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THE EUROPEAN UNION**

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of : Working Party on Energy

on: 15 & 20 October 2002

No. prev. doc. : 12766/02 ENER 214 CODEC 1203

No. Cion prop. : 9855/02 ENER 129 CODEC 747 (COM(2002) 304 final)

Subject : Amended proposal for a Directive of the European Parliament and of the Council amending directive 96/92/EC (electricity) and directive 98/30/EC (gas) concerning common rules for the internal market in electricity and natural gas
- Gas

On 15 October, the Working Party on Energy examined Articles 2, 19 and 22 of this text as set out in doc. 12766/02.

The result of this examination is set out at Annex. Comments from delegations are in footnotes, Presidency suggestions in *italics* and underlined, deletions in [].

Following its examination by the Working party on 20 October a revised draft preamble is attached.

(consolidated proposal)

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
concerning rules for the internal market in natural gas and repealing Directive 98/30/EC

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

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

Whereas

- (1) Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas¹ has made *significant* contributions towards the creation of internal market for gas.
- (2) Experience in implementing this Directive demonstrates the benefits that have begun to result from the internal market in gas, in terms of efficiency gains, price reductions, higher standards of service and increased competitiveness. However, important shortcomings and possibilities for improving the functioning of the market remain, notably in ensuring a level playing field in addressing the risks of predatory behaviour, ensuring non-discriminatory transmission and distribution tariffs, through access to the network on the basis of tariffs published prior to their entry into force, and ensuring that the rights of small and vulnerable customers are protected.
- (3) At its meeting in Lisbon on 23 and 24 March 2000, the European Council called for rapid work to be undertaken to complete the internal market in both electricity and gas sectors and to speed up liberalisation in these sectors with a view to achieving a fully operational internal market. The European Parliament, in its Resolution of 6 July 2000 on the Commission's second report on the state of liberalisation of energy markets, requested the Commission to adopt a detailed timetable for the achievement of accurately defined objectives with a view to gradually but completely liberalising the energy market.
- (4) The freedoms which the Treaty guarantees European citizens – free movement of goods, freedom to provide services and freedom of establishment – are only possible in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.
- (5) In view of the anticipated increase in dependency as regards natural gas consumption, consideration should be given to initiatives and measures to encourage reciprocal arrangements for access to third-country networks and market integration.

¹ OJ L 204, 21.7.1998, p. 1.

- (6) The main obstacles in arriving at a fully operational internal market are related to issues of access to the network, access to storage, network tariffication and different degrees of market opening between Member States {}.
- (7) For competition to function, network access must be non-discriminatory, transparent and fairly priced {}.
- (8) In order to complete the internal gas market, {} non-discriminatory access to the network of the transmission and distribution system operators is of paramount importance. A transmission or distribution system operator may comprise one or more undertakings.
- (9) *{duplicate 11}*
- (10) In case of a gas undertaking performing transmission, distribution, storage or LNG activities and which is separated in its legal form from those undertakings performing production and/or supply activities, the designated {} system operators may be the same undertaking owning the infrastructure.
- (11) In order to ensure efficient and non-discriminatory network access it is appropriate that the transmission and distribution systems are operated through legally separated entities where vertically integrated undertakings exist. It is also appropriate that the transmission and distribution system operators have effective decision making rights with respect to assets necessary to maintain and operate networks when the assets in question are owned and operated by vertically integrated company.

It is important however to distinguish between such legal separation and ownership unbundling. Legal separation implies neither a change of ownership of assets and nothing prevents similar or identical employment conditions applying throughout the whole of the vertically integrated undertaking.

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

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- (13) In order to facilitate the conclusion of contracts by a gas undertaking established in a Member State for the supply of gas to eligible customers in another Member State, Member States or national regulatory authorities should work towards more homogenous conditions and the same degree of eligibility for the whole of the internal market.

(14) The existence of effective regulation, carried out by national regulatory authorities, is an important feature in guaranteeing non-discriminatory access to the network. Member States specify the functions, competencies and administrative powers of the regulatory authority. It is important that all regulatory authorities share the same minimum set of competencies. Those authorities should at least have the competence to fix or approve the tariffs, or at least, the methodologies underlying the calculation of transmission and distribution tariffs and tariffs for access to liquefied natural gas (LNG) facilities. These tariffs should be published prior to their entry into force.

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(15) In order to ensure effective market access for new entrants, non discriminatory and cost-reflective balancing mechanisms are necessary. As soon as the gas market is sufficiently liquid, this should be achieved through the setting up of transparent market-based mechanisms for the supply and purchase of gas needed in the framework of balancing requirements. In the absence of such a liquid market, national regulatory authorities should play an active role to ensure that balancing tariffs are non-discriminatory and cost-reflective.

