

Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Text with EEA relevance)

CHAPTER I

**SUBJECT MATTER, SCOPE AND DEFINITIONS**

*Article 1*

**Subject matter and scope**

1 This Directive establishes common rules for the transmission, distribution, supply and storage of natural gas. It lays down the rules relating to the organisation and functioning of the natural gas sector, access to the market, the criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas and the operation of systems.

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

*Article 2*

**Definitions**

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

- (1) ‘natural gas undertaking’ means a natural or legal person carrying out at least one of the following functions: production, transmission, distribution, supply, purchase or storage of natural gas, including LNG, which is responsible for the commercial, technical and/or maintenance tasks related to those functions, but shall not include final customers;
- (2) ‘upstream pipeline network’ means any pipeline or network of pipelines operated and/or constructed as part of an oil or gas production project, or used to convey natural gas from one or more such projects to a processing plant or terminal or final coastal landing terminal;
- (3) ‘transmission’ means the transport of natural gas through a network, which mainly contains high-pressure pipelines, other than an upstream pipeline network and other than the part of high-pressure pipelines primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, but not including supply;
- (4) ‘transmission system operator’ means a natural or legal person who carries out the function of transmission and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transport of gas;

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- (5) 'distribution' means the transport of natural gas through local or regional pipeline networks with a view to its delivery to customers, but not including supply;
- (6) 'distribution system operator' means a natural or legal person who carries out the function of distribution and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the distribution system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of gas;
- (7) 'supply' means the sale, including resale, of natural gas, including LNG, to customers;
- (8) 'supply undertaking' means any natural or legal person who carries out the function of supply;
- (9) 'storage facility' means a facility used for the stocking of natural gas and owned and/or operated by a natural gas undertaking, including the part of LNG facilities used for storage but excluding the portion used for production operations, and excluding facilities reserved exclusively for transmission system operators in carrying out their functions;
- (10) 'storage system operator' means a natural or legal person who carries out the function of storage and is responsible for operating a storage facility;
- (11) 'LNG facility' means a terminal which is used for the liquefaction of natural gas or the importation, offloading, and re-gasification of LNG, and includes ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system, but does not include any part of LNG terminals used for storage;
- (12) 'LNG system operator' means a natural or legal person who carries out the function of liquefaction of natural gas, or the importation, offloading, and re-gasification of LNG and is responsible for operating a LNG facility;
- (13) 'system' means any transmission networks, distribution networks, LNG facilities and/or storage facilities owned and/or operated by a natural gas undertaking, including linepack and its facilities supplying ancillary services and those of related undertakings necessary for providing access to transmission, distribution and LNG;
- (14) 'ancillary services' means all services necessary for access to and the operation of transmission networks, distribution networks, LNG facilities, and/or storage facilities, including load balancing, blending and injection of inert gases, but not including facilities reserved exclusively for transmission system operators carrying out their functions;
- (15) 'linepack' means the storage of gas by compression in gas transmission and distribution systems, but not including facilities reserved for transmission system operators carrying out their functions;
- (16) 'interconnected system' means a number of systems which are linked with each other;
- (17) 'interconnector' means a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States;
- (18) 'direct line' means a natural gas pipeline complementary to the interconnected system;

- (19) ‘integrated natural gas undertaking’ means a vertically or horizontally integrated undertaking;
- (20) ‘vertically integrated undertaking’ means a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas;
- (21) ‘horizontally integrated undertaking’ means an undertaking performing at least one of the functions of production, transmission, distribution, supply or storage of natural gas, and a non-gas activity;
- (22) ‘related undertaking’ means an affiliated undertaking, within the meaning of Article 41 of Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 44(2) (g)<sup>(1)</sup> of the Treaty on consolidated accounts<sup>(2)</sup> and/or an associated undertaking, within the meaning of Article 33(1) of that Directive, and/or an undertaking which belong to the same shareholders;
- (23) ‘system user’ means a natural or legal person supplying to, or being supplied by, the system;
- (24) ‘customer’ means a wholesale or final customer of natural gas or a natural gas undertaking which purchases natural gas;
- (25) ‘household customer’ means a customer purchasing natural gas for his own household consumption;
- (26) ‘non-household customer’ means a customer purchasing natural gas which is not for his own household use;
- (27) ‘final customer’ means a customer purchasing natural gas for his own use;
- (28) ‘eligible customer’ means a customer who is free to purchase gas from the supplier of his choice, within the meaning of Article 37;
- (29) ‘wholesale customer’ means a natural or legal person other than a transmission system operator or distribution system operator who purchases natural gas for the purpose of resale inside or outside the system where he is established;
- (30) ‘long-term planning’ means the planning of supply and transport capacity of natural gas undertakings on a long-term basis with a view to meeting the demand for natural gas of the system, diversification of sources and securing supplies to customers;
- (31) ‘emergent market’ means a Member State in which the first commercial supply of its first long-term natural gas supply contract was made not more than 10 years earlier;
- (32) ‘security’ means both security of supply of natural gas and technical safety;
- (33) ‘new infrastructure’ means an infrastructure not completed by 4 August 2003;
- (34) ‘gas supply contract’ means a contract for the supply of natural gas, but does not include a gas derivative;
- (35) ‘gas derivative’ means a financial instrument specified in points 5, 6 or 7 of Section C of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments<sup>(3)</sup>, where that instrument relates to natural gas;

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- (36) ‘control’ means any rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
- (a) ownership or the right to use all or part of the assets of an undertaking;
  - (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

## CHAPTER II

### GENERAL RULES FOR THE ORGANISATION OF THE SECTOR

#### *Article 3*

##### **Public service obligations and customer protection**

1 Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, natural gas undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in natural gas, and shall not discriminate between those undertakings as regards their rights or obligations.

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

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

4 Member States shall take appropriate measures, such as formulating national energy action plans, providing social security benefits to ensure the necessary gas supply to vulnerable customers, or providing for support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty. Such measures shall not impede the effective opening of the market set out in Article 37 and market functioning and shall

be notified to the Commission, where relevant, in accordance with paragraph 11 of this Article. Such notification shall not include measures taken within the general social security system.

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

6 Member States shall ensure that:

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

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

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

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

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

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

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

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

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

#### *Article 4*

### **Authorisation procedure**

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

2 Where Member States have a system of authorisation, they shall lay down objective and non-discriminatory criteria which shall be met by an undertaking applying for an authorisation to build and/or operate natural gas facilities or applying for an authorisation to supply natural gas. The non-discriminatory criteria and procedures for the granting of authorisations shall be made public. Member States shall ensure that authorisation procedures for facilities, pipelines and associated equipment take into account the importance of the project for the internal market in natural gas where appropriate.

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

4 For the development of newly supplied areas and efficient operation generally, and without prejudice to Article 38, Member States may decline to grant a further authorisation to build and operate distribution pipeline systems in any particular area once such pipeline systems have been or are proposed to be built in that area and if existing or proposed capacity is not saturated.

#### *Article 5*

### **Monitoring of security of supply**

Member States shall ensure the monitoring of security of supply issues. Where Member States consider it appropriate, they may delegate that task to the regulatory authorities referred to in Article 39(1). Such monitoring shall, in particular, cover the balance of supply and demand on the national market, the level of expected future demand and available supplies, envisaged additional capacity being planned or under construction, and the quality and level of maintenance of the networks, as well as measures to cover peak demand and to deal with shortfalls of one or more suppliers. The competent authorities shall publish, by 31 July each year, a report outlining the findings resulting from the monitoring of those issues, as well as any measures taken or envisaged to address them and shall forward that report to the Commission forthwith.

