



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.02.1998  
SEC(1998) 209 final – COD 385

COMMUNICATION FROM THE COMMISSION  
TO THE EUROPEAN PARLIAMENT

pursuant to the second subparagraph of Article 189 b (2) of the EC-Treaty

**Common position taken by the Council of the European Union on the proposal for a Directive of the European Parliament and of the Council concerning common rules for the internal market in natural gas.**

## I. STATE OF THE PROCEDURE

The Commission presented to the Council on 21 February 1992 a proposal for a Council Directive concerning common rules for the internal market for natural gas (COM(91) 548 final SYN 385).

The Economic and Social Committee gave its opinion on 27 January 1993.

The European Parliament gave its opinion in a first reading on 17 November 1993. It proposed a number of amendments.

The Commission presented an amended proposal for a European Parliament and Council Directive on 7 December 1993 (COM(93)643 final - COD 385).

The Council of the European Union adopted a common position on 12 February 1998.

## II. LEGAL BASIS

The present proposal for a Directive is based on Article 57(2), Article 66 and Article 100a of the EC Treaty. These articles require the procedure of Article 189b of the EC Treaty.

## III. OBJECT

The present proposal for a Directive concerns the transmission, distribution, supply and storage of natural gas. It aims at ensuring the introduction of competition to the natural gas sector, creating more efficiency, ensuring more transparency, strengthening security of supply and providing equal access for all eligible customers to this sector. The proposal is part of the second phase of the effort of the Commission to establish the internal gas market and as such represents an important phase towards the creation of a true internal market in the natural gas sector. It may be followed by further measures improving the internal market in natural gas.

## IV. COMMENTS TO THE COMMON POSITION

### 1. **General comments**

The common position is generally in line with the amended proposal of the Commission. It will gradually open the natural gas market to more competition, while ensuring the fulfillment of public service obligations and guaranteeing reasonable safeguards for operators from possible economic and financial difficulties deriving from take-or-pay commitments. The Commission considers that the modifications in the text of the recitals and articles do not change the essence of the content of the amended proposal for a Directive, although it does regret that distributors will not in all cases be fully eligible to participate in the new market arrangements.

2. **Amendments by the European Parliament in its first reading**

a) **Accepted by the Commission and integrated in the common position**

Amendments: 112, 113, 120, 124, 126, 129, 136, 137, 139, 145, 146, 151, 154, 155, 158, 162, 169, 234, 172, 173, 180, 219 (part), 186, 187, 191, 196, 197, 198, 201, 202 (part), 212, 213.

b) **Accepted by the Commission and not integrated in the common position**

Amendments: 115, 117, 127, 131, 132, 133, 135, 150, 157, 159, 160, 164, 193.

c) **Not accepted by the Commission, but integrated in the common position**

Amendments: 142 (part), 175 (part), 179, 184, 185, 192.

d) **Not accepted by the Commission, not integrated in the common position**

Amendments: 227, 114, 116, 118, 119, 121, 122, 123, 125, 128, 130, 134, 138, 140, 141, 143, 144, 147, 148, 149, 152, 153, 156, 161, 163, 165, 166, 167, 168, 171, 220, 239, 178, 181, 182, 183, 188, 189, 240, 194, 195, 199, 203, 204, 205, 206, 207, 208, 209, 210, 211, 214.

3 **Principal modifications by the Council**

a) **Recitals**

The Council decided to adapt the recitals to reflect the changes made in the articles of the proposal. The recitals refer to many issues such as the internal market, competitiveness, public service obligations, external supply, long term planning, authorizations, the gradual completion of the internal energy market, regulation, the transposition of the Directive, system access, Treaty rules on competition, take-or-pay contracts, transparency, upstream pipelines, customer rights, environmental protection, dispute settlement and further liberalization.

The Commission accepts ~~these modifications~~ as clarifications of the text of the proposal and underlines the importance of recital 6 stating that the provision of the Directive shall not affect the full application of the EC Treaty, in particular the provisions concerning the internal market and competition.

b) **Chapter I (Scope and definitions)**

This chapter in its Article 1 delimits the scope and defines the activities which are regulated by the provisions of the Directive. Article 2 provides a list of definitions covering the main concepts included in the Directive.

The Council decided to modify some of the definitions of Article 2 (for example 2.3 "transmission" and 2.12 "interconnected system"), add new ones (for example 2.2 "upstream pipeline network" and 2.13 "system") and delete certain old ones (for example old 2.12 "European specification" and old 2.13 "European standard"). The modifications clarify the various concepts used in the text of the proposal.

The Commission accepts these modifications as clarifications of the text of the proposal.

c) **Chapter II (General rules for the organization of the sector)**

This chapter establishes some general principles which apply to the sector. In particular, Article 3 gives the possibility to Member States to impose specific public service obligations on natural gas undertakings. Article 4 provides that objective and non-discriminatory criteria be applied by Member States for the granting of authorizations for the construction and operation of gas facilities.

