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

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

On 3 and 4 September 2002, the Working Party on Energy examined the revised text of the above proposal prepared by the Presidency (document 11272/02), with the exception of Articles 1 and 2. The result of this examination is set out at Annex.

Comments and drafting suggestions by delegations are in footnotes. Provisions as amended by the Presidency are in **bold**.

At this stage, a positive scrutiny reservation on this text from I, as well as scrutiny reservations from D/E/F are recorded.

(consolidated proposal)
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
concerning rules for the internal markets in electricity and repealing Directive 96/92/EC

Chapter I
Scope and definitions

Article 1

This Directive establishes common rules for the generation, transmission, distribution and supply of electricity. It lays down the rules relating to the organisation and functioning of the electricity sector, access to the market, the criteria and procedures applicable to calls for tender and the granting of authorisations and the operation of systems.

Article 2

For the purposes of this Directive:

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

* Recital 8 to read "In order to achieve non-discriminatory access to the network, the independence of the transmission system operator is of paramount importance. A transmission system operator may comprise one or more undertakings. The provisions on unbundling should therefore be strengthened. In order to ensure non-discriminatory access to the distribution network, unbundling requirements for the distribution system operator should be introduced for electricity distribution system operators"

area and, where applicable, its interconnections with other systems and for ensuring the long-term ability of the system to meet reasonable demands for the distribution of electricity;

- 9) "customers" means wholesale and final customers of electricity ;
- 10) "wholesale customers" means any natural or legal persons who purchase electricity for the purpose of resale inside or outside the system where they are established;
- 11) "final customer" means a customer purchasing electricity for his/her own use;
- 12) "household customer" means a customer purchasing electricity for his/her own household consumption, excluding commercial or professional activities;
- 13) "non-household customer" means any natural or legal person purchasing electricity which is not for its own household use and shall include producers and wholesale customers;
- 14) "eligible customer[]" means a customer[] which is free to purchase electricity from the supplier of his/her choice in the meaning of Article 19 of this Directive;
- 15) "interconnectors" means equipment used to link electricity systems;
- 16) "interconnected system" means a number of transmission and distribution systems linked together by means of one or more interconnectors;
- 17) "direct line" means either an electricity line linking an isolated production site with an isolated customer or an electricity line linking an electricity producer and an electricity supply undertaking to supply directly their own premises, subsidiaries and eligible customers ;
- 18) "economic precedence" means the ranking of sources of electricity supply in accordance with economic criteria;
- 19) "ancillary services" means all services necessary for the operation of a transmission or distribution system;
- 20) "system user" means any natural or legal person supplying to, or being supplied by, a transmission or distribution system;
- 21) "supply" means the sale, **including resale**, of electricity to customers;
- 22) "integrated electricity undertaking" means a vertically or horizontally integrated undertaking;
- 23) "vertically integrated undertaking" means an undertaking or a group of undertakings whose mutual relationships are defined in Article 3(3) of Council Regulation (EEC) No 4064/89* and where the undertaking/group concerned is performing at least one of the functions of transmission or distribution and at least one of the functions of generation **or** supply or resale of electricity ;