## Article 6

### Regional solidarity

- 1 In order to safeguard a secure supply on the internal market in natural gas, Member States shall cooperate in order to promote regional and bilateral solidarity.
- 2 Such cooperation shall cover situations resulting or likely to result in the short term in a severe disruption of supply affecting a Member State. It shall include:
  - a coordination of national emergency measures referred to in Article 8 of Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply<sup>(4)</sup>;
  - b identification and, where necessary, development or upgrading of electricity and natural gas interconnections; and
  - c conditions and practical modalities for mutual assistance.
- 3 The Commission and the other Member States shall be kept informed of such cooperation.
- 4 The Commission may adopt Guidelines for regional cooperation in a spirit of solidarity. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

## Article 7

### Promotion of regional cooperation

- 1 Member States as well as the regulatory authorities shall cooperate with each other for the purpose of integrating their national markets at one and more regional levels, as a first step towards the creation of a fully liberalised internal market. In particular, the regulatory authorities where Member States have so provided or Member States shall promote and facilitate the cooperation of transmission system operators at a regional level, including on cross-border issues with the aim of creating a competitive internal market in natural gas, foster the consistency of their legal, regulatory and technical framework and facilitate integration of the isolated systems forming gas islands that persist in the Community. The geographical areas covered by such regional cooperation shall include cooperation in geographical areas defined in accordance with Article 12(3) of Regulation (EC) No 715/2009. Such cooperation may cover other geographical areas.
- 2 The Agency shall cooperate with national regulatory authorities and transmission system operators to ensure the compatibility of regulatory frameworks between the regions with the aim of creating a competitive internal market in natural gas. Where the Agency considers that binding rules on such cooperation are required, it shall make appropriate recommendations.
- 3 Member States shall ensure, through the implementation of this Directive, that transmission system operators have one or more integrated system(s) at regional level covering two or more Member States for capacity allocation and for checking the security of the network.
- 4 Where vertically integrated transmission system operators participate in a joint undertaking established for implementing such cooperation, the joint undertaking shall establish and implement a compliance programme which sets out the measures to be taken to ensure that

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discriminatory and anticompetitive conduct is excluded. That compliance programme shall set out the specific obligations of employees to meet the objective of excluding discriminatory and anticompetitive conduct. It shall be subject to the approval of the Agency. Compliance with the programme shall be independently monitored by the compliance officers of the vertically integrated transmission system operators.

#### *Article 8*

#### **Technical rules**

The regulatory authorities where Member States have so provided or Member States shall ensure that technical safety criteria are defined and that technical rules establishing the minimum technical design and operational requirements for the connection to the system of LNG facilities, storage facilities, other transmission or distribution systems, and direct lines, are developed and made public. Those technical rules shall ensure the interoperability of systems and shall be objective and non-discriminatory. The Agency may make appropriate recommendations towards achieving compatibility of those rules, where appropriate. Those rules shall be notified to the Commission in accordance with Article 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services<sup>(5)</sup>.

### CHAPTER III

#### **TRANSMISSION, STORAGE AND LNG**

#### *Article 9*

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

- 1 Member States shall ensure that from 3 March 2012:
  - a each undertaking which owns a transmission system acts as a transmission system operator;
  - b the same person or persons are entitled neither:
    - (i) directly or indirectly to exercise control over an undertaking performing any of the functions of production or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system; nor
    - (ii) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply;
  - c the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of production or supply; and
  - d the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an



undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system.

- 2 The rights referred to in points (b) and (c) of paragraph 1 shall include, in particular:
- a the power to exercise voting rights;
  - b the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; or
  - c the holding of a majority share.

3 For the purpose of paragraph 1(b), the notion ‘undertaking performing any of the functions of production or supply’ shall include ‘undertaking performing any of the functions of generation and supply’ within the meaning of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity<sup>(6)</sup>, and the terms ‘transmission system operator’ and ‘transmission system’ shall include ‘transmission system operator’ and ‘transmission system’ within the meaning of that Directive.

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

5 The obligation set out in paragraph 1(a) of this Article shall be deemed to be fulfilled in a situation where two or more undertakings which own transmission systems have created a joint venture which acts as a transmission system operator in two or more Member States for the transmission systems concerned. No other undertaking may be part of the joint venture, unless it has been approved under Article 14 as an independent system operator or as an independent transmission operator for the purposes of Chapter IV.

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

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

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

In such case, the Member State concerned shall either:

- a designate an independent system operator in accordance with Article 14, or
- b comply with the provisions of Chapter IV.

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

10 Before an undertaking is approved and designated as a transmission system operator under paragraph 9 of this Article, it shall be certified according to the procedures laid down in Article 10(4), (5) and (6) of this Directive and in Article 3 of Regulation (EC) No 715/2009, pursuant to which the Commission shall verify that the arrangements in place clearly guarantee

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more effective independence of the transmission system operator than the provisions of Chapter IV.

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

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

### *Article 10*

#### **Designation and certification of transmission system operators**

1 Before an undertaking is approved and designated as transmission system operator, it shall be certified according to the procedures laid down in paragraphs 4, 5 and 6 of this Article and in Article 3 of Regulation (EC) No 715/2009.

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

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

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

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

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

6 The explicit or tacit decision on the certification of a transmission system operator shall be notified without delay to the Commission by the regulatory authority, together with all the relevant information with respect to that decision. The Commission shall act in accordance with the procedure laid down in Article 3 of Regulation (EC) No 715/2009.

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

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

### *Article 11*

#### **Certification in relation to third countries**

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

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

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

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

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

4 The regulatory authority shall notify the decision to the Commission without delay, together with all the relevant information with respect to that decision.

5 Member States shall provide for the regulatory authority or the designated competent authority referred to in paragraph 3(b), before the regulatory authority adopts a decision on the certification, to request an opinion from the Commission on whether:

- a the entity concerned complies with the requirements of Article 9; and
- b granting certification will not put at risk the security of energy supply to the Community.

6 The Commission shall examine the request referred to in paragraph 5 as soon as it is received. Within a period of two months after receiving the request, it shall deliver its opinion to the national regulatory authority or, if the request was made by the designated competent authority, to that authority.

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

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

7 When assessing whether the control by a person or persons from a third country or third countries will put at risk the security of energy supply to the Community, the Commission shall take into account:

- a the specific facts of the case and the third country or third countries concerned; and
- b the rights and obligations of the Community with respect to that third country or third countries arising under international law, including an agreement concluded with one or more third countries to which the Community is a party and which addresses the issues of security of supply.

8 The national regulatory authority shall, within a period of two months after the expiry of the period referred to in paragraph 6, adopt its final decision on the certification. In adopting its final decision the national regulatory authority shall take utmost account of the Commission's opinion. In any event Member States shall have the right to refuse certification where granting certification puts at risk the Member State's security of energy supply or the security of energy supply of another Member State. Where the Member State has designated another competent authority to assess paragraph 3(b), it may require the national regulatory authority to adopt its final decision in accordance with the assessment of that competent authority. The regulatory authority's final decision and the Commission's opinion shall be published together. Where the final decision diverges from the Commission's opinion, the Member State concerned shall provide and publish, together with that decision, the reasoning underlying such decision.

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

10 The Commission may adopt Guidelines setting out the details of the procedure to be followed for the application of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

11 This Article, with exception of paragraph 3(a), shall also apply to Member States which are subject to a derogation under Article 49.

## *Article 12*

### **Designation of storage and LNG system operators**

Member States shall designate, or shall require natural gas undertakings which own storage or LNG facilities to designate, for a period of time to be determined by Member States, having regard to considerations of efficiency and economic balance, one or more storage and LNG system operators.

### Article 13

#### **Tasks of transmission, storage and/or LNG system operators**

- 1 Each transmission, storage and/or LNG system operator shall:
  - a operate, maintain and develop under economic conditions secure, reliable and efficient transmission, storage and/or LNG facilities to secure an open market, with due regard to the environment, ensure adequate means to meet service obligations;
  - b refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;
  - c provide any other transmission system operator, any other storage system operator, any other LNG system operator and/or any distribution system operator, sufficient information to ensure that the transport and storage of natural gas may take place in a manner compatible with the secure and efficient operation of the interconnected system; and
  - d provide system users with the information they need for efficient access to the system.
- 2 Each transmission system operator shall build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity and taking into account security of gas supply.
- 3 Rules adopted by transmission system operators for balancing the gas transmission system shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by transmission system operators shall be established pursuant to a methodology compatible with Article 41(6) in a non-discriminatory and cost-reflective way and shall be published.
- 4 The regulatory authorities where Member States have so provided or Member States may require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity.
- 5 Transmission system operators shall procure the energy they use for the carrying out of their functions according to transparent, non-discriminatory and market based procedures.

### Article 14

#### **Independent system operators**

- 1 Where the transmission system belongs to a vertically integrated undertaking on 3 September 2009, Member States may decide not to apply Article 9(1) and designate an independent system operator upon a proposal from the transmission system owner. Such designation shall be subject to approval by the Commission.
- 2 The Member State may approve and designate an independent system operator only where:
  - a the candidate operator has demonstrated that it complies with the requirements of Article 9(1)(b), (c) and (d);
  - 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;

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- c the candidate operator has undertaken to comply with a ten-year network development plan monitored by the regulatory authority;
- d the transmission system owner has demonstrated its ability to comply with its obligations under paragraph 5. To that end, it shall provide all the draft contractual arrangements with the candidate undertaking and any other relevant entity; and
- e the candidate operator has demonstrated its ability to comply with its obligations under Regulation (EC) No 715/2009 including the cooperation of transmission system operators at European and regional level.

3 Undertakings which have been certified by the regulatory authority as having complied with the requirements of Article 11 and of paragraph 2 of this Article shall be approved and designated as independent system operators by Member States. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 715/2009 or in Article 11 of this Directive shall be applicable.

