COMMON POSITION (EC) No 9/2009

adopted by the Council on 9 January 2009

with a view to the adoption of Directive 2009/…/EC of the European Parliament and of the Council of … concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC

(Text with EEA relevance)

(2009/C 70 E/02)

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 ([1]),

Having regard to the opinion of the Committee of the Regions ([2]),

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

Whereas:

(1) The internal market in natural gas, which has been progressively implemented throughout the Community since 1999, aims at delivering 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 ([4]) 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 — free movement of goods, freedom to provide services and freedom of establishment — 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 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.

(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 in Brussels 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 this reason, the European Parliament, in its resolution of 10 July 2007 on prospects for the internal gas and electricity market 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 and, at the same time, exercise control or any right over a

([1]) OJ C 211, 19.8.2008, p. 23.
([2]) OJ C 172, 5.7.2008, p. 55.
([3]) Opinion of the European Parliament of 9 July 2008 (not yet published in the Official Journal), Council Common Position of 9 January 2009 and Position of the European Parliament of … (not yet published in the Official Journal).
([4]) OJ L 176, 15.7.2003, p. 57.

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) 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) ([1]).

(10) Since ownership unbundling requires, in some instances, the restructuring of undertakings, Member States 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.

(11) 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.

(12) The setting up of a system operator or a transmission operator 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.

(13) Where, on … (*), 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.

(14) 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.

(15) The full effectiveness of the independent system operator or independent transmission operator solutions should be ensured by way of specific additional rules. The independence of the transmission operator should, 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.

(16) 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.

(17) 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.

(18) The implementation of effective unbundling should respect the principle of non-discrimination between the public and private sectors. To this 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.

(19) 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

([1]) OJ L 24, 29.1.2004, p. 1.
(*) Date of entry into force of this Directive.

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, 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.

(20) The safeguarding 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. Gas can reach the citizens of the Union only through the network. Functioning 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.

(21) Further measures should be taken in order to ensure transparent and non-discriminatory tariffs for access to transportation. Those tariffs should be applicable to all users on a non-discriminatory basis. Where a storage facility, linepack or ancillary service operates in a sufficiently competitive market, access could be allowed on the basis of transparent and non-discriminatory market-based mechanisms.

(22) 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.

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.

(23) 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.

(24) To avoid imposing a disproportionate financial and administrative burden on small distribution system operators, Member States should be able, where necessary, to exempt such companies from the legal distribution unbundling requirements.

(25) 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 this reason, at its meeting in Brussels 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.

(26) Energy regulators need to be able to take decisions on 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.

(27) 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.

(28) 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.

(29) 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. Regulatory authorities should also be granted the power to decide, irrespective of the application of competition rules, on appropriate measures promoting 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.

(30) 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 …/2009 [1] of the European Parliament and of the Council (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 these 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. This should apply, for security of supply reasons, in particular, to new pipelines within the Community transporting gas from third countries into the Community.

(31) 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 legislation on 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.

(32) 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') 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.

(33) In the interests of security of supply, the supply/demand balance in individual Member States should be monitored, and monitoring should be followed by a report on the situation at Community level, taking account of

[1] OJ L …

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.

(34) 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.

(35) 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 transportation capacity of natural gas undertakings.

(36) 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.

(37) 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.

(38) Measures implemented by Member States to achieve the objectives of social and economic cohesion may include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools. Such tools may include liability mechanisms to guarantee the necessary investment.

(39) 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.

(40) The public service requirements and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers can benefit from competition. A key aspect of supplying customers is access to consumption data, and consumers must have access to their data 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. Regularly provided information on energy costs 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.

(41) 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. This cooperation in a spirit of solidarity may rely, if Member States so decide, first and foremost on market-based mechanisms.

(42) 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.

(43) 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, cross-border trade, investments, wholesale and consumer prices, market liquidity and environmental and efficiency improvements.

(44) 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.

(45) Under Regulation (EC) No …/2009 of the European Parliament and of the Council of … on conditions for access to the natural gas transmission network ([1]), 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.

(46) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ([2]).

(47) 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.

(48) In accordance with point 34 of the Interinstitutional Agreement on better law-making ([3]), 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.

(49) 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.

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

(2) 'upstream pipeline network' means any pipeline or network of pipelines operated and/or constructed as part of an oil or gas production project, or used to convey natural gas from one or more such projects to a processing plant or terminal or final coastal landing terminal;

(3) 'transmission' means the transport of natural gas through a high-pressure pipeline network other than an upstream pipeline network with a view to its delivery to customers, but not including supply;

(4) 'transmission system operator' means a natural or legal person who carries out the function of transmission and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transportation of gas;

(5) 'distribution' means the transport of natural gas through local or regional pipeline networks with a view to its delivery to customers, but not including supply;

(6) 'distribution system operator' means a natural or legal person who carries out the function of distribution and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of gas;

(7) 'supply' means the sale, including resale, of natural gas, including LNG, to customers;

(8) 'supply undertaking' means any natural or legal person who carries out the function of supply;

(9) 'storage facility' means a facility used for the stocking of natural gas and owned and/or operated by a natural gas undertaking, including the part of LNG facilities used for storage but excluding the portion used for production operations, and excluding facilities reserved exclusively for transmission system operators in carrying out their functions;

([1]) OJ L …
([2]) OJ L 184, 17.7.1999, p. 23.
([3]) OJ C 321, 31.12.2003, p. 1.