* OJ L 257, 21.9.90, p.13

- 24) "horizontally integrated undertaking" means an undertaking performing at least one of the functions of generation for sale, or transmission, or distribution, or supply of electricity, and another non-electricity activity;
- 25) "tendering procedure" means the procedure through which planned additional requirements and replacement capacity are covered by supplies from new or existing generating capacity;
- 26) "long-term planning" means the planning of the need for investment in generation and transmission and distribution capacity on a long-term basis, with a view to meeting the demand for electricity of the system and securing supplies to customers;
- 27) "small isolated system" means any system with consumption of less than 2500 GWh in the year 1996, where less than 5% of annual consumption is obtained through interconnection with other systems;
- 28) "energy imbalance" means the difference between the quantity of electricity notified *by one or more system users* to the transmission or distribution system operator for injection or withdrawal at one or more given locations over a given time period and the [] quantity of electricity *actually* withdrawn or injected *by the same system users* at *the same* locations over the same time period;
- 29) "security" means both security of supply and provision of electricity, and technical safety;
- 30) "energy efficiency/demand-side management" means a global or integrated approach aimed at influencing the amount and timing of electricity consumption in order to reduce primary energy consumption and peak loads by giving precedence to investments in energy efficiency measures, or other measures, such as interruptible supply contracts, over investments to increase generation capacity, if the former are the most effective and economical option, taking into account the positive environmental impact of reduced energy consumption and the security of supply and distribution cost aspects related to it;
- 31) "renewable energy sources" means renewable non-fossil energy sources (wind, solar, geothermal, wave, tidal, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases);
- 32) "distributed generation" means generation plants connected to the [] distribution system;
- 33) "disclosure" means making available in aggregate form commercial information associated with the production of electricity and relating to the sources used to produce electricity, their location, or environmental impact.

Chapter II

General rules for the organisation of the sector

Article 3

1. Member States shall ensure, on the basis of their institutional organisation and with due regard for the principle of subsidiarity, that, without prejudice to paragraph 2, electricity undertakings are operated in accordance with the principles of this Directive, with a view to achieving a competitive and sustainable market in electricity, and shall not discriminate between these undertakings as regards either rights or obligations.
2. Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency and climate protection. *When* financial compensation, other forms of compensation and exclusive rights which a Member State grants for the fulfilment of such obligations *are provided, this shall be done* in a non-discriminatory and transparent way. Such obligations shall be clearly defined, transparent, non-discriminatory and verifiable. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals, as referred to in this paragraph Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.
3. Member States shall ensure that at least all household¹ customers enjoy universal service*, that is the right to be supplied with electricity of a specified quality within their territory at reasonable ²prices. To that end, Member States may appoint a supplier of last resort**. Member States shall impose on distribution companies an obligation to connect customers to their grid under terms, conditions and tariffs set in accordance with the procedure laid down in Article 22(2).

The above provision shall be implemented in a transparent and non-discriminatory way and shall not impede **the ~~full~~³ market opening provided by Article 19.**

¹ E: would prefer to replace "household" by "final". D/A: agree to "household", but would clarify that only "household" is meant. Cion: reservation on the limitation to "household".

* Recital to clarify that universal service can be interpreted on a national basis, taking into account national circumstances

Recital to indicate that "*When universal service is also provided to SMEs measures to ensure that this universal service is provided* may differ according to households and SMEs."

² P: would like to have a definition of "reasonable"

** Recital to indicate that "*The supplier of last resort appointed by Member States may be a distribution company.*"

³ E: replace "full" by "effective"

4. Member States shall take appropriate measures to protect [final customers]⁴, and shall in particular ensure that there are adequate safeguards to protect vulnerable customers, including measures to *help them avoid*⁵ disconnection []. In this context, Member States may take [] measures to protect final customers in remote areas. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is effectively able to switch to a new supplier. []. [As regard at least household customers these measures shall include those set out in the Annex]⁶.
5. Member States shall ensure that electricity suppliers specify in the bills and in [] promotional materials made available to final customers:
- []
- (a) the *contribution of each energy source to the* overall fuel mix of the supplier over the preceding year;
- (b)⁷ the relative importance of each energy source with respect to the *emissions* of CO₂ [] *resulting from electricity production*

The implementation of paragraph 5(b) may be undertaken on the basis of publicly available aggregated figures representing average CO₂ emissions.

With respect to electricity obtained via an electricity exchange or imported from an undertaking situated outside the European Union, [] aggregate figures provided by the exchange or the undertaking in question over the preceding year may be used.