(16) National regulatory authorities should be able to fix or approve tariffs, or the methodologies underlying the calculation of the tariffs, on the basis of a proposal by the transmission system operator or distribution system operator(s) or LNG system operator, or on the basis of a proposal agreed between these operator(s) and the users of the network. In carrying out these tasks, national regulatory authorities should ensure that transmission and distribution tariffs are non-discriminatory and cost-reflective, and should take account of the long-term, marginal, avoided network costs from { } demand-side management measures.

(17) The benefits resulting from the internal market should be available to all Community industry and commerce, including small and medium-sized enterprises, and to all Community citizens as quickly as possible, for reasons of fairness, competitiveness, and indirectly, to create employment as a result of the efficiency gains that will be enjoyed by enterprises.

(18) Gas customers should be able to choose their supplier freely. Nonetheless a phased approach should be taken to completing the internal market for gas, coupled with a specific deadline, to enable industry to adjust and ensure that adequate measures and systems are in place to protect the interests of customers and ensure they have a real and effective right to choose supplier.

(19) Progressive market opening towards full competition should gradually remove differences between Member States. Transparency and certainty in the implementation of this Directive should be ensured.

(20) Directive 98/30/EC provides for access to storage as part of the gas system. In the light of the experience gained in implementing the internal market, additional measures should be taken to clarify the provisions for access to storage and { } ancillary services { }.

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

- (22) In the interest of security of supply, the supply/demand balance in individual Member States should be monitored, followed by a report on the situation at Community level, taking account of interconnection capacity between areas. Such monitoring should be carried out sufficiently early to enable appropriate measures to be taken if security of supply is compromised. The construction and maintenance of the necessary network infrastructure, including interconnection capacity, should contribute to ensuring a stable gas supply.
- (23) Member States should ensure that biogas and gas from biomass or other types of gas are granted non-discriminatory access to the gas system, provided such access is compatible with the relevant technical rules and safety standards. *These rules and standards should ensure that these gases can technically and safely be injected into, and transported through the natural gas system and should also address the chemical characteristics of these gases.*
- (24) Long-term contracts will continue to be an important part of the gas supply of Member States and should be maintained as an option for gas supply undertakings in so far as they do not undermine the objectives of this Directive and are compatible with the Treaty, including competition rules. It is therefore necessary to take them into account in the planning of supply and transportation capacity of gas undertakings.
- (25) In order to ensure the maintenance of high {} standards of public service in the Community, all measures taken by Member States to achieve the objectives of this Directive should be regularly notified to the Commission. The Commission should regularly publish a report analysing measures taken at national level to achieve public service objectives and comparing their effectiveness, with a view to making recommendations as regards measures to be taken at national level to achieve high public service standards.

Member States should ensure that *when they are* connected to the gas system *customers* are informed about their rights to be supplied with natural gas of a specified quality at reasonable prices. Measures taken by Member States to protect final customers may differ according to households and small and medium enterprises.

- (26) The respect of the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of consumer protection, security of supply, environmental protection and equivalent levels of competition in all Member States. It is important that the requirements on public service can be interpreted on a national basis, taking into account national circumstances and subject to the respect of Community law.
- (27) Measures implemented by Member States to achieve the objectives of social and economic cohesion may include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools. These tools may include liability mechanisms to guarantee the necessary investment.
- (28) To the extent that measures taken by Member States to fulfil public service obligations constitute State aid under Article 87(1) of the EC Treaty, there is an obligation according to Article 88(3) of the EC Treaty to notify them to the Commission

- (29) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of the proposed action, namely the creation of a fully operational internal gas market, in which fair competition prevails, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved by the Community. This Directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.
- (30) In the light of the experience gained with the operation of Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids², measures should be taken to ensure homogeneous and non-discriminatory access regimes for transmission, including cross-border flows of gas between Member States. To ensure homogeneity in the treatment of access to the gas networks, also in the case of transit, *this* Directive {} should be repealed, *without prejudice to the continuity of contracts concluded under this Directive..*
- (31) Given the scope of the amendments that are being made to Directive 98/30/EC, it is desirable, for reasons of clarity and rationalisation, that the provisions in question should be recast.
- (32) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.
- (33) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission³,

HAVE ADOPTED THIS DIRECTIVE

Chapter I

Scope and definitions

Article 2

Definitions

For the purposes of this Directive:

1. “natural gas undertaking” means any natural or legal person carrying out at least one of the following functions: production, transmission, distribution, supply, purchase or storage of natural gas, including LNG, which is responsible for the commercial, technical and/or maintenance tasks related to those functions, but shall not include final customers;
2. “upstream pipeline network” means any pipeline or network of pipelines operated and/or constructed as part of an oil or gas production project, or used to convey natural gas from one or more such projects to a processing plant or terminal or final coastal landing terminal;
3. “transmission” means the transport of natural gas through a high pressure pipeline network other than an upstream pipeline network with a view to its delivery to customers, but not including supply;

² OJ L 147, 12.6.1991, p. 37. Directive as last amended by Commission Directive 95/49/EC (OJ L 233, 30.9.1995, p. 86).