The Council decided to modify this chapter. The modifications clarify the objective of introducing competition, the balance between competition and public service obligations and the scope of public service (Article 3). They also provide procedures for the definition of public service obligations at the Member State level. The modifications result in greater emphasis on public service obligations as compared to the Commission's amended proposal, which is in line with the opinion expressed by the European Parliament in first reading.

The authorization procedures for the construction and operation of various gas facilities have been streamlined (Article 4). The modifications concern the abolition of the list of specific criteria which may be imposed by Member States and the deletion of the provisions concerning the expropriation procedures because of the possible constitutional implications of such a mechanism. Moreover, a limitation to the granting of authorization of distribution pipelines in newly supplied areas has been added. In addition, the Council has included an obligation for Member States to inform the Commission of the reasons for any refusal. The Council has strengthened the reference to the establishment of technical rules necessary to ensure the interoperability of the systems.

The Commission accepts the modifications of Article 3 as striking the correct balance between competition rules and public service considerations. The result is a text which is a good reflection of the rules of the EC Treaty. The greater emphasis on public service obligations should be placed within the context of Community law, and in particular of Article 90(2) of the Treaty. The Commission can also accept the modifications to Article 4, which aim at ensuring the objective and non-discriminatory treatment of investments in gas facilities and the technical efficiency of the gas networks. The Commission will ensure the monitoring of the proper and full respect of these rules.

d) Chapter III (Transmission, Storage and LNG)

This chapter establishes the common rules applying to natural gas undertakings which operate in the transmission, storage and LNG (liquefied natural gas) activities (Article 6, 7, 8).

The Council decided to enlarge the scope of Chapter III which now also covers LNG. The Council also decided, in line with the opinion of the European Parliament, to streamline the technical provisions of this chapter. Greater emphasis is made on environmental concern and on the obligation for transmission undertakings not to abuse of commercially sensitive information obtained from third parties. These changes are in line with the first reading of the European Parliament.

The Commission accepts these modifications.

e) Chapter IV (Distribution and supply)

This chapter establishes some basic minimum rules applying to natural gas undertakings which operate in the distribution and supply activities (Article 9, 10, 11).

The Council decided to enlarge the scope of Chapter IV which now also covers the activity of supply. This chapter was also streamlined and brought in line with the Chapter III on the operation of transmission, storage and LNG activities. The obligation for Member States to designate a system operator responsible for the distribution system was deleted, in line with the opinion of the European Parliament. An obligation to supply customers can be imposed by Member States and tariffs for these customers may be regulated.

The Commission accepts these modifications.

f) Chapter V (Unbundling and transparency of accounts)

~~This chapter imposes an obligation on integrated undertakings to separate internal accounts for transmission, distribution, storage and non-gas activities to allow competent authorities to control the cost allocation when deciding on disputes for the use of the system. It includes some minimum rules on the organization of the accounts and the respect of confidentiality in the treatment of this information.~~

The Council decided to ~~modify~~ this chapter. The ~~deletion~~ of management unbundling has been ~~maintained~~, in line with the opinion of the European Parliament. The introduction of the separation of the accounts for the activities not related to the gas sector constitutes an added-value to the transparency of accounts. However, the Council decided not to separate the accounts for production activities. The provisions on the respect of the confidentiality of commercially sensitive information by any competent authority were strengthened, in line with the opinion of the European Parliament.

The Commission accepts these modifications. The Commission will make all efforts to ensure that these unbundled internal accounts will be established on a comparable basis.

g) Chapter VI (Access to the system)

This chapter provides the basic rules for the organization of access to the system for natural gas undertakings and eligible customers. It also establishes the criteria for the definition of eligible customers (Article 18). A safeguard/adjustment clause was included to avoid any imbalance between Member States (Article 19). Other provisions relate to the possibility of building direct lines and the obligation for Member States to designate a dispute settlement authority and a mechanism to avoid any abuse of dominant position. A specific article applies to the requirement that Member States give access to upstream pipeline network (Article 23).

The Council decided to modify this chapter. The modifications have introduced the possibility for Member States to choose between two systems of access: negotiated Third Party Access and regulated Third Party Access. Under the negotiated TPA, gas undertakings will be obliged to publish annually their main commercial conditions for the use of the system, while access to the network in the regulated TPA system will be made on the basis of the publication of the tariffs for the use of the system. Unlike the directive on common rules for the internal electricity market, no provision has been made for the introduction of the Single Buyer as a third option for the system of access.

Access to the network may be refused where this would prevent an undertaking from carrying out public service obligations, in case of serious economic difficulties with take-or-pay contracts within the procedure foreseen in Article 25 and on the basis of lack of capacity. However, in the latter case, attention may be paid to the possibility to make the necessary enhancements to the network.