(10) 'storage system operator' means a natural or legal person who carries out the function of storage and is responsible for operating a storage facility;

(11) 'LNG facility' means a terminal which is used for the liquefaction of natural gas or the importation, offloading, and re-gasification of LNG, and shall include ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system, but shall not include any part of LNG terminals used for storage;

(12) 'LNG system operator' means a natural or legal person who carries out the function of liquefaction of natural gas, or the importation, offloading, and re-gasification of LNG and is responsible for operating a LNG facility;

(13) 'system' means any transmission networks, distribution networks, LNG facilities and/or storage facilities owned and/or operated by a natural gas undertaking, including linepack and its facilities supplying ancillary services and those of related undertakings necessary for providing access to transmission, distribution and LNG;

(14) 'ancillary services' means all services necessary for access to and the operation of transmission networks, distribution networks, LNG facilities, and/or storage facilities, including load balancing and blending, but excluding facilities reserved exclusively for transmission system operators carrying out their functions;

(15) 'linepack' means the storage of gas by compression in gas transmission and distribution systems, but excluding facilities reserved for transmission system operators carrying out their functions;

(16) 'interconnected system' means a number of systems which are linked with each other;

(17) 'interconnector' means a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of these Member States;

(18) 'direct line' means a natural gas pipeline complementary to the interconnected system;

(19) 'integrated natural gas undertaking' means a vertically or horizontally integrated undertaking;

(20) 'vertically integrated undertaking' means a natural gas undertaking or a group of 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 undertakings' means affiliated undertakings, within the meaning of Article 41 of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 44(2)(g) (*) of the Treaty on consolidated accounts [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) 'system users' means any natural or legal persons supplying to, or being supplied by, the system;

(24) 'customers' means wholesale and final customers of natural gas and natural gas undertakings which purchase natural gas;

(25) 'household customers' means customers purchasing natural gas for their own household consumption;

(26) 'non-household customers' means customers purchasing natural gas which is not for their own household use;

(27) 'final customers' means customers purchasing natural gas for their own use;

(28) 'eligible customers' means customers who are free to purchase gas from the supplier of their choice, within the meaning of Article 36;

(29) 'wholesale customers' means any natural or legal persons other than transmission system operators and distribution system operators who purchase natural gas for the purpose of resale inside or outside the system where they are established;

(30) 'long-term planning' means the planning of supply and transportation capacity of natural gas undertakings on a long-term basis with a view to meeting the demand for natural gas of the system, diversification of sources and securing supplies to customers;

(31) 'emergent market' means a Member State in which the first commercial supply of its first long-term natural gas supply contract was made not more than 10 years earlier;

(32) 'security' means both security of supply of natural gas and technical safety;

(33) 'new infrastructure' means an infrastructure not completed by the entry into force of this Directive;

(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 [2], 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;

(*) 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.

[2] OJ L 145, 30.4.2004, p. 1.

(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 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 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 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, 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 to ensure high levels of consumer protection, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers, including appropriate measures to help them avoid disconnection. In this context, they may take appropriate measures to protect customers in remote areas who are connected to the gas system. Member States may appoint a supplier of last resort for customers connected to the gas network. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding general contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is effectively able to switch to a new supplier. As regards at least household customers those measures shall include those set out in Annex I.

4. 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.

5. Member States may decide not to apply the provisions of Article 4 with respect to distribution insofar as their application would obstruct, in law or in fact, the performance of the obligations imposed on natural gas undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community. The interests of the Community include, inter alia, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.

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

Article 4

Authorisation procedure

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

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

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

4. For the development of newly supplied areas and efficient operation generally, and without prejudice to Article 37, 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 44(1). Such monitoring shall, in particular, cover the supply/demand balance on the national market, the level of expected future demand and available supplies, envisaged additional capacity being planned or under construction, and the quality and level of maintenance of the networks, as well as measures to cover peak demand and to deal with shortfalls of one or more suppliers. The competent authorities shall publish, by 31 July each year, 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 ([1]);

(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 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 50(3).

Article 7

Promotion of regional cooperation

1. Member States shall cooperate among themselves for the purpose of integrating their national markets at least at the regional level. In particular, Member States shall promote the cooperation of transmission system operators at a regional level, and foster the consistency of their legal and regulatory framework. 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 …/2009. Such cooperation may cover other geographical areas.

2. 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.

3. If 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

Member States shall ensure that technical safety criteria are defined and that technical rules establishing the minimum technical design and operational requirements for the connection to the system of LNG facilities, storage facilities, other transmission or distribution systems, and direct lines, are developed and made public. These technical rules shall ensure the interoperability of systems and shall be objective and non-discriminatory. They shall be notified to the Commission in accordance with Article 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of the rules on information society services ([2]).

CHAPTER III

Transmission, storage and LNG

Article 9

Unbundling of transmission systems and transmission system operators

1. Member States shall ensure that from … (*):

(a) each undertaking which owns a transmission system acts as a transmission system operator;

(b) the same person or persons are not entitled:

(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; or

([1]) OJ L 127, 29.4.2004, p. 92.

