the supplier over the preceding year is publicly available;
- (c) information concerning their rights as regards the means of dispute settlement available to them in the event of a dispute.

As regards points (a) and (b) of the first subparagraph with respect to electricity obtained via an electricity exchange or imported from an undertaking situated outside the Community, aggregate figures provided by the exchange or the undertaking in question over the preceding year may be used.

The regulatory authority or another competent national authority shall take the necessary steps to ensure that the information provided by suppliers to their customers pursuant to this Article is reliable and is provided, at a national level, in a clearly comparable manner.

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

11. In order to promote energy efficiency, Member States or, where a Member State has so provided, the regulatory authority shall strongly recommend that electricity undertakings optimise the use of electricity, for example by providing energy management services, developing innovative pricing formulas, or introducing intelligent metering systems or smart grids, where appropriate.

12. Member States shall ensure the provision of single points of contact to provide consumers with all necessary information concerning their rights, current legislation and the means of dispute settlement available to them in the event of a dispute. Such contact points may be part of general consumer information points.

13. Member States shall ensure that an independent mechanism such as an energy ombudsman or a consumer body is in place in order to ensure efficient treatment of complaints and out-of-court dispute settlements.

14. Member States may decide not to apply the provisions of Articles 7, 8, 32 and/or 34 insofar as their application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and 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.

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

16. The Commission shall establish, in consultation with relevant stakeholders including Member States, the national regulatory authorities, consumer organisations, electricity undertakings and, building on the progress achieved to date, social partners, a clear and concise energy consumer checklist of practical information relating to energy consumer rights. Member States shall ensure that electricity suppliers or distribution system operators, in cooperation with the regulatory authority, take the necessary steps to provide their consumers with a copy of the energy consumer checklist and ensure that it is made publicly available.

#### Article 4

### 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 that task to the regulatory authorities referred to in Article 35. Such monitoring shall, in particular, cover the balance of supply and demand on the national market, the level of expected future demand and 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 every two years, by 31 July, a report outlining the findings resulting from the monitoring of those issues, as well as any measures taken or envisaged to address them and shall forward that report to the Commission forthwith.

#### Article 5

### Technical rules

The regulatory authorities where Member States have so provided or 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 generating installations, distribution systems, directly connected consumers' equipment, interconnector circuits and direct lines are developed and made public. Those technical rules shall ensure the interoperability of systems and shall be objective and non-discriminatory. The Agency may make appropriate recommendations towards achieving compatibility of those rules, where appropriate. Those rules 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 <sup>(1)</sup>.

#### Article 6

### Promotion of regional cooperation

1. Member States as well as the regulatory authorities shall cooperate with each other for the purpose of integrating their national markets at one or more regional levels, as a first step towards the creation of a fully liberalised internal market. In particular, the regulatory authorities where Member States have so

provided or Member States shall promote and facilitate the cooperation of transmission system operators at a regional level, including on cross-border issues, with the aim of creating a competitive internal market in electricity, foster the consistency of their legal, regulatory and technical framework and facilitate integration of the isolated systems forming electricity islands that persist in the Community. The geographical areas covered by such regional cooperation shall include cooperation in geographical areas defined in accordance with Article 12(3) of Regulation (EC) No 714/2009. Such cooperation may cover other geographical areas.

2. The Agency shall cooperate with national regulatory authorities and transmission system operators to ensure the compatibility of regulatory frameworks between the regions with the aim of creating a competitive internal market in electricity. Where the Agency considers that binding rules on such cooperation are required, it shall make appropriate recommendations.

3. Member States shall ensure, through the implementation of this Directive, that transmission system operators have one or more integrated system(s) at regional level covering two or more Member States for capacity allocation and for checking the security of the network.

4. Where vertically integrated transmission system operators participate in a joint undertaking established for implementing such cooperation, the joint undertaking shall establish and implement a compliance programme which sets out the measures to be taken to ensure that discriminatory and anticompetitive conduct is excluded. That compliance programme shall set out the specific obligations of employees to meet the objective of excluding discriminatory and anticompetitive conduct. It shall be subject to the approval of the Agency. Compliance with the programme shall be independently monitored by the compliance officers of the vertically integrated transmission system operators.

## CHAPTER III

### GENERATION

#### Article 7

### Authorisation procedure for new capacity

1. For the construction of new generating capacity, Member States shall adopt an authorisation procedure, which shall be conducted in accordance with objective, transparent and non-discriminatory criteria.

2. Member States shall lay down the criteria for the grant of authorisations for the construction of generating capacity in their territory. In determining appropriate criteria, Member States shall consider:

- (a) the safety and security of the electricity system, installations and associated equipment;

<sup>(1)</sup> OJ L 204, 21.7.1998, p. 27.

- (b) the protection of public health and safety;
- (c) the protection of the environment;
- (d) land use and siting;
- (e) the use of public ground;
- (f) energy efficiency;
- (g) the nature of the primary sources;
- (h) the characteristics particular to the applicant, such as technical, economic and financial capabilities;
- (i) compliance with measures adopted pursuant to Article 3;
- (j) the contribution of the generating capacity to meeting the overall Community target of at least a 20 % share of energy from renewable sources in the Community's gross final consumption of energy in 2020 referred to in Article 3(1) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources <sup>(1)</sup>; and
- (k) the contribution of generating capacity to reducing emissions.

3. Member States shall ensure that specific authorisation procedures exist for small decentralised and/or distributed generation, which take into account their limited size and potential impact.

Member States may set guidelines for that specific authorisation procedure. National regulatory authorities or other competent national authorities including planning authorities shall review those guidelines and may recommend amendments thereto.

Where Member States have established particular land use permit procedures applying to major new infrastructure projects in generation capacity, Member States shall, where appropriate, include the construction of new generation capacity within the scope of those procedures and shall implement them in a non-discriminatory manner and within an appropriate time-frame.

4. The authorisation procedures and criteria shall be made public. Applicants shall be informed of the reasons for any refusal to grant an authorisation. Those reasons shall be objective, non-discriminatory, well-founded and duly substantiated. Appeal procedures shall be made available to the applicant.

#### Article 8

#### Tendering for new capacity

1. Member States shall ensure the possibility, in the interests of security of supply, of providing for new capacity or energy

efficiency/demand-side management measures through a tendering procedure or any procedure equivalent in terms of transparency and non-discrimination, on the basis of published criteria. Those procedures may, however, be launched only where, on the basis of the authorisation procedure, the generating capacity to be built or the energy efficiency/demand-side management measures to be taken are insufficient to ensure security of supply.

2. Member States may ensure the possibility, in the interests of environmental protection and the promotion of infant new technologies, of tendering for new capacity on the basis of published criteria. Such tendering may relate to new capacity or to energy efficiency/demand-side management measures. A tendering procedure may, however, be launched only where, on the basis of the authorisation procedure the generating capacity to be built or the measures to be taken, are insufficient to achieve those objectives.

3. Details of the tendering procedure for means of generating capacity and energy efficiency/demand-side management measures shall be published in the *Official Journal of the European Union* at least six months prior to the closing date for tenders.

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

With a view to ensuring transparency and non-discrimination, the tender specifications shall contain a detailed description of the contract specifications and of the procedure to be followed by all tenderers and an exhaustive list of criteria governing the selection of tenderers and the award of the contract, including incentives, such as subsidies, which are covered by the tender. Those specifications may also relate to the fields referred to in Article 7(2).

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

5. Member States shall designate an authority or a public or private body independent from electricity generation, transmission, distribution and supply activities, which may be a regulatory authority referred to in Article 35(1), to be responsible for the organisation, monitoring and control of the tendering procedure referred to in paragraphs 1 to 4 of this Article. Where a transmission system operator is fully independent from other activities not relating to the transmission system in ownership terms, the transmission system operator may be designated as the body responsible for organising, monitoring and controlling the tendering procedure. That authority or body shall take all necessary steps to ensure confidentiality of the information contained in the tenders.

<sup>(1)</sup> OJ L 140, 5.6.2009, p. 16.

## CHAPTER IV

## TRANSMISSION SYSTEM OPERATION

## Article 9

**Unbundling of transmission systems and transmission system operators**

1. Member States shall ensure that from 3 March 2012:
  - (a) each undertaking which owns a transmission system acts as a transmission system operator;
  - (b) the same person or persons are entitled neither:
    - (i) directly or indirectly to exercise control over an undertaking performing any of the functions of generation or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor
    - (ii) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of generation or supply;
  - (c) the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of generation or supply; and
  - (d) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of generation or supply and a transmission system operator or a transmission system.
2. The rights referred to in points (b) and (c) of paragraph 1 shall include, in particular:
  - (a) the power to exercise voting rights;
  - (b) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; or
  - (c) the holding of a majority share.
3. For the purpose of paragraph 1(b), the notion 'undertaking performing any of the functions of generation or supply' shall include 'undertaking performing any of the functions of production and supply' within the meaning of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009

concerning common rules for the internal market in natural gas <sup>(1)</sup>, and the terms 'transmission system operator' and 'transmission system' shall include 'transmission system operator' and 'transmission system' within the meaning of that Directive.

4. Member States may allow for derogations from points (b) and (c) of paragraph 1 until 3 March 2013, provided that transmission system operators are not part of a vertically integrated undertaking.

5. The obligation set out in paragraph 1(a) shall be deemed to be fulfilled in a situation where two or more undertakings which own transmission systems have created a joint venture which acts as a transmission system operator in two or more Member States for the transmission systems concerned. No other undertaking may be part of the joint venture, unless it has been approved under Article 13 as an independent system operator or as an independent transmission operator for the purposes of Chapter V.

6. For the implementation of this Article, where the person referred to in points (b), (c) and (d) of paragraph 1 is the Member State or another public body, two separate public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of the functions of generation or supply on the other, shall be deemed not to be the same person or persons.

7. Member States shall ensure that neither commercially sensitive information referred to in Article 16 held by a transmission system operator which was part of a vertically integrated undertaking, nor the staff of such a transmission system operator, is transferred to undertakings performing any of the functions of generation and supply.

8. Where on 3 September 2009, the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply paragraph 1.

In such case, the Member State concerned shall either:

- (a) designate an independent system operator in accordance with Article 13; or
- (b) comply with the provisions of Chapter V.

9. Where, on 3 September 2009, the transmission system belongs to a vertically integrated undertaking and there are arrangements in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter V, a Member State may decide not to apply paragraph 1.

10. Before an undertaking is approved and designated as a transmission system operator under paragraph 9 of this Article, it shall be certified according to the procedures laid down in Article 10(4), (5) and (6) of this Directive and in Article 3 of Regulation (EC) No 714/2009, pursuant to which the Commission shall verify that the arrangements in place clearly guarantee more effective independence of the transmission system operator than the provisions of Chapter V.

<sup>(1)</sup> See page 94 of this Official Journal.

11. Vertically integrated undertakings which own a transmission system shall not in any event be prevented from taking steps to comply with paragraph 1.

12. Undertakings performing any of the functions of generation or supply shall not in any event be able to directly or indirectly take control over or exercise any right over unbundled transmission system operators in Member States which apply paragraph 1.

#### Article 10

### Designation and certification of transmission system operators

1. Before an undertaking is approved and designated as transmission system operator, it shall be certified according to the procedures laid down in paragraphs 4, 5 and 6 of this Article and in Article 3 of Regulation (EC) No 714/2009.

2. Undertakings which own a transmission system and which have been certified by the national regulatory authority as having complied with the requirements of Article 9, pursuant to the certification procedure below, shall be approved and designated as transmission system operators by Member States. The designation of transmission system operators shall be notified to the Commission and published in the *Official Journal of the European Union*.

3. Transmission system operators shall notify to the regulatory authority any planned transaction which may require a reassessment of their compliance with the requirements of Article 9.

4. Regulatory authorities shall monitor the continuing compliance of transmission system operators with the requirements of Article 9. They shall open a certification procedure to ensure such compliance:

- (a) upon notification by the transmission system operator pursuant to paragraph 3;
- (b) on their own initiative where they have knowledge that a planned change in rights or influence over transmission system owners or transmission system operators may lead to an infringement of Article 9, or where they have reason to believe that such an infringement may have occurred; or
- (c) upon a reasoned request from the Commission.

5. The regulatory authorities shall adopt a decision on the certification of a transmission system operator within a period of four months from the date of the notification by the transmission system operator or from the date of the Commission request. After expiry of that period, the certification shall be deemed to be granted. The explicit or tacit decision of the regulatory authority shall become effective only after the conclusion of the procedure set out in paragraph 6.

6. The explicit or tacit decision on the certification of a transmission system operator shall be notified without delay to the Commission by the regulatory authority, together with all the relevant information with respect to that decision. The Commission shall act in accordance with the procedure laid down in Article 3 of Regulation (EC) No 714/2009.

7. The regulatory authorities and the Commission may request from transmission system operators and undertakings performing any of the functions of generation or supply any information relevant for the fulfilment of their tasks under this Article.

8. Regulatory authorities and the Commission shall preserve the confidentiality of commercially sensitive information.

#### Article 11

### Certification in relation to third countries

1. Where certification is requested by a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries, the regulatory authority shall notify the Commission.

The regulatory authority shall also notify to the Commission without delay any circumstances that would result in a person or persons from a third country or third countries acquiring control of a transmission system or a transmission system operator.

2. The transmission system operator shall notify to the regulatory authority any circumstances that would result in a person or persons from a third country or third countries acquiring control of the transmission system or the transmission system operator.

3. The regulatory authority shall adopt a draft decision on the certification of a transmission system operator within four months from the date of notification by the transmission system operator. It shall refuse the certification if it has not been demonstrated:

- (a) that the entity concerned complies with the requirements of Article 9; and
- (b) to the regulatory authority or to another competent authority designated by the Member State that granting certification will not put at risk the security of energy supply of the Member State and the Community. In considering that question the regulatory authority or other competent authority so designated shall take into account:
  - (i) the rights and obligations of the Community with respect to that third country arising under international law, including any agreement concluded with one or more third countries to which the Community is a party and which addresses the issues of security of energy supply;

- (ii) the rights and obligations of the Member State with respect to that third country arising under agreements concluded with it, insofar as they are in compliance with Community law; and
  - (iii) other specific facts and circumstances of the case and the third country concerned.
4. The regulatory authority shall notify the decision to the Commission without delay, together with all the relevant information with respect to that decision.
5. Member States shall provide for the regulatory authority or the designated competent authority referred to in paragraph 3(b), before the regulatory authority adopts a decision on the certification, to request an opinion from the Commission on whether:
- (a) the entity concerned complies with the requirements of Article 9; and
  - (b) granting certification will not put at risk the security of energy supply to the Community.
6. The Commission shall examine the request referred to in paragraph 5 as soon as it is received. Within a period of two months after receiving the request, it shall deliver its opinion to the national regulatory authority or, if the request was made by the designated competent authority, to that authority.

In preparing the opinion, the Commission may request the views of the Agency, the Member State concerned, and interested parties. In the event that the Commission makes such a request, the two-month period shall be extended by two months.

In the absence of an opinion by the Commission within the period referred to in the first and second subparagraphs, the Commission shall be deemed not to raise objections to the decision of the regulatory authority.

7. When assessing whether the control by a person or persons from a third country or third countries will put at risk the security of energy supply to the Community, the Commission shall take into account:
- (a) the specific facts of the case and the third country or third countries concerned; and
  - (b) the rights and obligations of the Community with respect to that third country or third countries arising under international law, including an agreement concluded with one or more third countries to which the Community is a party and which addresses the issues of security of supply.
8. The national regulatory authority shall, within a period of two months after the expiry of the period referred to in paragraph 6, adopt its final decision on the certification. In adopting its final decision the national regulatory authority shall take utmost account of the Commission's opinion. In any event Member States shall have the right to refuse certification where granting certification puts at risk the Member State's security of energy

supply or the security of energy supply of another Member State. Where the Member State has designated another competent authority to assess paragraph 3(b), it may require the national regulatory authority to adopt its final decision in accordance with the assessment of that competent authority. The national regulatory authority's final decision and the Commission's opinion shall be published together. Where the final decision diverges from the Commission's opinion, the Member State concerned shall provide and publish, together with that decision, the reasoning underlying such decision.

9. Nothing in this Article shall affect the right of Member States to exercise, in compliance with Community law, national legal controls to protect legitimate public security interests.

10. The Commission may adopt Guidelines setting out the details of the procedure to be followed for the application of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).

11. This Article, with exception of paragraph 3(a), shall also apply to Member States which are subject to a derogation under Article 44.

#### Article 12

#### Tasks of transmission system operators

Each transmission system operator shall be responsible for:

- (a) ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity, operating, maintaining and developing under economic conditions secure, reliable and efficient transmission systems with due regard to the environment;
- (b) ensuring adequate means to meet service obligations;
- (c) contributing to security of supply through adequate transmission capacity and system reliability;
- (d) managing electricity flows on the system, taking into account exchanges with other interconnected systems. To that end, the transmission system operator shall be responsible for ensuring a secure, reliable and efficient electricity system and, in that context, for ensuring the availability of all necessary ancillary services, including those provided by demand response, insofar as such availability is independent from any other transmission system with which its system is interconnected;
- (e) providing to the operator of any other system with which its system is interconnected sufficient information to ensure the secure and efficient operation, coordinated development and interoperability of the interconnected system;



- (f) ensuring non-discrimination as between system users or classes of system users, particularly in favour of its related undertakings;
- (g) providing system users with the information they need for efficient access to the system; and
- (h) collecting congestion rents and payments under the inter-transmission system operator compensation mechanism, in compliance with Article 13 of Regulation (EC) No 714/2009, granting and managing third-party access and giving reasoned explanations when it denies such access, which shall be monitored by the national regulatory authorities; in carrying out their tasks under this Article transmission system operators shall primarily facilitate market integration.

#### Article 13

##### Independent system operator

1. Where the transmission system belongs to a vertically integrated undertaking on 3 September 2009, Member States may decide not to apply Article 9(1) and designate an independent system operator upon a proposal from the transmission system owner. Such designation shall be subject to approval by the Commission.

2. The Member State may approve and designate an independent system operator only where:

- (a) the candidate operator has demonstrated that it complies with the requirements of Article 9(1)(b), (c) and (d);
- (b) the candidate operator has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks under Article 12;
- (c) the candidate operator has undertaken to comply with a ten-year network development plan monitored by the regulatory authority;
- (d) the transmission system owner has demonstrated its ability to comply with its obligations under paragraph 5. To that end, it shall provide all the draft contractual arrangements with the candidate undertaking and any other relevant entity; and
- (e) the candidate operator has demonstrated its ability to comply with its obligations under Regulation (EC) No 714/2009 including the cooperation of transmission system operators at European and regional level.

3. Undertakings which have been certified by the regulatory authority as having complied with the requirements of Article 11 and paragraph 2 of this Article shall be approved and designated as independent system operators by Member States. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 714/2009 or in Article 11 of this Directive shall be applicable.

4. Each independent system operator shall be responsible for granting and managing third-party access, including the collection of access charges, congestion charges, and payments under the inter-transmission system operator compensation mechanism in compliance with Article 13 of Regulation (EC) No 714/2009, as well as for operating, maintaining and developing the transmission system, and for ensuring the long-term ability of the system to meet reasonable demand through investment planning. When developing the transmission system, the independent system operator shall be responsible for planning (including authorisation procedure), construction and commissioning of the new infrastructure. For this purpose, the independent system operator shall act as a transmission system operator in accordance with this Chapter. The transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning.

5. Where an independent system operator has been designated, the transmission system owner shall:

- (a) provide all the relevant cooperation and support to the independent system operator for the fulfilment of its tasks, including in particular all relevant information;
- (b) finance the investments decided by the independent system operator and approved by the regulatory authority, or give its agreement to financing by any interested party including the independent system operator. The relevant financing arrangements shall be subject to approval by the regulatory authority. Prior to such approval, the regulatory authority shall consult the transmission system owner together with the other interested parties;
- (c) provide for the coverage of liability relating to the network assets, excluding the liability relating to the tasks of the independent system operator; and
- (d) provide guarantees to facilitate financing any network expansions with the exception of those investments where, pursuant to point (b), it has given its agreement to financing by any interested party including the independent system operator.

6. In close cooperation with the regulatory authority, the relevant national competition authority shall be granted all relevant powers to effectively monitor compliance of the transmission system owner with its obligations under paragraph 5.

#### Article 14

##### Unbundling of transmission system owners

1. A transmission system owner, where an independent system operator has been appointed, which is part of a vertically integrated undertaking shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to transmission.

2. In order to ensure the independence of the transmission system owner referred to in paragraph 1, the following minimum criteria shall apply:

- (a) persons responsible for the management of the transmission system owner shall not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, distribution and supply of electricity;
- (b) appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner are taken into account in a manner that ensures that they are capable of acting independently; and
- (c) the transmission system owner 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 compliance programme shall set out the specific obligations of employees to meet those objectives. 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 and shall be published.

3. The Commission may adopt Guidelines to ensure full and effective compliance of the transmission system owner with paragraph 2 of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).

#### Article 15

### Dispatching and balancing

1. Without prejudice to the supply of electricity on the basis of contractual obligations, including those which derive from the tendering specifications, the transmission system operator shall, where it has such a function, be responsible for dispatching the generating installations in its area and for determining the use of interconnectors with other systems.

2. The dispatching of generating installations and the use of interconnectors shall be determined on the basis of criteria which shall be approved by national regulatory authorities where competent and which must be objective, published and applied in a non-discriminatory manner, ensuring the proper functioning of the internal market in electricity. The criteria shall take into account the economic precedence of electricity from available generating installations or interconnector transfers and the technical constraints on the system.