The modifications to the mechanism of market opening introduce a system of gradual and progressive market opening over a ten year period, which includes a combination of qualitative and quantitative criteria. The application of a qualitative criteria means the establishment of a threshold for the eligibility of industrial customers which will be initially set at 25 million m<sup>3</sup>, then reduced to 15 million after five years and 5 million after ten years. Moreover, all electricity producers will be considered eligible, irrespective of their annual consumption. However, in order to safeguard the balance of their electricity market, Member States may introduce a threshold for the eligibility of combined heat and power producers, not exceeding the threshold established for other final consumers.

Quantitative criteria will also apply, introducing a minimum obligatory percentage of market opening for Member States, initially set at 20%, and then raised at 28% and 33% after five and ten years respectively. To take account of possible imbalances on the level of market opening due to the different gas

market structures, Member States may reduce the level of market opening if, after application of the qualitative criteria, this exceeds 30%, 38% and 43% during the first, second and third stage respectively. In addition to this, distributors, where they are not already considered eligible, will be eligible for the supply of gas consumed by their customers which are designated as eligible.

A safeguard/adjustment clause may be applied where different degrees of market opening exist between Member States to avoid any imbalances between the different markets (Article 19). This clause will be reviewed by the Commission at latest five years after the entry into force of the Directive.

This chapter also includes specific rules for dispute settlement authorities, for the authorizations concerning direct lines and for the establishment of mechanisms for regulation, control and transparency.

In addition, a specific provision was included on the access to the upstream pipeline networks, which must ensure that access can be obtained in a way to be determined by each Member State and must be based on fair and open access. The objective of this provision is to ensure that the specific organization of this sector in the Member States be taken into account in the framework of the system of access.

The Commission accepts these modifications. It considers that they maintain the basic principles of the Directive relating to a progressive and substantial level of market opening and a degree of subsidiarity as regard the choice of the system of access. The combination of qualitative and quantitative criteria in particular achieves the objective of balancing, on the one hand, the need to give the choice to customers subject to international competition and, on the other hand, the necessity to ensure an equilibrated degree of market opening in all Member States. The approach chosen reflects the transitional character of the Directive, which represents a progressive step leaving open the possibility of greater liberalization in the future.

The safeguard/adjustment clause included in Article 19 fits into this transitional approach, and will cease to exist after the review of the Directive which will take place ten years after its entry into force. The Commission would not have been in a position to accept this clause if it had been a permanent instrument. The Commission will review the application of this clause halfway that time period. This transitional approach is also in line with the opinion expressed by the European Parliament in first reading.

#### **h) Chapter VII (Final provisions)**

This chapter includes some specific provisions concerning derogations from the application of the Directive and general final provisions. Article 25 concerns specific temporary derogations which may be granted when a natural gas undertaking is faced with economic and financial difficulties deriving from take-or-pay commitments. Other derogations are provided for emergent markets, for Member States not directly connected to the interconnected system of any

other Member State and for areas where investments may need some form of temporary protection because of the recent introduction of natural gas (Article 26). This chapter also includes an obligation for the Commission to present a report on harmonization needs one year after the entry into force of the Directive.

The Council decided to modify this chapter. The procedure for the granting of derogation in case of difficulties for gas undertakings with take-or-pay commitments has been modified to ensure the need to protect gas companies from potential serious economic and financial difficulties due to a change towards a framework of more competitive market conditions and taking into account any alternative measures. All the relevant parties are involved in the derogation procedure, with the final decision to be taken in accordance with procedure I of Article 2 of Council Decision 87/373 (Consultative Committee). An exhaustive list of criteria to be taken into account by the competent authorities was added, which contribute to a clarification of the extent of the derogation.

The Council decided to introduce a derogation for Member States which can be qualified as emergent markets because of the recent introduction of natural gas and for Member States not connected to the interconnected system of any other Member State. Temporary derogations may be granted by the Commission for geographically limited areas of Member States where the implementation of the Directive would create substantial problems for the development of the natural gas network (Article 26.4).

The presentation to the Council and the European Parliament of a report of the Commission on harmonization requirements was maintained, in line with the opinion of the European Parliament.

The Commission accepts these modifications. They contribute to clarifying the extent of the derogation procedure and at ensuring a balanced development of new gas markets, while maintaining a decisive role for the Commission in ensuring a level playing field within the internal market. The Commission intends to apply the criteria for temporary derogations referred to in Article 26.4 in a restrictive manner excluding an unacceptable proliferation of such derogations.

## V. CONCLUSIONS

The Commission supports the common position of the Council, which has been adopted by unanimity, because it follows the line and direction of its own proposals. Modifications by the Council have made this line more balanced, but have not changed the basic principles underlying the amended proposal for a Directive. In reaching this common position full account has been taken of the amendments of the European Parliament which made an important contribution to providing a text which the Commission views as well-balanced and likely to produce an effective single market for gas in the European Union.