([2]) OJ L 204, 21.7.1998, p. 37.

(*) Date of transposition of this Directive plus one year, i.e. 30 months after the date of entry into force of this Directive.

(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; or

(b) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking.

3. For the purpose of point (b) of paragraph 1, 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/…/EC of the European Parliament and of the Council of … concerning common rules for the internal market in electricity ([1]), and the terms 'transmission system operator' and 'transmission system' shall include 'transmission system operator' and 'transmission system' within the meaning of Directive 2009/…/EC.

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

5. The obligation set out in point (a) of paragraph 1 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 15 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.

([1]) OJ L …

(*) Date of transposition of this Directive plus two years, i.e. 42 months after entry into force of this Directive.

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 … (**), 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 … (**), 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.

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 …/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 …/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*.

(**) Date of entry into force of this Directive.

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 …/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. Transmission system operators 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 and/or the designated competent authority referred to in point (b) of paragraph 3, 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. Where the Member State has designated another competent authority to assess point (b) of paragraph 3, 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.

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 50(3).

11. This Article, with exception of point (a) of paragraph 3, shall also apply to Member States which are subject to a derogation under Article 48.

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, with due regard to the environment;

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

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

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

2. Rules adopted by transmission system operators for balancing the gas transmission system shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by transmission system operators shall be established pursuant to a methodology compatible with Article 40(6) in a non-discriminatory and cost-reflective way and shall be published.

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

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

Article 14

Independent system operators

1. Where the transmission system belongs to a vertically integrated undertaking on … (*), 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 13;

(c) the candidate operator has undertaken to comply with a 10-year network development plan monitored by the regulatory authority;

(*) Date of entry into force of this Directive.

(d) the transmission system owner has demonstrated its ability to comply with its obligations under paragraph 5. To this end, it shall provide all the draft contractual arrangements with the candidate undertaking and any other relevant entity;

(e) the candidate operator has demonstrated its ability to comply with its obligations under Regulation (EC) No …/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 Article 14(2) 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 …/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;

(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 owner and storage system operator

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 32.

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 40(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 50(3).

Article 16

Confidentiality for transmission system operators and transmission system owners

1. Without prejudice to Article 29 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.

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 the legal form of a limited liability company as referred to in Article 1 of Council Directive 68/151/EEC ([1]).

([1]) 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).

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 of it.

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 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 10-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 …/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 …/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 subparagraph.

The first subparagraph 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 the provisions set out in the first subparagraph, 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.

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. The second subparagraph of paragraph 3 and paragraph 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 10-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), the first subparagraph of Article 19(3) and Article 19(4) to (7) shall apply to at least half of the members of the Supervisory Body minus one.

Point (a) 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. The compliance officer may be a natural or legal person. Article 19(2) to (7) shall apply to the compliance officer. The regulatory authority may object to the appointment of a compliance officer for reasons of lack of independence or professional capacity.

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 in the network, the compliance officer shall report this to the regulatory authority.

6. The conditions governing the mandate or the employment conditions of the compliance officer shall be subject to approval by the regulatory authority and shall ensure the independence of the compliance officer.

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 …/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.

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 10-year network development plan based on existing and forecast supply and demand after having consulted all the relevant stakeholders. The plan shall contain efficient measures in order to guarantee the adequacy of the system and the security of supply.

2. The 10-year network development plan shall, in particular:

(a) indicate to market participants the main transmission infrastructure that need 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 10-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 10-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 10-year network development plan covers all investment needs identified during the consultation process, and whether it is consistent with the non-binding Community-wide 10-year network development plan referred to in Article 8(3)(b) of Regulation (EC) No …/2009. If any doubt arises as to the consistency with the non-binding Community-wide 10-year network development plan, the regulatory authority shall consult the Agency. The regulatory authority may require the transmission system operator to amend its plan.

6. The regulatory authority shall monitor and evaluate the implementation of the 10-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 10-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 10-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.

When 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. When 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 operate, maintain and develop under economic conditions a secure, reliable and efficient system, with due regard for the environment.

2. In any event, the distribution system operator shall not discriminate between system users or classes of system users, particularly in favour of its related undertakings.

3. Each distribution system operator shall provide any other distribution, 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 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 40(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 40(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 38(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, Member States shall ensure that the activities of the distribution system operator are monitored 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 29 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

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 48(6).

CHAPTER VI

Unbundling and transparency of accounts

Article 29

Right of access to accounts

1. Member States or any competent authority they designate, including the regulatory authorities referred to in Article 38(1) and the dispute settlement authorities referred to in Article 33(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 30.

2. Member States and any designated competent authority, including the regulatory authorities referred to in Article 38(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 30

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 48(2) and (4), they shall at least keep their internal accounts in accordance with this Article.

2. Natural gas undertakings, whatever their system of ownership or legal form, shall draw up, submit to audit and publish their annual accounts in accordance with the rules of national law concerning the annual accounts of limited liability companies adopted pursuant to the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 44(2)(g) (*) of the Treaty on the annual accounts of certain types of companies ([1]).

Undertakings which are not legally obliged to publish their annual accounts shall keep a copy of these at the disposal of the public at their head office.