[Where a supplier offers electricity for sale from a specified *fuel mix*, Member States shall ensure that appropriate verification measures of the *fuel mix* are in place.]⁸

6. Member States shall implement appropriate measures to achieve the objectives of social and economic cohesion, environmental protection, which may include energy efficiency/demand-side management measures and 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 the necessary network infrastructure, including interconnection capacity.
7. Member States may decide not to apply the provisions of Articles 5, 6, 16 and 21 in so far as their application would obstruct the performance, in law or in fact, of the obligations imposed on electricity undertakings in the general economic interest and in so far as the development

⁴ D/I/NL/A/UK: replace bracketed words by "household"

⁵ NL: prefers earlier text to underlined words

⁶ D/FIN/NL/UK: would prefer Annex to be optional. IRL: prefers Annex to be mandatory, at least for households. Cion: reservation on Annex being mandatory only for households

⁷ D/E/FIN/I/IRL/S/UK: this provision is too ambitious and prescriptive, basic level of information should be appropriate. E: doubts on specific nature of provision, is afraid of disproportionate costs. FIN/NL/A: provision could be simplified or even deleted. B/A: other factors could be added, such as "radioactive waste"

⁸ FIN/S: delete bracketed words. D: clarification of provision needed, will provide text. E: doubts on implementation of provision

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.

8. Member States shall, upon implementation of this Directive, *inform*⁹ the Commission of all measures adopted to fulfil universal service and public service obligations, including consumer protection and environmental protection, and their possible effect on national and international competition, whether or not such measures require a derogation from this Directive. They shall inform the Commission subsequently every two years of any changes to such measures, whether or not they require a derogation from this Directive.
9. []*

Chapter III

Generation

Article 4 [deleted]

Article 5

1. For the construction of new generating capacity, Member States shall adopt an authorisation procedure, which shall be conducted in accordance with objective, transparent and non-discriminatory criteria.
2. Member States shall lay down the criteria for the grant of authorisations for the construction of generating capacity in their territory. These criteria may relate to:
 - (a) the safety and security of the electricity system, installations and associated equipment;
 - (b) protection of public health and safety;
 - (c) protection of the environment;
 - (d) land use and siting;
 - (e) use of public ground;
 - (f) energy efficiency;
 - (g) the nature of the primary sources;
 - (h) characteristics particular to the applicant, such as technical, economic and financial capabilities;
 - (i) compliance with measures adopted pursuant to Article 3.

⁹ I/NL/A: prefer "notify" to "inform"

* Recital: "To the extent that measures adopted by Member States to fulfil universal service and public service obligations constitute State aids under Article 87(1) of the EC Treaty, there is an obligation according to Article 88(3) of the EC Treaty to notify them to the Commission."

3. Member States shall take appropriate measures to streamline and expedite authorisation procedures for small and/or distributed generation * ¹⁰ **in order to take into account their limited size and impact.**
4. The authorisation procedures and criteria shall be made public. Applicants shall be informed of the reasons for any refusal to grant an authorisation. The reasons must be objective, non-discriminatory, well founded and duly substantiated. Appeal procedures shall be made available to the applicant.

Article 6

1. Member States shall¹¹ ensure the possibility, in the interests of security of supply, to tender for new capacity or energy efficiency/demand-side management measures on the basis of published criteria. A tendering procedure can, however, only be launched if on the basis of the authorisation procedure the generating capacity being built or the energy efficiency/demand-side management measures being taken are not sufficient to ensure security of supply.
2. Member States may ensure the possibility, in the interests of environmental protection and the promotion of infant new technologies, to tender for new capacity** on the basis of published criteria. This tender may relate to new capacity or energy efficiency/demand-side management measures. A tendering procedure can, however, only be launched if on the basis of the authorisation procedure the generating capacity being built or the measures being taken are not sufficient to achieve these objectives.
3. Details of the tendering procedure for means of generating capacity and energy efficiency/demand-side management measures shall be published in the Official Journal of the European Communities at least six months prior to the closing date for tenders.

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

With a view to ensuring transparency and non-discrimination the tender specifications shall contain a detailed description of the contract specifications and of the procedure to be followed by all tenderers and an exhaustive list of criteria governing the selection of tenderers and the award of the contract, including incentives, such as subsidies, which are covered by the tender. These specifications may also relate to the fields referred to in Article 5(2).