3. A Member State shall require system operators to act in accordance with Article 16 of Directive 2009/28/EC when dispatching generating installations using renewable energy sources. They also may require the system operator to give priority when dispatching generating installations producing combined heat and power.

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

5. The regulatory authorities where Member States have so provided or Member States shall require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity.

6. Transmission system operators shall procure the energy they use to cover energy losses and reserve capacity in their system according to transparent, non-discriminatory and market-based procedures, whenever they have such a function.

7. Rules adopted by transmission system operators for balancing the electricity system shall be objective, transparent and non-discriminatory, including rules for charging system users of their networks for energy imbalance. The terms and conditions, including the rules and tariffs, for the provision of such services by transmission system operators shall be established pursuant to a methodology compatible with Article 37(6) in a non-discriminatory and cost-reflective way and shall be published.

#### Article 16

### Confidentiality for transmission system operators and transmission system owners

1. Without prejudice to Article 30 or any other legal duty to disclose information, each transmission system operator and each transmission system owner shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its activities, and shall prevent information about its own activities which may be commercially advantageous from being disclosed in a discriminatory manner. In particular it shall not disclose any commercially sensitive information to the remaining parts of the undertaking, unless this is necessary for carrying out a business transaction. In order to ensure the full respect of the rules on information unbundling, Member States shall ensure that the transmission system owner and the remaining part of the undertaking do not use joint services, such as joint legal services, apart from purely administrative or IT functions.

2. Transmission system operators shall not, in the context of sales or purchases of electricity by related undertakings, misuse commercially sensitive information obtained from third parties in the context of providing or negotiating access to the system.

3. Information necessary for effective competition and the efficient functioning of the market shall be made public. That obligation shall be without prejudice to preserving the confidentiality of commercially sensitive information.

## CHAPTER V

### INDEPENDENT TRANSMISSION OPERATOR

#### Article 17

#### Assets, equipment, staff and identity

1. Transmission system operators shall be equipped with all human, technical, physical and financial resources necessary for fulfilling their obligations under this Directive and carrying out the activity of electricity transmission, in particular:

- (a) assets that are necessary for the activity of electricity transmission, including the transmission system, shall be owned by the transmission system operator;
- (b) personnel, necessary for the activity of electricity transmission, including the performance of all corporate tasks, shall be employed by the transmission system operator;
- (c) leasing of personnel and rendering of services, to and from any other parts of the vertically integrated undertaking shall be prohibited. A transmission system operator may, however, render services to the vertically integrated undertaking as long as:
  - (i) the provision of those services does not discriminate between system users, is available to all system users on the same terms and conditions and does not restrict, distort or prevent competition in generation or supply; and
  - (ii) the terms and conditions of the provision of those services are approved by the regulatory authority;
- (d) without prejudice to the decisions of the Supervisory Body under Article 20, appropriate financial resources for future investment projects and/or for the replacement of existing assets shall be made available to the transmission system operator in due time by the vertically integrated undertaking following an appropriate request from the transmission system operator.

2. The activity of electricity transmission shall include at least the following tasks in addition to those listed in Article 12:

- (a) the representation of the transmission system operator and contacts to third parties and the regulatory authorities;
- (b) the representation of the transmission system operator within the European Network of Transmission System Operators for Electricity (ENTSO for Electricity);
- (c) granting and managing third-party access on a non-discriminatory basis between system users or classes of system users;
- (d) the collection of all the transmission system related charges including access charges, balancing charges for ancillary services such as purchasing of services (balancing costs, energy for losses);
- (e) the operation, maintenance and development of a secure, efficient and economic transmission system;
- (f) investment planning ensuring the long-term ability of the system to meet reasonable demand and guaranteeing security of supply;
- (g) the setting up of appropriate joint ventures, including with one or more transmission system operators, power exchanges, and the other relevant actors pursuing the objectives to develop the creation of regional markets or to facilitate the liberalisation process; and
- (h) all corporate services, including legal services, accountancy and IT services.

3. Transmission system operators shall be organised in a legal form as referred to in Article 1 of Council Directive 68/151/EEC <sup>(1)</sup>.

4. The transmission system operator shall not, in its corporate identity, communication, branding and premises, create confusion in respect of the separate identity of the vertically integrated undertaking or any part thereof.

5. The transmission system operator shall not share IT systems or equipment, physical premises and security access systems with any part of the vertically integrated undertaking nor use the same consultants or external contractors for IT systems or equipment, and security access systems.

6. The accounts of transmission system operators shall be audited by an auditor other than the one auditing the vertically integrated undertaking or any part thereof.

<sup>(1)</sup> First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ L 65, 14.3.1968, p. 8).

*Article 18***Independence of the transmission system operator**

1. Without prejudice to the decisions of the Supervisory Body under Article 20, the transmission system operator shall have:

- (a) effective decision-making rights, independent from the vertically integrated undertaking, with respect to assets necessary to operate, maintain or develop the transmission system; and
- (b) the power to raise money on the capital market in particular through borrowing and capital increase.

2. The transmission system operator shall at all times act so as to ensure it has the resources it needs in order to carry out the activity of transmission properly and efficiently and develop and maintain an efficient, secure and economic transmission system.

3. Subsidiaries of the vertically integrated undertaking performing functions of generation or supply shall not have any direct or indirect shareholding in the transmission system operator. The transmission system operator shall neither have any direct or indirect shareholding in any subsidiary of the vertically integrated undertaking performing functions of generation or supply, nor receive dividends or any other financial benefit from that subsidiary.

4. The overall management structure and the corporate statutes of the transmission system operator shall ensure effective independence of the transmission system operator in compliance with this Chapter. The vertically integrated undertaking shall not determine, directly or indirectly, the competitive behaviour of the transmission system operator in relation to the day to day activities of the transmission system operator and management of the network, or in relation to activities necessary for the preparation of the ten-year network development plan developed pursuant to Article 22.

5. In fulfilling their tasks in Article 12 and Article 17(2) of this Directive, and in complying with Articles 14, 15 and 16 of Regulation (EC) No 714/2009, transmission system operators shall not discriminate against different persons or entities and shall not restrict, distort or prevent competition in generation or supply.

6. Any commercial and financial relations between the vertically integrated undertaking and the transmission system operator, including loans from the transmission system operator to the vertically integrated undertaking, shall comply with market conditions. The transmission system operator shall keep detailed records of such commercial and financial relations and make them available to the regulatory authority upon request.

7. The transmission system operator shall submit for approval by the regulatory authority all commercial and financial agreements with the vertically integrated undertaking.

8. The transmission system operator shall inform the regulatory authority of the financial resources, referred to in Article 17(1)(d), available for future investment projects and/or for the replacement of existing assets.

9. The vertically integrated undertaking shall refrain from any action impeding or prejudicing the transmission system operator from complying with its obligations in this Chapter and shall not require the transmission system operator to seek permission from the vertically integrated undertaking in fulfilling those obligations.

10. An undertaking which has been certified by the regulatory authority as being in compliance with the requirements of this Chapter shall be approved and designated as a transmission system operator by the Member State concerned. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 714/2009 or in Article 11 of this Directive shall apply.

*Article 19***Independence of the staff and the management of the transmission system operator**

1. Decisions regarding the appointment and renewal, working conditions including remuneration, and termination of the term of office of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator shall be taken by the Supervisory Body of the transmission system operator appointed in accordance with Article 20.

2. The identity and the conditions governing the term, the duration and the termination of office of the persons nominated by the Supervisory Body for appointment or renewal as persons responsible for the executive management and/or as members of the administrative bodies of the transmission system operator, and the reasons for any proposed decision terminating such term of office, shall be notified to the regulatory authority. Those conditions and the decisions referred to in paragraph 1 shall become binding only if the regulatory authority has raised no objections within three weeks of notification.

The regulatory authority may object to the decisions referred to in paragraph 1 where:

- (a) doubts arise as to the professional independence of a nominated person responsible for the management and/or member of the administrative bodies; or
- (b) in the case of premature termination of a term of office, doubts exist regarding the justification of such premature termination.

3. No professional position or responsibility, interest or business relationship, directly or indirectly, with the vertically integrated undertaking or any part of it or its controlling shareholders other than the transmission system operator shall be exercised for a period of three years before the appointment of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator who are subject to this paragraph.

4. The persons responsible for the management and/or members of the administrative bodies, and employees of the transmission system operator shall have no other professional position or responsibility, interest or business relationship, directly or indirectly, with any other part of the vertically integrated undertaking or with its controlling shareholders.

5. The persons responsible for the management and/or members of the administrative bodies, and employees of the transmission system operator shall hold no interest in or receive any financial benefit, directly or indirectly, from any part of the vertically integrated undertaking other than the transmission system operator. Their remuneration shall not depend on activities or results of the vertically integrated undertaking other than those of the transmission system operator.

6. Effective rights of appeal to the regulatory authority shall be guaranteed for any complaints by the persons responsible for the management and/or members of the administrative bodies of the transmission system operator against premature terminations of their term of office.

7. After termination of their term of office in the transmission system operator, the persons responsible for its management and/or members of its administrative bodies shall have no professional position or responsibility, interest or business relationship with any part of the vertically integrated undertaking other than the transmission system operator, or with its controlling shareholders for a period of not less than four years.

8. Paragraph 3 shall apply to the majority of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator.

The persons responsible for the management and/or members of the administrative bodies of the transmission system operator who are not subject to paragraph 3 shall have exercised no management or other relevant activity in the vertically integrated undertaking for a period of at least six months before their appointment.

The first subparagraph of this paragraph and paragraphs 4 to 7 shall be applicable to all the persons belonging to the executive management and to those directly reporting to them on matters related to the operation, maintenance or development of the network.

#### Article 20

### Supervisory Body

1. The transmission system operator shall have a Supervisory Body which shall be in charge of taking decisions which may have a significant impact on the value of the assets of the shareholders within the transmission system operator, in particular decisions regarding the approval of the annual and longer-term financial plans, the level of indebtedness of the transmission system operator and the amount of dividends distributed to shareholders. The decisions falling under the remit of the Supervisory Body shall exclude those that are related to the day to day activities of the

transmission system operator and management of the network, and to activities necessary for the preparation of the ten-year network development plan developed pursuant to Article 22.

2. The Supervisory Body shall be composed of members representing the vertically integrated undertaking, members representing third party shareholders and, where the relevant legislation of a Member State so provides, members representing other interested parties such as employees of the transmission system operator.

3. The first subparagraph of Article 19(2) and Article 19(3) to (7) shall apply to at least half of the members of the Supervisory Body minus one.

Point (b) of the second subparagraph of Article 19(2) shall apply to all the members of the Supervisory Body.

#### Article 21

### Compliance programme and compliance officer

1. Member States shall ensure that transmission system operators establish and implement a compliance programme which sets out the measures taken in order to ensure that discriminatory conduct is excluded, and ensure that the compliance with that programme is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet those objectives. It shall be subject to approval by the regulatory authority. Without prejudice to the powers of the national regulator, compliance with the program shall be independently monitored by a compliance officer.

2. The compliance officer shall be appointed by the Supervisory Body, subject to the approval by the regulatory authority. The regulatory authority may refuse the approval of the compliance officer only for reasons of lack of independence or professional capacity. The compliance officer may be a natural or legal person. Article 19(2) to (8) shall apply to the compliance officer.

3. The compliance officer shall be in charge of:

- (a) monitoring the implementation of the compliance programme;
- (b) elaborating an annual report, setting out the measures taken in order to implement the compliance programme and submitting it to the regulatory authority;
- (c) reporting to the Supervisory Body and issuing recommendations on the compliance programme and its implementation;
- (d) notifying the regulatory authority on any substantial breaches with regard to the implementation of the compliance programme; and
- (e) reporting to the regulatory authority on any commercial and financial relations between the vertically integrated undertaking and the transmission system operator.

4. The compliance officer shall submit the proposed decisions on the investment plan or on individual investments in the network to the regulatory authority. This shall occur at the latest when the management and/or the competent administrative body of the transmission system operator submits them to the Supervisory Body.

5. Where the vertically integrated undertaking, in the general assembly or through the vote of the members of the Supervisory Body it has appointed, has prevented the adoption of a decision with the effect of preventing or delaying investments, which under the ten-year network development plan was to be executed in the following three years, the compliance officer shall report this to the regulatory authority, which then shall act in accordance with Article 22.

6. The conditions governing the mandate or the employment conditions of the compliance officer, including the duration of its mandate, shall be subject to approval by the regulatory authority. Those conditions shall ensure the independence of the compliance officer, including by providing him with all the resources necessary for fulfilling his duties. During his mandate, the compliance officer shall have no other professional position, responsibility or interest, directly or indirectly, in or with any part of the vertically integrated undertaking or with its controlling shareholders.

7. The compliance officer shall report regularly, either orally or in writing, to the regulatory authority and shall have the right to report regularly, either orally or in writing, to the Supervisory Body of the transmission system operator.

8. The compliance officer may attend all meetings of the management or administrative bodies of the transmission system operator, and those of the Supervisory Body and the general assembly. The compliance officer shall attend all meetings that address the following matters:

- (a) conditions for access to the network, as defined in Regulation (EC) No 714/2009, in particular regarding tariffs, third party access services, capacity allocation and congestion management, transparency, balancing and secondary markets;
- (b) projects undertaken in order to operate, maintain and develop the transmission system, including interconnection and connection investments;
- (c) energy purchases or sales necessary for the operation of the transmission system.

9. The compliance officer shall monitor the compliance of the transmission system operator with Article 16.

10. The compliance officer shall have access to all relevant data and to the offices of the transmission system operator and to all the information necessary for the fulfilment of his task.

11. After prior approval by the regulatory authority, the Supervisory Body may dismiss the compliance officer. It shall dismiss the compliance officer for reasons of lack of independence or professional capacity upon request of the regulatory authority.

12. The compliance officer shall have access to the offices of the transmission system operator without prior announcement.

## Article 22

### **Network development and powers to make investment decisions**

1. Every year, transmission system operators shall submit to the regulatory authority a ten-year network development plan based on existing and forecast supply and demand after having consulted all the relevant stakeholders. That network development plan shall contain efficient measures in order to guarantee the adequacy of the system and the security of supply.

2. The ten-year network development plan shall in particular:

- (a) indicate to market participants the main transmission infrastructure that needs to be built or upgraded over the next ten years;
- (b) contain all the investments already decided and identify new investments which have to be executed in the next three years; and
- (c) provide for a time frame for all investment projects.

3. When elaborating the ten-year network development plan, the transmission system operator shall make reasonable assumptions about the evolution of the generation, supply, consumption and exchanges with other countries, taking into account investment plans for regional and Community-wide networks.

4. The regulatory authority shall consult all actual or potential system users on the ten-year network development plan in an open and transparent manner. Persons or undertakings claiming to be potential system users may be required to substantiate such claims. The regulatory authority shall publish the result of the consultation process, in particular possible needs for investments.

5. The regulatory authority shall examine whether the ten-year network development plan covers all investment needs identified during the consultation process, and whether it is consistent with the non-binding Community-wide ten-year network development plan (Community-wide network development plan) referred to in Article 8(3)(b) of Regulation (EC) No 714/2009. If any doubt arises as to the consistency with the Community-wide network development plan, the regulatory authority shall consult the Agency. The regulatory authority may require the transmission system operator to amend its ten-year network development plan.

6. The regulatory authority shall monitor and evaluate the implementation of the ten-year network development plan.

7. In circumstances where the transmission system operator, other than for overriding reasons beyond its control, does not execute an investment, which, under the ten-year network development plan, was to be executed in the following three years, Member States shall ensure that the regulatory authority is required to take at least one of the following measures to ensure that the investment in question is made if such investment is still relevant on the basis of the most recent ten-year network development plan:

- (a) to require the transmission system operator to execute the investments in question;
- (b) to organise a tender procedure open to any investors for the investment in question; or
- (c) to oblige the transmission system operator to accept a capital increase to finance the necessary investments and allow independent investors to participate in the capital.

Where the regulatory authority has made use of its powers under point (b) of the first subparagraph, it may oblige the transmission system operator to agree to one or more of the following:

- (a) financing by any third party;
- (b) construction by any third party;
- (c) building the new assets concerned itself;
- (d) operating the new asset concerned itself.

The transmission system operator shall provide the investors with all information needed to realise the investment, shall connect new assets to the transmission network and shall generally make its best efforts to facilitate the implementation of the investment project.

The relevant financial arrangements shall be subject to approval by the regulatory authority.

8. Where the regulatory authority has made use of its powers under the first subparagraph of paragraph 7, the relevant tariff regulations shall cover the costs of the investments in question.

#### *Article 23*

### **Decision-making powers regarding the connection of new power plant to the transmission system**

1. The transmission system operator shall establish and publish transparent and efficient procedures for non-discriminatory connection of new power plants to the transmission system. Those procedures shall be subject to the approval of national regulatory authorities.

2. The transmission system operator shall not be entitled to refuse the connection of a new power plant on the grounds of possible future limitations to available network capacities, such as congestion in distant parts of the transmission system. The transmission system operator shall supply necessary information.

3. The transmission system operator shall not be entitled to refuse a new connection point, on the ground that it will lead to additional costs linked with necessary capacity increase of system elements in the close-up range to the connection point.

## CHAPTER VI

### **DISTRIBUTION SYSTEM OPERATION**

#### *Article 24*

### **Designation of distribution system operators**

Member States shall designate or shall require undertakings that 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. Member States shall ensure that distribution system operators act in accordance with Articles 25, 26 and 27.

#### *Article 25*

### **Tasks of distribution system operators**

1. The distribution system operator shall be responsible for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity, for operating, maintaining and developing under economic conditions a secure, reliable and efficient electricity distribution system in its area with due regard for the environment and energy efficiency.

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

3. The distribution system operator shall provide system users with the information they need for efficient access to, including use of, the system.

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

5. Each distribution system operator shall procure the energy it uses to cover energy losses and reserve capacity in its system according to transparent, non-discriminatory and market based procedures, whenever it has such a function. That requirement shall be without prejudice to using electricity acquired under contracts concluded before 1 January 2002.

6. Where a distribution system operator is responsible for balancing the distribution system, rules adopted by it for that purpose shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by distribution system operators shall be established in accordance with Article 37(6) in a non-discriminatory and cost-reflective way and shall be published.

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

#### Article 26

##### 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. Those rules shall not create an obligation to separate the ownership of assets of the distribution system operator from the vertically integrated undertaking.

2. In addition to the requirements under paragraph 1, where the distribution system operator is part of a vertically integrated undertaking, it shall be independent in terms of its organisation and decision-making from the other activities not related to distribution. In order to achieve this, the following minimum criteria shall apply:

- (a) those persons responsible for the management of the distribution system operator must not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, transmission or supply of electricity;
- (b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;
- (c) the distribution system operator must have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network. In order to fulfil those

tasks, the distribution system operator shall have at its disposal the necessary resources including human, technical, physical and financial resources. 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, regulated indirectly in accordance with Article 37(6), in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the distribution system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of distribution lines, that do not exceed the terms of the approved financial plan, or any equivalent instrument; and

- (d) the distribution system operator must 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 compliance programme shall set out the specific obligations of employees to meet that objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme, the compliance officer of the distribution system operator, to the regulatory authority referred to in Article 35(1) and shall be published. The compliance officer of the distribution system operator shall be fully independent and shall have access to all the necessary information of the distribution system operator and any affiliated undertaking to fulfil his task.

3. Where the distribution system operator is part of a vertically integrated undertaking, the Member States shall ensure that the activities of the distribution system operator are monitored by regulatory authorities or other competent bodies so that it cannot take advantage of its vertical integration to distort competition. In particular, vertically integrated distribution system operators shall not, in their communication and branding, create confusion in respect of the separate identity of the supply branch of the vertically integrated undertaking.

4. Member States may decide not to apply paragraphs 1, 2 and 3 to integrated electricity undertakings serving less than 100 000 connected customers, or serving small isolated systems.

#### Article 27

##### Confidentiality obligation of distribution system operators

Without prejudice to Article 30 or any other legal duty to disclose information, the distribution system operator must preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, and shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.



*Article 28***Closed distribution systems**

1. Member States may provide for national regulatory authorities or other competent authorities to classify a system which distributes electricity within a geographically confined industrial, commercial or shared services site and does not, without prejudice to paragraph 4, supply household customers, as a closed distribution system if:

- (a) for specific technical or safety reasons, the operations or the production process of the users of that system are integrated; or
- (b) that system distributes electricity primarily to the owner or operator of the system or their related undertakings.

2. Member States may provide for national regulatory authorities to exempt the operator of a closed distribution system from:

- (a) the requirement under Article 25(5) to procure the energy it uses to cover energy losses and reserve capacity in its system according to transparent, non-discriminatory and market based procedures;
- (b) the requirement under Article 32(1) that tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37.

3. Where an exemption is granted under paragraph 2, the applicable tariffs, or the methodologies underlying their calculation, shall be reviewed and approved in accordance with Article 37 upon request by a user of the closed distribution system.

4. Incidental use by a small number of households with employment or similar associations with the owner of the distribution system and located within the area served by a closed distribution system shall not preclude an exemption under paragraph 2 being granted.

*Article 29***Combined operator**

Article 26(1) shall not prevent the operation of a combined transmission and distribution system operator provided that operator complies with Articles 9(1), or 13 and 14, or Chapter V or falls under Article 44(2).

## CHAPTER VII

**UNBUNDLING AND TRANSPARENCY OF ACCOUNTS***Article 30***Right of access to accounts**

1. Member States or any competent authority they designate, including the regulatory authorities referred to in Article 35, shall,

insofar as necessary to carry out their functions, have right of access to the accounts of electricity undertakings as set out in Article 31.

2. Member States and any designated competent authority, including the regulatory 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 31***Unbundling of accounts**

1. Member States shall take the necessary steps to ensure that the accounts of electricity undertakings are kept in accordance with paragraphs 2 and 3.