3. Natural gas undertakings shall, in their internal accounting, keep separate accounts for each of their transmission, distribution, LNG and storage activities as they would be required to do if the activities in question were carried out by separate undertakings, with a view to avoiding discrimination, cross-subsidisation and distortion of competition. They shall also keep accounts, which may be consolidated, for other gas activities not relating to transmission, distribution, LNG and storage. Until 1 July 2007, they shall keep separate accounts for supply activities for eligible customers and supply activities for non-eligible customers. Revenue from ownership of the transmission 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.

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.

(*) 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 VII

Organisation of access to the system

Article 31

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 40 by a regulatory authority referred to in Article 38(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 32

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. Member States shall define and publish criteria according to which it may be determined whether access to storage facilities and linepack is technically and/or economically necessary in order to provide efficient access to the system for the supply of customers. Member States 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.

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

3. In the case of negotiated access, Member States shall take the necessary measures for natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system to be able to negotiate access to storage 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. 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 … (*) and on an annual basis every year thereafter.

4. In the case of regulated access Member States shall take the necessary measures to give natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system a right to access to storage, linepack and other ancillary services, on the basis of published tariffs and/or other terms and obligations for use of that storage and linepack, when technically and/or economically necessary for providing efficient access to the system, as well as for the organisation of access to other ancillary services. This right of access for eligible customers may be given by enabling them to enter into supply contracts with competing natural gas undertakings other than the owner and/or operator of the system or a related undertaking.

Article 33

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 53.

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

(a) the need to refuse access where there is an incompatibility of technical specifications which cannot 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 34

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 47 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 35

New infrastructure

1. Major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, may, upon request, be exempted, for a limited period of time, from the provisions of Articles 9, 31, 32 and 33 and Article 40(6), (7) and (8) under the following conditions:

(a) the investment must enhance competition in gas supply and enhance security of supply;

(*) 6 months after the implementation deadline referred to in Article 33(1) of Directive 2003/55/EC.

(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;

(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 apply also 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 shall exercise the tasks conferred on the regulatory authorities of the Member States concerned by the present Article. This shall, however, apply only:

(a) where the regulatory authorities concerned have not been able to reach an agreement within a period of six months from the date the exemption was requested before the last of these regulatory authorities; or

(b) upon a joint request from the regulatory authorities concerned.

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

5. 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 fourth subparagraph of this paragraph, shall be duly reasoned and published.

6. 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.

7. 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. This information may be submitted to the Commission in aggregate form, enabling the Commission to reach a well-founded decision. In particular, the information shall contain:

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

(b) the analysis undertaken of the effect on competition and the effective functioning of the internal 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;

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

8. Within a period of two months beginning on the day of 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.

9. 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, 5, 7 and 8 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 50(3).

Article 36

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 ([1]). 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 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 37

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.

([1]) OJ L 204, 21.7.1998, p. 1.

2. In circumstances where an authorisation (e.g. licence, permission, concession, consent or approval) is required for the construction or operation of direct lines, the Member States or any competent authority they designate shall lay down the criteria for the grant of authorisations for the construction or operation of such lines in their territory. 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 34 or to the opening of a dispute-settlement procedure under Article 40.

CHAPTER VIII

NATIONAL REGULATORY AUTHORITIES

Article 38

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 compliance with Article 13(1) of Regulation (EC) No …/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 13(1) of Regulation (EC) No …/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. 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 40.

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 autonomy in the implementation of the budget, and adequate human and financial resources to carry out its duties;

(b) the regulatory authority's top management is appointed for at least five years, and may be relieved from office during its term only if it no longer fulfills the conditions set out in this Article or it has been guilty of serious misconduct under national law.

Article 39

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 40, in close consultation with other relevant national 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;

(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) promoting the development of secure, reliable and efficient non-discriminatory systems as well as system adequacy;

(e) facilitating the access of new production capacity to the network, in particular removing barriers that could prevent access of new market entrants;

(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 the efficient functioning of their national market, and to promote effective competition and consumer protection;

(h) contributing to high standards of public service for natural gas, the protection of vulnerable customers, and the effectiveness of the consumer protection measures set out in Annex I.

Article 40

Duties and powers of the regulatory authority

1. The regulatory authority shall have the following duties:

(a) 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;

(b) cooperating in relation to cross-border issues with the regulatory authority or authorities of the Member States concerned;

(c) complying with, and implementing, any relevant legally binding decisions of the Agency and of the Commission;

(d) 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;

(e) ensuring that there are no cross-subsidies between transmission, distribution, storage, LNG and supply activities;

(f) 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 non-binding Community-wide 10-year network development plan referred to in Article 8(3)(b) of Regulation (EC) No …/2009;

(g) monitoring compliance with network security and reliability rules and monitoring standards and requirements for quality of network service;

(h) monitoring the level of transparency and ensuring compliance of natural gas undertakings with transparency obligations;

(i) monitoring the level of market opening and competition at wholesale and retail levels, including on natural gas exchanges, prices for household customers, switching rates, disconnection rates 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 attention of the relevant competition authorities;

(j) monitoring the time taken by transmission and distribution system operators to make connections and repairs;

(k) monitoring and reviewing the access conditions to storage, linepack and other ancillary services as provided for in Article 32. In the event that the access regime to storage is defined according to Article 32(3), that task shall exclude the reviewing of tariffs;

(l) publishing recommendations, at least annually, in relation to compliance of supply tariffs with Article 3;

(m) ensuring access to customer consumption data, the provision for optional use, of a harmonised format at national level for consumption data and the access to data under point (h) of Annex I;

(n) 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 …/2009;

(o) monitoring the correct application of the criteria that determine whether a storage facility falls under Article 32(3) or (4); and

(p) monitoring the implementation of safeguards measures as referred to in Article 45.