4 Each independent system operator shall be responsible for granting and managing third-party access, including the collection of access charges and congestion charges, for operating, maintaining and developing the transmission system, as well as for ensuring the long-term ability of the system to meet reasonable demand through investment planning. When developing the transmission system the independent system operator shall be responsible for planning (including authorisation procedure), construction and commissioning of the new infrastructure. For this purpose, the independent system operator shall act as a transmission system operator in accordance with this Chapter. The transmission system owner shall not be responsible for granting and managing third-party access, nor for investment planning.

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

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

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

### *Article 15*

#### **Unbundling of transmission system owners and storage system operators**

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

This Article shall apply only to storage facilities that are technically and/or economically necessary for providing efficient access to the system for the supply of customers pursuant to Article 33.

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

- a persons responsible for the management of the transmission system owner and storage system operator shall not participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production and supply of natural gas;
- b appropriate measures shall be taken to ensure that the professional interests of persons responsible for the management of the transmission system owner and storage system operator are taken into account in a manner that ensures that they are capable of acting independently;
- c the storage system operator shall have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to operate, maintain or develop the storage facilities. This shall not preclude the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets regulated indirectly in accordance with Article 41(6) in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the storage system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of storage facilities, that do not exceed the terms of the approved financial plan, or any equivalent instrument; and
- d the transmission system owner and the storage system operator shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet those objectives. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority and shall be published.

3 The Commission may adopt Guidelines to ensure full and effective compliance of the transmission system owner and of the storage system operator with paragraph 2 of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

### *Article 16*

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

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

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transmission system owner including, in the case of a combined operator, the distribution system operator, and the remaining part of the undertaking do not use joint services, such as joint legal services, apart from purely administrative or IT functions.

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

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

## CHAPTER IV

### INDEPENDENT TRANSMISSION OPERATOR

#### *Article 17*

#### **Assets, equipment, staff and identity**

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

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

2 The activity of gas transmission shall include at least the following tasks in addition to those listed in Article 13:

- a the representation of the transmission system operator and contacts to third parties and the regulatory authorities;
- b the representation of the transmission system operator within the European Network of Transmission System Operators for Gas (ENTSO for Gas);
- c granting and managing third-party access on a non-discriminatory basis between system users or classes of system users;



- d the collection of all the transmission system related charges including access charges, balancing charges for ancillary services such as gas treatment, purchasing of services (balancing costs, energy for losses);
- e the operation, maintenance and development of a secure, efficient and economic transmission system;
- f investment planning ensuring the long-term ability of the system to meet reasonable demand and guaranteeing security of supply;
- g the setting up of appropriate joint ventures, including with one or more transmission system operators, gas exchanges, and the other relevant actors pursuing the objective to develop the creation of regional markets or to facilitate the liberalisation process; and
- h all corporate services, including legal services, accountancy and IT services.

3 Transmission system operators shall be organised in a legal form as referred to in Article 1 of Council Directive 68/151/EEC<sup>(7)</sup>.

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

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

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

### *Article 18*

#### **Independence of the transmission system operator**

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

- 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

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in relation to activities necessary for the preparation of the ten-year network development plan developed pursuant to Article 22.

5 In fulfilling their tasks in Article 13 and Article 17(2) of this Directive, and in complying with Article 13(1), Article 14(1)(a), Article 16(2), (3) and (5), Article 18(6) and Article 21(1) of Regulation (EC) No 715/2009, transmission system operators shall not discriminate against different persons or entities and shall not restrict, distort or prevent competition in production or supply.

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

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

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

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

10 An undertaking which has been certified by the regulatory authority as being in compliance with the requirements of this Chapter shall be approved and designated as a transmission system operator by the Member State concerned. The certification procedure in either Article 10 of this Directive and Article 3 of Regulation (EC) No 715/2009 or in Article 11 of this Directive shall apply.

### *Article 19*

#### **Independence of the staff and the management of the transmission system operator**

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

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

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

- a doubts arise as to the professional independence of a nominated person responsible for the management and/or member of the administrative bodies; or

- b in the case of premature termination of a term of office, doubts exist regarding the justification of such premature termination.

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

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

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

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

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

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

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

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

#### *Article 20*

### **Supervisory Body**

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

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and in relation to activities necessary for the preparation of the ten-year network development plan developed pursuant to Article 22.

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

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

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

### *Article 21*

#### **Compliance programme and compliance officer**

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

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

3 The compliance officer shall be in charge of:

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

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

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

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

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

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

- a conditions for access to the network, as defined in Regulation (EC) No 715/2009, in particular regarding tariffs, third party access services, capacity allocation and congestion management, transparency, balancing and secondary markets;
- b projects undertaken in order to operate, maintain and develop the transmission system, including investments in new transport connections, in expansion of capacity and in optimisation of existing capacity;
- c energy purchases or sales necessary for the operation of the transmission system.

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

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

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

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

## *Article 22*

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

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

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

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

3 When elaborating the ten-year network development plan, the transmission system operator shall make reasonable assumptions about the evolution of the production, supply,

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consumption and exchanges with other countries, taking into account investment plans for regional and Community-wide networks, as well as investment plans for storage and LNG regasification facilities.

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

5 The regulatory authority shall examine whether the ten-year network development plan covers all investment needs identified during the consultation process, and whether it is consistent with the non-binding Community-wide ten-year network development plan (Community-wide network development plan) referred to in Article 8(3)(b) of Regulation (EC) No 715/2009. If any doubt arises as to the consistency with the Community-wide network development plan, the regulatory authority shall consult the Agency. The regulatory authority may require the transmission system operator to amend its ten-year network development plan.

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

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

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

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

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

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

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

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

### Article 23

#### **Decision-making powers regarding the connection of storage facilities, LNG regasification facilities and industrial customers to the transmission system**

1 The transmission system operator shall establish and publish transparent and efficient procedures and tariffs for non-discriminatory connection of storage facilities, LNG regasification facilities and industrial customers to the transmission system. Those procedures shall be subject to approval by the regulatory authority.

2 The transmission system operator shall not be entitled to refuse the connection of a new storage facility, LNG regasification facility or industrial customer on the grounds of possible future limitations to available network capacities or additional costs linked with necessary capacity increase. The transmission system operator shall ensure sufficient entry and exit capacity for the new connection.

## CHAPTER V

### DISTRIBUTION AND SUPPLY

#### Article 24

##### **Designation of distribution system operators**

Member States shall designate, or shall require undertakings which own or are responsible for distribution systems to designate, for a period of time to be determined by Member States, having regard to considerations of efficiency and economic balance, one or more distribution system operators and shall ensure that those operators act in accordance with Articles 25, 26 and 27.

#### Article 25

##### **Tasks of distribution system operators**

1 Each distribution system operator shall be responsible for ensuring the long-term ability of the system to meet reasonable demands for the distribution of gas, and for operating, maintaining and developing under economic conditions a secure, reliable and efficient system in its area, with due regard for the environment and energy efficiency.

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

3 Each distribution system operator shall provide any other distribution, transmission, LNG, and/or storage system operator with sufficient information to ensure that the transport and storage of natural gas takes place in a manner compatible with the secure and efficient operation of the interconnected system.

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

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5 Where a distribution system operator is responsible for balancing the distribution system, rules adopted by it for that purpose shall be objective, transparent and non-discriminatory, including rules for the charging of system users for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by distribution system operators shall be established pursuant to a methodology compatible with Article 41(6) in a non-discriminatory and cost-reflective way and shall be published.

#### *Article 26*

### **Unbundling of distribution system operators**

1 Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to distribution. Those rules shall not create an obligation to separate the ownership of assets of the distribution system from the vertically integrated undertaking.

2 In addition to the requirements under paragraph 1, where the distribution system operator is part of a vertically integrated undertaking, it shall be independent in terms of its organisation and decision-making from the other activities not related to distribution. In order to achieve this, the following minimum criteria shall apply:

- a those persons responsible for the management of the distribution system operator must not participate in company structures of the integrated natural gas undertaking responsible, directly or indirectly, for the day-to-day operation of the production, transmission and supply of natural gas;
- b appropriate measures must be taken to ensure that the professional interests of persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;
- c the distribution system operator must have effective decision-making rights, independent from the integrated natural gas undertaking, with respect to assets necessary to operate, maintain or develop the network. In order to fulfil those tasks, the distribution system operator shall have at its disposal the necessary resources including human, technical, financial and physical resources. This should not prevent the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect of return on assets, regulated indirectly in accordance with Article 41(6) in a subsidiary are protected. In particular, this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the distribution system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions concerning the construction or upgrading of distribution lines, that do not exceed the terms of the approved financial plan, or any equivalent instrument; and
- d the distribution system operator must establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet that objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme, the compliance officer of the distribution system operator, to the regulatory authority referred to in Article 39(1) and shall be published. The compliance officer of the distribution system operator shall be fully independent and shall have access to all the necessary information of the distribution system operator and any affiliated undertaking to fulfil his task.