2. Electricity undertakings, whatever their system of ownership or legal form, shall draw up, submit to audit and publish their annual accounts in accordance with the rules of national law concerning the annual accounts of limited liability companies adopted pursuant to the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 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 in their head office.

3. Electricity undertakings shall, in their internal accounting, keep separate accounts for each of their transmission and distribution 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 electricity activities not relating to transmission or distribution. 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 or distribution system shall be specified in the accounts. Where appropriate, they shall keep consolidated accounts for other, non-electricity activities. The internal accounts shall include a balance sheet and a profit and loss account for each activity.

4. The audit referred to in paragraph 2 shall, in particular, verify that the obligation to avoid discrimination and cross-subsidies referred to in paragraph 3 is respected.

(\*) 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.

## CHAPTER VIII

**ORGANISATION OF ACCESS TO THE SYSTEM***Article 32***Third-party access**

1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 37 and that those tariffs, and the methodologies — where only methodologies are approved — are published prior to their entry into force.

2. The transmission or distribution system operator may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3, and based on objective and technically and economically justified criteria. The regulatory authorities where Member States have so provided or Member States shall ensure that those criteria are consistently applied and that the system user who has been refused access can make use of a dispute settlement procedure. The regulatory authorities shall also ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information.

*Article 33***Market opening and reciprocity**

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

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

(b) from 1 July 2004, all non-household customers;

(c) from 1 July 2007, all customers.

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

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

(b) 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 the Member State where the eligible customer is located.

*Article 34***Direct lines**

1. Member States shall take the measures necessary to enable:

(a) all electricity producers and electricity supply undertakings established within their territory to supply their own premises, subsidiaries and eligible customers through a direct line; and

(b) all eligible customers within their territory to be supplied through a direct line by a producer and supply undertakings.

2. Member States shall lay down the criteria for the grant of authorisations for the construction of direct lines in their territory. Those criteria shall be objective and non-discriminatory.

3. The possibility of supplying electricity through a direct line as referred to in paragraph 1 of this Article shall not affect the possibility of contracting electricity in accordance with Article 32.

4. Member States may issue an authorisation to construct a direct line subject either to the refusal of system access on the basis, as appropriate, of Article 32 or to the opening of a dispute settlement procedure under Article 37.

5. Member States may refuse to authorise a direct line if the granting of such an authorisation would obstruct the provisions of Article 3. Duly substantiated reasons shall be given for such refusal.

## CHAPTER IX

**NATIONAL REGULATORY AUTHORITIES***Article 35***Designation and independence of regulatory authorities**

1. Each Member State shall designate a single national regulatory authority at national level.

2. Paragraph 1 of this Article shall be without prejudice to the designation of other regulatory authorities at regional level within Member States, provided that there is one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in accordance with Article 14(1) of Regulation (EC) No 713/2009.

3. By way of derogation from paragraph 1 of this Article, a Member State may designate regulatory authorities for small systems on a geographically separate region whose consumption, in 2008, accounted for less than 3 % of the total consumption of the Member State of which it is part. This derogation shall be without prejudice to the appointment of one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in compliance with Article 14(1) of Regulation (EC) No 713/2009.

4. Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member State shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority:

- (a) is legally distinct and functionally independent from any other public or private entity;
- (b) ensures that its staff and the persons responsible for its management:
  - (i) act independently from any market interest; and
  - (ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 37.

5. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

- (a) the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and
- (b) the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once.

In regard to point (b) of the first subparagraph, Member States shall ensure an appropriate rotation scheme for the board or the top management. The members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law.

### Article 36

#### General objectives of the regulatory authority

In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures in pursuit of the following objectives within the framework of their duties and powers as laid down in Article 37, in close consultation with other relevant national authorities including competition authorities, as appropriate, and without prejudice to their competencies:

- (a) promoting, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, a competitive, secure and environmentally sustainable internal market in electricity within the Community, and effective market opening for all customers and suppliers in the Community and ensuring appropriate conditions for the effective and reliable operation of electricity networks, taking into account long-term objectives;
- (b) developing competitive and properly functioning regional markets within the Community in view of the achievement of the objectives referred to in point (a);
- (c) eliminating restrictions on trade in electricity between Member States, including developing appropriate cross-border transmission capacities to meet demand and enhancing the integration of national markets which may facilitate electricity flows across the Community;
- (d) helping to achieve, in the most cost-effective way, the development of secure, reliable and efficient non-discriminatory systems that are consumer oriented, and promoting system adequacy and, in line with general energy policy objectives, energy efficiency as well as the integration of large and small-scale production of electricity from renewable energy sources and distributed generation in both transmission and distribution networks;
- (e) facilitating access to the network for new generation capacity, in particular removing barriers that could prevent access for new market entrants and of electricity from renewable energy sources;
- (f) ensuring that system operators and system users are granted appropriate incentives, in both the short and the long term, to increase efficiencies in system performance and foster market integration;
- (g) ensuring that customers benefit through the efficient functioning of their national market, promoting effective competition and helping to ensure consumer protection;
- (h) helping to achieve high standards of universal and public service in electricity supply, contributing to the protection of vulnerable customers and contributing to the compatibility of necessary data exchange processes for customer switching.

## Article 37

**Duties and powers of the regulatory authority**

1. The regulatory authority shall have the following duties:
    - (a) fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies;
    - (b) ensuring compliance of transmission and distribution system operators and, where relevant, system owners, as well as of any electricity undertakings, with their obligations under this Directive and other relevant Community legislation, including as regards cross-border issues;
    - (c) cooperating in regard to cross-border issues with the regulatory authority or authorities of the Member States concerned and with the Agency;
    - (d) complying with, and implementing, any relevant legally binding decisions of the Agency and of the Commission;
    - (e) reporting annually on its activity and the fulfilment of its duties to the relevant authorities of the Member States, the Agency and the Commission. Such reports shall cover the steps taken and the results obtained as regards each of the tasks listed in this Article;
    - (f) ensuring that there are no cross-subsidies between transmission, distribution, and supply activities;
    - (g) monitoring investment plans of the transmission system operators, and providing in its annual report an assessment of the investment plans of the transmission system operators as regards their consistency with the Community-wide network development plan referred to in Article 8(3)(b) of Regulation (EC) No 714/2009; such assessment may include recommendations to amend those investment plans;
    - (h) monitoring compliance with and reviewing the past performance of network security and reliability rules and setting or approving standards and requirements for quality of service and supply or contributing thereto together with other competent authorities;
    - (i) monitoring the level of transparency, including of wholesale prices, and ensuring compliance of electricity undertakings with transparency obligations;
    - (j) monitoring the level and effectiveness of market opening and competition at wholesale and retail levels, including on electricity exchanges, prices for household customers including prepayment systems, switching rates, disconnection rates, charges for and the execution of maintenance services, and complaints by household customers, as well as any distortion or restriction of competition, including providing any relevant information, and bringing any relevant cases to the relevant competition authorities;
    - (k) monitoring the occurrence of restrictive contractual practices, including exclusivity clauses which may prevent large non-household customers from contracting simultaneously with more than one supplier or restrict their choice to do so, and, where appropriate, informing the national competition authorities of such practices;
    - (l) respecting contractual freedom with regard to interruptible supply contracts and with regard to long-term contracts provided that they are compatible with Community law and consistent with Community policies;
    - (m) monitoring the time taken by transmission and distribution system operators to make connections and repairs;
    - (n) helping to ensure, together with other relevant authorities, that the consumer protection measures, including those set out in Annex I, are effective and enforced;
    - (o) publishing recommendations, at least annually, in relation to compliance of supply prices with Article 3, and providing these to the competition authorities, where appropriate;
    - (p) ensuring access to customer consumption data, the provision, for optional use, of an easily understandable harmonised format at national level for consumption data, and prompt access for all customers to such data under point (h) of Annex I;
    - (q) monitoring the implementation of rules relating to the roles and responsibilities of transmission system operators, distribution system operators, suppliers and customers and other market parties pursuant to Regulation (EC) No 714/2009;
    - (r) monitoring investment in generation capacities in relation to security of supply;
    - (s) monitoring technical cooperation between Community and third-country transmission system operators;
    - (t) monitoring the implementation of safeguards measures as referred to in Article 42; and
    - (u) contributing to the compatibility of data exchange processes for the most important market processes at regional level.
  2. Where a Member State has so provided, the monitoring duties set out in paragraph 1 may be carried out by other authorities than the regulatory authority. In such a case, the information resulting from such monitoring shall be made available to the regulatory authority as soon as possible.
- While preserving their independence, without prejudice to their own specific competencies and consistent with the principles of better regulation, the regulatory authority shall, as appropriate, consult transmission system operators and, as appropriate, closely cooperate with other relevant national authorities when carrying out the duties set out in paragraph 1.

Any approvals given by a regulatory authority or the Agency under this Directive are without prejudice to any duly justified future use of its powers by the regulatory authority under this Article or to any penalties imposed by other relevant authorities or the Commission.

3. In addition to the duties conferred upon it under paragraph 1 of this Article, when an independent system operator has been designated under Article 13, the regulatory authority shall:

- (a) monitor the transmission system owner's and the independent system operator's compliance with their obligations under this Article, and issue penalties for non-compliance in accordance with paragraph 4(d);
- (b) monitor the relations and communications between the independent system operator and the transmission system owner so as to ensure compliance of the independent system operator with its obligations, and in particular approve contracts and act as a dispute settlement authority between the independent system operator and the transmission system owner in respect of any complaint submitted by either party pursuant to paragraph 11;
- (c) without prejudice to the procedure under Article 13(2)(c), for the first ten-year network development plan, approve the investments planning and the multi-annual network development plan presented annually by the independent system operator;
- (d) ensure that network access tariffs collected by the independent system operator include remuneration for the network owner or network owners, which provides for adequate remuneration of the network assets and of any new investments made therein, provided they are economically and efficiently incurred;
- (e) have the powers to carry out inspections, including unannounced inspections, at the premises of transmission system owner and independent system operator; and
- (f) monitor the use of congestion charges collected by the independent system operator in accordance with Article 16(6) of Regulation (EC) No 714/2009.

4. Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraphs 1, 3 and 6 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

- (a) to issue binding decisions on electricity undertakings;
- (b) to carry out investigations into the functioning of the electricity markets, and to decide upon and impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the

market. Where appropriate, the regulatory authority shall also have the power to cooperate with the national competition authority and the financial market regulators or the Commission in conducting an investigation relating to competition law;

- (c) to require any information from electricity undertakings relevant for the fulfilment of its tasks, including the justification for any refusal to grant third-party access, and any information on measures necessary to reinforce the network;
- (d) to impose effective, proportionate and dissuasive penalties on electricity undertakings not complying with their obligations under this Directive or any relevant legally binding decisions of the regulatory authority or of the Agency, or to propose that a competent court impose such penalties. This shall include the power to impose or propose the imposition of penalties of up to 10 % of the annual turnover of the transmission system operator on the transmission system operator or of up to 10 % of the annual turnover of the vertically integrated undertaking on the vertically integrated undertaking, as the case may be, for non-compliance with their respective obligations pursuant to this Directive; and
- (e) appropriate rights of investigations and relevant powers of instructions for dispute settlement under paragraphs 11 and 12.

5. In addition to the duties and powers conferred on it under paragraphs 1 and 4 of this Article, when a transmission system operator has been designated in accordance with Chapter V, the regulatory authority shall be granted at least the following duties and powers:

- (a) to issue penalties in accordance with paragraph 4(d) for discriminatory behaviour in favour of the vertically integrated undertaking;
- (b) to monitor communications between the transmission system operator and the vertically integrated undertaking so as to ensure compliance of the transmission system operator with its obligations;
- (c) to act as dispute settlement authority between the vertically integrated undertaking and the transmission system operator in respect of any complaint submitted pursuant to paragraph 11;
- (d) to monitor commercial and financial relations including loans between the vertically integrated undertaking and the transmission system operator;
- (e) to approve all commercial and financial agreements between the vertically integrated undertaking and the transmission system operator on the condition that they comply with market conditions;

- (f) to request justification from the vertically integrated undertaking when notified by the compliance officer in accordance with Article 21(4). Such justification shall, in particular, include evidence to the end that no discriminatory behaviour to the advantage of the vertically integrated undertaking has occurred;
- (g) to carry out inspections, including unannounced ones, on the premises of the vertically integrated undertaking and the transmission system operator; and
- (h) to assign all or specific tasks of the transmission system operator to an independent system operator appointed in accordance with Article 13 in case of a persistent breach by the transmission system operator of its obligations under this Directive, in particular in case of repeated discriminatory behaviour to the benefit of the vertically integrated undertaking.
6. The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of 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 or their methodologies. Those tariffs or methodologies shall allow the necessary investments in the networks to be carried out in a manner allowing those investments to ensure the viability of the networks;
- (b) the provision of balancing services which shall be performed in the most economic manner possible and provide appropriate incentives for network users to balance their input and off-takes. The balancing services shall be provided in a fair and non-discriminatory manner and be based on objective criteria; and
- (c) access to cross-border infrastructures, including the procedures for the allocation of capacity and congestion management.
7. The methodologies or the terms and conditions referred to in paragraph 6 shall be published.
8. In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.
9. The regulatory authorities shall monitor congestion management of national electricity systems including interconnectors, and the implementation of congestion management rules. To that end, transmission system operators or market operators shall submit their congestion management rules, including capacity allocation, to the national regulatory authorities. National regulatory authorities may request amendments to those rules.
10. Regulatory authorities shall have the authority to require transmission and distribution system operators, if necessary, to modify the terms and conditions, including tariffs or methodologies referred to in this Article, to ensure that they are proportionate and applied in a non-discriminatory manner. In the event of delay in the fixing of transmission and distribution tariffs, regulatory authorities shall have the power to fix or approve provisional transmission and distribution tariffs or methodologies and to decide on the appropriate compensatory measures if the final transmission and distribution tariffs or methodologies deviate from those provisional tariffs or methodologies.
11. Any party having a complaint against a transmission or distribution system operator in relation to that operator's obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within a period of two months after receipt of the complaint. That period may be extended by two months where additional information is sought by the regulatory authority. That extended period may be further extended with the agreement of the complainant. The regulatory authority's decision shall have binding effect unless and until overruled on appeal.
12. Any party who is affected and who has a right to complain concerning a decision on methodologies taken pursuant to this Article or, where the regulatory authority has a duty to consult, concerning the proposed tariffs or 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.
13. 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. Those mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.
14. 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.
15. Complaints referred to in paragraphs 11 and 12 shall be without prejudice to the exercise of rights of appeal under Community or national law.
16. Decisions taken by regulatory authorities shall be fully reasoned and justified to allow for judicial review. The decisions shall be available to the public while preserving the confidentiality of commercially sensitive information.

17. Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.

#### Article 38

##### **Regulatory regime for cross-border issues**

1. Regulatory authorities shall closely consult and cooperate with each other, and shall provide each other and the Agency with any information necessary for the fulfilment of their tasks under this Directive. In respect of the information exchanged, the receiving authority shall ensure the same level of confidentiality as that required of the originating authority.

2. Regulatory authorities shall cooperate at least at a regional level to:

- (a) foster the creation of operational arrangements in order to enable an optimal management of the network, promote joint electricity exchanges and the allocation of cross-border capacity, and to enable an adequate level of interconnection capacity, including through new interconnection, within the region and between regions to allow for development of effective competition and improvement of security of supply, without discriminating between supply undertakings in different Member States;
- (b) coordinate the development of all network codes for the relevant transmission system operators and other market actors; and
- (c) coordinate the development of the rules governing the management of congestion.

3. National regulatory authorities shall have the right to enter into cooperative arrangements with each other to foster regulatory cooperation.

4. The actions referred to in paragraph 2 shall be carried out, as appropriate, in close consultation with other relevant national authorities and without prejudice to their specific competencies.

5. The Commission may adopt Guidelines on the extent of the duties of the regulatory authorities to cooperate with each other and with the Agency. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).

#### Article 39

##### **Compliances with the Guidelines**

1. Any regulatory authority and the Commission may request the opinion of the Agency on the compliance of a decision taken by a regulatory authority with the Guidelines referred to in this Directive or in Regulation (EC) No 714/2009.

2. The Agency shall provide its opinion to the regulatory authority which has requested it or to the Commission, respectively, and to the regulatory authority which has taken the decision in question within three months from the date of receipt of the request.

3. Where the regulatory authority which has taken the decision does not comply with the Agency's opinion within four months from the date of receipt of that opinion, the Agency shall inform the Commission accordingly.

4. Any regulatory authority may inform the Commission where it considers that a decision relevant for cross-border trade taken by another regulatory authority does not comply with the Guidelines referred to in this Directive or in Regulation (EC) No 714/2009 within two months from the date of that decision.

5. Where the Commission, within two months after having been informed by the Agency in accordance with paragraph 3, or by a regulatory authority in accordance with paragraph 4, or on its own initiative, within three months from the date of the decision, finds that the decision of a regulatory authority raises serious doubts as to its compatibility with the Guidelines referred to in this Directive or in Regulation (EC) No 714/2009, the Commission may decide to examine the case further. In such a case, it shall invite the regulatory authority and the parties to the proceedings before the regulatory authority to submit observations.

6. Where the Commission takes a decision to examine the case further, it shall, within four months of the date of such decision, issue a final decision:

- (a) not to raise objections against the decision of the regulatory authority; or
- (b) to require the regulatory authority concerned to withdraw its decision on the basis that that the Guidelines have not been complied with.

7. Where the Commission has not taken a decision to examine the case further or a final decision within the time-limits set in paragraphs 5 and 6 respectively, it shall be deemed not to have raised objections to the decision of the regulatory authority.

8. The regulatory authority shall comply with the Commission decision to withdraw their decision within a period of two months and shall inform the Commission accordingly.

9. The Commission may adopt Guidelines setting out the details of the procedure to be followed for the application of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).

*Article 40***Record keeping**

1. Member States shall require supply undertakings to keep at the disposal of the national authorities, including the national regulatory authority, the national competition authorities and the Commission, for the fulfilment of their tasks, for at least five years, the relevant data relating to all transactions in electricity supply contracts and electricity derivatives with wholesale customers and transmission system operators.
2. The data shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled electricity supply contracts and electricity derivatives.
3. The regulatory authority may decide to make available to market participants elements of that information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC.
4. To ensure the uniform application of this Article, the Commission may adopt Guidelines which define the methods and arrangements for record keeping as well as the form and content of the data that shall be kept. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 46(2).
5. With respect to transactions in electricity derivatives of supply undertakings with wholesale customers and transmission system operators, this Article shall apply only once the Commission has adopted the Guidelines referred to in paragraph 4.
6. The provisions of this Article shall not create additional obligations towards the authorities referred to in paragraph 1 for entities falling within the scope of Directive 2004/39/EC.
7. In the event that the authorities referred to in paragraph 1 need access to data kept by entities falling within the scope of Directive 2004/39/EC, the authorities responsible under that Directive shall provide them with the required data.

## CHAPTER X

**RETAIL MARKETS***Article 41***Retail markets**

In order to facilitate the emergence of well functioning and transparent retail markets in the Community, Member States shall ensure that the roles and responsibilities of transmission

system operators, distribution system operators, supply undertakings and customers and if necessary other market participants are defined with respect to contractual arrangements, commitment to customers, data exchange and settlement rules, data ownership and metering responsibility.

Those rules shall be made public, be designed with the aim to facilitate customers' and suppliers' access to networks, and they shall be subject to review by the regulatory authorities or other relevant national authorities.

Large non-household customers shall have the right to contract simultaneously with several suppliers.

## CHAPTER XI

**FINAL PROVISIONS***Article 42***Safeguard measures**

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

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

The Member State concerned shall, without delay, notify those 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 43***Level playing field**

1. Measures that the Member States may take pursuant to this Directive in order to ensure a level playing field shall be compatible with the Treaty, notably Article 30 thereof, and with Community law.

2. The measures referred to in paragraph 1 shall be proportionate, non-discriminatory and transparent. Those measures may be put into effect only following the notification to and approval by the Commission.

3. The Commission shall act on the notification referred to in paragraph 2 within two months of the receipt of the notification. That period shall begin on the day following receipt of the complete information. In the event that the Commission has not acted within that two-month period, it shall be deemed not to have raised objections to the notified measures.



*Article 44***Derogations**

1. Member States which can demonstrate, after this Directive has been brought into force, that there are substantial problems for the operation of their small isolated systems, may apply for derogations from the relevant provisions of Chapters IV, VI, VII, and VIII, as well as Chapter III, in the case of micro isolated systems, as far as refurbishing, upgrading and expanding existing capacity are concerned, which may be granted to them by the Commission. The Commission shall inform the Member States of those applications before taking a decision, taking into account respect for confidentiality. That decision shall be published in the *Official Journal of the European Union*.

2. Article 9 shall not apply to Cyprus, Luxembourg and/or Malta. In addition, Articles 26, 32 and 33 shall not apply to Malta.

For the purposes of Article 9(1)(b), the notion 'undertaking performing any of the functions of generation or supply' shall not include final customers who perform any of the functions of generation and/or supply of electricity, either directly or via undertakings over which they exercise control, either individually or jointly, provided that the final customers including their shares of the electricity produced in controlled undertakings are, on an annual average, net consumers of electricity and provided that the economic value of the electricity they sell to third parties is insignificant in proportion to their other business operations.

*Article 45***Review procedure**

In the event that in the report referred to in Article 47(6) the Commission reaches the conclusion that 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 — 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.

Such 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 this Directive. The Commission may propose, in the proposals to amend this Directive, to exempt the Member State concerned from specific requirements, subject to that Member State implementing equally effective measures as appropriate.