2. When 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 point (d) of paragraph 4;

(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 9;

(c) without prejudice to the procedure under Article 14(2)(c), for the first 10-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 or the Commission in conducting an investigation relating to competition law;

(c) to request any information from natural gas undertakings relevant for the fulfilment of its tasks;

(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 9 and 10.

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 point (d) of paragraph 4 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 9;

(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 prior to their entry into force at least the methodologies used to calculate or establish the terms and conditions for:

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

7. In fixing or approving the tariffs or methodologies, 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.

8. 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 32(3), this task shall exclude the modification of tariffs.

9. Any party having a complaint against a transmission, storage, LNG or distribution system operator with respect to the issues referred to in paragraphs 1 to 8 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.

10. 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 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.

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

12. 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.

13. Complaints referred to in paragraphs 9 and 10 shall be without prejudice to the exercise of rights of appeal under Community and/or national law.

14. Decisions taken by regulatory authorities shall be reasoned and justified to allow for judicial review.

15. 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.

Article 41

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 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 a minimum 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.

3. 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.

4. 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 50(3).

Article 42

Compliance with 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 …/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 four 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 …/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 …/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 50(3).

Article 43

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 50(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 44

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 45

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 46

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 47

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 31 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 its receipt of this notification, the Commission may request that the Member State or the designated competent authority concerned amend or withdraw the decision to grant a derogation.

If the Member State or the designated competent authority concerned does not comply with this request within a period of four weeks, a final decision shall be taken expeditiously in accordance with the advisory procedure referred to in Article 50(2).

The Commission shall preserve the confidentiality of commercially sensitive information.

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

(a) the objective of achieving a competitive gas market;

(b) the need to fulfil public-service obligations and to ensure security of supply;

(c) the position of the natural gas undertaking in the gas market and the actual state of competition in this market;

(d) the seriousness of the economic and financial difficulties encountered by natural gas undertakings and transmission undertakings or eligible customers;

(e) the dates of signature and terms of the contract or contracts in question, including the extent to which they allow for market changes;

(f) the efforts made to find a solution to the problem;

(g) the extent to which, when accepting the take-or-pay commitments in question, the undertaking could reasonably have foreseen, having regard to the provisions of this Directive, that serious difficulties were likely to arise;

(h) the level of connection of the system with other systems and the degree of interoperability of these systems; and

(i) the effects the granting of a derogation would have on the correct application of this Directive as regards the smooth functioning of the internal natural market in natural gas.

A decision on a request for a derogation concerning take-or-pay contracts concluded before … (*) 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 Chapter VII namely Articles 31 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 … (**), 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 48

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, 36 and/or 37. 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 when 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, 36 and/or 37. This derogation shall expire from the moment when Cyprus is not qualifying as an isolated market.

Articles 4, 9, 36 and/or 37 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 sub-paragraph 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 (2), Articles 14 and 24, Article 25(5), Articles 26, 30 and 31, Article 36(1) and/or Article 37. This derogation shall automatically expire from the moment when the Member State no longer qualifies as an emergent market. Any such derogation shall be notified to the Commission.

Cyprus may derogate from Articles 4 and 9, Article 13(1) and (2), Articles 14 and 24, Article 25(5), Articles 26, 30 and 31, Article 36(1) and/or Article 37. This 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 36(1)(b) shall apply, and three years thereafter, Article 36(1)(c) shall apply. Until Article 36(1)(b) applies the Member State referred to in paragraph 2 of this Article may decide not to apply Article 31 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 (2), Articles 14 and 24, Article 25(5), Articles 26, 30 and 31, Article 36(1) and/or Article 37 for developments within this area.

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

— the need for infrastructure investments, which would not be economic to operate in a competitive market environment;

— the level and pay-back prospects of investments required;

(*) Date of entry into force of Directive 2003/55/EC.
(**) Five years after the entry into force of Directive 2003/55/EC.

— the size and maturity of the gas system in the area concerned;

— the prospects for the gas market concerned;

— the geographical size and characteristics of the area or region concerned, and socio-economic and demographic factors.

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. This decision, as well as the derogations referred to in paragraphs 1 and 2, shall be published in the *Official Journal of the European Union*.

8. Greece may derogate from Articles 4, 24, 25, 26, 31, 36 and/or 37 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 49

Review procedure

In the event that in the report referred to in Article 51(3), 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 50

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 51

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 … (*), 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(2) with a view to a possible revision of the threshold;

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

(d) an examination of issues relating to system capacity levels and security of supply of natural gas in the Community, and in particular the existing and projected balance between demand and supply, taking into account the physical capacity for exchanges between areas and the development of storage (including the question of the proportionality of market regulation in this field);

(e) special attention will be given to the measures taken in Member States to cover peak demand and to deal with shortfalls of one or more suppliers;

(*) 31 December of the year following the entry into force of Directive 2003/55/EC.