3 Where the distribution system operator is part of a vertically integrated undertaking, the Member States shall ensure that the activities of the distribution system operator are monitored by regulatory authorities or other competent bodies so that it cannot take advantage of its vertical integration to distort competition. In particular, vertically integrated distribution system operators shall not, in their communication and branding, create confusion in respect of the separate identity of the supply branch of the vertically integrated undertaking.

4 Member States may decide not to apply paragraphs 1, 2 and 3 to integrated natural gas undertakings serving less than 100 000 connected customers.

#### *Article 27*

### **Confidentiality obligations of distribution system operators**

1 Without prejudice to Article 30 or any other legal duty to disclose information, each distribution system operator shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, and shall prevent information about its own activities which may be commercially advantageous from being disclosed in a discriminatory manner.

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

#### *Article 28*

### **Closed distribution systems**

1 Member States may provide for national regulatory authorities or other competent authorities to classify a system which distributes gas within a geographically confined industrial, commercial or shared services site and does not, without prejudice to paragraph 4, supply household customers, as a closed distribution system if:

- a for specific technical or safety reasons, the operations or the production process of the users of that system are integrated; or
- b that system distributes gas primarily to the owner or operator of the system or to their related undertakings.

2 Member States may provide for national regulatory authorities to exempt the operator of a closed distribution system from the requirement under Article 32(1) that tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 41.

3 Where an exemption is granted under paragraph 2, the applicable tariffs, or the methodologies underlying their calculation, shall be reviewed and approved in accordance with Article 41 upon request by a user of the closed distribution system.

4 Incidental use by a small number of households with employment or similar associations with the owner of the distribution system and located within the area served by a closed distribution system shall not preclude an exemption under paragraph 2 being granted.

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### Article 29

#### **Combined operator**

Article 26(1) shall not prevent the operation of a combined transmission, LNG, storage and distribution system operator provided that operator complies with Articles 9(1), or 14 and 15, or Chapter IV or falls under Article 49(6).

## CHAPTER VI

### **UNBUNDLING AND TRANSPARENCY OF ACCOUNTS**

#### Article 30

##### **Right of access to accounts**

1 Member States or any competent authority they designate, including the regulatory authorities referred to in Article 39(1) and the dispute settlement authorities referred to in Article 34(3), shall, insofar as necessary to carry out their functions, have right of access to the accounts of natural gas undertakings as set out in Article 31.

2 Member States and any designated competent authority, including the regulatory authorities referred to in Article 39(1) and the dispute settlement authorities, shall preserve the confidentiality of commercially sensitive information. Member States may provide for the disclosure of such information where this is necessary in order for the competent authorities to carry out their functions.

#### Article 31

##### **Unbundling of accounts**

1 Member States shall take the necessary steps to ensure that the accounts of natural gas undertakings are kept in accordance with paragraphs 2 to 5 of this Article. Where natural gas undertakings benefit from a derogation from this provision on the basis of Article 49(2) and (4), they shall at least keep their internal accounts in accordance with this Article.

2 Natural gas undertakings, whatever their system of ownership or legal form, shall draw up, submit to audit and publish their annual accounts in accordance with the rules of national law concerning the annual accounts of limited liability companies adopted pursuant to the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 44(2)(g)<sup>(8)</sup> of the Treaty on the annual accounts of certain types of companies<sup>(9)</sup>.

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

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

eligible customers and supply activities for non-eligible customers. Revenue from ownership of the transmission or distribution network shall be specified in the accounts. Where appropriate, they shall keep consolidated accounts for other, non-gas activities. The internal accounts shall include a balance sheet and a profit and loss account for each activity.

4 The audit, referred to in paragraph 2, shall, in particular, verify that the obligation to avoid discrimination and cross-subsidies referred to in paragraph 3 is respected.

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

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

## CHAPTER VII

### ORGANISATION OF ACCESS TO THE SYSTEM

#### *Article 32*

##### **Third-party access**

1 Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and LNG facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation are approved prior to their entry into force in accordance with Article 41 by a regulatory authority referred to in Article 39(1) and that those tariffs — and the methodologies, where only methodologies are approved — are published prior to their entry into force.

2 Transmission system operators shall, if necessary for the purpose of carrying out their functions including in relation to cross-border transmission, have access to the network of other transmission system operators.

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

#### *Article 33*

##### **Access to storage**

1 For the organisation of access to storage facilities and linepack when technically and/or economically necessary for providing efficient access to the system for the supply of customers, as well as for the organisation of access to ancillary services, Member States may choose either or both of the procedures referred to in paragraphs 3 and 4. Those procedures shall operate in accordance with objective, transparent and non-discriminatory criteria.

The regulatory authorities where Member States have so provided or Member States shall define and publish criteria according to which the access regime applicable to

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storage facilities and linepack may be determined. They shall make public, or oblige storage and transmission system operators to make public, which storage facilities, or which parts of those storage facilities, and which linepack is offered under the different procedures referred to in paragraphs 3 and 4.

The obligation referred to in the second sentence of the second subparagraph shall be without prejudice to the right of choice granted to Member States in the first subparagraph.

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

3 In the case of negotiated access, Member States or, where Member States have so provided, the regulatory authorities shall take the necessary measures for natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system to be able to negotiate access to storage facilities and linepack, when technically and/or economically necessary for providing efficient access to the system, as well as for the organisation of access to other ancillary services. The parties shall be obliged to negotiate access to storage, linepack and other ancillary services in good faith.

Contracts for access to storage, linepack and other ancillary services shall be negotiated with the relevant storage system operator or natural gas undertakings. The regulatory authorities where Member States have so provided or Member States shall require storage system operators and natural gas undertakings to publish their main commercial conditions for the use of storage, linepack and other ancillary services by 1 January 2005 and on an annual basis every year thereafter.

When developing the conditions referred to in the second subparagraph, storage operators and natural gas undertakings shall consult system users.

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

#### *Article 34*

### **Access to upstream pipeline networks**

1 Member States shall take the necessary measures to ensure that natural gas undertakings and eligible customers, wherever they are located, are able to obtain access to upstream pipeline networks, including facilities supplying technical services incidental to such access, in accordance with this Article, except for the parts of such networks and facilities which are used for local production operations at the site of a field where the gas is produced. The measures shall be notified to the Commission in accordance with the provisions of Article 54.

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

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

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

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

### *Article 35*

#### **Refusal of access**

1 Natural gas undertakings may refuse access to the system on the basis of lack of capacity or where the access to the system would prevent them from carrying out the public service obligations referred to in Article 3(2) which are assigned to them or on the basis of serious economic and financial difficulties with take-or-pay contracts having regard to the criteria and procedures set out in Article 48 and the alternative chosen by the Member State in accordance with paragraph 1 of that Article. Duly substantiated reasons shall be given for any such a refusal.

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

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## Article 36

### New infrastructure

1 Major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, may, upon request, be exempted, for a defined period of time, from the provisions of Articles 9, 32, 33 and 34 and Article 41(6), (8) and (10) under the following conditions:

- a the investment must enhance competition in gas supply and enhance security of supply;
- b the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;
- c the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;
- d charges must be levied on users of that infrastructure; and
- e the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.

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

3 The regulatory authority referred to in Chapter VIII may, on a case-by-case basis, decide on the exemption referred to in paragraphs 1 and 2.

4 Where the infrastructure in question is located in the territory of more than one Member State, the Agency may submit an advisory opinion to the regulatory authorities of the Member States concerned, which may be used as a basis for their decision, within two months from the date on which the request for exemption was received by the last of those regulatory authorities.

Where all the regulatory authorities concerned agree on the request for exemption within six months of the date on which it was received by the last of the regulatory authorities, they shall inform the Agency of their decision.

The Agency shall exercise the tasks conferred on the regulatory authorities of the Member States concerned by the present Article:

- a where all regulatory authorities concerned have not been able to reach an agreement within a period of six months from the date on which the request for exemption was received by the last of those regulatory authorities; or
- b upon a joint request from the regulatory authorities concerned.

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

5 Before taking a decision, the Agency shall consult the relevant regulatory authorities and the applicants.

6 An exemption may cover all or part of the capacity of the new infrastructure, or of the existing infrastructure with significantly increased capacity.

In deciding to grant an exemption, consideration shall be given, on a case-by-case basis, to the need to impose conditions regarding the duration of the exemption and non-discriminatory access to the infrastructure. When deciding on those conditions, account

shall, in particular, be taken of the additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances.