*Article 46***Committee**

1. The Commission shall be assisted by a committee.
2. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

*Article 47***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 for the first time by 4 August 2004, and thereafter on an annual basis. The progress report shall cover at least:
  - (a) the experience gained and progress made in creating a complete and fully operational internal market in electricity and the obstacles that remain in this respect, including aspects of market dominance, concentration in the market, predatory or anti-competitive behaviour and the effect thereof in terms of market distortion;
  - (b) the extent to which the unbundling and tariffication requirements contained in this Directive have been successful in ensuring fair and non-discriminatory access to the Community's electricity system and equivalent levels of competition, as well as the economic, environmental and social consequences of the opening of the electricity market to customers;
  - (c) an examination of issues relating to system capacity levels and security of supply of electricity in the Community, and in particular the existing and projected balance between demand and supply, taking into account the physical capacity for exchanges between areas;
  - (d) special attention will be given to measures taken in Member States to cover peak demand and to deal with shortfalls of one or more suppliers;
  - (e) the implementation of the derogation provided under Article 26(4) with a view to a possible revision of the threshold;
  - (f) a general assessment of the progress achieved with regard to bilateral relations with third countries which produce and export or transport electricity, including progress in market integration, the social and environmental consequences of the trade in electricity and access to the networks of such third countries;

- (g) the need for possible harmonisation requirements that are not linked to the provisions of this Directive; and
- (h) the manner in which Member States have implemented in practice the requirements regarding energy labelling contained in Article 3(9), and the manner in which any Commission recommendations on that issue have been taken into account.

Where appropriate, the progress report may include recommendations as regards, in particular, the scope and modalities of labelling provisions, including the way in which reference is made to existing reference sources and the content of those sources, and, notably, how information relating to environmental impact, as regards at least CO<sub>2</sub> emissions, and radioactive waste, resulting from electricity generation from different energy sources could be made available in a transparent, easily accessible and comparable manner throughout the Community, how the measures taken by the Member States to control the accuracy of the information provided by suppliers could be streamlined, and which measures could counteract the negative effects of market dominance and market concentration.

2. Every two years, the progress report referred to in paragraph 1 shall also include an analysis of the different measures taken in the Member States to meet public service obligations, together with an examination of the effectiveness of those measures and, in particular, their effects on competition in the electricity market. Where appropriate, 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, by 3 March 2013, submit, as part of the general review, to the European Parliament and the Council, a detailed specific report outlining the extent to which the unbundling requirements under Chapter V have been successful in ensuring full and effective independence of transmission system operators, using effective and efficient unbundling as a benchmark.

4. For the purpose of its assessment under paragraph 3, the Commission shall take into account in particular the following criteria: fair and non-discriminatory network access, effective regulation, the development of the network to meet market needs, undistorted incentives to invest, the development of interconnection infrastructure, effective competition in the energy markets of the Community and the security of supply situation in the Community.

5. Where appropriate, and in particular in the event that the detailed specific report referred to in paragraph 3 determines that the conditions referred to in paragraph 4 have not been guaranteed in practice, the Commission shall submit proposals to the European Parliament and the Council to ensure fully effective independence of transmission system operators by 3 March 2014.

6. The Commission shall, by 1 January 2006, forward to the European Parliament and Council, a detailed report outlining progress in creating the internal electricity market. That report shall, in particular, consider:

- the existence of non-discriminatory network access,
- effective regulation,
- the development of interconnection infrastructure and the security of supply situation in the Community,
- the extent to which the full benefits of the opening of markets are accruing to small enterprises and household customers, notably with respect to public service and universal service standards,
- the extent to which markets are in practice open to effective competition, including aspects of market dominance, market concentration and predatory or anti-competitive behaviour,
- 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; and,
- the experience gained in the application of this 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. When necessary, those proposals shall, in conformity with competition law, also concern measures to address issues of market dominance, market concentration and predatory or anti-competitive behaviour.

#### Article 48

#### Repeal

Directive 2003/54/EC is repealed from 3 March 2011 without prejudice to the obligations of Member States concerning the deadlines for transposition and application of the said Directive. References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

*Article 49***Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 3 March 2011. They shall forthwith inform the Commission thereof.

They shall apply those measures from 3 March 2011, with the exception of Article 11, which they shall apply from 3 March 2013.

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

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 50***Entry into force**

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

*Article 51***Addressees**

This Directive is addressed to the Member States.

Done at Brussels, 13 July 2009.

*For the European Parliament*  
*The President*  
H.-G. PÖTTERING

*For the Council*  
*The President*  
E. ERLANDSSON

## ANNEX I

## MEASURES ON CONSUMER PROTECTION

1. Without prejudice to Community rules on consumer protection, in particular Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts <sup>(1)</sup> and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts <sup>(2)</sup>, the measures referred to in Article 3 are to ensure that customers:

- (a) have a right to a contract with their electricity 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,
  - 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 and whether withdrawal from the contract without charge is permitted,
  - any compensation and the refund arrangements which apply if contracted service quality levels are not met, including inaccurate and delayed billing,
  - the method of initiating procedures for settlement of disputes in accordance with point (f),
  - information relating to consumer rights, including on the complaint handling and all of the information referred to in this point, clearly communicated through billing or the electricity undertaking's web site,

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 information relating to the matters set out in this point 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 in a transparent and comprehensible manner. 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 electricity service provider;
- (c) receive transparent information on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of electricity services;
- (d) are offered a wide choice of payment methods, which do not unduly discriminate between customers. Prepayment systems shall be fair and adequately reflect likely consumption. 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 and shall not include non-contractual barriers to the exercise of customers' rights, for example excessive contractual documentation. Customers shall be protected against unfair or misleading selling methods;
- (e) are not charged for changing supplier;

<sup>(1)</sup> OJ L 144, 4.6.1997, p. 19.

<sup>(2)</sup> OJ L 95, 21.4.1993, p. 29.

- (f) benefit from transparent, simple and inexpensive procedures for dealing with their complaints. In particular, all consumers shall have the right to a good standard of service and complaint handling by their electricity service provider. Such out-of-court dispute settlements procedures shall enable disputes to be settled fairly and promptly, preferably within three months, with provision, where warranted, for a system of reimbursement and/or compensation. They should, wherever possible, be in line with the principles set out in Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes <sup>(1)</sup>;
  - (g) when having access to universal service under the provisions adopted by Member States pursuant to Article 3(3), are informed about their rights regarding universal service;
  - (h) have at their disposal their consumption data, and shall be able to, by explicit agreement and free of charge, give any registered supply undertaking access to its metering data. The party responsible for data management shall be obliged to give those data to the undertaking. Member States shall define a format for the data and a procedure for suppliers and consumers to have access to the data. No additional costs shall be charged to the consumer for that service;
  - (i) are properly informed of actual electricity consumption and costs frequently enough to enable them to regulate their own electricity consumption. That information shall be given by using a sufficient time frame, which takes account of the capability of customer's metering equipment and the electricity product in question. Due account shall be taken of the cost-efficiency of such measures. No additional costs shall be charged to the consumer for that service;
  - (j) receive a final closure account following any change of electricity supplier no later than six weeks after the change of supplier has taken place.
2. Member States shall ensure the implementation of intelligent metering systems that shall assist the active participation of consumers in the electricity supply market. The implementation of those metering systems may be subject to an economic assessment of all the long-term costs and benefits to the market and the individual consumer or which form of intelligent metering is economically reasonable and cost-effective and which timeframe is feasible for their distribution.

Such assessment shall take place by 3 September 2012.

Subject to that assessment, Member States or any competent authority they designate shall prepare a timetable with a target of up to 10 years for the implementation of intelligent metering systems.

Where roll-out of smart meters is assessed positively, at least 80 % of consumers shall be equipped with intelligent metering systems by 2020.

The Member States, or any competent authority they designate, shall ensure the interoperability of those metering systems to be implemented within their territories and shall have due regard to the use of appropriate standards and best practice and the importance of the development of the internal market in electricity.

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<sup>(1)</sup> OJ L 115, 17.4.1998, p. 31.

## ANNEX II

## CORRELATION TABLE

| Directive 2003/54/EC                      | This Directive |
|---|----------------|
| Article 1                                 | Article 1      |
| Article 2                                 | Article 2      |
| Article 3                                 | Article 3      |
| Article 4                                 | Article 4      |
| Article 5                                 | Article 5      |
| —   | Article 6      |
| Article 6                                 | Article 7      |
| Article 7                                 | Article 8      |
| Article 10                                | Article 9      |
| Article 8                                 | Article 10     |
| —   | Article 11     |
| Article 9                                 | Article 12     |
| —   | Article 13     |
| —   | Article 14     |
| Article 11                                | Article 15     |
| Article 12                                | Article 16     |
| —   | Article 17     |
| —   | Article 18     |
| —   | Article 19     |
| —   | Article 20     |
| —   | Article 21     |
| —   | Article 22     |
| —   | Article 23     |
| Article 13                                | Article 24     |
| Article 14                                | Article 25     |
| Article 15                                | Article 26     |
| Article 16                                | Article 27     |
| Article 17                                | Article 29     |
| Article 18                                | Article 30     |
| Article 19                                | Article 31     |
| Article 20                                | Article 32     |
| Article 21                                | Article 33     |
| Article 22                                | Article 34     |
| Article 23(1) (first and second sentence) | Article 35     |
| —   | Article 36     |
| Article 23 (rest)                         | Article 37     |
| —   | Article 38     |
| —   | Article 39     |
| —   | Article 40     |
| —   | Article 41     |
| Article 24                                | Article 42     |

| Directive 2003/54/EC | This Directive |
|----------------------|----------------|
| —                    | Article 43     |
| Article 25           | —              |
| Article 26           | Article 44     |
| Article 27           | Article 45     |
| —                    | Article 46     |
| Article 28           | Article 47     |
| Article 29           | Article 48     |
| Article 30           | Article 49     |
| Article 31           | Article 50     |
| Article 32           | Article 51     |
| Annex A              | Annex I        |

**DIRECTIVE 2009/73/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**of 13 July 2009**  
**concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC**  
**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the Committee of the Regions <sup>(2)</sup>,

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

Whereas:

- (1) The internal market in natural gas, which has been progressively implemented throughout the Community since 1999, aims to deliver real choice for all consumers of the European Union, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices, and higher standards of service, and to contribute to security of supply and sustainability.
- (2) Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas <sup>(4)</sup> has made a significant contribution towards the creation of such an internal market in natural gas.
- (3) The freedoms which the Treaty guarantees the citizens of the Union — *inter alia*, the free movement of goods, the freedom of establishment and the freedom to provide services — are achievable only in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.
- (4) However, at present, there are obstacles to the sale of gas on equal terms and without discrimination or disadvantages in the Community. In particular, non-discriminatory network access and an equally effective level of regulatory supervision in each Member State do not yet exist.

(5) The Communication of the Commission of 10 January 2007 entitled 'An Energy Policy for Europe' highlighted the importance of completing the internal market in natural gas and of creating a level playing field for all natural gas undertakings established in the Community. The Communications of the Commission of 10 January 2007 entitled 'Prospects for the internal gas and electricity market' and 'Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)' showed that the present rules and measures do not provide the necessary framework for achieving the objective of a well-functioning internal market.

(6) Without effective separation of networks from activities of production and supply (effective unbundling), there is a risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks.

(7) The rules on legal and functional unbundling as provided for in Directive 2003/55/EC have not, however, led to effective unbundling of the transmission system operators. At its meeting on 8 and 9 March 2007, the European Council therefore invited the Commission to develop legislative proposals for the 'effective separation of supply and production activities from network operations'.

(8) Only the removal of the incentive for vertically integrated undertakings to discriminate against competitors as regards network access and investment can ensure effective unbundling. Ownership unbundling, which implies the appointment of the network owner as the system operator and its independence from any supply and production interests, is clearly an effective and stable way to solve the inherent conflict of interests and to ensure security of supply. For that reason, the European Parliament, in its resolution of 10 July 2007 on prospects for the internal gas and electricity market <sup>(5)</sup> referred to ownership unbundling at transmission level as the most effective tool by which to promote investments in infrastructure in a non-discriminatory way, fair access to the network for new entrants and transparency in the market. Under ownership unbundling, Member States should therefore be required to ensure that the same person or persons are not entitled to exercise control over a production or supply undertaking

<sup>(1)</sup> OJ C 211, 19.8.2008, p. 23.

<sup>(2)</sup> OJ C 172, 5.7.2008, p. 55.

<sup>(3)</sup> Opinion of the European Parliament of 9 July 2008 (not yet published in the Official Journal), Council Common Position of 9 January 2009 (OJ C 70 E, 24.3.2009, p. 37) and Position of the European Parliament of 22 April 2009 (not yet published in the Official Journal). Council Decision of 25 June 2009.

<sup>(4)</sup> OJ L 176, 15.7.2003, p. 57.

<sup>(5)</sup> OJ C 175 E, 10.7.2008, p. 206.



and, at the same time, exercise control or any right over a transmission system operator or transmission system. Conversely, control over a transmission system or transmission system operator should preclude the possibility of exercising control or any right over a production or supply undertaking. Within those limits, a production or supply undertaking should be able to have a minority shareholding in a transmission system operator or transmission system.

- (9) Any system for unbundling should be effective in removing any conflict of interests between producers, suppliers and transmission system operators, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime and should not create an overly onerous regulatory regime for national regulatory authorities.
- (10) The definition of the term 'control' is taken from Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) <sup>(1)</sup>.
- (11) Since ownership unbundling requires, in some instances, the restructuring of undertakings, Member States that decide to implement ownership unbundling should be granted additional time to apply the relevant provisions. In view of the vertical links between the electricity and gas sectors, the unbundling provisions should apply across the two sectors.
- (12) Under ownership unbundling, to ensure full independence of network operation from supply and production interests and to prevent exchanges of any confidential information, the same person should not be a member of the managing boards of both a transmission system operator or a transmission system and an undertaking performing any of the functions of production or supply. For the same reason, the same person should not be entitled to appoint members of the managing boards of a transmission system operator or a transmission system and to exercise control or any right over a production or supply undertaking.
- (13) The setting up of a system operator or a transmission operator that is independent from supply and production interests should enable a vertically integrated undertaking to maintain its ownership of network assets whilst ensuring an effective separation of interests, provided that

such independent system operator or such independent transmission operator performs all the functions of a system operator and detailed regulation and extensive regulatory control mechanisms are put in place.

- (14) Where, on 3 September 2009, an undertaking owning a transmission system is part of a vertically integrated undertaking, Member States should therefore be given a choice between ownership unbundling and setting up a system operator or transmission operator which is independent from supply and production interests.
- (15) To preserve fully the interests of the shareholders of vertically integrated undertakings, Member States should have the choice of implementing ownership unbundling either by direct divestiture or by splitting the shares of the integrated undertaking into shares of the network undertaking and shares of the remaining supply and production undertaking, provided that the requirements resulting from ownership unbundling are complied with.
- (16) The full effectiveness of the independent system operator or independent transmission operator solutions should be ensured by way of specific additional rules. The rules on the independent transmission operator provide an appropriate regulatory framework to guarantee fair competition, sufficient investment, access for new market entrants and the integration of gas markets. Effective unbundling through the independent transmission operator provisions should be based on a pillar of organisational measures and measures relating to the governance of transmission system operators and on a pillar of measures relating to investment, connecting new production capacities to the network and market integration through regional cooperation. The independence of the transmission operator should also, *inter alia*, be ensured through certain 'cooling-off' periods during which no management or other relevant activity giving access to the same information as could have been obtained in a managerial position is exercised in the vertically integrated undertaking. The independent transmission operator model of effective unbundling is in line with the requirements laid down by the European Council at its meeting on 8 and 9 March 2007.
- (17) In order to develop competition in the internal market in gas, large non-household customers should be able to choose their suppliers and enter into contracts with several suppliers to secure their gas requirements. Such customers should be protected against exclusivity clauses, the effect of which is to exclude competing or complementary offers.

<sup>(1)</sup> OJ L 24, 29.1.2004, p. 1.

- (18) A Member State has the right to opt for full ownership unbundling in its territory. Where a Member State has exercised that right, an undertaking does not have the right to set up an independent system operator or an independent transmission operator. Furthermore, an undertaking performing any of the functions of production or supply cannot directly or indirectly exercise control or any right over a transmission system operator from a Member State that has opted for full ownership unbundling.
- (19) Under this Directive different types of market organisation will exist in the internal market in natural gas. The measures that Member States could take in order to ensure a level playing field should be based on overriding requirements of general interest. The Commission should be consulted on the compatibility of the measures with the Treaty and Community law.
- (20) The implementation of effective unbundling should respect the principle of non-discrimination between the public and private sectors. To that end, the same person should not be able to exercise control or any right, in violation of the rules of ownership unbundling or the independent system operator option, solely or jointly, over the composition, voting or decision of the bodies of both the transmission system operators or the transmission systems and the production or supply undertakings. With regard to ownership unbundling and the independent system operator solution, provided that the Member State in question is able to demonstrate that the requirement is complied with, two separate public bodies should be able to control production and supply activities on the one hand and transmission activities on the other.
- (21) Fully effective separation of network activities from supply and production activities should apply throughout the Community to both Community and non-Community undertakings. To ensure that network activities and supply and production activities throughout the Community remain independent from each other, regulatory authorities should be empowered to refuse certification to transmission system operators that do not comply with the unbundling rules. To ensure the consistent application of those rules across the Community, the regulatory authorities should take utmost account of the Commission's opinion when the former take decisions on certification. To ensure, in addition, respect for the international obligations of the Community and solidarity and energy security within the Community, the Commission should have the right to give an opinion on certification in relation to a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries.
- (22) The security of energy supply is an essential element of public security and is therefore inherently connected to the efficient functioning of the internal market in gas and the integration of the isolated gas markets of Member States. Gas can reach the citizens of the Union only through the network. Functioning open gas markets and, in particular, the networks and other assets associated with gas supply are essential for public security, for the competitiveness of the economy and for the well-being of the citizens of the Union. Persons from third countries should therefore only be allowed to control a transmission system or a transmission system operator if they comply with the requirements of effective separation that apply inside the Community. Without prejudice to the international obligations of the Community, the Community considers that the gas transmission system sector is of high importance to the Community and therefore additional safeguards are necessary regarding the preservation of the security of supply of energy to the Community to avoid any threats to public order and public security in the Community and the welfare of the citizens of the Union. The security of supply of energy to the Community requires, in particular, an assessment of the independence of network operation, the level of the Community's and individual Member States' dependence on energy supply from third countries, and the treatment of both domestic and foreign trade and investment in energy in a particular third country. Security of supply should therefore be assessed in the light of the factual circumstances of each case as well as the rights and obligations arising under international law, in particular the international agreements between the Community and the third country concerned. Where appropriate the Commission is encouraged to submit recommendations to negotiate relevant agreements with third countries addressing the security of supply of energy to the Community or to include the necessary issues in other negotiations with those third countries.
- (23) Further measures should be taken in order to ensure transparent and non-discriminatory tariffs for access to transport. 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.
- (24) It is necessary to ensure the independence of storage system operators in order to improve third-party access to storage facilities that are technically and/or economically necessary for providing efficient access to the system for the supply of customers. It is therefore appropriate that storage facilities are operated through legally separate entities that have effective decision-making rights with respect to assets necessary to maintain, operate and develop storage facilities. It is also necessary to increase transparency in respect of the storage capacity that is offered to third parties, by obliging Member States to define and publish a

non-discriminatory, clear framework that determines the appropriate regulatory regime applicable to storage facilities. That obligation should not require a new decision on access regimes but should improve the transparency regarding the access regime to storage. Confidentiality requirements for commercially sensitive information are particularly important where data of a strategic nature are concerned or where there is only a single user of a storage facility.

- (25) Non-discriminatory access to the distribution network determines downstream access to customers at retail level. The scope for discrimination as regards third party access and investment, however, is less significant at distribution level than at transmission level where congestion and the influence of production interests are generally greater than at distribution level. Moreover, legal and functional unbundling of distribution system operators was required, pursuant to Directive 2003/55/EC, only from 1 July 2007 and its effects on the internal market in natural gas still need to be evaluated. The rules on legal and functional unbundling currently in place can lead to effective unbundling provided they are more clearly defined, properly implemented and closely monitored. To create a level playing field at retail level, the activities of distribution system operators should therefore be monitored so that they are prevented from taking advantage of their vertical integration as regards their competitive position on the market, in particular in relation to household and small non-household customers.
- (26) Member States should take concrete measures to assist the wider use of biogas and gas from biomass, the producers of which should be granted non-discriminatory access to the gas system, provided that such access is compatible with the relevant technical rules and safety standards on an ongoing basis.
- (27) To avoid imposing a disproportionate financial and administrative burden on small distribution system operators, Member States should be able, where necessary, to exempt the undertakings concerned from the legal distribution unbundling requirements.
- (28) Where a closed distribution system is used to ensure the optimal efficiency of an integrated energy supply requiring specific operational standards, or a closed distribution system is maintained primarily for the use of the owner of the system, it should be possible to exempt the distribution system operator from obligations which would constitute an unnecessary administrative burden because of the particular nature of the relationship between the distribution system operator and the users of the system. Industrial, commercial or shared services sites such as train station buildings, airports, hospitals, large camping sites with integrated facilities or chemical industry sites can include closed distribution systems because of the specialised nature of their operations.
- (29) Directive 2003/55/EC introduced a requirement for Member States to establish regulators with specific competences. However, experience shows that the effectiveness of regulation is frequently hampered through a lack of independence of regulators from government, and insufficient powers and discretion. For that reason, at its meeting on 8 and 9 March 2007, the European Council invited the Commission to develop legislative proposals providing for further harmonisation of the powers and strengthening of the independence of national energy regulators. It should be possible for those national regulatory authorities to cover both the electricity and the gas sectors.
- (30) Energy regulators need to be able to take decisions in relation to all relevant regulatory issues if the internal market in natural gas is to function properly, and to be fully independent from any other public or private interests. This precludes neither judicial review nor parliamentary supervision in accordance with the constitutional law of the Member States. In addition, approval of the budget of the regulator by the national legislator does not constitute an obstacle to budgetary autonomy. The provisions relating to autonomy in the implementation of the allocated budget of the regulatory authority should be implemented within the framework defined by national budgetary law and rules. While contributing to the independence of the national regulatory authority from any political or economic interest through an appropriate rotation scheme, it should be possible for Member States to take due account of the availability of human resources and of the size of the board.
- (31) In order to ensure effective market access for all market players, including new entrants, non-discriminatory and cost-reflective balancing mechanisms are necessary. 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. 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 the in-put and off-take of gas and not to endanger the system.