(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.

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 … (*), 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 … (**).

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. 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 52

Repeal

Directive 2003/55/EC is repealed from … (***) 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 53

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by … (***). They shall forthwith inform the Commission thereof.

They shall apply these provisions from … (***) with the exception of Article 11, which they shall apply from … (****).

(*) Two years after the date referred to in the first subparagraph of Article 53(1), i.e. 42 months after the entry into force of this Directive.

(**) Three years after the date referred to in the first subparagraph of Article 53(1), i.e. 54 months after entry into force of this Directive.

(***) 18 months after entry into force of this Directive.

(****) 42 months after entry into force of this Directive.

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 54

Entry into force

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

Article 55

Addressees

This Directive is addressed to the Member States.

Done at, …

For the European Parliament	*For the Council*
The President	*The President*
…	…

ANNEX I

MEASURES ON CONSUMER PROTECTION

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 ([1]) and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ([2]), the measures referred to in Article 3 are to ensure that customers:

(a) have a right to a contract with their gas service provider that specifies:

— the identity and address of the supplier;

— the services provided, the service quality levels offered, as well as the time for the initial connection;

— if offered, the types of maintenance service offered;

— the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained;

— the duration of the contract, the conditions for renewal and termination of services and of the contract, the existence of any right of withdrawal;

— any compensation and the refund arrangements which apply if contracted service quality levels are not met; and

— the method of initiating procedures for settlement of disputes in accordance with point (f).

Conditions shall be fair and well-known in advance. In any case, this information should be provided prior to the conclusion or confirmation of the contract. Where contracts are concluded through intermediaries, the 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. Member States shall ensure that customers are free to withdraw from contracts if they do not accept the new conditions, notified to them by their gas service provider;

(c) receive transparent information on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of gas services;

(d) are offered a wide choice of payment methods. Any difference in terms and conditions shall reflect the costs to the supplier of the different payment systems. General terms and conditions shall be fair and transparent. They shall be given in clear and comprehensible language. Customers shall be protected against unfair or misleading selling methods;

(e) are not charged for changing supplier;

(f) benefit from transparent, simple and inexpensive procedures for dealing with their complaints. Such procedures shall enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation. They should, 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 ([3]);

(g) connected to the gas system are informed about their rights to be supplied, under the national legislation applicable, with natural gas of a specified quality at reasonable prices;

(h) have at their disposal their consumption data, and shall be able to, by explicit agreement and free of charge, give any undertaking with a supply license access to its metering data. The party responsible for data management is 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 this 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 this service;

(j) may change supplier at any time in the year and shall be entitled to a final invoice no later than three months following the last supply by the previous supplier.

([1]) OJ L 144, 4.6.1997, p. 19.
([2]) OJ L 95, 21.4.1993, p. 29.
([3]) OJ L 115, 17.4.1998, p. 31.

ANNEX 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
Article 5	Article 5
—	Article 6
—	Article 7
Article 6	Article 8
Article 9	Article 9
Article 7	Article 10
—	Article 11
Article 7	Article 12
Article 8	Article 13
—	Article 14
—	Article 15
Article 10	Article 16
—	Article 17
—	Article 18
—	Article 19
—	Article 20
—	Article 21
—	Article 22
—	Article 23
Article 11	Article 24
Article 12	Article 25
Article 13	Article 26
Article 14	Article 27
Article 15	Article 28
Article 16	Article 29
Article 17	Article 30
Article 18	Article 31
Article 19	Article 32
Article 20	Article 33
Article 21	Article 34

Directive 2003/55/EC	This Directive
Article 22	Article 35
Article 23	Article 36
Article 24	Article 37
Article 25(1) (first and second sentence)	Article 38
—	Article 39
Article 25 (rest)	Article 40
—	Article 41
—	Article 42
—	Article 43
—	Article 44
Article 26	Article 45
—	Article 46
Article 27	Article 47
Article 28	Article 48
Article 29	Article 49
Article 30	Article 50
Article 31	Article 51
Article 32	Article 52
Article 33	Article 53
Article 34	Article 54
Article 35	Article 55
Annex A	Annex I

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 19 September 2007, the Commission presented a proposal for a Directive amending Directive 2003/55/EC, based on Articles 47(2), 55 and 95 of the Treaty, together in a package with four other proposals concerning the internal energy market.

2. The Committee of the Regions and the European Economic and Social Committee delivered their opinions on the complete package on 10 ([1]) and 22 April 2008 ([2]) respectively.

3. The European Parliament adopted its Opinion ([3]) at first reading on 9 July 2008, approving 122 amendments. The Commission did not present a modified proposal.

4. On 9 January 2009, the Council adopted its Common Position in accordance with Article 251 of the Treaty, in the form of a recast directive.

II. OBJECTIVE OF THE PROPOSAL

5. The proposal is part of the third internal energy market package, together with the Regulation on conditions for access to the natural gas transmission networks, the Directive concerning common rules for the internal market in electricity, the Regulation on conditions for access to the network for cross-border exchanges in electricity, and the Regulation establishing an Agency for the Cooperation of Energy Regulators. It aims at completing the internal market in natural gas by introducing in particular:

— provisions regarding the effective separation of transmission from generation and supply activities, including a procedure for the certification of transmission system operators of the Community as well as from third countries;

— provisions aiming at improving the independence of national energy regulators and at harmonising their powers at Community level;

— provisions aiming at improving regional solidarity and cooperation;

— provisions improving transparency and the functioning of the energy market.