Before granting an exemption, the regulatory authority shall decide upon the rules and mechanisms for management and allocation of capacity. The rules shall require that all potential users of the infrastructure are invited to indicate their interest in contracting capacity before capacity allocation in the new infrastructure, including for own use, takes place. The regulatory authority shall require congestion management rules to include the obligation to offer unused capacity on the market, and shall require users of the infrastructure to be entitled to trade their contracted capacities on the secondary market. In its assessment of the criteria referred to in points (a), (b) and (e) of paragraph 1, the regulatory authority shall take into account the results of that capacity allocation procedure.

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

7 Notwithstanding paragraph 3, Member States may provide that their regulatory authority or the Agency, as the case may be, shall submit, for the purposes of the formal decision, to the relevant body in the Member State its opinion on the request for an exemption. That opinion shall be published together with the decision.

8 The regulatory authority shall transmit to the Commission, without delay, a copy of every request for exemption as of its receipt. The decision shall be notified, without delay, by the competent authority to the Commission, together with all the relevant information with respect to the decision. That information may be submitted to the Commission in aggregate form, enabling the Commission to reach a well-founded decision. In particular, the information shall contain:

- a the detailed reasons on the basis of which the regulatory authority, or Member State, granted or refused the exemption together with a reference to paragraph 1 including the relevant point or points of that paragraph on which such decision is based, including the financial information justifying the need for the exemption;
- b the analysis undertaken of the effect on competition and the effective functioning of the internal market in natural gas resulting from the grant of the exemption;
- c the reasons for the time period and the share of the total capacity of the gas infrastructure in question for which the exemption is granted;
- d in case the exemption relates to an interconnector, the result of the consultation with the regulatory authorities concerned; and
- e the contribution of the infrastructure to the diversification of gas supply.

9 Within a period of two months from the day following the receipt of a notification, the Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption. That two-month period may be extended by an additional period of two months where further information is sought by the Commission. That additional period shall begin on the day following the receipt of the complete information. The initial two-month period may also be extended with the consent of both the Commission and the regulatory authority.

Where the requested information is not provided within the period set out in the request, the notification shall be deemed to be withdrawn unless, before the expiry of that period, either the period has been extended with the consent of both the Commission and the regulatory authority, or the regulatory authority, in a duly reasoned statement, has informed the Commission that it considers the notification to be complete.

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The regulatory authority shall comply with the Commission decision to amend or withdraw the exemption decision within a period of one month and shall inform the Commission accordingly.

The Commission shall preserve the confidentiality of commercially sensitive information.

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

10 The Commission may adopt Guidelines for the application of the conditions laid down in paragraph 1 of this Article and to set out the procedure to be followed for the application of paragraphs 3, 6, 8 and 9 of this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

#### *Article 37*

### **Market opening and reciprocity**

- 1 Member States shall ensure that the eligible customers comprise:
  - a until 1 July 2004, eligible customers as specified in Article 18 of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas<sup>(10)</sup>. 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 38*

### **Direct lines**

- 1 Member States shall take the necessary measures to enable:
  - a natural gas undertakings established within their territory to supply the eligible customers through a direct line; and
  - b any such eligible customer within their territory to be supplied through a direct line by natural gas undertakings.
- 2 In circumstances where an authorisation (for example, licence, permission, concession, consent or approval) is required for the construction or operation of direct lines, the Member States or any competent authority they designate shall lay down the criteria for the



grant of authorisations for the construction or operation of such lines in their territory. Those criteria shall be objective, transparent and non-discriminatory.

3 Member States may issue an authorisation to construct a direct line subject either to the refusal of system access on the basis of Article 35 or to the opening of a dispute-settlement procedure under Article 41.

## CHAPTER VIII

### NATIONAL REGULATORY AUTHORITIES

#### *Article 39*

#### **Designation and independence of regulatory authorities**

1 Each Member State shall designate a single national regulatory authority at national level.

2 Paragraph 1 of this Article shall be without prejudice to the designation of other regulatory authorities at regional level within Member States, provided that there is one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in accordance with Article 14(1) of Regulation (EC) No 713/2009.

3 By way of derogation from paragraph 1 of this Article, a Member State may designate regulatory authorities for small systems on a geographically separate region whose consumption, in 2008, accounted for less than 3 % of the total consumption of the Member State of which it is part. That derogation shall be without prejudice to the appointment of one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in compliance with Article 14(1) of Regulation (EC) No 713/2009.

4 Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member States shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority:

- a is legally distinct and functionally independent from any other public or private entity;
- b ensures that its staff and the persons responsible for its management:

- (i) act independently from any market interest; and
- (ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. That requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 41.

5 In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

- a the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and

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- b the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once.

In regard to point (b) of the first subparagraph, Member States shall ensure an appropriate rotation scheme for the board or the top management. The members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law.

#### *Article 40*

### **General objectives of the regulatory authority**

In carrying out the regulatory tasks specified in this Directive, the regulatory authority shall take all reasonable measures in pursuit of the following objectives within the framework of their duties and powers as laid down in Article 41, in close consultation with other relevant national authorities, including competition authorities, as appropriate, and without prejudice to their competencies:

- (a) promoting, in close cooperation with the Agency, regulatory authorities of other Member States and the Commission, a competitive, secure and environmentally sustainable internal market in natural gas within the Community, and effective market opening for all customers and suppliers in the Community, and ensuring appropriate conditions for the effective and reliable operation of gas networks, taking into account long-term objectives;
- (b) developing competitive and properly functioning regional markets within the Community in view of the achievement of the objectives referred to in point (a);
- (c) eliminating restrictions on trade in natural gas between Member States, including developing appropriate cross-border transmission capacities to meet demand and enhancing the integration of national markets which may facilitate natural gas flow across the Community;
- (d) helping to achieve, in the most cost-effective way, the development of secure, reliable and efficient non-discriminatory systems that are consumer oriented, and promoting system adequacy and, in line with general energy policy objectives, energy efficiency as well as the integration of large and small scale production of gas from renewable energy sources and distributed production in both transmission and distribution networks;
- (e) facilitating access to the network for new production capacity, in particular removing barriers that could prevent access for new market entrants and of gas from renewable energy sources;
- (f) ensuring that system operators and system users are granted appropriate incentives, in both the short and the long term, to increase efficiencies in system performance and foster market integration;
- (g) ensuring that customers benefit through the efficient functioning of their national market, promoting effective competition and helping to ensure consumer protection;
- (h) helping to achieve high standards of public service for natural gas, contributing to the protection of vulnerable customers and contributing to the compatibility of necessary data exchange processes for customer switching.

## Article 41

### Duties and powers of the regulatory authority

- 1 The regulatory authority shall have the following duties:
  - a fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies;
  - b ensuring compliance of transmission and distribution system operators, and where relevant, system owners, as well as of any natural gas undertakings, with their obligations under this Directive and other relevant Community legislation, including as regards cross-border issues;
  - c cooperating in regard to cross-border issues with the regulatory authority or authorities of the Member States concerned and with the Agency;
  - d complying with, and implementing, any relevant legally binding decisions of the Agency and of the Commission;
  - e reporting annually on its activity and the fulfilment of its duties to the relevant authorities of the Member States, the Agency and the Commission. Such reports shall cover the steps taken and the results obtained as regards each of the tasks listed in this Article;
  - f ensuring that there are no cross-subsidies between transmission, distribution, storage, LNG and supply activities;
  - g monitoring investment plans of the transmission system operators, and providing in its annual report an assessment of the investment plans of the transmission system operators as regards their consistency with the Community-wide network development plan referred to in Article 8(3)(b) of Regulation (EC) No 715/2009; such assessment may include recommendations to amend those investment plans;
  - h monitoring compliance with and reviewing the past performance of network security and reliability rules and setting or approving standards and requirements for quality of service and supply or contributing thereto together with other competent authorities;
  - i monitoring the level of transparency, including of wholesale prices, and ensuring compliance of natural gas undertakings with transparency obligations;
  - j monitoring the level and effectiveness of market opening and competition at wholesale and retail levels, including on natural gas exchanges, prices for household customers including prepayment systems, switching rates, disconnection rates, charges for and the execution of maintenance services and complaints by household customers, as well as any distortion or restriction of competition, including providing any relevant information, and bringing any relevant cases to the relevant competition authorities;
  - k monitoring the occurrence of restrictive contractual practices, including exclusivity clauses which may prevent large non-household customers from contracting simultaneously with more than one supplier or restrict their choice to do so, and, where appropriate, informing the national competition authorities of such practices;
  - l respecting contractual freedom with regard to interruptible supply contracts as well as with regard to long-term contracts provided that they are compatible with Community law and consistent with Community policies;
  - m monitoring the time taken by transmission and distribution system operators to make connections and repairs;
  - n monitoring and reviewing the access conditions to storage, linepack and other ancillary services as provided for in Article 33. In the event that the access regime to storage is defined according to Article 33(3), that task shall exclude the reviewing of tariffs;

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- o helping to ensure, together with other relevant authorities, that the consumer protection measures, including those set out in Annex I, are effective and enforced;
- p publishing recommendations, at least annually, in relation to compliance of supply prices with Article 3, and providing those to the competition authorities, where appropriate;
- q ensuring access to customer consumption data, the provision for optional use, of an easily understandable harmonised format at national level for consumption data and prompt access for all customers to such data under point (h) of Annex I;
- r monitoring the implementation of rules relating to the roles and responsibilities of transmission system operators, distribution system operators, suppliers and customers and other market parties pursuant to Regulation (EC) No 715/2009;
- s monitoring the correct application of the criteria that determine whether a storage facility falls under Article 33(3) or (4); and
- t monitoring the implementation of safeguards measures as referred to in Article 46;
- u contributing to the compatibility of data exchange processes for the most important market processes at regional level.