- (32) 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 liquefied natural gas (LNG) system operator, or on the basis of a proposal agreed between those operator(s) and the users of the network. In carrying out those 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.
- (33) Energy regulators should have the power to issue binding decisions in relation to natural gas undertakings and to impose effective, proportionate and dissuasive penalties on natural gas undertakings which fail to comply with their obligations or to propose that a competent court impose such penalties on them. Energy regulators should also be granted the power to decide, irrespective of the application of competition rules, on appropriate measures ensuring customer benefits through the promotion of effective competition necessary for the proper functioning of the internal market in natural gas. The establishment of gas-release programmes is one of the possible measures that can be used to promote effective competition and ensure the proper functioning of the market. Energy regulators should also be granted the powers to contribute to ensuring high standards of public service in compliance with market opening, to the protection of vulnerable customers, and to the full effectiveness of consumer protection measures. Those provisions should be without prejudice to both the Commission's powers concerning the application of competition rules including the examination of mergers with a Community dimension, and the rules on the internal market such as the free movement of capital. The independent body to which a party affected by the decision of a national regulator has a right to appeal could be a court or other tribunal empowered to conduct a judicial review.
- (34) Any harmonisation of the powers of national regulatory authorities should include the powers to provide incentives to natural gas undertakings and to impose effective, proportionate and dissuasive penalties on natural gas undertakings or to propose that a competent court impose such penalties. Moreover, regulatory authorities should have the power to request relevant information from natural gas undertakings, make appropriate and sufficient investigations and settle disputes.
- (35) Investments in major new infrastructure should be strongly promoted while ensuring the proper functioning of the internal market in natural gas. In order to enhance the positive effect of exempted infrastructure projects on competition and security of supply, market interest during the project planning phase should be tested and congestion management rules should be implemented. Where an infrastructure is located in the territory of more than one Member State, the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators <sup>(1)</sup> (the 'Agency') should handle as a last resort the exemption request in order to take better account of its cross-border implications and to facilitate its administrative handling. Moreover, given the exceptional risk profile of constructing those exempt major infrastructure projects, it should be possible temporarily to grant partial derogations to undertakings with supply and production interests in respect of the unbundling rules for the projects concerned. The possibility of temporary derogations should apply, for security of supply reasons, in particular, to new pipelines within the Community transporting gas from third countries into the Community. Exemptions granted under Directive 2003/55/EC continue to apply until the scheduled expiry date as decided in the granted exemption decision.
- (36) The internal market in natural gas suffers from a lack of liquidity and transparency hindering the efficient allocation of resources, risk hedging and new entry. Trust in the market, its liquidity and the number of market participants needs to increase, and, therefore, regulatory oversight of undertakings active in the supply of gas needs to be increased. Such requirements should be without prejudice to, and compatible with, existing Community law in relation to the financial markets. Energy regulators and financial market regulators need to cooperate in order to enable each other to have an overview of the markets concerned.
- (37) Natural gas is mainly, and increasingly, imported into the Community from third countries. Community law should take account of the characteristics of natural gas, such as certain structural rigidities arising from the concentration of suppliers, the long-term contracts or the lack of downstream liquidity. Therefore, more transparency is needed, including in regard to the formation of prices.
- (38) Prior to the adoption by the Commission of Guidelines defining further the record-keeping requirements, the Agency and the Committee of European Securities Regulators (the 'CESR'), established by Commission Decision

<sup>(1)</sup> See page 1 of this Official Journal.

- 2009/77/EC<sup>(1)</sup>, should confer and advise the Commission in regard to their content. The Agency and the CESR should also cooperate to investigate further and advise on whether transactions in gas supply contracts and gas derivatives should be subject to pre- and/or post-trade transparency requirements and, if so, what the content of those requirements should be.
- (39) Member States or, where a Member State has so provided, the regulatory authority, should encourage the development of interruptible supply contracts.
- (40) In the interests of security of supply, the balance between supply and demand in individual Member States should be monitored, and such 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.
- (41) 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. Those rules and standards should ensure that those gases can technically and safely be injected into, and transported through the natural gas system and should also address their chemical characteristics.
- (42) 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 objective of this Directive and are compatible with the Treaty, including the competition rules. It is therefore necessary to take into account long-term contracts in the planning of supply and transport capacity of natural gas undertakings.
- (43) 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 whether they are aimed at household customers or small and medium-sized enterprises.
- (44) Respect for 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 common 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 respect of Community law.
- (45) It should be possible for measures implemented by Member States to achieve the objectives of social and economic cohesion to include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools. It should be possible for such tools to include liability mechanisms to guarantee the necessary investment.
- (46) 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 under Article 88(3) of the Treaty to notify them to the Commission.
- (47) The public service requirements and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers, especially vulnerable ones, can benefit from competition and fair prices. The public service requirements should be defined at national level, taking into account national circumstances; Community law should, however, be respected by the Member States. The citizens of the Union and, where Member States deem it to be appropriate, small enterprises, should be able to enjoy public service obligations, in particular with regard to security of supply and reasonable tariffs. A key aspect in supplying customers is access to objective and transparent consumption data. Thus, consumers should have access to their consumption data and associated prices and services costs so that they can invite competitors to make an offer based on those data. Consumers should also have the right to be properly informed about their energy consumption. Prepayments should reflect the likely consumption of natural gas and different payment systems should be non-discriminatory. Information on energy costs provided to consumers frequently enough will create incentives for energy savings because it will give customers direct feedback on the effects of investment in energy efficiency and change of behaviour.

(1) OJ L 25, 29.1.2009, p. 18.

- (48) Consumer interests should be at the heart of this Directive and quality of service should be a central responsibility of natural gas undertakings. Existing rights of consumers need to be strengthened and guaranteed, and should include greater transparency. Consumer protection should ensure that all consumers in the wider remit of the Community benefit from a competitive market. Consumer rights should be enforced by Member States or, where a Member State has so provided, the regulatory authorities.
- (49) Clear and comprehensible information should be made available to consumers concerning their rights in relation to the energy sector. The Commission should establish, after consulting relevant stakeholders including Member States, national regulatory authorities, consumer organisations and natural gas undertakings, an accessible, user-friendly energy consumer checklist providing consumers with practical information about their rights. That energy consumer checklist should be provided to all consumers and should be made publicly available.
- (50) Energy poverty is a growing problem in the Community. Member States which are affected and which have not yet done so should, therefore, develop national action plans or other appropriate frameworks to tackle energy poverty, aiming at decreasing the number of people suffering such situation. In any event, Member States should ensure the necessary energy supply for vulnerable customers. In doing so, an integrated approach, such as in the framework of social policy, could be used and measures could include social policies or energy efficiency improvements for housing. At the very least, this Directive should allow national policies in favour of vulnerable customers.
- (51) Greater consumer protection is guaranteed by the availability of effective means of dispute settlement for all consumers. Member States should introduce speedy and effective complaint handling procedures.
- (52) It should be possible to base the introduction of intelligent metering systems on an economic assessment. Should that assessment conclude that the introduction of such metering systems is economically reasonable and cost-effective only for consumers with a certain amount of gas consumption, Member States should be able to take this into account when implementing intelligent metering systems.
- (53) Market prices should give the right incentives for the development of the network.
- (54) Promoting fair competition and easy access for different suppliers should be of the utmost importance for Member States in order to allow consumers to take full advantage of the opportunities of a liberalised internal market in natural gas.
- (55) In order to contribute to security of supply whilst maintaining a spirit of solidarity between Member States, notably in the event of an energy supply crisis, it is important to provide a framework for regional cooperation in a spirit of solidarity. Such cooperation may rely, if Member States so decide, first and foremost on market-based mechanisms. Cooperation for the promotion of regional and bilateral solidarity should not impose a disproportionate burden on or discriminate between market participants.
- (56) With a view to creating an internal market in natural gas, Member States should foster the integration of their national markets and the cooperation of system operators at Community and regional level, also incorporating the isolated systems forming gas islands that persist in the Community.
- (57) The development of a true internal market in natural gas, through a network connected across the Community, should be one of the main goals of this Directive and regulatory issues on cross border interconnections and regional markets should, therefore, be one of the main tasks of the regulatory authorities, in close cooperation with the Agency where relevant.
- (58) Securing common rules for a true internal market and a broad supply of gas should also be one of the main goals of this Directive. To that end, undistorted market prices would provide an incentive for cross-border interconnections while leading, in the long term, to price convergence.
- (59) The regulatory authorities should also provide information on the market to permit the Commission to exercise its role of observing and monitoring the internal market in natural gas and its short, medium and long-term evolution, including aspects such as supply and demand, transmission and distribution infrastructure, quality of service, cross-border trade, congestion management, investments, wholesale and consumer prices, market liquidity and environmental and efficiency improvements. National regulatory authorities should report to the competition authorities and the Commission those Member States in which prices impair competition and proper functioning of the market.

(60) Since the objective of this Directive, namely the creation of a fully operational internal market in natural gas, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity 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.

(61) Under Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks <sup>(1)</sup>, the Commission may adopt Guidelines to achieve the necessary degree of harmonisation. Such Guidelines, which constitute binding implementing measures, are, also with regard to certain provisions of this Directive, a useful tool which can be adapted quickly where necessary.

(62) 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 <sup>(2)</sup>.

(63) In particular, the Commission should be empowered to adopt the Guidelines necessary for providing the minimum degree of harmonisation required to achieve the aim of this Directive. Since those measures are of general scope and are designed to amend non-essential elements of this Directive, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

(64) In accordance with point 34 of the Interinstitutional Agreement on better law-making <sup>(3)</sup>, Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(65) Given the scope of the amendments made to Directive 2003/55/EC herein, it is desirable, for reasons of clarity and rationalisation, that the provisions in question should be recast by bringing them all together in a single text in a new Directive.

(66) This Directive respects the fundamental rights, and observes the principles, recognised in particular by the Charter of Fundamental Rights of the European Union,

HAVE ADOPTED THIS DIRECTIVE:

## CHAPTER I

### SUBJECT MATTER, SCOPE AND DEFINITIONS

#### Article 1

#### Subject matter and 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 LNG, shall also apply in a non-discriminatory way 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, the following definitions apply:

(1) 'natural gas undertaking' means a 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 network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, 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 transport of gas;

<sup>(1)</sup> See page 36 of this Official Journal.

<sup>(2)</sup> OJ L 184, 17.7.1999, p. 23.

<sup>(3)</sup> OJ C 321, 31.12.2003, p. 1.

- (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 includes ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system, but does 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 networks, distribution networks, LNG facilities, and/or storage facilities, including load balancing, blending and injection of inert gases, but not including 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 not including 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 those 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 natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform 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 undertaking' means an affiliated undertaking, within the meaning of Article 41 of Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 44(2)(g) (\*) of the Treaty on consolidated accounts <sup>(1)</sup> and/or an associated undertaking, within the meaning of Article 33(1) of that Directive, and/or an undertaking which belong to the same shareholders;
- (23) 'system user' means a natural or legal person supplying to, or being supplied by, the system;
- (24) 'customer' means a wholesale or final customer of natural gas or a natural gas undertaking which purchases natural gas;
- (25) 'household customer' means a customer purchasing natural gas for his own household consumption;
- (26) 'non-household customer' means a customer purchasing natural gas which is not for his own household use;
- (27) 'final customer' means a customer purchasing natural gas for his own use;
- (28) 'eligible customer' means a customer who is free to purchase gas from the supplier of his choice, within the meaning of Article 37;
- (\*) 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).
- (1) OJ L 193, 18.7.1983, p. 1.



- (29) 'wholesale customer' means a natural or legal person other than a transmission system operator or distribution system operator who purchases natural gas for the purpose of resale inside or outside the system where he is established;
- (30) 'long-term planning' means the planning of supply and transport 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 4 August 2003;
- (34) 'gas supply contract' means a contract for the supply of natural gas, but does not include a gas derivative;
- (35) 'gas derivative' means a financial instrument specified in points 5, 6 or 7 of Section C of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments <sup>(1)</sup>, where that instrument relates to natural gas;
- (36) 'control' means any rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
- (a) ownership or the right to use all or part of the assets of an undertaking;
  - (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

## 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, secure and environmentally sustainable market in natural gas, and shall not discriminate between those undertakings as regards their rights or obligations.

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

3. Member States shall take appropriate measures to protect final customers, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers. In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, *inter alia*, to the prohibition of disconnection of gas to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied. In particular, they shall take appropriate measures to protect final 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 system. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is in fact able easily to switch to a new supplier. As regards at least household customers those measures shall include those set out in Annex I.

4. Member States shall take appropriate measures, such as formulating national energy action plans, providing social security benefits to ensure the necessary gas supply to vulnerable customers, or providing for support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty. Such measures shall not impede the effective opening of the market set out in Article 37 and market functioning and shall be notified to the Commission, where relevant, in accordance with paragraph 11 of this Article. Such notification shall not include measures taken within the general social security system.

5. Member States shall ensure that all customers connected to the gas network are entitled to have their gas provided by a supplier, subject to the supplier's agreement, regardless of the Member State in which the supplier is registered, as long as the supplier follows the applicable trading and balancing rules and subject to security of supply requirements. In this regard, Member States shall take all measures necessary to ensure that administrative procedures do not constitute a barrier for supply undertakings already registered in another Member State.

<sup>(1)</sup> OJ L 145, 30.4.2004, p. 1.

6. Member States shall ensure that:
- (a) where a customer, while respecting the contractual conditions, wishes to change supplier, the change is effected by the operator(s) concerned within three weeks; and
  - (b) customers are entitled to receive all relevant consumption data.

Member States shall ensure that the rights referred to in points (a) and (b) of the first subparagraph are granted to customers in a non-discriminatory manner as regards cost, effort or time.

7. Member States shall implement appropriate measures to achieve the objectives of social and economic cohesion and 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.

8. In order to promote energy efficiency, Member States or, where a Member State has so provided, the regulatory authority shall strongly recommend that natural gas undertakings optimise the use of gas, for example by providing energy management services, developing innovative pricing formulas or introducing intelligent metering systems or smart grids where appropriate.

9. Member States shall ensure the provision of single points of contact to provide consumers with all necessary information concerning their rights, current legislation and the means of dispute settlement available to them in the event of a dispute. Such contact points may be part of general consumer information points.

Member States shall ensure that an independent mechanism such as an energy ombudsman or a consumer body is in place in order to ensure efficient treatment of complaints and out-of-court dispute settlements.

10. 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.

11. 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.

12. The Commission shall establish, in consultation with relevant stakeholders, including Member States, the national regulatory authorities, consumer organisations and natural gas undertakings, a clear and concise energy consumer checklist of practical information relating to energy consumer rights. Member States shall ensure that gas suppliers or distribution system operators, in cooperation with the regulatory authority, take the necessary steps to provide their consumers with a copy of the energy consumer checklist and ensure that it is made publicly available.

#### Article 4

#### Authorisation procedure

1. In circumstances where an authorisation (for example, 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. Member States shall ensure that authorisation procedures for facilities, pipelines and associated equipment take into account the importance of the project for the internal market in natural gas where appropriate.

3. Member States shall ensure that the reasons for any refusal to grant an authorisation are objective and non-discriminatory and that they are given to the applicant. Reasons for such refusals shall be notified 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 38, 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 that task to the regulatory authorities referred to in Article 39(1). Such monitoring shall, in particular, cover the balance of supply and demand 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, a report outlining the findings resulting from the monitoring of those issues, as well as any measures taken or envisaged to address them and shall forward that report to the Commission forthwith.

*Article 6***Regional solidarity**

1. In order to safeguard a secure supply on the internal market in natural gas, Member States shall cooperate in order to promote regional and bilateral solidarity.
2. Such cooperation shall cover situations resulting or likely to result in the short term in a severe disruption of supply affecting a Member State. It shall include:
  - (a) coordination of national emergency measures referred to in Article 8 of Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply <sup>(1)</sup>;
  - (b) identification and, where necessary, development or upgrading of electricity and natural gas interconnections; and
  - (c) conditions and practical modalities for mutual assistance.
3. The Commission and the other Member States shall be kept informed of such cooperation.
4. The Commission may adopt Guidelines for regional cooperation in a spirit of solidarity. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

*Article 7***Promotion of regional cooperation**

1. Member States as well as the regulatory authorities shall cooperate with each other for the purpose of integrating their national markets at one and more regional levels, as a first step towards the creation of a fully liberalised internal market. In particular, the regulatory authorities where Member States have so

provided or Member States shall promote and facilitate the cooperation of transmission system operators at a regional level, including on cross-border issues with the aim of creating a competitive internal market in natural gas, foster the consistency of their legal, regulatory and technical framework and facilitate integration of the isolated systems forming gas islands that persist in the Community. The geographical areas covered by such regional cooperation shall include cooperation in geographical areas defined in accordance with Article 12(3) of Regulation (EC) No 715/2009. Such cooperation may cover other geographical areas.

2. The Agency shall cooperate with national regulatory authorities and transmission system operators to ensure the compatibility of regulatory frameworks between the regions with the aim of creating a competitive internal market in natural gas. Where the Agency considers that binding rules on such cooperation are required, it shall make appropriate recommendations.

3. Member States shall ensure, through the implementation of this Directive, that transmission system operators have one or more integrated system(s) at regional level covering two or more Member States for capacity allocation and for checking the security of the network.

4. Where vertically integrated transmission system operators participate in a joint undertaking established for implementing such cooperation, the joint undertaking shall establish and implement a compliance programme which sets out the measures to be taken to ensure that discriminatory and anticompetitive conduct is excluded. That compliance programme shall set out the specific obligations of employees to meet the objective of excluding discriminatory and anticompetitive conduct. It shall be subject to the approval of the Agency. Compliance with the programme shall be independently monitored by the compliance officers of the vertically integrated transmission system operators.

*Article 8***Technical rules**

The regulatory authorities where Member States have so provided or 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. Those technical rules shall ensure the interoperability of systems and shall be objective and non-discriminatory. The Agency may make appropriate recommendations towards achieving compatibility of those rules, where appropriate. Those rules 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 <sup>(2)</sup>.

<sup>(1)</sup> OJ L 127, 29.4.2004, p. 92.

<sup>(2)</sup> OJ L 204, 21.7.1998, p. 37.

## CHAPTER III

## TRANSMISSION, STORAGE AND LNG

## Article 9

**Unbundling of transmission systems and transmission system operators**

1. Member States shall ensure that from 3 March 2012:
  - (a) each undertaking which owns a transmission system acts as a transmission system operator;
  - (b) the same person or persons are entitled neither:
    - (i) directly or indirectly to exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor
    - (ii) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply;
  - (c) the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply; and
  - (d) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system.
2. The rights referred to in points (b) and (c) of paragraph 1 shall include, in particular:
  - (a) the power to exercise voting rights;
  - (b) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; or
  - (c) the holding of a majority share.

3. For the purpose of paragraph 1(b), the notion 'undertaking performing any of the functions of production or supply' shall include 'undertaking performing any of the functions of generation and supply' within the meaning of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity <sup>(1)</sup>, and the terms 'transmission system operator' and 'transmission system' shall include 'transmission system operator' and 'transmission system' within the meaning of that Directive.

4. Member States may allow for derogations from points (b) and (c) of paragraphs 1 until 3 March 2013, provided that transmission system operators are not part of a vertically integrated undertaking.

5. The obligation set out in paragraph 1(a) of this Article shall be deemed to be fulfilled in a situation where two or more undertakings which own transmission systems have created a joint venture which acts as a transmission system operator in two or more Member States for the transmission systems concerned. No other undertaking may be part of the joint venture, unless it has been approved under Article 14 as an independent system operator or as an independent transmission operator for the purposes of Chapter IV.

6. For the implementation of this Article, where the person referred to in points (b), (c) and (d) of paragraph 1 is the Member State or another public body, two separate public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of the functions of production or supply on the other, shall be deemed not to be the same person or persons.

7. Member States shall ensure that neither commercially sensitive information referred to in Article 16 held by a transmission system operator which was part of a vertically integrated undertaking, nor the staff of such a transmission system operator, is transferred to undertakings performing any of the functions of production and supply.

8. Where on 3 September 2009, the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply paragraph 1.

In such case, the Member State concerned shall either:

- (a) designate an independent system operator in accordance with Article 14, or
- (b) comply with the provisions of Chapter IV.

9. Where, on 3 September 2009, the transmission system belongs to a vertically integrated undertaking and there are arrangements in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter IV, a Member State may decide not to apply paragraph 1.

<sup>(1)</sup> See page 55 of this Official Journal.

10. Before an undertaking is approved and designated as a transmission system operator under paragraph 9 of this Article, it shall be certified according to the procedures laid down in Article 10(4), (5) and (6) of this Directive and in Article 3 of Regulation (EC) No 715/2009, pursuant to which the Commission shall verify that the arrangements in place clearly guarantee more effective independence of the transmission system operator than the provisions of Chapter IV.