* Recital to clarify that "The ~~streamlining~~ of authorisation procedures should not lead to an administrative burden disproportionate to the size and potential impact ~~discrimination~~ of electricity producers according to their size".

¹⁰ F: scrutiny reservation on para 3. D/I/A/UK: reservation on need for this provision with respect to possible discrimination against other producers. Pdcy: Recital should make clear that the "result of the administrative burden should be proportionate to the capacity and/or size of the undertaking"

¹¹ D/E/A/UK/P: replace "shall" by "may"

** Recital to stipulate that new capacity includes i.a. renewables and CHP.

4. In invitations to tender for the requisite generating capacity, consideration must also be given to electricity supply offers with long-term guarantees from existing generating units, provided that additional requirements can be met in this way.
5. Member States shall designate an authority or a public body or a private body independent of electricity generation, transmission, distribution and supply activities, which may be a regulatory authority referred to in Article 22(1), to be responsible for the organisation, monitoring and control of the tendering procedure referred to in paragraphs 1 to 4. Where a transmission system operator is fully independent from other activities not relating to the transmission system in ownership terms, the transmission system operator may be designated as the body responsible for organising, monitoring and controlling the tendering procedure. This authority or body shall take all necessary steps to ensure confidentiality of the information contained in the tenders.

Article 6a

Member States shall ensure the monitoring of security of supply issues¹² **and shall define technical safety criteria**. Where Member States consider it appropriate they may confer this task to the [~~independent~~]¹³ regulatory authorities referred to in Article 22(1). This monitoring shall, in particular, cover the supply/demand balance on the national market, the level of expected future demand and envisaged additional capacity under planning or construction, and the quality and level of maintenance of the networks. They shall publish every two years, by 31 July at the latest, a report outlining the findings resulting from the monitoring of these issues, as well as any measures taken or envisaged to address them and forward this report to the Commission forthwith.

Chapter IV

Transmission system operation

Article 7

1. Member States shall designate or shall require undertakings which own transmission 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 transmission system operators.¹⁴
2. Member States shall ensure that technical rules establishing the minimum technical design and operational requirements for the connection to the system of generating installations, distribution systems, directly connected consumers' equipment, interconnector circuits and

¹² P: suggests to add "as well as the harmonisation of the security criteria".

¹³ I: bracketed word should be deleted as already covered by Article 22

¹⁴ Recital: "**While this Directive is not addressing ownership issues it is recalled that *in case of an undertaking performing transmission and separated in its legal form from those undertakings performing generation and/or supply activities, the designated operators may be the same undertaking owning the infrastructure.***". F/S: scrutiny reservation on this Recital

direct lines are developed and published. These requirements shall ensure the interoperability of systems and shall be objective and non-discriminatory. They shall be notified to the Commission in accordance with Article 8 of Council Directive 98/34/EC*.

3. For the purposes of this Directive, the transmission system operator shall be responsible for:
 - a) ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity;
 - b) contributing to security of supply through adequate transmission capacity and system reliability;
 - c) managing energy flows on the system, taking into account exchanges with other interconnected systems. To that end, the transmission system operator shall be responsible for ensuring a secure, reliable and efficient electricity system and, in that context, for ensuring the availability of all necessary ancillary services *insofar as this availability is independent of any other transmission system with which its system is interconnected*;^{**}
 - d) providing to the operator of any other system with which its system is interconnected sufficient information to ensure the secure and efficient operation, co-ordinated development and interoperability of the interconnected system;
 - e) the non-discrimination as between system users or classes of system users, particularly in favour of its subsidiaries or shareholders.¹⁵
 - f) **providing system users with the information they need for efficient access to the system.**
4. Where the transmission system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal¹⁶ form, organisation and decision making from other activities not relating to transmission
- 5.¹⁷ In order to ensure the independence of the transmission system operator¹⁸, the following minimum criteria shall apply:
 - (a) those persons responsible for the management of the transmission system operator may not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, distribution and supply of electricity;
 - (b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the transmission system operator are taken into account in a manner that ensures that they are capable of acting independently;

* OJ L 204, 21.7.1998, p. 37

** Recital indicating that "*In the case of small systems the provision of ancillary services may have to be ensured by TSOs interconnected with the small system.*"

¹⁵ UK: add new indent f): "providing to the system users the information they need"

¹⁶ D/E: reservation on "legal" unbundling; D: reiterates that opinion from Council Legal Service would be useful. Cion/DK/FIN/GR/I/NL/A/S: legal unbundling is indispensable.