³ OJ L 184, 17.07.1999, p. 23.

4. “transmission system operator“ means a natural or legal person who carries out the function of transmission and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and to ensure the long-term ability of the system to meet reasonable demands for the transportation of gas;
5. “distribution” means the transport of natural gas through local or regional pipeline networks with a view to its delivery to customers, but not including supply;
6. “distribution system operator“ means a natural or legal person who carries out the function of distribution and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems, and to ensure the long-term ability of the system to meet reasonable demands for the distribution of gas;
7. “supply” means the sale, 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]⁴ but excluding the portion used for production operations, *and excluding facilities reserved exclusively for transmission system operators in carrying out their functions*;
10. “storage system operator“ means a natural or legal person who carries out the function of storage and is responsible for operating a storage facility;
11. “LNG facility” means a terminal which is used for the liquefaction of natural gas or the importation, offloading, and re-gaseification of LNG, [but shall not include any part of LNG terminals used for storage]⁵;
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-gaseification of LNG and is responsible for operating a LNG facility;
- 13⁶. “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 and distribution;
- 14⁷. “ancillary services” means all services necessary for the access to and the operation of transmission and/or distribution networks and/or LNG facilities and/or storage facilities including load balancing and blending, but excluding facilities reserved exclusively for transmission system operators in carrying out their functions;

⁴ P: delete bracketed words

⁵ P: delete bracketed words

⁶ UK: scrutiny reservation on the inclusion of "storage" in this definition. NL: definition 13 could be deleted.

⁷ UK: scrutiny reservation

- 15.⁸ "linepack" means the storage of gas by compression in gas transmission and distribution systems, *but excluding facilities reserved exclusively for transmission system operators in carrying out their functions*.
16. "interconnected system" means a number of systems which are linked with each other;
- 17.⁹ "direct line" means a natural gas pipeline complementary to the interconnected system;
18. "integrated natural gas undertaking" means a vertically or horizontally integrated undertaking;
19. "vertically integrated undertaking" means a natural gas undertaking or a group of undertakings whose mutual relationships are defined in Article 3(3) of Council Regulation (EEC) No 4064/89 and where the undertaking/group concerned is performing at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas;
20. "horizontally integrated undertaking" means an undertaking performing at least one of the functions of production, transmission, distribution, supply or storage of natural gas, and a non-gas activity;
21. "related undertaking" means affiliated undertakings, within the meaning of Article 41 of the Seventh Council Directive, 83/349/EEC, and/or associated undertakings, within the meaning of Article 33(1) thereof, and/or undertakings which belong to the same shareholders;
22. "system users" means any natural or legal persons supplying to, or being supplied by, the system;
23. "customers" means wholesale and final customers of natural gas and natural gas undertakings which purchase natural gas;
24. "household customers" means customers purchasing natural gas for their own household consumption;
25. "non-household customers" means customers purchasing natural gas which is not for their own household use;
26. "final customers" means customers purchasing natural gas for their own use;
27. "eligible customers" means customers who are free to purchase gas from the supplier of their choice, in the meaning of Article 23 of this Directive;
28. "wholesale customers" means any natural or legal persons other than transmission system operators and distribution system operators who purchase natural gas for the purpose of resale inside or outside the system where they are established;
29. "long-term planning" means the planning of supply and transportation capacity of natural gas undertakings on a long-term basis with a view to meeting the demand for natural gas of the system, diversification of sources and securing supplies to customers;

⁸ D: scrutiny reservation on "linepack".

⁹ UK: wonders whether coherence with Electricity Directive should be ensured; prefers this definition

30. "emergent market" means a Member State in which the first commercial supply of its first long-term natural gas supply contract was made not more than 10 years earlier;
31. "security" means both security of supply of natural gas, and technical safety;

Article 19 (former Art 15)
Access to storage¹⁰

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 []¹¹ ancillary services, Member States may, if storage facility, linepack¹² or [] ancillary services operate in a sufficiently competitive¹³ market, choose either or both procedures referred to in paragraphs 2 and 3. If storage facility, linepack or [] ancillary services do not operate in a sufficiently competitive market, a Member State should¹⁴ choose the procedure referred to in paragraph 3. These procedures shall operate in accordance with objective, transparent and non-discriminatory criteria.
2. In the case of negotiated access, Member States shall take the necessary measures for natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system to be able to negotiate access to storage and linepack, when technically and/or economically necessary for providing efficient access to the system, as well as for the organisation of access to other ancillary services. The parties shall be obliged to negotiate access to storage, linepack and other ancillary services in good faith.