11. Vertically integrated undertakings which own a transmission system shall not in any event be prevented from taking steps to comply with paragraph 1.

12. Undertakings performing any of the functions of production or supply shall not in any event be able to directly or indirectly take control over or exercise any right over unbundled transmission system operators in Member States which apply paragraph 1.

#### Article 10

### Designation and certification of transmission system operators

1. Before an undertaking is approved and designated as transmission system operator, it shall be certified according to the procedures laid down in paragraphs 4, 5 and 6 of this Article and in Article 3 of Regulation (EC) No 715/2009.

2. Undertakings which own a transmission system and which have been certified by the national regulatory authority as having complied with the requirements of Article 9, pursuant to the certification procedure, shall be approved and designated as transmission system operators by Member States. The designation of transmission system operators shall be notified to the Commission and published in the *Official Journal of the European Union*.

3. Transmission system operators shall notify to the regulatory authority any planned transaction which may require a reassessment of their compliance with the requirements of Article 9.

4. The regulatory authorities shall monitor the continuing compliance of transmission system operators with the requirements of Article 9. They shall open a certification procedure to ensure such compliance:

- (a) upon notification by the transmission system operator pursuant to paragraph 3;
- (b) on their own initiative where they have knowledge that a planned change in rights or influence over transmission system owners or transmission system operators may lead to an infringement of Article 9, or where they have reason to believe that such an infringement may have occurred; or
- (c) upon a reasoned request from the Commission.

5. The regulatory authorities shall adopt a decision on the certification of a transmission system operator within a period of four months from the date of the notification by the transmission system operator or from the date of the Commission request. After expiry of that period, the certification shall be deemed to be granted. The explicit or tacit decision of the regulatory authority shall become effective only after the conclusion of the procedure set out in paragraph 6.

6. The explicit or tacit decision on the certification of a transmission system operator shall be notified without delay to the Commission by the regulatory authority, together with all the relevant information with respect to that decision. The Commission shall act in accordance with the procedure laid down in Article 3 of Regulation (EC) No 715/2009.

7. The regulatory authorities and the Commission may request from transmission system operators and undertakings performing any of the functions of production or supply any information relevant for the fulfilment of their tasks under this Article.

8. The regulatory authorities and the Commission shall preserve the confidentiality of commercially sensitive information.

#### Article 11

### Certification in relation to third countries

1. Where certification is requested by a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries, the regulatory authority shall notify the Commission.

The regulatory authority shall also notify to the Commission without delay any circumstances that would result in a person or persons from a third country or third countries acquiring control of a transmission system or a transmission system operator.

2. The transmission system operator shall notify to the regulatory authority any circumstances that would result in a person or persons from a third country or third countries acquiring control of the transmission system or the transmission system operator.

3. The regulatory authority shall adopt a draft decision on the certification of a transmission system operator within four months from the date of notification by the transmission system operator. It shall refuse the certification if it has not been demonstrated:

- (a) that the entity concerned complies with the requirements of Article 9; and
- (b) to the regulatory authority or to another competent authority designated by the Member State that granting certification will not put at risk the security of energy supply of the Member State and the Community. In considering that question the regulatory authority or other competent authority so designated shall take into account:

- (i) the rights and obligations of the Community with respect to that third country arising under international law, including any agreement concluded with one or more third countries to which the Community is a party and which addresses the issues of security of energy supply;
- (ii) the rights and obligations of the Member State with respect to that third country arising under agreements concluded with it, insofar as they are in compliance with Community law; and
- (iii) other specific facts and circumstances of the case and the third country concerned.

4. The regulatory authority shall notify the decision to the Commission without delay, together with all the relevant information with respect to that decision.

5. Member States shall provide for the regulatory authority or the designated competent authority referred to in paragraph 3(b), before the regulatory authority adopts a decision on the certification, to request an opinion from the Commission on whether:

- (a) the entity concerned complies with the requirements of Article 9; and
- (b) granting certification will not put at risk the security of energy supply to the Community.

6. The Commission shall examine the request referred to in paragraph 5 as soon as it is received. Within a period of two months after receiving the request, it shall deliver its opinion to the national regulatory authority or, if the request was made by the designated competent authority, to that authority.

In preparing the opinion, the Commission may request the views of the Agency, the Member State concerned, and interested parties. In the event that the Commission makes such a request, the two-month period shall be extended by two months.

In the absence of an opinion by the Commission within the period referred to in the first and second subparagraphs, the Commission is deemed not to raise objections to the decision of the regulatory authority.

7. When assessing whether the control by a person or persons from a third country or third countries will put at risk the security of energy supply to the Community, the Commission shall take into account:

- (a) the specific facts of the case and the third country or third countries concerned; and
- (b) the rights and obligations of the Community with respect to that third country or third countries arising under international law, including an agreement concluded with one or more third countries to which the Community is a party and which addresses the issues of security of supply.

8. The national regulatory authority shall, within a period of two months after the expiry of the period referred to in paragraph 6, adopt its final decision on the certification. In adopting its final decision the national regulatory authority shall take utmost account of the Commission's opinion. In any event Member States shall have the right to refuse certification where granting certification puts at risk the Member State's security of energy supply or the security of energy supply of another Member State. Where the Member State has designated another competent authority to assess paragraph 3(b), it may require the national regulatory authority to adopt its final decision in accordance with the assessment of that competent authority. The regulatory authority's final decision and the Commission's opinion shall be published together. Where the final decision diverges from the Commission's opinion, the Member State concerned shall provide and publish, together with that decision, the reasoning underlying such decision.

9. Nothing in this Article shall affect the right of Member States to exercise, in compliance with Community law, national legal controls to protect legitimate public security interests.

10. The Commission may adopt Guidelines setting out the details of the procedure to be followed for the application of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

11. This Article, with exception of paragraph 3(a), shall also apply to Member States which are subject to a derogation under Article 49.

#### Article 12

#### **Designation of storage and LNG system operators**

Member States shall designate, or shall require natural gas undertakings which own 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 storage and LNG system operators.

#### Article 13

#### **Tasks of transmission, storage and/or LNG 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 to secure an open market, with due regard to the environment, ensure adequate means to meet service obligations;

- (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; and
- (d) provide system users with the information they need for efficient access to the system.
2. Each transmission system operator shall build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity and taking into account security of gas supply.
3. 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 41(6) in a non-discriminatory and cost-reflective way and shall be published.
4. The regulatory authorities where Member States have so provided or Member States may require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity.
5. 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.
- (b) the candidate operator has demonstrated that it has at its disposal the required financial, technical, physical and human resources to carry out its tasks under Article 13;
- (c) the candidate operator has undertaken to comply with a ten-year network development plan monitored by the regulatory authority;
- (d) the transmission system owner has demonstrated its ability to comply with its obligations under paragraph 5. To that end, it shall provide all the draft contractual arrangements with the candidate undertaking and any other relevant entity; and
- (e) the candidate operator has demonstrated its ability to comply with its obligations under Regulation (EC) No 715/2009 including the cooperation of transmission system operators at European and regional level.
3. Undertakings which have been certified by the regulatory authority as having complied with the requirements of Article 11 and of paragraph 2 of this Article shall be approved and designated as independent system operators by Member States. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 715/2009 or in Article 11 of this Directive shall be applicable.
4. Each independent system operator shall be responsible for granting and managing third-party access, including the collection of access charges and congestion charges, for operating, maintaining and developing the transmission system, as well as for ensuring the long-term ability of the system to meet reasonable demand through investment planning. When developing the transmission system the independent system operator shall be responsible for planning (including authorisation procedure), construction and commissioning of the new infrastructure. For this purpose, the independent system operator shall act as a transmission system operator in accordance with this Chapter. The transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning.
5. Where an independent system operator has been designated, the transmission system owner shall:
- (a) provide all the relevant cooperation and support to the independent system operator for the fulfilment of its tasks, including in particular all relevant information;
- (b) finance the investments decided by the independent system operator and approved by the regulatory authority, or give its agreement to financing by any interested party including the independent system operator. The relevant financing arrangements shall be subject to approval by the regulatory authority. Prior to such approval, the regulatory authority shall consult the transmission system owner together with other interested parties;

#### Article 14

#### Independent system operators

1. Where the transmission system belongs to a vertically integrated undertaking on 3 September 2009, Member States may decide not to apply Article 9(1) and designate an independent system operator upon a proposal from the transmission system owner. Such designation shall be subject to approval by the Commission.
2. The Member State may approve and designate an independent system operator only where:
- (a) the candidate operator has demonstrated that it complies with the requirements of Article 9(1)(b), (c) and (d);

- (c) provide for the coverage of liability relating to the network assets, excluding the liability relating to the tasks of the independent system operator; and
- (d) provide guarantees to facilitate financing any network expansions with the exception of those investments where, pursuant to point (b), it has given its agreement to financing by any interested party including the independent system operator.

6. In close cooperation with the regulatory authority, the relevant national competition authority shall be granted all relevant powers to effectively monitor compliance of the transmission system owner with its obligations under paragraph 5.

#### Article 15

##### **Unbundling of transmission system owners and storage system operators**

1. A transmission system owner, where an independent system operator has been appointed, and a storage system operator which are part of vertically integrated undertakings shall be independent at least in terms of their legal form, organisation and decision making from other activities not relating to transmission, distribution and storage.

This Article shall apply only to storage facilities that are technically and/or economically necessary for providing efficient access to the system for the supply of customers pursuant to Article 33.

2. In order to ensure the independence of the transmission system owner and storage system operator referred to in paragraph 1, the following minimum criteria shall apply:

- (a) persons responsible for the management of the transmission system owner and storage system operator shall 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 shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner and storage system operator are taken into account in a manner that ensures that they are capable of acting independently;
- (c) the storage 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 storage facilities. This shall 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 regulated indirectly in accordance with Article 41(6) in a subsidiary are protected. In particular, this shall enable the

parent company to approve the annual financial plan, or any equivalent instrument, of the storage system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of storage facilities, that do not exceed the terms of the approved financial plan, or any equivalent instrument; and

- (d) the transmission system owner and the storage 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 compliance programme shall set out the specific obligations of employees to meet those objectives. 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 and shall be published.

3. The Commission may adopt Guidelines to ensure full and effective compliance of the transmission system owner and of the storage system operator with paragraph 2 of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

#### Article 16

##### **Confidentiality for transmission system operators and transmission system owners**

1. Without prejudice to Article 30 or any other legal duty to disclose information, each transmission, storage and/or LNG system operator, and each transmission system owner, shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its activities, and shall prevent information about its own activities which may be commercially advantageous from being disclosed in a discriminatory manner. In particular, it shall not disclose any commercially sensitive information to the remaining parts of the undertaking, unless this is necessary for carrying out a business transaction. In order to ensure the full respect of the rules on information unbundling, Member States shall ensure that the transmission system owner including, in the case of a combined operator, the distribution system operator, and the remaining part of the undertaking do not use joint services, such as joint legal services, apart from purely administrative or IT functions.

2. Transmission, storage and/or LNG system operators shall not, in the context of sales or purchases of natural gas by related undertakings, misuse commercially sensitive information obtained from third parties in the context of providing or negotiating access to the system.



3. Information necessary for effective competition and the efficient functioning of the market shall be made public. That obligation shall be without prejudice to protecting commercially sensitive information.

#### CHAPTER IV

### INDEPENDENT TRANSMISSION OPERATOR

#### Article 17

##### Assets, equipment, staff and identity

1. Transmission system operators shall be equipped with all human, technical, physical and financial resources necessary for fulfilling their obligations under this Directive and carrying out the activity of gas transmission, in particular:

- (a) assets that are necessary for the activity of gas transmission, including the transmission system, shall be owned by the transmission system operator;
- (b) personnel necessary for the activity of gas transmission, including the performance of all corporate tasks, shall be employed by the transmission system operator;
- (c) leasing of personnel and rendering of services, to and from any other parts of the vertically integrated undertaking shall be prohibited. A transmission system operator may, however, render services to the vertically integrated undertaking as long as:
  - (i) the provision of those services does not discriminate between system users, is available to all system users on the same terms and conditions and does not restrict, distort or prevent competition in production or supply; and
  - (ii) the terms and conditions of the provision of those services are approved by the regulatory authority;
- (d) without prejudice to the decisions of the Supervisory Body under Article 20, appropriate financial resources for future investment projects and/or for the replacement of existing assets shall be made available to the transmission system operator in due time by the vertically integrated undertaking following an appropriate request from the transmission system operator.

2. The activity of gas transmission shall include at least the following tasks in addition to those listed in Article 13:

- (a) the representation of the transmission system operator and contacts to third parties and the regulatory authorities;

- (b) the representation of the transmission system operator within the European Network of Transmission System Operators for Gas (ENTSO for Gas);

- (c) granting and managing third-party access on a non-discriminatory basis between system users or classes of system users;

- (d) the collection of all the transmission system related charges including access charges, balancing charges for ancillary services such as gas treatment, purchasing of services (balancing costs, energy for losses);

- (e) the operation, maintenance and development of a secure, efficient and economic transmission system;

- (f) investment planning ensuring the long-term ability of the system to meet reasonable demand and guaranteeing security of supply;

- (g) the setting up of appropriate joint ventures, including with one or more transmission system operators, gas exchanges, and the other relevant actors pursuing the objective to develop the creation of regional markets or to facilitate the liberalisation process; and

- (h) all corporate services, including legal services, accountancy and IT services.

3. Transmission system operators shall be organised in a legal form as referred to in Article 1 of Council Directive 68/151/EEC <sup>(1)</sup>.

4. The transmission system operator shall not, in its corporate identity, communication, branding and premises, create confusion in respect of the separate identity of the vertically integrated undertaking or any part thereof.

5. The transmission system operator shall not share IT systems or equipment, physical premises and security access systems with any part of the vertically integrated undertaking, nor use the same consultants or external contractors for IT systems or equipment, and security access systems.

6. The accounts of transmission system operators shall be audited by an auditor other than the one auditing the vertically integrated undertaking or any part thereof.

#### Article 18

##### Independence of the transmission system operator

1. Without prejudice to the decisions of the Supervisory Body under Article 20, the transmission system operator shall have:

<sup>(1)</sup> First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ L 65, 14.3.1968, p. 8).

- (a) effective decision-making rights, independent from the vertically integrated undertaking, with respect to assets necessary to operate, maintain or develop the transmission system; and
  - (b) the power to raise money on the capital market in particular through borrowing and capital increase.
2. The transmission system operator shall at all times act so as to ensure it has the resources it needs in order to carry out the activity of transmission properly and efficiently and develop and maintain an efficient, secure and economic transmission system.
3. Subsidiaries of the vertically integrated undertaking performing functions of production or supply shall not have any direct or indirect shareholding in the transmission system operator. The transmission system operator shall neither have any direct or indirect shareholding in any subsidiary of the vertically integrated undertaking performing functions of production or supply, nor receive dividends or any other financial benefit from that subsidiary.
4. The overall management structure and the corporate statutes of the transmission system operator shall ensure effective independence of the transmission system operator in compliance with this Chapter. The vertically integrated undertaking shall not determine, directly or indirectly, the competitive behaviour of the transmission system operator in relation to the day to day activities of the transmission system operator and management of the network, or in relation to activities necessary for the preparation of the ten-year network development plan developed pursuant to Article 22.
5. In fulfilling their tasks in Article 13 and Article 17(2) of this Directive, and in complying with Article 13(1), Article 14(1)(a), Article 16(2), (3) and (5), Article 18(6) and Article 21(1) of Regulation (EC) No 715/2009, transmission system operators shall not discriminate against different persons or entities and shall not restrict, distort or prevent competition in production or supply.
6. Any commercial and financial relations between the vertically integrated undertaking and the transmission system operator, including loans from the transmission system operator to the vertically integrated undertaking, shall comply with market conditions. The transmission system operator shall keep detailed records of such commercial and financial relations and make them available to the regulatory authority upon request.
7. The transmission system operator shall submit for approval by the regulatory authority all commercial and financial agreements with the vertically integrated undertaking.
8. The transmission system operator shall inform the regulatory authority of the financial resources, referred to in Article 17(1)(d), available for future investment projects and/or for the replacement of existing assets.

9. The vertically integrated undertaking shall refrain from any action impeding or prejudicing the transmission system operator from complying with its obligations in this Chapter and shall not require the transmission system operator to seek permission from the vertically integrated undertaking in fulfilling those obligations.

10. An undertaking which has been certified by the regulatory authority as being in compliance with the requirements of this Chapter shall be approved and designated as a transmission system operator by the Member State concerned. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 715/2009 or in Article 11 of this Directive shall apply.

#### Article 19

##### **Independence of the staff and the management of the transmission system operator**

1. Decisions regarding the appointment and renewal, working conditions including remuneration, and termination of the term of office, of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator shall be taken by the Supervisory Body of the transmission system operator appointed in accordance with Article 20.

2. The identity of, and the conditions governing the term, the duration and the termination of office of, the persons nominated by the Supervisory Body for appointment or renewal as persons responsible for the executive management and/or as members of the administrative bodies of the transmission system operator, and the reasons for any proposed decision terminating such term of office, shall be notified to the regulatory authority. Those conditions and the decisions referred to in paragraph 1 shall become binding only if the regulatory authority has raised no objections within three weeks of notification.

The regulatory authority may object to the decisions referred to in paragraph 1 where:

- (a) doubts arise as to the professional independence of a nominated person responsible for the management and/or member of the administrative bodies; or
- (b) in the case of premature termination of a term of office, doubts exist regarding the justification of such premature termination.

3. No professional position or responsibility, interest or business relationship, directly or indirectly, with the vertically integrated undertaking or any part of it or its controlling shareholders other than the transmission system operator shall be exercised for a period of three years before the appointment of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator who are subject to this paragraph.

4. The persons responsible for the management and/or members of the administrative bodies, and employees of the transmission system operator shall have no other professional position or responsibility, interest or business relationship, directly or indirectly, with any other part of the vertically integrated undertaking or with its controlling shareholders.

5. The persons responsible for the management and/or members of the administrative bodies, and employees of the transmission system operator shall hold no interest in or receive any financial benefit, directly or indirectly, from any part of the vertically integrated undertaking other than the transmission system operator. Their remuneration shall not depend on activities or results of the vertically integrated undertaking other than those of the transmission system operator.

6. Effective rights of appeal to the regulatory authority shall be guaranteed for any complaints by the persons responsible for the management and/or members of the administrative bodies of the transmission system operator against premature terminations of their term of office.

7. After termination of their term of office in the transmission system operator, the persons responsible for its management and/or members of its administrative bodies shall have no professional position or responsibility, interest or business relationship with any part of the vertically integrated undertaking other than the transmission system operator, or with its controlling shareholders for a period of not less than four years.

8. Paragraph 3 shall apply to the majority of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator.

The persons responsible for the management and/or members of the administrative bodies of the transmission system operator who are not subject to paragraph 3 shall have exercised no management or other relevant activity in the vertically integrated undertaking for a period of at least six months before their appointment.

The first subparagraph of this paragraph and paragraphs 4 to 7 shall be applicable to all the persons belonging to the executive management and to those directly reporting to them on matters related to the operation, maintenance or development of the network.

#### Article 20

### Supervisory Body

1. The transmission system operator shall have a Supervisory Body which shall be in charge of taking decisions which may have a significant impact on the value of the assets of the shareholders within the transmission system operator, in particular decisions regarding the approval of the annual and longer-term financial plans, the level of indebtedness of the transmission system operator and the amount of dividends distributed to shareholders. The decisions falling under the remit of the Supervisory Body shall exclude those that are related to the day to day activities of the transmission system operator and management of the network, and in relation to activities necessary for the preparation of the ten-year network development plan developed pursuant to Article 22.

2. The Supervisory Body shall be composed of members representing the vertically integrated undertaking, members representing third party shareholders and, where the relevant legislation of a Member State so provides, members representing other interested parties such as employees of the transmission system operator.

3. The first subparagraph of Article 19(2) and Article 19(3) to (7) shall apply to at least half of the members of the Supervisory Body minus one.

Point (b) of the second subparagraph of Article 19(2) shall apply to all the members of the Supervisory Body.

#### Article 21

### Compliance programme and compliance officer

1. Member States shall ensure that transmission system operators establish and implement a compliance programme which sets out the measures taken in order to ensure that discriminatory conduct is excluded, and ensure that the compliance with that programme is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet those objectives. It shall be subject to approval by the regulatory authority. Without prejudice to the powers of the national regulator, compliance with the program shall be independently monitored by a compliance officer.

2. The compliance officer shall be appointed by the Supervisory Body, subject to the approval by the regulatory authority. The regulatory authority may refuse the approval of the compliance officer only for reasons of lack of independence or professional capacity. The compliance officer may be a natural or legal person. Article 19(2) to (8) shall apply to the compliance officer.

3. The compliance officer shall be in charge of:

- (a) monitoring the implementation of the compliance programme;
- (b) elaborating an annual report, setting out the measures taken in order to implement the compliance programme and submitting it to the regulatory authority;
- (c) reporting to the Supervisory Body and issuing recommendations on the compliance programme and its implementation;
- (d) notifying the regulatory authority on any substantial breaches with regard to the implementation of the compliance programme; and
- (e) reporting to the regulatory authority on any commercial and financial relations between the vertically integrated undertaking and the transmission system operator.

4. The compliance officer shall submit the proposed decisions on the investment plan or on individual investments in the network to the regulatory authority. This shall occur at the latest when the management and/or the competent administrative body of the transmission system operator submits them to the Supervisory Body.

5. Where the vertically integrated undertaking, in the general assembly or through the vote of the members of the Supervisory Body it has appointed, has prevented the adoption of a decision with the effect of preventing or delaying investments, which under the ten-year network development plan, was to be executed in the following three years, the compliance officer shall report this to the regulatory authority, which then shall act in accordance with Article 22.