2 Where a Member State has so provided, the monitoring duties set out in paragraph 1 may be carried out by other authorities than the regulatory authority. In such a case, the information resulting from such monitoring shall be made available to the regulatory authority as soon as possible.

While preserving their independence, without prejudice to their own specific competencies and consistent with the principles of better regulation, the regulatory authority shall, as appropriate, consult transmission system operators and, as appropriate, closely cooperate with other relevant national authorities when carrying out the duties set out in paragraph 1.

Any approvals given by a regulatory authority or the Agency under this Directive are without prejudice to any duly justified future use of its powers by the regulatory authority under this Article or to any penalties imposed by other relevant authorities or the Commission.

3 In addition to the duties conferred upon it under paragraph 1 of this Article, when an independent system operator has been designated under Article 14, the regulatory authority shall:

- a monitor the transmission system owner's and the independent system operator's compliance with their obligations under this Article, and issue penalties for non compliance in accordance with paragraph 4(d);
- b monitor the relations and communications between the independent system operator and the transmission system owner so as to ensure compliance of the independent system operator with its obligations, and in particular approve contracts and act as a dispute settlement authority between the independent system operator and the transmission system owner in respect of any complaint submitted by either party pursuant to paragraph 11;
- c without prejudice to the procedure under Article 14(2)(c), for the first ten-year network development plan, approve the investments planning and the multi-annual network development plan presented annually by the independent system operator;
- d ensure that network access tariffs collected by the independent system operator include remuneration for the network owner or network owners, which provides for adequate remuneration of the network assets and of any new investments made therein, provided they are economically and efficiently incurred; and

- e have the powers to carry out inspections, including unannounced inspections, at the premises of transmission system owner and independent system operator.

4 Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out the duties referred to in paragraph 1, 3 and 6 in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the following powers:

- a to issue binding decisions on natural gas undertakings;
- b to carry out investigations into the functioning of the gas markets, and to decide upon and impose any necessary and proportionate measures to promote effective competition and ensure the proper functioning of the market. Where appropriate, the regulatory authority shall also have the power to cooperate with the national competition authority and the financial market regulators or the Commission in conducting an investigation relating to competition law;
- c to require any information from natural gas undertakings relevant for the fulfilment of its tasks, including the justification for any refusal to grant third-party access, and any information on measures necessary to reinforce the network;
- d to impose effective, proportionate and dissuasive penalties on natural gas undertakings not complying with their obligations under this Directive or any relevant legally binding decisions of the regulatory authority or of the Agency, or to propose to a competent court to impose such penalties. This shall include the power to impose or propose the imposition of penalties of up to 10 % of the annual turnover of the transmission system operator or of up to 10 % of the annual turnover of the vertically integrated undertaking on the transmission system operator or on the vertically integrated undertaking, as the case may be, for non compliance with their respective obligations pursuant to this Directive; and
- e appropriate rights of investigations and relevant powers of instructions for dispute settlement under paragraphs 11 and 12.

5 In addition to the duties and powers conferred on it under paragraphs 1 and 4 of this Article, when a transmission system operator has been designated in accordance with Chapter IV, the regulatory authority shall be granted at least the following duties and powers:

- a to issue penalties in accordance with paragraph 4(d) for discriminatory behaviour in favour of the vertically integrated undertaking;
- b to monitor communications between the transmission system operator and the vertically integrated undertaking so as to ensure compliance of the transmission system operator with its obligations;
- c to act as dispute settlement authority between the vertically integrated undertaking and the transmission system operator in respect of any complaint submitted pursuant to paragraph 11;
- d to monitor commercial and financial relations including loans between the vertically integrated undertaking and the transmission system operator;
- e to approve all commercial and financial agreements between the vertically integrated undertaking and the transmission system operator, on the condition that they comply with market conditions;
- f to request justification from the vertically integrated undertaking when notified by the compliance officer in accordance with Article 21(4). Such justification shall in particular include evidence to the end that no discriminatory behaviour to the advantage of the vertically integrated undertaking has occurred;
- g to carry out inspections, including unannounced inspections, on the premises of the vertically integrated undertaking and the transmission system operator; and

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- h to assign all or specific tasks of the transmission system operator to an independent system operator appointed in accordance with Article 14 in case of a persistent breach by the transmission system operator of its obligations under this Directive, in particular in case of repeated discriminatory behaviour to the benefit of the vertically integrated undertaking.

6 The regulatory authorities shall be responsible for fixing or approving sufficiently in advance of their entry into force at least the methodologies used to calculate or establish the terms and conditions for:

- a connection and access to national networks, including transmission and distribution tariffs, and terms, conditions and tariffs for access to LNG facilities. Those tariffs or methodologies shall allow the necessary investments in the networks and LNG facilities to be carried out in a manner allowing those investments to ensure the viability of the networks and LNG facilities;
- b the provision of balancing services which shall be performed in the most economic manner and provide appropriate incentives for network users to balance their input and off-takes. The balancing services shall be provided in a fair and non-discriminatory manner and be based on objective criteria; and
- c access to cross-border infrastructures, including the procedures for the allocation of capacity and congestion management.

7 The methodologies or the terms and conditions referred to in paragraph 6 shall be published.

8 In fixing or approving the tariffs or methodologies and the balancing services, the regulatory authorities shall ensure that transmission and distribution system operators are granted appropriate incentive, over both the short and long term, to increase efficiencies, foster market integration and security of supply and support the related research activities.

9 The regulatory authorities shall monitor congestion management of national gas transmission networks including interconnectors, and the implementation of congestion management rules. To that end, transmission system operators or market operators shall submit their congestion management rules, including capacity allocation, to the national regulatory authorities. National regulatory authorities may request amendments to those rules.

10 Regulatory authorities shall have the authority to require transmission, storage, LNG and distribution system operators, if necessary, to modify the terms and conditions, including tariffs and methodologies referred to in this Article, to ensure that they are proportionate and applied in a non-discriminatory manner. In the event that the access regime to storage is defined according to Article 33(3), that task shall exclude the modification of tariffs. In the event of delay in the fixing of transmission and distribution tariffs, regulatory authorities shall have the power to fix or approve provisional transmission and distribution tariffs or methodologies and to decide on the appropriate compensatory measures if the final tariffs or methodologies deviate from those provisional tariffs or methodologies.

11 Any party having a complaint against a transmission, storage, LNG or distribution system operator in relation to that operator's obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within a period of two months after receipt of the complaint. That period may be extended by two months where additional information is sought by the regulatory authorities. That extended period may be further extended with the agreement of the complainant. The regulatory authority's decision shall have binding effect unless and until overruled on appeal.

12 Any party who is affected and who has a right to complain concerning a decision on methodologies taken pursuant to this Article or, where the regulatory authority has a duty to

consult, concerning the proposed tariffs or methodologies, may, at the latest within two months, or a shorter time period as provided by Member States, following publication of the decision or proposal for a decision, submit a complaint for review. Such a complaint shall not have suspensive effect.

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

14 Member States shall ensure that the appropriate measures are taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where confidentiality rules imposed by this Directive have not been respected.

15 Complaints referred to in paragraphs 11 and 12 shall be without prejudice to the exercise of rights of appeal under Community or national law.

16 Decisions taken by regulatory authorities shall be fully reasoned and justified to allow for judicial review. The decisions shall be available to the public while preserving the confidentiality of commercially sensitive information.

17 Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.

#### *Article 42*

### **Regulatory regime for cross-border issues**

1 Regulatory authorities shall closely consult and cooperate with each other, and shall provide each other and the Agency with any information necessary for the fulfilment of their tasks under this Directive. In respect of the information exchanged, the receiving authority shall ensure the same level of confidentiality as that required of the originating authority.