III. ANALYSIS OF THE COMMON POSITION

6. General Remarks

6.1. The Council has considered it more effective, more transparent and coherent with Directive 2003/55/EC as well as more reader friendly to recast the provisions of the Directive. Moreover, the Council has as a general principle fully respected the amending proposal of the Commission in the sense that it has not opened any other provision not being part of the Commission proposal, unless changes were necessary following from the changes introduced by the Council to the proposal, changed references resulting from the renumbering of the Articles etc. To the extent possible the Council has followed the Commission's approach regarding an identical treatment of the electricity and gas sectors.

The Commission has accepted all the changes introduced by the Council to its proposal.

6.2. Concerning the *122 amendments adopted by the European Parliament*, the Council has followed the Commission in

— accepting the following 20 amendments:

fully (sometimes with redrafting): 50, 98 and 103;

partly/in principle/in spirit: 11, 12, 63, 64, 68, 78/125/135/138, 91-96, 98, 101, 104, and 107;

and

— rejecting the following 44 amendments: 1, 4, 10, 14, 15, 18, 19, 22, 30, 37-39, 41, 43, 47, 54, 57-59, 62, 65-67, 70-72, 82, 83, 89, 90, 97, 105, 106, 108-110, 113, 114, 116/137, 123, 126, 128, [129],131, and 133, on grounds of substance and/or of form.

([1]) OJ C 172, 5.7.2008, p. 55.
([2]) OJ C 211, 19.8.2008, p. 23.
([3]) Not yet published in the Official Journal.

6.3. The Council has deviated from the Commission position in

— accepting one amendment: 79

and

— rejecting the following 59 amendments: 2, 3, 5-9, 13, 16, 17, 20, 21, 23-29, 31-36, 40, 45, 46, 48, 49, 51-53, 55, 56, 60, 61, 69, 73-77, 80, 81, 84-88, [93/129 + 94-96] (partly), 99, 100, 102, 111, 112, 118, 120, 132, 136.

7. **Specific Remarks**

7.1. Regarding the *EP amendments* where the Council has deviated from the *Commission position*:

a) The Council has accepted amdt 79 because it is as the EP of the opinion that it is not appropriate to take decisions through committee procedure on DSO activities and independence.

b) The Council has rejected the 59 amdts listed above (point 6.3) on the following grounds:

i) The amendments concern provisions which are not part of the Commission proposal; those amendments have been rejected as a question of principle (see above under 6.1): amdts 6, 13, 21, 23, 25, 31, 32, 33, 34, 35, 40, 45, 46, 48, 49, 51, 69, 73, 74, 75, 76, 77, 111 (first part), 118, 120, 132.

ii) The amendments do not have added value, mainly because the issues are (partly) sufficiently covered by other parts of the text: amdt 2 would weaken the emphasis given in recital 6; amdt 7 is repetitive; amdt 87 is partly covered by recital 15; amdt 20 is already (partly) covered by recitals 29 and 31; amdt 26 is not necessary; amdt 60: the issue is sufficiently covered by Art. 9; amdt 61: the issue is covered by Art. 51 on reporting; amdt 81 would make Art. 35(1) less clearly defined; amdt 85 adds confusion to Art. 35 para. 3; amdt 87: the level of detail is not necessary; amdt 88 would weaken too much the text in Art. 35(8) subpara. 5; amdt 136 is (partly) sufficiently covered by Art. 40(15).

iii) The amendments introduce text which is not appropriate or necessary in this Directive or which is not in line with the scope of the Directive: 5, 9, 16, 17, 36, 53, 56, 80, 81, 85, 86, 96 (partly) not appropriate in Art. 40, 99, 100, 111 (second part), 112.

iv) The amendments are introducing a recital which does not have a corresponding Article: amdts 24 and 29.

v) The Council considers that the list of duties and powers of the regulatory authorities as in Art. 40 of the Common Position is sufficient; the following amendments go (partly) beyond the tasks the Council is attributing to the regulators: amdts 93-95.

vi) The amendments introduce text which does not correspond to the role which the Council is giving to the Agency: 28, 55 (second part), 84.

vii) The Council is of the view that the Common Position reflects sufficiently the aim of regional solidarity/cooperation: amdts 3, 27, 52, and 55(first part) are therefore not necessary.

7.2 Concerning the *Commission proposal*, the Council has introduced certain other modifications (of substance and/or of form); the main ones are set out below.

a) *Effective separation of network operation from generation and supply activities*

In addition to the two options proposed by the Commission (ownership unbundling (OU) and the Independent System Operator (ISO)), the Council, in agreement with the Commission, considered it appropriate to introduce a third option, the Independent Transmission Operator (ITO), for the case a transmission system operator is part of a vertically integrated undertaking (VIU) at the entry into force of the Directive (new Chapter IV with the Articles 17-23, corresponding recitals 13, 15 and 16). The three options are on equal footing and will be available for both the electricity and the gas sector.