6. The conditions governing the mandate or the employment conditions of the compliance officer, including the duration of his mandate, shall be subject to approval by the regulatory authority. Those conditions shall ensure the independence of the compliance officer, including by providing it with all the resources necessary for fulfilling his duties. During his mandate, the compliance officer shall have no other professional position, responsibility or interest, directly or indirectly, in or with any part of the vertically integrated undertaking or with its controlling shareholders.

7. The compliance officer shall report regularly, either orally or in writing, to the regulatory authority and shall have the right to report regularly, either orally or in writing, to the Supervisory Body of the transmission system operator.

8. The compliance officer may attend all meetings of the management or administrative bodies of the transmission system operator, and those of the Supervisory Body and the general assembly. The compliance officer shall attend all meetings that address the following matters:

- (a) conditions for access to the network, as defined in Regulation (EC) No 715/2009, in particular regarding tariffs, third party access services, capacity allocation and congestion management, transparency, balancing and secondary markets;
- (b) projects undertaken in order to operate, maintain and develop the transmission system, including investments in new transport connections, in expansion of capacity and in optimisation of existing capacity;
- (c) energy purchases or sales necessary for the operation of the transmission system.

9. The compliance officer shall monitor the compliance of the transmission system operator with Article 16.

10. The compliance officer shall have access to all relevant data and to the offices of the transmission system operator and to all the information necessary for the fulfilment of his task.

11. After prior approval by the regulatory authority, the Supervisory Body may dismiss the compliance officer. It shall dismiss the compliance officer for reasons of lack of independence or professional capacity upon request of the regulatory authority.

12. The compliance officer shall have access to the offices of the transmission system operator without prior announcement.

#### Article 22

#### **Network development and powers to make investment decisions**

1. Every year, transmission system operators shall submit to the regulatory authority a ten-year network development plan based on existing and forecast supply and demand after having consulted all the relevant stakeholders. That network development plan shall contain efficient measures in order to guarantee the adequacy of the system and the security of supply.

2. The ten-year network development plan shall, in particular:

- (a) indicate to market participants the main transmission infrastructure that needs to be built or upgraded over the next ten years;
- (b) contain all the investments already decided and identify new investments which have to be executed in the next three years; and
- (c) provide for a time frame for all investment projects.

3. When elaborating the ten-year network development plan, the transmission system operator shall make reasonable assumptions about the evolution of the production, supply, consumption and exchanges with other countries, taking into account investment plans for regional and Community-wide networks, as well as investment plans for storage and LNG regasification facilities.

4. The regulatory authority shall consult all actual or potential system users on the ten-year network development plan in an open and transparent manner. Persons or undertakings claiming to be potential system users may be required to substantiate such claims. The regulatory authority shall publish the result of the consultation process, in particular possible needs for investments.

5. The regulatory authority shall examine whether the ten-year network development plan covers all investment needs identified during the consultation process, and whether it is consistent with the non-binding Community-wide ten-year network development plan (Community-wide network development plan) referred to in

Article 8(3)(b) of Regulation (EC) No 715/2009. If any doubt arises as to the consistency with the Community-wide network development plan, the regulatory authority shall consult the Agency. The regulatory authority may require the transmission system operator to amend its ten-year network development plan.

6. The regulatory authority shall monitor and evaluate the implementation of the ten-year network development plan.

7. In circumstances where the transmission system operator, other than for overriding reasons beyond its control, does not execute an investment, which, under the ten-year network development plan, was to be executed in the following three years, Member States shall ensure that the regulatory authority is required to take at least one of the following measures to ensure that the investment in question is made if such investment is still relevant on the basis of the most recent ten-year network development plan:

- (a) to require the transmission system operator to execute the investments in question;
- (b) to organise a tender procedure open to any investors for the investment in question; or
- (c) to oblige the transmission system operator to accept a capital increase to finance the necessary investments and allow independent investors to participate in the capital.

Where the regulatory authority has made use of its powers under point (b) of the first subparagraph, it may oblige the transmission system operator to agree to one or more of the following:

- (a) financing by any third party;
- (b) construction by any third party;
- (c) building the new assets concerned itself;
- (d) operating the new asset concerned itself.

The transmission system operator shall provide the investors with all information needed to realise the investment, shall connect new assets to the transmission network and shall generally make its best efforts to facilitate the implementation of the investment project.

The relevant financial arrangements shall be subject to approval by the regulatory authority.

8. Where the regulatory authority has made use of its powers under the first subparagraph of paragraph 7, the relevant tariff regulations shall cover the costs of the investments in question.

#### Article 23

### Decision-making powers regarding the connection of storage facilities, LNG regasification facilities and industrial customers to the transmission system

1. The transmission system operator shall establish and publish transparent and efficient procedures and tariffs for non-discriminatory connection of storage facilities, LNG regasification facilities and industrial customers to the transmission system. Those procedures shall be subject to approval by the regulatory authority.

2. The transmission system operator shall not be entitled to refuse the connection of a new storage facility, LNG regasification facility or industrial customer on the grounds of possible future limitations to available network capacities or additional costs linked with necessary capacity increase. The transmission system operator shall ensure sufficient entry and exit capacity for the new connection.

#### CHAPTER V

### DISTRIBUTION AND SUPPLY

#### Article 24

### 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 25, 26 and 27.

#### Article 25

### Tasks of distribution system operators

1. Each distribution system operator shall be responsible for ensuring the long-term ability of the system to meet reasonable demands for the distribution of gas, and for operating, maintaining and developing under economic conditions a secure, reliable and efficient system in its area, with due regard for the environment and energy efficiency.

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, transmission, LNG, 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, including use of, the system.

5. Where a distribution system operator is responsible for balancing the distribution system, rules adopted by it 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 distribution system operators shall be established pursuant to a methodology compatible with Article 41(6) in a non-discriminatory and cost-reflective way and shall be published.

#### Article 26

### 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. Those rules shall not create an obligation to separate the ownership of assets of the distribution system from the vertically integrated undertaking.

2. In addition to the requirements under paragraph 1, where the distribution system operator is part of a vertically integrated undertaking, it shall be independent in terms of its organisation and decision-making from the other activities not related to distribution. In order to achieve this, the following minimum criteria shall apply:

- (a) those persons responsible for the management of the distribution system operator must not participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production, transmission and supply of natural gas;
- (b) appropriate measures must be taken to ensure that the professional interests of persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;
- (c) the distribution system operator must have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to operate, maintain or develop the network. In order to fulfil those tasks, the distribution system operator shall have at its disposal the necessary resources including human, technical, financial and physical resources. 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, regulated indirectly in accordance with Article 41(6) in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent

instrument, of the distribution system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of distribution lines, that do not exceed the terms of the approved financial plan, or any equivalent instrument; and

- (d) the distribution system operator must 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 compliance programme shall set out the specific obligations of employees to meet that objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme, the compliance officer of the distribution system operator, to the regulatory authority referred to in Article 39(1) and shall be published. The compliance officer of the distribution system operator shall be fully independent and shall have access to all the necessary information of the distribution system operator and any affiliated undertaking to fulfil his task.

3. Where the distribution system operator is part of a vertically integrated undertaking, the Member States shall ensure that the activities of the distribution system operator are monitored by regulatory authorities or other competent bodies so that it cannot take advantage of its vertical integration to distort competition. In particular, vertically integrated distribution system operators shall not, in their communication and branding, create confusion in respect of the separate identity of the supply branch of the vertically integrated undertaking.

4. Member States may decide not to apply paragraphs 1, 2 and 3 to integrated natural gas undertakings serving less than 100 000 connected customers.

#### Article 27

### Confidentiality obligations of distribution system operators

1. Without prejudice to Article 30 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 28***Closed distribution systems**

1. Member States may provide for national regulatory authorities or other competent authorities to classify a system which distributes gas within a geographically confined industrial, commercial or shared services site and does not, without prejudice to paragraph 4, supply household customers, as a closed distribution system if:

- (a) for specific technical or safety reasons, the operations or the production process of the users of that system are integrated; or
- (b) that system distributes gas primarily to the owner or operator of the system or to their related undertakings.

2. Member States may provide for national regulatory authorities to exempt the operator of a closed distribution system from the requirement under Article 32(1) that tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 41.

3. Where an exemption is granted under paragraph 2, the applicable tariffs, or the methodologies underlying their calculation, shall be reviewed and approved in accordance with Article 41 upon request by a user of the closed distribution system.

4. Incidental use by a small number of households with employment or similar associations with the owner of the distribution system and located within the area served by a closed distribution system shall not preclude an exemption under paragraph 2 being granted.

*Article 29***Combined operator**

Article 26(1) shall not prevent the operation of a combined transmission, LNG, storage and distribution system operator provided that operator complies with Articles 9(1), or 14 and 15, or Chapter IV or falls under Article 49(6).

## CHAPTER VI

**UNBUNDLING AND TRANSPARENCY OF ACCOUNTS***Article 30***Right of access to accounts**

1. Member States or any competent authority they designate, including the regulatory authorities referred to in Article 39(1) and the dispute settlement authorities referred to in Article 34(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 31.

2. Member States and any designated competent authority, including the regulatory authorities referred to in Article 39(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 31***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 of this Article. Where natural gas undertakings benefit from a derogation from this provision on the basis of Article 49(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 thereof 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 or 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. The audit, referred to in paragraph 2, shall, in particular, verify that the obligation to avoid discrimination and cross-subsidies referred to in paragraph 3 is respected.

(\*) 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.

5. 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. Those internal rules may be amended only in exceptional cases. Such amendments shall be mentioned and duly substantiated.

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

## CHAPTER VII

### ORGANISATION OF ACCESS TO THE SYSTEM

#### Article 32

##### 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 tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation are approved prior to their entry into force in accordance with Article 41 by a regulatory authority referred to in Article 39(1) and that those 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 33

##### 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. Those procedures shall operate in accordance with objective, transparent and non-discriminatory criteria.

The regulatory authorities where Member States have so provided or Member States shall define and publish criteria according to which the access regime applicable to storage facilities and

linepack may be determined. They shall make public, or oblige storage and transmission system operators to make public, which storage facilities, or which parts of those storage facilities, and which linepack is offered under the different procedures referred to in paragraphs 3 and 4.

The obligation referred to in the second sentence of the second subparagraph shall be without prejudice to the right of choice granted to Member States in the first subparagraph.

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 or, where Member States have so provided, the regulatory authorities 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 facilities 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. The regulatory authorities where Member States have so provided or 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 by 1 January 2005 and on an annual basis every year thereafter.

When developing the conditions referred to in the second subparagraph, storage operators and natural gas undertakings shall consult system users.

4. In the case of regulated access, the regulatory authorities where Member States have so provided or 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. The regulatory authorities where Member States have so provided or Member States shall consult system users when developing those tariffs or the methodologies for those tariffs. The 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 34***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 54.

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 matters may be taken into account:

- (a) the need to refuse access where there is an incompatibility of technical specifications which cannot reasonably be overcome;
- (b) the need to avoid difficulties which cannot reasonably be 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 each other with a view to ensuring that the provisions of this Directive are applied consistently.

*Article 35***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 48 and the alternative chosen by the Member State in accordance with paragraph 1 of that Article. Duly substantiated reasons shall be given for any 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 36***New infrastructure**

1. Major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, may, upon request, be exempted, for a defined period of time, from the provisions of Articles 9, 32, 33 and 34 and Article 41(6), (8) and (10) 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 must be 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 must be levied on users of that infrastructure; and
- (e) the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.

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

3. The regulatory authority referred to in Chapter VIII may, on a case-by-case basis, decide on the exemption referred to in paragraphs 1 and 2.

4. Where the infrastructure in question is located in the territory of more than one Member State, the Agency may submit an advisory opinion to the regulatory authorities of the Member States concerned, which may be used as a basis for their decision, within two months from the date on which the request for exemption was received by the last of those regulatory authorities.

Where all the regulatory authorities concerned agree on the request for exemption within six months of the date on which it was received by the last of the regulatory authorities, they shall inform the Agency of their decision.

The Agency shall exercise the tasks conferred on the regulatory authorities of the Member States concerned by the present Article:

- (a) where all regulatory authorities concerned have not been able to reach an agreement within a period of six months from the date on which the request for exemption was received by the last of those regulatory authorities; or
- (b) upon a joint request from the regulatory authorities concerned.

All regulatory authorities concerned may, jointly, request that the period referred to in point (a) of the third subparagraph is extended by up to three months.

5. Before taking a decision, the Agency shall consult the relevant regulatory authorities and the applicants.

6. An exemption may cover all or part of the capacity of the new infrastructure, or of the existing infrastructure with significantly increased capacity.

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 infrastructure. When deciding on those conditions, account shall, in particular, be taken of the additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances.

Before granting an exemption, the regulatory authority shall decide upon the rules and mechanisms for management and allocation of capacity. The rules shall require that all potential users of the infrastructure are invited to indicate their interest in contracting capacity before capacity allocation in the new infrastructure, including for own use, takes place. The regulatory authority shall require congestion management rules to include the obligation to offer unused capacity on the market, and shall require users of the infrastructure to be entitled to trade their contracted capacities on the secondary market. In its assessment of the criteria referred to in points (a), (b) and (e) of paragraph 1, the regulatory authority shall take into account the results of that capacity allocation procedure.

The exemption decision, including any conditions referred to in the second subparagraph of this paragraph, shall be duly reasoned and published.

7. Notwithstanding paragraph 3, Member States may provide that their regulatory authority or the Agency, as the case may be, shall submit, for the purposes of the formal decision, to the relevant body in the Member State its opinion on the request for an exemption. That opinion shall be published together with the decision.

8. The regulatory authority shall transmit to the Commission, without delay, a copy of every request for exemption as of its receipt. The decision shall be notified, without delay, by the competent authority to the Commission, together with all the relevant information with respect to the decision. That 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 or refused the exemption together with a reference to paragraph 1 including the relevant point or points of that paragraph on which such decision is based, 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 market in natural gas 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 regulatory authorities concerned; and
- (e) the contribution of the infrastructure to the diversification of gas supply.

9. Within a period of two months from the day following the receipt of a notification, the Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption. That two-month period may be extended by an additional period of two months where further information is sought by the Commission. That additional period shall begin on the day following the receipt of the complete information. The initial two-month period may also be extended with the consent of both the Commission and the regulatory authority.

Where the requested information is not provided within the period set out in the request, the notification shall be deemed to be withdrawn unless, before the expiry of that period, either the period has been extended with the consent of both the Commission and the regulatory authority, or the regulatory authority, in a duly reasoned statement, has informed the Commission that it considers the notification to be complete.

The regulatory authority shall comply with the Commission decision to amend or withdraw the exemption decision within a period of one month and shall inform the Commission accordingly.

The Commission shall preserve the confidentiality of commercially sensitive information.

The Commission's approval of an exemption decision shall lose its effect two years from its adoption in the event that construction of the infrastructure has not yet started, and five years from its adoption in the event that the infrastructure has not become operational unless the Commission decides that any delay is due to major obstacles beyond control of the person to whom the exemption has been granted.

10. The Commission may adopt Guidelines for the application of the conditions laid down in paragraph 1 of this Article and to set out the procedure to be followed for the application of paragraphs 3, 6, 8 and 9 of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

#### Article 37

### Market opening and reciprocity

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

- (a) until 1 July 2004, eligible customers as specified in Article 18 of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas <sup>(1)</sup>. Member States shall publish, by 31 January each year, the criteria for the definition of those eligible customers;

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

- (b) from 1 July 2004, all non-household customers;

- (c) from 1 July 2007, all customers.

2. To avoid imbalance in the opening of the 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; and

- (b) 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 38

### 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; and
- (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 (for example, 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. Those criteria shall be objective, transparent and non-discriminatory.

3. Member States may issue an authorisation to construct a direct line subject either to the refusal of system access on the basis of Article 35 or to the opening of a dispute-settlement procedure under Article 41.

#### CHAPTER VIII

### NATIONAL REGULATORY AUTHORITIES

#### Article 39

### Designation and independence of regulatory authorities

1. Each Member State shall designate a single national regulatory authority at national level.

2. Paragraph 1 of this Article shall be without prejudice to the designation of other regulatory authorities at regional level within Member States, provided that there is one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in accordance with Article 14(1) of Regulation (EC) No 713/2009.

3. By way of derogation from paragraph 1 of this Article, a Member State may designate regulatory authorities for small systems on a geographically separate region whose consumption, in 2008, accounted for less than 3 % of the total consumption of the Member State of which it is part. That derogation shall be without prejudice to the appointment of one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in compliance with Article 14(1) of Regulation (EC) No 713/2009.

4. Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member States shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority:

- (a) is legally distinct and functionally independent from any other public or private entity;
- (b) ensures that its staff and the persons responsible for its management:
  - (i) act independently from any market interest; and
  - (ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. That requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 41.

5. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

- (a) the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and
- (b) the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once.

In regard to point (b) of the first subparagraph, Member States shall ensure an appropriate rotation scheme for the board or the top management. The members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law.

#### Article 40

#### General objectives of the regulatory authority

In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures in pursuit of the following objectives within the framework of their duties and powers as laid down in Article 41, in close consultation with other relevant national authorities, including competition authorities, as appropriate, and without prejudice to their competencies:

- (a) promoting, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, a competitive, secure and environmentally sustainable internal market in natural gas within the Community, and effective market opening for all customers and suppliers in the Community, and ensuring appropriate conditions for the effective and reliable operation of gas networks, taking into account long-term objectives;
- (b) developing competitive and properly functioning regional markets within the Community in view of the achievement of the objectives referred to in point (a);
- (c) eliminating restrictions on trade in natural gas between Member States, including developing appropriate cross-border transmission capacities to meet demand and enhancing the integration of national markets which may facilitate natural gas flow across the Community;
- (d) helping to achieve, in the most cost-effective way, the development of secure, reliable and efficient non-discriminatory systems that are consumer oriented, and promoting system adequacy and, in line with general energy policy objectives, energy efficiency as well as the integration of large and small scale production of gas from renewable energy sources and distributed production in both transmission and distribution networks;
- (e) facilitating access to the network for new production capacity, in particular removing barriers that could prevent access for new market entrants and of gas from renewable energy sources;

- (f) ensuring that system operators and system users are granted appropriate incentives, in both the short and the long term, to increase efficiencies in system performance and foster market integration;
  - (g) ensuring that customers benefit through the efficient functioning of their national market, promoting effective competition and helping to ensure consumer protection;
  - (h) helping to achieve high standards of public service for natural gas, contributing to the protection of vulnerable customers and contributing to the compatibility of necessary data exchange processes for customer switching.
- (h) monitoring compliance with and reviewing the past performance of network security and reliability rules and setting or approving standards and requirements for quality of service and supply or contributing thereto together with other competent authorities;
  - (i) monitoring the level of transparency, including of wholesale prices, and ensuring compliance of natural gas undertakings with transparency obligations;
  - (j) monitoring the level and effectiveness of market opening and competition at wholesale and retail levels, including on natural gas exchanges, prices for household customers including prepayment systems, switching rates, disconnection rates, charges for and the execution of maintenance services and complaints by household customers, as well as any distortion or restriction of competition, including providing any relevant information, and bringing any relevant cases to the relevant competition authorities;

#### Article 41

#### Duties and powers of the regulatory authority

1. The regulatory authority shall have the following duties:
    - (a) fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies;
    - (b) ensuring compliance of transmission and distribution system operators, and where relevant, system owners, as well as of any natural gas undertakings, with their obligations under this Directive and other relevant Community legislation, including as regards cross-border issues;
    - (c) cooperating in regard to cross-border issues with the regulatory authority or authorities of the Member States concerned and with the Agency;
    - (d) complying with, and implementing, any relevant legally binding decisions of the Agency and of the Commission;
    - (e) reporting annually on its activity and the fulfilment of its duties to the relevant authorities of the Member States, the Agency and the Commission. Such reports shall cover the steps taken and the results obtained as regards each of the tasks listed in this Article;
    - (f) ensuring that there are no cross-subsidies between transmission, distribution, storage, LNG and supply activities;
    - (g) monitoring investment plans of the transmission system operators, and providing in its annual report an assessment of the investment plans of the transmission system operators as regards their consistency with the Community-wide network development plan referred to in Article 8(3)(b) of Regulation (EC) No 715/2009; such assessment may include recommendations to amend those investment plans;
- (k) monitoring the occurrence of restrictive contractual practices, including exclusivity clauses which may prevent large non-household customers from contracting simultaneously with more than one supplier or restrict their choice to do so, and, where appropriate, informing the national competition authorities of such practices;
  - (l) respecting contractual freedom with regard to interruptible supply contracts as well as with regard to long-term contracts provided that they are compatible with Community law and consistent with Community policies;
  - (m) monitoring the time taken by transmission and distribution system operators to make connections and repairs;
  - (n) monitoring and reviewing the access conditions to storage, linepack and other ancillary services as provided for in Article 33. In the event that the access regime to storage is defined according to Article 33(3), that task shall exclude the reviewing of tariffs;
  - (o) helping to ensure, together with other relevant authorities, that the consumer protection measures, including those set out in Annex I, are effective and enforced;
  - (p) publishing recommendations, at least annually, in relation to compliance of supply prices with Article 3, and providing those to the competition authorities, where appropriate;
  - (q) ensuring access to customer consumption data, the provision for optional use, of an easily understandable harmonised format at national level for consumption data and prompt access for all customers to such data under point (h) of Annex I;

- (r) monitoring the implementation of rules relating to the roles and responsibilities of transmission system operators, distribution system operators, suppliers and customers and other market parties pursuant to Regulation (EC) No 715/2009;
- (s) monitoring the correct application of the criteria that determine whether a storage facility falls under Article 33(3) or (4); and
- (t) monitoring the implementation of safeguards measures as referred to in Article 46;
- (u) contributing to the compatibility of data exchange processes for the most important market processes at regional level.