2 Regulatory authorities shall cooperate at least at a regional level to:

- a foster the creation of operational arrangements in order to enable an optimal management of the network, promote joint gas exchanges and the allocation of cross-border capacity, and to enable an adequate level of interconnection capacity, including through new interconnections, within the region and between regions to allow for development of effective competition and improvement of security of supply without discriminating between supply undertakings in different Member States;
- b coordinate the development of all network codes for the relevant transmission system operators and other market actors; and
- c coordinate the development of the rules governing the management of congestion.

3 National regulatory authorities shall have the right to enter into cooperative arrangements with each other to foster regulatory cooperation.

4 The actions referred to in paragraph 2 shall be carried out, as appropriate, in close consultation with other relevant national authorities and without prejudice to their specific competencies.

5 The Commission may adopt Guidelines on the extent of the duties of the regulatory authorities to cooperate with each other and with the Agency. Those measures, designed

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to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

### *Article 43*

#### **Compliance with the Guidelines**

1 Any regulatory authority and the Commission may request the opinion of the Agency on the compliance of a decision taken by a regulatory authority with the Guidelines referred to in this Directive or in Regulation (EC) No 715/2009.

2 The Agency shall provide its opinion to the regulatory authority which has requested it or to the Commission, respectively, and to the regulatory authority which has taken the decision in question within three months from the date of receipt of the request.

3 Where the regulatory authority which has taken the decision does not comply with the Agency's opinion within four months from the date of receipt of that opinion, the Agency shall inform the Commission accordingly.

4 Any regulatory authority may inform the Commission where it considers that a decision relevant for cross border-trade taken by another regulatory authority does not comply with the Guidelines referred to in this Directive or in Regulation (EC) No 715/2009 within two months from the date of that decision.

5 Where the Commission, within two months of having been informed by the Agency in accordance with paragraph 3, or by a regulatory authority in accordance with paragraph 4, or on its own initiative, within three months from the date of the decision, finds that the decision of a regulatory authority raises serious doubts as to its compatibility with the Guidelines referred to in this Directive or in Regulation (EC) No 715/2009, the Commission may decide to examine the case further. In such a case, it shall invite the regulatory authority and the parties to the proceedings before the regulatory authority to submit observations.

6 Where the Commission takes a decision to examine the case further, it shall, within four months of the date of such decision, issue a final decision:

- a not to raise objections against the decision of the regulatory authority; or
- b to require the regulatory authority concerned to withdraw its decision on the basis that the Guidelines have not been complied with.

7 Where the Commission has not taken a decision to examine the case further or a final decision within the time-limits set in paragraphs 5 and 6 respectively, it shall be deemed not to have raised objections to the decision of the regulatory authority.

8 The regulatory authority shall comply with the Commission decision to withdraw its decision within a period of two months and shall inform the Commission accordingly.

9 The Commission may adopt Guidelines setting out the details of the procedure to be followed by the regulatory authorities, the Agency and the Commission as regards the compliance of decisions taken by regulatory authorities with the Guidelines referred to in this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).



#### Article 44

### Record keeping

1 Member States shall require supply undertakings to keep at the disposal of the national authorities, including the regulatory authority, the national competition authorities and the Commission, for the fulfilment of their tasks, for at least five years, the relevant data relating to all transactions in gas supply contracts and gas derivatives with wholesale customers and transmission system operators as well as storage and LNG operators.

2 The data shall include details on the characteristics of the relevant transactions such as duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified details of all unsettled gas supply contracts and gas derivatives.

3 The regulatory authority may decide to make available to market participants elements of this information provided that commercially sensitive information on individual market players or individual transactions is not released. This paragraph shall not apply to information about financial instruments which fall within the scope of Directive 2004/39/EC.

4 To ensure the uniform application of this Article, the Commission may adopt Guidelines which define the methods and arrangements for record keeping as well as the form and content of the data that shall be kept. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51(3).

5 With respect to transactions in gas derivatives of supply undertakings with wholesale customers and transmission system operators as well as storage and LNG operators, this Article shall apply only once the Commission has adopted the Guidelines referred to in paragraph 4.

6 The provisions of this Article shall not create additional obligations towards the authorities referred to in paragraph 1 for entities falling within the scope of Directive 2004/39/EC.

7 In the event that the authorities referred to in paragraph 1 need access to data kept by entities falling within the scope of Directive 2004/39/EC, the authorities responsible under that Directive shall provide them with the required data.

## CHAPTER IX

### RETAIL MARKETS

#### Article 45

### Retail markets

In order to facilitate the emergence of well functioning and transparent retail markets in the Community, Member States shall ensure that the roles and responsibilities of transmission system operators, distribution system operators, supply undertakings and customers and if necessary other market parties are defined with respect to contractual arrangements, commitment to customers, data exchange and settlement rules, data ownership and metering responsibility.

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Those rules shall be made public, be designed with the aim to facilitate customers' and suppliers' access to networks and they shall be subject to review by the regulatory authorities or other relevant national authorities.

## CHAPTER X

### FINAL PROVISIONS

#### *Article 46*

##### **Safeguard measures**

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

2 Such measures shall cause the least possible disturbance to the functioning of the internal market and shall be no wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

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

#### *Article 47*

##### **Level playing field**

1 Measures that the Member States may take pursuant to this Directive in order to ensure a level playing field shall be compatible with the Treaty, notably Article 30 thereof, and with the legislation of the Community.

2 The measures referred to in paragraph 1 shall be proportionate, non-discriminatory and transparent. Those measures may be put into effect only following the notification to and approval by the Commission.

3 The Commission shall act on the notification referred to in paragraph 2 within two months of the receipt of the notification. That period shall begin on the day following receipt of the complete information. In the event that the Commission has not acted within that two-month period, it shall be deemed not to have raised objections to the notified measures.

#### *Article 48*

##### **Derogations in relation to take-or-pay commitments**

1 If a natural gas undertaking encounters, or considers it would encounter, serious economic and financial difficulties because of its take-or-pay commitments accepted in one or more gas-purchase contracts, it may send an application for a temporary derogation from Article 32 to the Member State concerned or the designated competent authority. Applications shall, in accordance with the choice of Member States, be presented on a case-by-case basis either before or after refusal of access to the system. Member States may also give the natural gas

undertaking the choice of presenting an application either before or after refusal of access to the system. Where a natural gas undertaking has refused access, the application shall be presented without delay. The applications shall be accompanied by all relevant information on the nature and extent of the problem and on the efforts undertaken by the natural gas undertaking to solve the problem.

If alternative solutions are not reasonably available, and taking into account paragraph 3, the Member State or the designated competent authority may decide to grant a derogation.

2 The Member State, or the designated competent authority, shall notify the Commission without delay of its decision to grant a derogation, together with all the relevant information with respect to the derogation. That information may be submitted to the Commission in an aggregated form, enabling the Commission to reach a well-founded decision. Within eight weeks of receipt of that notification, the Commission may request that the Member State or the designated competent authority concerned amend or withdraw the decision to grant a derogation.

If the Member State or the designated competent authority concerned does not comply with that request within a period of four weeks, a final decision shall be taken expeditiously in accordance with the advisory procedure referred to in Article 51(2).

The Commission shall preserve the confidentiality of commercially sensitive information.

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

- a the objective of achieving a competitive gas market;
- b the need to fulfil public-service obligations and to ensure security of supply;
- c the position of the natural gas undertaking in the gas market and the actual state of competition in that market;
- d the seriousness of the economic and financial difficulties encountered by natural gas undertakings and transmission undertakings or eligible customers;
- e the dates of signature and terms of the contract or contracts in question, including the extent to which they allow for market changes;
- f the efforts made to find a solution to the problem;
- g the extent to which, when accepting the take-or-pay commitments in question, the undertaking could reasonably have foreseen, having regard to the provisions of this Directive, that serious difficulties were likely to arise;
- h the level of connection of the system with other systems and the degree of interoperability of those systems; and
- i the effects the granting of a derogation would have on the correct application of this Directive as regards the smooth functioning of the internal market in natural gas.

A decision on a request for a derogation concerning take-or-pay contracts concluded before 4 August 2003 should not lead to a situation in which it is impossible to find economically viable alternative outlets. Serious difficulties shall in any case be deemed not to exist when the sales of natural gas do not fall below the level of minimum offtake guarantees contained in gas-purchase take-or-pay contracts or in so far as the relevant gas-purchase take-or-pay contract can be adapted or the natural gas undertaking is able to find alternative outlets.

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4 Natural gas undertakings which have not been granted a derogation as referred to in paragraph 1 of this Article shall not refuse, or shall no longer refuse, access to the system because of take-or-pay commitments accepted in a gas purchase contract. Member States shall ensure that the relevant provisions of Articles 32 to 44 are complied with.