The ITO-provisions will ensure the effective independence of the operator (Arts. 17 and 18), its management (Art. 19) and the supervisory body (Art. 20) and that conflicts of interest are avoided. The setting up of a compliance programme and compliance officer (Art. 21) is also contributing to this aim. Moreover, undistorted investment incentives and the development of interconnection infrastructure (Art. 22) as well as fair and non-discriminatory network access (Art. 23) will be ensured.

Additional powers and competences for the regulatory authorities have been added in Art. 40(5) in order to ensure compliance with the provisions of Chapter IV. In addition, a paragraph has been added to Art. 7 regarding regional cooperation where ITOs are involved. Finally, Art. 51 on reporting provides in paragraphs 3 to 5 that the Commission will assess, as part of a general review, the implementation of the ITO option against certain criteria two years after the date of transposition of the Directive.

The ITO provisions of the Common Position aim at balancing concerns on the scope, timeframe and enforceability of the ITO-option with preserving the financial interest of the VIU and keeping it workable. That is one of the reasons why the Council has not considered it appropriate to introduce provisions on a trustee.

In order to take account of cases where arrangements are in place for a transmission system belonging to a VIU which guarantee more effective independence of the TSO than the provisions of Chapter IV, an additional provision has been introduced in Article 9(9).

b) *Level playing field*

Linked to the future presence of three different unbundling models on the Community market is the introduction of a so-called level playing field clause in Article 46, together with the corresponding recital 17. It gives notably a number of criteria for measures which Member States have the possibility to take in order to ensure a level playing field.

c) *Certification of TSOs of the Community and of third countries*

The Common Position has two Articles on certification of TSOs: a general one (Article 10), and one on certification in relation to third countries (Article 11) which has replaced Article 7a of the Commission proposal. Article 11 ensures on the one hand that TSOs of third countries have to respect the same unbundling rules as Community TSOs; on the other hand, it introduces the criterion of security of energy supply of the Member States and the Community which has to be taken into account when certification is granted.

In addition, the Council has considered it appropriate to transfer the part of the certification procedure which sets out the role of the Commission in this procedure to a new Article 3 of the gas Regulation. Moreover, the main decision on certification will remain with the national regulatory authorities while the Commission is requested to give its opinion on the certification. National regulators must take utmost account of that opinion.

d) *Regulatory authorities*

The Council has introduced two additional paragraphs to Article 38 which ensure that the principle of a single regulator at national level combined with unique representation (e.g. at the Agency) is compatible with the current existence in some Member States of regulators at regional level or for small and isolated parts of the territory (Art. 38(2 + 3)).

While ensuring the independence of the regulatory authorities, the text of the Common Position also clarifies that this does not mean that regulators are free from judicial control or parliamentary supervision (recital 26) or can ignore broader objectives e.g. on environmental sustainability or on public service obligations (Art. 38(4)).

The Common Position also ensures that, when carrying out their duties, regulators have the possibility to act, where relevant, in close cooperation with other authorities, such as competition ones, while preserving their independence and without duplicating the tasks (e.g. monitoring) usually carried out by other authorities (Art. 40(2)).

e) *Regulatory regime for cross-border issues*

The paragraphs setting out the role of the Agency (Article 41, paragraphs 3 and (partly) 4) have, for legal reasons, been transferred to the Agency Regulation (new Article 8). The Agency will be involved in cross-border issues as a last resort, at the request of national regulators or if national regulators don't reach an agreement within a certain time frame.

f) *Exemptions for new infrastructure*

In regard to granting exemptions for new cross-border infrastructure (Art. 35), the Council has considered it appropriate to involve the Agency only in those cases where the national regulatory authorities concerned do not find an agreement or submit a joint request to the Agency (para 4). Moreover, Member States should have the possibility to provide, if they so wish, that the *formal* decision on the exemption is taken by another relevant body of the Member State, on the basis of the opinion of the regulator (para 6).

g) *Retail markets*

The Council has considered it appropriate to redraft the Article on retail markets, taking *i.a.* out the cross-border reference, and transfer it from the gas Regulation (Art. 8a of the Commission proposal) to the Directive (new Article 44).

h) *Derogations*

In the light of the recast, the Council considered it appropriate to update Article 48, in particular regarding a derogation from the unbundling provisions for Member States with emergent or isolated markets.

i) *Other points*

— The Council considered it appropriate not to exclude *minority shareholding* of producer/supplier in ownership unbundled TSOs as long as this does not entail any control or any influence of one on the other and cannot lead to a conflict of interest (Article 9(2)).

— The Common Position contains, with respect to *public ownership*, the possibility to achieve ownership unbundling with two separate public bodies through a provision recognising that two distinct public bodies can be considered as two persons for the purpose of implementing ownership unbundling (Article 9(6)).

— Some technical drafting changes have been made to clarify the provision on combined *operators* (Article 28). This provision allows that a combined operator can be operated, alternatively, either as an ownership unbundled operator, as an independent System Operator or as an Independent Transmission Operator.

— Recital 29 introduces and explains the notion of *gas release programmes* as one of the possible measures to promote effective competition.

— Finally, in line with the recast format, the Council has introduced a new Article to *repeal* the current legislative act (Art. 52).