Contracts for access to storage, linepack and other ancillary services shall be negotiated with the relevant storage system operator or natural gas undertakings. Member States shall require storage system operators and natural gas undertakings to publish their main commercial conditions for the use of storage, linepack and other ancillary services within the first six months following implementation of this Directive and on an annual basis every year thereafter.

3. *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]¹⁵ 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.

¹⁰ F/P: access to storage should be on a negotiated basis only. NL: a real choice should exist between negotiated and regulated access, regulated access alone would scare investors. E: access should be regulated, except in a competitive environment.

¹¹ D: scrutiny reservation on deletion of "other"

¹² E: delete "linepack". D: "linepack" gives further security, could collide with security of supply. UK: "linepack" could be deleted or moved to Article 18, as a non-competitive activity

¹³ IRL: wonders what is "sufficiently competitive"

¹⁴ E/IRL/S: replace "should" by "shall"

¹⁵ IRL: delete bracketed words

Article 22 (former Art 14(3)-(5))
New infrastructure¹⁶

1. Major new gas infrastructures, *i.e.* interconnectors between Member States, LNG and storage facilities, may, upon request, be exempted from the provisions in Articles 18, 20, and 24(2), (3) and (4) under the following conditions:
 - a) the investment must enhance competition in gas supply and enhance security of supply;
 - b) 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 built¹⁷;
 - d) charges are levied on users of that infrastructure;
 - e) the exemption is not to the detriment of competition or the effective functioning of the internal gas market, or the efficient functioning of the regulated system to which the infrastructure is connected;
2. Paragraph 1 *a), b), and d) to f)* shall apply also to significant increases of capacity in existing infrastructures and to modifications of such infrastructures which enable the development of new sources of gas supply.
3. a) The regulatory authority¹⁸ referred to in Article 24 may, on a case by case basis, decide on the exemption referred to in paragraphs 1 and 2. However, Member States may provide that the regulatory authorities shall submit, for formal decision, to the relevant body in the Member State its opinion on the request for an exemption. This opinion shall be published together with the decision¹⁹.
 - b) i) The exemption may cover all or parts of, respectively, the new infrastructure, the significantly increased existing infrastructure or the modification of existing infrastructure.
 - ii) The exemption may be for a limited or unlimited time period.
 - iii) When deciding on the conditions in this subparagraph account shall, in particular, be taken of the duration of contracts, additional capacity to be built or the modification of existing capacity, the expected rate of return on investment and national circumstances.

¹⁶ I: prefers previous text of this Article, in particular, as the reference to "share of the infrastructure" is not kept in the new wording. IRL/UK: benign reservation. S (and Cion): this text is an improvement. F: agrees to the principle of the provisions of this Article. P: positive scrutiny. D/A/B/E: scrutiny.

¹⁷ I: suggests addition of the following words: "The legal separation could be not mandatory in case the new infrastructure is a transboundary transmission pipeline which operates jointly as import line and local distribution line. The undertakings which own the infrastructure have to keep separate accounts for distribution and transit activities and the exemption to provisions of Articles 18, 19, 25(2 and 3) could be granted only to the part of new infrastructure which does not operate as a local distribution line".

¹⁸ IRL/NL: Member States should be involved. Cion: could be aligned on Article 25

¹⁹ NL: reservation on underlined text being moved from 3f to 3a.

- c) When granting an exemption the regulatory authority may decide upon the rules and mechanisms for management and allocation of capacity [insofar as this does not prevent the implementation of [] long term contracts²⁰]²¹
- d) The exemption decision, including any conditions referred to in b), shall be duly reasoned and published.
- e) In the case of an interconnector any exemption decision shall be taken after consultation with the other Member States or regulatory authorities concerned.
- f) Where the State has a controlling interest in the meaning of Article 3(3) of Council Regulation (EEC) 4064/89 in the natural gas undertaking requesting an exemption, the exemption decision shall be taken by the regulatory authority referred to in Article 25. []
3. The exemption decision shall be notified, without delay, by the competent authority to the Commission, together with all the relevant information with respect to the decision. This information may be submitted to the Commission in aggregate form, enabling the Commission to reach a well-founded decision.

In particular, the information shall contain:

- 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;
- the analysis undertaken of the effect on competition and the effective functioning of the internal gas market resulting from the grant of the exemption;
- 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;
- in case the exemption relates to an interconnector, the result of the consultation with the concerned Member States, or regulatory authorities;
- the contribution of the infrastructure to the diversification of gas supply.

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

If the regulatory authority or Member State concerned does not comply with the request within a period of four weeks, a final decision shall be taken in accordance with the procedure referred to in Article 29(2).

The Commission shall preserve the confidentiality of commercial sensitive information.

²⁰ NL: will provide written contribution on importance of long term contracts

²¹ UK/I: bracketed words could be deleted. S: add "or contracts in question"