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

6 The Commission shall, within 4 August 2008, submit a review report on the experience gained from the application of this Article, so as to allow the European Parliament and the Council to consider, in due course, the need to adjust it.

#### Article 49

### Emergent and isolated markets

1 Member States not directly connected to the interconnected system of any other Member State and having only one main external supplier may derogate from Articles 4, 9, 37 and/or 38. A supply undertaking having a market share of more than 75 % shall be considered to be a main supplier. Any such derogation shall automatically expire where at least one of the conditions referred to in this subparagraph no longer applies. Any such derogation shall be notified to the Commission.

Cyprus may derogate from Articles 4, 9, 37 and/or 38. Such derogation shall expire from the moment when Cyprus is not qualifying as an isolated market.

Articles 4, 9, 37 and/or 38 shall not apply to Estonia, Latvia and/or Finland until any of those Member States is directly connected to the interconnected system of any Member State other than Estonia, Latvia, Lithuania and Finland. This subparagraph is without prejudice to derogations under the first subparagraph of this paragraph.

2 A Member State, qualifying as an emergent market, which, because of the implementation of this Directive, would experience substantial problems may derogate from Articles 4 and 9, Article 13(1) and (3), Articles 14 and 24, Article 25(5), Articles 26, 31 and 32, Article 37(1) and/or Article 38. Such derogation shall automatically expire from the moment when the Member State no longer qualifies as an emergent market. Any such derogation shall be notified to the Commission.

Cyprus may derogate from Articles 4 and 9, Article 13(1) and (3), Articles 14 and 24, Article 25(5), Articles 26, 31 and 32, Article 37(1) and/or Article 38. Such derogation shall expire from the moment when Cyprus is not qualifying as an emergent market.

3 On the date at which the derogation referred to in the first subparagraph of paragraph 2 expires, the definition of eligible customers shall result in an opening of the market equal to at least 33 % of the total annual gas consumption of the national gas market. Two years thereafter, Article 37(1)(b) shall apply, and three years thereafter, Article 37(1)(c) shall apply. Until Article 37(1)(b) applies the Member State referred to in paragraph 2 of this Article may decide not to apply Article 32 as far as ancillary services and temporary storage for the re-gasification process and its subsequent delivery to the transmission system are concerned.

4 Where the implementation of this Directive would cause substantial problems in a geographically limited area of a Member State, in particular concerning the development of the transmission and major distribution infrastructure, and with a view to encouraging investments, the Member State may apply to the Commission for a temporary derogation from

Articles 4 and 9, Article 13(1) and (3), Articles 14 and 24, Article 25(5), Articles 26, 31 and 32, Article 37(1) and/or Article 38 for developments within that area.

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

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

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

For distribution infrastructure a derogation may be granted for a period not exceeding 20 years from when gas is first supplied through the said infrastructure in the area.

6 Article 9 shall not apply to Cyprus, Luxembourg and/or Malta.

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

8 Greece may derogate from Articles 4, 24, 25, 26, 32, 37 and/or 38 of this Directive for the geographical areas and time periods specified in the licences issued by it, prior to 15 March 2002 and in accordance with Directive 98/30/EC, for the development and exclusive exploitation of distribution networks in certain geographical areas.

#### *Article 50*

### **Review procedure**

In the event that in the report referred to in Article 52(6), the Commission reaches the conclusion that, given the effective manner in which network access has been carried out in a Member State — which gives rise to fully effective, non-discriminatory and unhindered network access — certain obligations imposed by this Directive on undertakings (including those with respect to legal unbundling for distribution system operators) are not proportionate to the objective pursued, the Member State in question may submit a request to the Commission for exemption from the requirement in question.

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

Within three months of its receipt of a notification, the Commission shall adopt an opinion with respect to the request by the Member State concerned, and where appropriate, submit proposals to the European Parliament and to the Council to amend the relevant provisions of this Directive. The Commission may propose, in the

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proposals to amend this Directive, to exempt the Member State concerned from specific requirements subject to that Member State implementing equally effective measures as appropriate.

#### *Article 51*

#### **Committee**

- 1 The Commission shall be assisted by a committee.
- 2 Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.
- 3 Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

#### *Article 52*

#### **Reporting**

- 1 The Commission shall monitor and review the application of this Directive and submit an overall progress report to the European Parliament and the Council for the first time by 31 December 2004, and thereafter on an annual basis. The progress report shall cover at least:
  - a the experience gained and progress made in creating a complete and fully operational internal market in natural gas and the obstacles that remain in this respect including aspects of market dominance, concentration in the market, predatory or anti-competitive behaviour;
  - b the derogations granted under this Directive, including implementation of the derogation provided for in Article 26(4) with a view to a possible revision of the threshold;
  - c the extent to which the unbundling and tariffication requirements contained in this Directive have been successful in ensuring fair and non-discriminatory access to the Community's gas system and equivalent levels of competition, as well as the economic, environmental and social consequences of the opening of the gas market for customers;
  - d an examination of issues relating to system capacity levels and security of supply of natural gas in the Community, and in particular the existing and projected balance between demand and supply, taking into account the physical capacity for exchanges between areas and the development of storage (including the question of the proportionality of market regulation in that field);
  - e special attention will be given to the measures taken in Member States to cover peak demand and to deal with shortfalls of one or more suppliers;
  - f a general assessment of the progress achieved with regard to bilateral relations with third countries which produce and export or transport natural gas, including progress in market integration, trade and access to the networks of such third countries;
  - g the need for possible harmonisation requirements which are not linked to the provisions of this Directive.

Where appropriate, the progress report may include recommendations and measures to counteract the negative effects of market dominance and market concentration.

In the report, the Commission, in consultation with the ENTSO for Gas, may also consider the feasibility of the creation, by transmission system operators, of a single European transmission system operator.

2 Every two years, the progress report referred to in paragraph 1 shall also include an analysis of the different measures taken in Member States to meet public service obligations, together with an examination of the effectiveness of those measures, and, in particular, their effects on competition in the gas market. Where appropriate, the report may include recommendations as to the measures to be taken at national level to achieve high public service standards or measures intended to prevent market foreclosure.

3 The Commission shall, by 3 March 2013, submit, as part of the general review, to the European Parliament and the Council, a detailed specific report outlining the extent to which the unbundling requirements under Chapter IV have been successful in ensuring full and effective independence of transmission system operators, using effective and efficient unbundling as a benchmark.

4 For the purpose of its assessment under paragraph 3, the Commission shall take into account, in particular, the following criteria: fair and non-discriminatory network access, effective regulation, the development of the network to meet market needs, undistorted incentives to invest, the development of interconnection infrastructure, effective competition in the energy markets of the Community and the security of supply situation in the Community.

5 Where appropriate, and in particular in the event that the detailed specific report referred to in paragraph 3 determines that the conditions referred to in paragraph 4 have not been guaranteed in practice, the Commission shall submit proposals to the European Parliament and the Council to ensure fully effective independence of transmission system operators by 3 March 2014.

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

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

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

Where appropriate, the Commission shall submit proposals to the European Parliament and the Council, in particular to ensure full and effective independence of distribution

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system operators before 1 July 2007. Where necessary, those proposals shall, in conformity with competition law, also concern measures to address issues of market dominance, market concentration and predatory or anti-competitive behaviour.

#### *Article 53*

##### **Repeal**

Directive 2003/55/EC is repealed from 3 March 2011 without prejudice to the obligations of Member States concerning the deadlines for transposition and application of the said Directive. References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

#### *Article 54*

##### **Transposition**

1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 3 March 2011. They shall forthwith inform the Commission thereof.

They shall apply those measures from 3 March 2011 with the exception of Article 11, which they shall apply from 3 March 2013.

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

2 Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 55*

##### **Entry into force**

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

#### *Article 56*

##### **Addressees**

This Directive is addressed to the Member States.



Done at Brussels, 13 July 2009.

*For the European Parliament*

*The President*

H.-G. PÖTTERING

*For the Council*

*The President*

E. ERLANDSSON

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- (1) The title of Directive 83/349/EEC has been adjusted to take account of the renumbering of the Articles of the Treaty establishing the European Community in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 54(3)(g).
- (2) [OJ L 193, 18.7.1983, p. 1.](#)
- (3) [OJ L 145, 30.4.2004, p. 1.](#)
- (4) [OJ L 127, 29.4.2004, p. 92.](#)
- (5) [OJ L 204, 21.7.1998, p. 37.](#)
- (6) See page 55 of this Official Journal.
- (7) 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.](#))
- (8) 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).
- (9) [OJ L 222, 14.8.1978, p. 11.](#)
- (10) [OJ L 204, 21.7.1998, p. 1.](#)