2. Where a Member State has so provided, the monitoring duties set out in paragraph 1 may be carried out by other authorities than the regulatory authority. In such a case, the information resulting from such monitoring shall be made available to the regulatory authority as soon as possible.

While preserving their independence, without prejudice to their own specific competencies and consistent with the principles of better regulation, the regulatory authority shall, as appropriate, consult transmission system operators and, as appropriate, closely cooperate with other relevant national authorities when carrying out the duties set out in paragraph 1.

Any approvals given by a regulatory authority or the Agency under this Directive are without prejudice to any duly justified future use of its powers by the regulatory authority under this Article or to any penalties imposed by other relevant authorities or the Commission.

3. In addition to the duties conferred upon it under paragraph 1 of this Article, when an independent system operator has been designated under Article 14, the regulatory authority shall:

- (a) monitor the transmission system owner's and the independent system operator's compliance with their obligations under this Article, and issue penalties for non compliance in accordance with paragraph 4(d);
- (b) monitor the relations and communications between the independent system operator and the transmission system owner so as to ensure compliance of the independent system operator with its obligations, and in particular approve contracts and act as a dispute settlement authority between the independent system operator and the transmission system owner in respect of any complaint submitted by either party pursuant to paragraph 11;
- (c) without prejudice to the procedure under Article 14(2)(c), for the first ten-year network development plan, approve the investments planning and the multi-annual network development plan presented annually by the independent system operator;

- (d) ensure that network access tariffs collected by the independent system operator include remuneration for the network owner or network owners, which provides for adequate remuneration of the network assets and of any new investments made therein, provided they are economically and efficiently incurred; and
- (e) have the powers to carry out inspections, including unannounced inspections, at the premises of transmission system owner and independent system operator.

4. Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraph 1, 3 and 6 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

- (a) to issue binding decisions on natural gas undertakings;
- (b) to carry out investigations into the functioning of the gas markets, and to decide upon and impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market. Where appropriate, the regulatory authority shall also have the power to cooperate with the national competition authority and the financial market regulators or the Commission in conducting an investigation relating to competition law;
- (c) to require any information from natural gas undertakings relevant for the fulfilment of its tasks, including the justification for any refusal to grant third-party access, and any information on measures necessary to reinforce the network;
- (d) to impose effective, proportionate and dissuasive penalties on natural gas undertakings not complying with their obligations under this Directive or any relevant legally binding decisions of the regulatory authority or of the Agency, or to propose to a competent court to impose such penalties. This shall include the power to impose or propose the imposition of penalties of up to 10 % of the annual turnover of the transmission system operator or of up to 10 % of the annual turnover of the vertically integrated undertaking on the transmission system operator or on the vertically integrated undertaking, as the case may be, for non compliance with their respective obligations pursuant to this Directive; and
- (e) appropriate rights of investigations and relevant powers of instructions for dispute settlement under paragraphs 11 and 12.

5. In addition to the duties and powers conferred on it under paragraphs 1 and 4 of this Article, when a transmission system operator has been designated in accordance with Chapter IV, the regulatory authority shall be granted at least the following duties and powers:

- (a) to issue penalties in accordance with paragraph 4(d) for discriminatory behaviour in favour of the vertically integrated undertaking;
  - (b) to monitor communications between the transmission system operator and the vertically integrated undertaking so as to ensure compliance of the transmission system operator with its obligations;
  - (c) to act as dispute settlement authority between the vertically integrated undertaking and the transmission system operator in respect of any complaint submitted pursuant to paragraph 11;
  - (d) to monitor commercial and financial relations including loans between the vertically integrated undertaking and the transmission system operator;
  - (e) to approve all commercial and financial agreements between the vertically integrated undertaking and the transmission system operator, on the condition that they comply with market conditions;
  - (f) to request justification from the vertically integrated undertaking when notified by the compliance officer in accordance with Article 21(4). Such justification shall in particular include evidence to the end that no discriminatory behaviour to the advantage of the vertically integrated undertaking has occurred;
  - (g) to carry out inspections, including unannounced inspections, on the premises of the vertically integrated undertaking and the transmission system operator; and
  - (h) to assign all or specific tasks of the transmission system operator to an independent system operator appointed in accordance with Article 14 in case of a persistent breach by the transmission system operator of its obligations under this Directive, in particular in case of repeated discriminatory behaviour to the benefit of the vertically integrated undertaking.
6. The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of 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. Those tariffs or methodologies shall allow the necessary investments in the networks and LNG facilities to be carried out in a manner allowing those investments to ensure the viability of the networks and LNG facilities;
  - (b) the provision of balancing services which shall be performed in the most economic manner and provide appropriate incentives for network users to balance their input and off-takes. The balancing services shall be provided in a fair and non-discriminatory manner and be based on objective criteria; and
  - (c) access to cross-border infrastructures, including the procedures for the allocation of capacity and congestion management.
7. The methodologies or the terms and conditions referred to in paragraph 6 shall be published.
8. In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.
9. The regulatory authorities shall monitor congestion management of national gas transmission networks including interconnectors, and the implementation of congestion management rules. To that end, transmission system operators or market operators shall submit their congestion management rules, including capacity allocation, to the national regulatory authorities. National regulatory authorities may request amendments to those rules.
10. Regulatory authorities shall have the authority to require transmission, storage, LNG and distribution system operators, if necessary, to modify the terms and conditions, including tariffs and methodologies referred to in this Article, to ensure that they are proportionate and applied in a non-discriminatory manner. In the event that the access regime to storage is defined according to Article 33(3), that task shall exclude the modification of tariffs. In the event of delay in the fixing of transmission and distribution tariffs, regulatory authorities shall have the power to fix or approve provisional transmission and distribution tariffs or methodologies and to decide on the appropriate compensatory measures if the final tariffs or methodologies deviate from those provisional tariffs or methodologies.
11. Any party having a complaint against a transmission, storage, LNG or distribution system operator in relation to that operator's obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within a period of two months after receipt of the complaint. That period may be extended by two months where additional information is sought by the regulatory authorities. That extended period may be further extended with the agreement of the complainant. The regulatory authority's decision shall have binding effect unless and until overruled on appeal.
12. Any party who is affected and who has a right to complain concerning a decision on methodologies taken pursuant to this Article or, where the regulatory authority has a duty to consult, concerning the proposed tariffs or 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.

13. 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. Those mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.

14. 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.

15. Complaints referred to in paragraphs 11 and 12 shall be without prejudice to the exercise of rights of appeal under Community or national law.

16. Decisions taken by regulatory authorities shall be fully reasoned and justified to allow for judicial review. The decisions shall be available to the public while preserving the confidentiality of commercially sensitive information.

17. Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.

#### Article 42

##### Regulatory regime for cross-border issues

1. Regulatory authorities shall closely consult and cooperate with each other, and shall provide each other and the Agency with any information necessary for the fulfilment of their tasks under this Directive. In respect of the information exchanged, the receiving authority shall ensure the same level of confidentiality as that required of the originating authority.

2. Regulatory authorities shall cooperate at least at a regional level to:

- (a) foster the creation of operational arrangements in order to enable an optimal management of the network, promote joint gas exchanges and the allocation of cross-border capacity, and to enable an adequate level of interconnection capacity, including through new interconnections, within the region and between regions to allow for development of effective competition and improvement of security of supply without discriminating between supply undertakings in different Member States;
- (b) coordinate the development of all network codes for the relevant transmission system operators and other market actors; and

(c) coordinate the development of the rules governing the management of congestion.

3. National regulatory authorities shall have the right to enter into cooperative arrangements with each other to foster regulatory cooperation.

4. The actions referred to in paragraph 2 shall be carried out, as appropriate, in close consultation with other relevant national authorities and without prejudice to their specific competencies.

5. The Commission may adopt Guidelines on the extent of the duties of the regulatory authorities to cooperate with each other and with the Agency. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

#### Article 43

##### Compliance with the Guidelines

1. Any regulatory authority and the Commission may request the opinion of the Agency on the compliance of a decision taken by a regulatory authority with the Guidelines referred to in this Directive or in Regulation (EC) No 715/2009.

2. The Agency shall provide its opinion to the regulatory authority which has requested it or to the Commission, respectively, and to the regulatory authority which has taken the decision in question within three months from the date of receipt of the request.

3. Where the regulatory authority which has taken the decision does not comply with the Agency's opinion within four months from the date of receipt of that opinion, the Agency shall inform the Commission accordingly.

4. Any regulatory authority may inform the Commission where it considers that a decision relevant for cross border-trade taken by another regulatory authority does not comply with the Guidelines referred to in this Directive or in Regulation (EC) No 715/2009 within two months from the date of that decision.

5. Where the Commission, within two months of having been informed by the Agency in accordance with paragraph 3, or by a regulatory authority in accordance with paragraph 4, or on its own initiative, within three months from the date of the decision, finds that the decision of a regulatory authority raises serious doubts as to its compatibility with the Guidelines referred to in this Directive or in Regulation (EC) No 715/2009, the Commission may decide to examine the case further. In such a case, it shall invite the regulatory authority and the parties to the proceedings before the regulatory authority to submit observations.



6. Where the Commission takes a decision to examine the case further, it shall, within four months of the date of such decision, issue a final decision:

- (a) not to raise objections against the decision of the regulatory authority; or
- (b) to require the regulatory authority concerned to withdraw its decision on the basis that the Guidelines have not been complied with.

7. Where the Commission has not taken a decision to examine the case further or a final decision within the time-limits set in paragraphs 5 and 6 respectively, it shall be deemed not to have raised objections to the decision of the regulatory authority.

8. The regulatory authority shall comply with the Commission decision to withdraw its decision within a period of two months and shall inform the Commission accordingly.

9. The Commission may adopt Guidelines setting out the details of the procedure to be followed by the regulatory authorities, the Agency and the Commission as regards the compliance of decisions taken by regulatory authorities with the Guidelines referred to in this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

#### *Article 44*

### **Record keeping**

1. Member States shall require supply undertakings to keep at the disposal of the national authorities, including the regulatory authority, the national competition authorities and the Commission, for the fulfilment of their tasks, for at least five years, the relevant data relating to all transactions in gas supply contracts and gas derivatives with wholesale customers and transmission system operators as well as storage and LNG operators.

2. The data shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled gas supply contracts and gas derivatives.

3. The regulatory authority may decide to make available to market participants elements of this information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC.

4. To ensure the uniform application of this Article, the Commission may adopt Guidelines which define the methods and arrangements for record keeping as well as the form and content of the data that shall be kept. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

5. With respect to transactions in gas derivatives of supply undertakings with wholesale customers and transmission system operators as well as storage and LNG operators, this Article shall apply only once the Commission has adopted the Guidelines referred to in paragraph 4.

6. The provisions of this Article shall not create additional obligations towards the authorities referred to in paragraph 1 for entities falling within the scope of Directive 2004/39/EC.

7. In the event that the authorities referred to in paragraph 1 need access to data kept by entities falling within the scope of Directive 2004/39/EC, the authorities responsible under that Directive shall provide them with the required data.

## CHAPTER IX

### **RETAIL MARKETS**

#### *Article 45*

### **Retail markets**

In order to facilitate the emergence of well functioning and transparent retail markets in the Community, Member States shall ensure that the roles and responsibilities of transmission system operators, distribution system operators, supply undertakings and customers and if necessary other market parties are defined with respect to contractual arrangements, commitment to customers, data exchange and settlement rules, data ownership and metering responsibility.

Those rules shall be made public, be designed with the aim to facilitate customers' and suppliers' access to networks and they shall be subject to review by the regulatory authorities or other relevant national authorities.

## CHAPTER X

### **FINAL PROVISIONS**

#### *Article 46*

### **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 be no wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

3. The Member State concerned shall, without delay, notify those 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 47

### Level playing field

1. Measures that the Member States may take pursuant to this Directive in order to ensure a level playing field shall be compatible with the Treaty, notably Article 30 thereof, and with the legislation of the Community.

2. The measures referred to in paragraph 1 shall be proportionate, non-discriminatory and transparent. Those measures may be put into effect only following the notification to and approval by the Commission.

3. The Commission shall act on the notification referred to in paragraph 2 within two months of the receipt of the notification. That period shall begin on the day following receipt of the complete information. In the event that the Commission has not acted within that two-month period, it shall be deemed not to have raised objections to the notified measures.

#### Article 48

### 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, it may send an application for a temporary derogation from Article 32 to the Member State concerned or the designated competent authority. Applications shall, in accordance with 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 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. That information may be submitted to the Commission in an aggregated form, enabling the Commission to reach a well-founded decision. Within eight weeks of receipt of that 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 that request within a period of four weeks, a final decision shall be taken expeditiously in accordance with the advisory procedure referred to in Article 51(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 that 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 those 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 market in natural gas.

A decision on a request for a derogation concerning take-or-pay contracts concluded before 4 August 2003 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 of this Article 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 Articles 32 to 44 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 Union*.

6. The Commission shall, within 4 August 2008, 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 49

##### 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, 37 and/or 38. A supply undertaking having a market share of more than 75 % shall be considered to be a main supplier. Any such derogation shall automatically expire where at least one of the conditions referred to in this subparagraph no longer applies. Any such derogation shall be notified to the Commission.

Cyprus may derogate from Articles 4, 9, 37 and/or 38. Such derogation shall expire from the moment when Cyprus is not qualifying as an isolated market.

Articles 4, 9, 37 and/or 38 shall not apply to Estonia, Latvia and/or Finland until any of those Member States is directly connected to the interconnected system of any Member State other than Estonia, Latvia, Lithuania and Finland. This subparagraph is without prejudice to derogations under the first subparagraph of this paragraph.

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 and 9, Article 13(1) and (3), Articles 14 and 24, Article 25(5), Articles 26, 31 and 32, Article 37(1) and/or Article 38. Such 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.

Cyprus may derogate from Articles 4 and 9, Article 13(1) and (3), Articles 14 and 24, Article 25(5), Articles 26, 31 and 32, Article 37(1) and/or Article 38. Such derogation shall expire from the moment when Cyprus is not qualifying as an emergent market.

3. On the date at which the derogation referred to in the first subparagraph of 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, Article 37(1)(b) shall apply, and three years thereafter, Article 37(1)(c) shall apply. Until Article 37(1)(b) applies the Member State referred to in paragraph 2 of this Article may decide not to apply Article 32 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 the 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 Articles 4 and 9, Article 13(1) and (3), Articles 14 and 24, Article 25(5), Articles 26, 31 and 32, Article 37(1) and/or Article 38 for developments within that 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 socioeconomic and demographic factors,

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

For distribution infrastructure a derogation may be granted for a period not exceeding 20 years from when gas is first supplied through the said infrastructure in the area.

6. Article 9 shall not apply to Cyprus, Luxembourg and/or Malta.

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. That 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, 24, 25, 26, 32, 37 and/or 38 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 50

##### Review procedure

In the event that in the report referred to in Article 52(6), the Commission reaches the conclusion that, 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 — 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.

Such 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 this Directive. The Commission may propose, in the proposals to amend this Directive, to exempt the Member State concerned from specific requirements subject to that Member State implementing equally effective measures as appropriate.

#### Article 51

##### 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. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

#### Article 52

##### 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 for the first time by 31 December 2004, and thereafter on an annual basis. The progress 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 26(4) 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 that 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, the progress report may include recommendations and measures to counteract the negative effects of market dominance and market concentration.

In the report, the Commission, in consultation with the ENTSO for Gas, may also consider the feasibility of the creation, by transmission system operators, of a single European transmission system operator.

2. Every two years, the progress report referred to in paragraph 1 shall also include 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, by 3 March 2013, submit, as part of the general review, to the European Parliament and the Council, a detailed specific report outlining the extent to which the unbundling requirements under Chapter IV have been successful in ensuring full and effective independence of transmission system operators, using effective and efficient unbundling as a benchmark.

4. For the purpose of its assessment under paragraph 3, the Commission shall take into account, in particular, the following criteria: fair and non-discriminatory network access, effective regulation, the development of the network to meet market needs, undistorted incentives to invest, the development of interconnection infrastructure, effective competition in the energy markets of the Community and the security of supply situation in the Community.

5. Where appropriate, and in particular in the event that the detailed specific report referred to in paragraph 3 determines that the conditions referred to in paragraph 4 have not been guaranteed in practice, the Commission shall submit proposals to the European Parliament and the Council to ensure fully effective independence of transmission system operators by 3 March 2014.

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

- 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 household customers, notably with respect to public service standards,
- the extent to which markets are in practice open to effective competition, including aspects of market dominance, market concentration and predatory or anti-competitive behaviour,
- 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 this 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. Where necessary, those proposals shall, in conformity with competition law, also concern measures to address issues of market dominance, market concentration and predatory or anti-competitive behaviour.

#### Article 53

##### Repeal

Directive 2003/55/EC is repealed from 3 March 2011 without prejudice to the obligations of Member States concerning the deadlines for transposition and application of the said Directive. References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

#### Article 54

##### Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 3 March 2011. They shall forthwith inform the Commission thereof.

They shall apply those measures from 3 March 2011 with the exception of Article 11, which they shall apply from 3 March 2013.

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

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 55*

**Entry into force**

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

*Article 56*

**Addressees**

This Directive is addressed to the Member States.

Done at Brussels, 13 July 2009.

*For the European Parliament*  
*The President*  
H.-G. PÖTTERING

*For the Council*  
*The President*  
E. ERLANDSSON

## ANNEX I

## MEASURES ON CONSUMER PROTECTION

1. Without prejudice to Community rules on consumer protection, in particular Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts <sup>(1)</sup> and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts <sup>(2)</sup>, 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,
  - 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, and whether withdrawal from the contract without charge is permitted,
  - any compensation and the refund arrangements which apply if contracted service quality levels are not met including inaccurate and delayed billing,
  - the method of initiating procedures for settlement of disputes in accordance with point (f); and,
  - information relating to consumer rights, including on the complaint handling and all of the information referred to in this point, clearly communicated through billing or the natural gas undertaking's web site,

Conditions shall be fair and well-known in advance. In any event, that information should be provided prior to the conclusion or confirmation of the contract. Where contracts are concluded through intermediaries, the information relating to the matters set out in this point 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 in a transparent and comprehensible manner. 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, which do not unduly discriminate between customers. Prepayment systems shall be fair and adequately reflect likely consumption. 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 and shall not include non-contractual barriers to the exercise of customers' rights, for example excessive contractual documentation. Customers shall be protected against unfair or misleading selling methods;
- (e) are not charged for changing supplier;
- (f) benefit from transparent, simple and inexpensive procedures for dealing with their complaints. In particular, all consumers shall have the right to a good standard of service and complaint handling by their gas service provider. Such out-of-court dispute settlements procedures shall enable disputes to be settled fairly and promptly, preferably within three months, with provision, where warranted, for a system of reimbursement and/or compensation. They should, wherever possible, be in line with the principles set out in Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes <sup>(3)</sup>;

<sup>(1)</sup> OJ L 144, 4.6.1997, p. 19.

<sup>(2)</sup> OJ L 95, 21.4.1993, p. 29.

<sup>(3)</sup> OJ L 115, 17.4.1998, p. 31.

- (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;
  - (h) have at their disposal their consumption data, and shall be able to, by explicit agreement and free of charge, give any registered supply undertaking access to its metering data. The party responsible for data management shall be obliged to give those data to the undertaking. Member States shall define a format for the data and a procedure for suppliers and consumers to have access to the data. No additional costs shall be charged to the consumer for that service;
  - (i) are properly informed of actual gas consumption and costs frequently enough to enable them to regulate their own gas consumption. That information shall be given by using a sufficient time frame, which takes account of the capability of customer's metering equipment. Due account shall be taken of the cost-efficiency of such measures. No additional costs shall be charged to the consumer for that service;
  - (j) receive a final closure account following any change of natural gas supplier no later than six weeks after the change of supplier has taken place.
2. Member States shall ensure the implementation of intelligent metering systems that shall assist the active participation of consumers in the gas supply market. The implementation of those metering systems may be subject to an economic assessment of all the long-term costs and benefits to the market and the individual consumer or which form of intelligent metering is economically reasonable and cost-effective and which timeframe is feasible for their distribution.

Such assessment shall take place by 3 September 2012.

Subject to that assessment, Member States or any competent authority they designate, shall prepare a timetable for the implementation of intelligent metering systems.

The Member States or any competent authority they designate, shall ensure the interoperability of those metering systems to be implemented within their territories and shall have due regard to the use of appropriate standards and best practice and the importance of the development of the internal market in natural gas.

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## ANNEX II

## CORRELATION TABLE

| Directive 2003/55/EC                      | This Directive |
|---|----------------|
| Article 1                                 | Article 1      |
| Article 2                                 | Article 2      |
| Article 3                                 | Article 3      |
| Article 4                                 | Article 4      |
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| —   | Article 7      |
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| Article 8                                 | Article 13     |
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| Article 10                                | Article 16     |
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| Article 11                                | Article 24     |
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| Article 20                                | Article 34     |
| Article 21                                | Article 35     |
| Article 22                                | Article 36     |
| Article 23                                | Article 37     |
| Article 24                                | Article 38     |
| Article 25(1) (first and second sentence) | Article 39     |
| —   | Article 40     |

| Directive 2003/55/EC | This Directive |
|----------------------|----------------|
| Article 25 (rest)    | Article 41     |
| —                    | Article 42     |
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| Article 30           | Article 51     |
| Article 31           | Article 52     |
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| Article 33           | Article 54     |
| Article 34           | Article 55     |
| Article 35           | Article 56     |
| Annex A              | Annex I        |



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