¹⁷ Cion, in reply to E: Paras 4 and 5 are both needed, as legal unbundling or management unbundling alone do not guarantee non-discrimination

¹⁸ Cion, agrees with FIN that para 5 only applies to TSOs which are part of a vertically integrated undertaking

- (c) the transmission system operator must have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network;
- (d)¹⁹ the transmission system operator must establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure its respect is adequately monitored. The programme must set out the specific obligations of employees to meet this objective.[]. An annual report, setting out the measures taken, must be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority referred to in Article 22(1) and published.

Article 7a [moved to Art 8(5a)]

Article 8

1. **Without prejudice to the supply of electricity on the basis of contractual obligations, including those which derive from the tendering specifications**, the transmission system operator shall, **where it has this function**, be responsible for dispatching the generating installations in its area and for determining the use of interconnectors with other systems²⁰.
2. ~~Without prejudice to the supply of electricity on the basis of contractual obligations, including those which derive from the tendering specifications~~, The dispatching of generating installations and the use of interconnectors shall be determined on the basis of criteria which may be approved by the Member State and which must be objective, published and applied in a non-discriminatory manner which ensures the proper functioning of the internal market in electricity. They shall take into account the economic precedence of electricity from available generating installations or interconnector transfers and the technical constraints on the system.
3. A Member State may require the system operator, when dispatching generating installations, to give priority²¹ to generating installations using renewable energy sources or waste or producing combined heat and power.
4. A Member State may, for reasons of security of supply, direct that priority be given to the dispatch of generating installations using indigenous primary energy fuel sources, to an extent not exceeding in any calendar year 15% of the overall primary energy necessary to produce the electricity consumed in the Member State concerned.
5. Member States may require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity.

¹⁹ UK/Cion: would prefer previous wording. F: scrutiny reservation

²⁰ UK: suggests to start this para by the following words: " Without prejudice to the supply of electricity on the basis of contractual obligations, including those which derive from the tendering specifications"

²¹ D: clarification of the word "priority" is needed

- 5a. Transmission system operators shall procure the energy they use to cover energy losses and reserve capacity in their system according to transparent, non-discriminatory and market based procedures²², **whenever they have this function.**
6. Rules adopted by transmission system operators for balancing the electricity 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 tariffs²³, for the provision of such services by transmission system operators shall be established pursuant to a methodology compatible with Article 22(2) in a non-discriminatory and cost-reflective way and shall be published.

Article 9

Without prejudice to Article 13 or any other legal duty to disclose information, the transmission system operator must preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, and shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.

Chapter V Distribution system operation

*Article 10*²⁴

1. Member States shall designate or shall require undertakings that own or are responsible for distribution systems to designate one or more distribution system operators. Member States shall ensure that distribution system operators act in accordance with Articles 10(2), 10(3), 11 and 12.^{*}
2. Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal²⁵ form, organisation and decision making from other activities not relating to distribution²⁶.
3. In order to ensure the independence of the distribution system operator²⁷ **referred to in paragraph 2**, the following minimum criteria shall apply:
 - (a) those persons responsible for the management of the distribution system operator may not participate in company structures of the integrated electricity undertaking

²² P, supported by E and Cion: suggests to add the words "whenever they are in charge of this function"

²³ linguistic coherence of the word "tariffs" has to be checked throughout the text

²⁴ D: reservation on this Article

^{*} Recital: "*In case of an undertaking performing distribution and separated in its legal form from those undertakings performing generation and/or supply activities, the designated operators may be the same undertaking owning the infrastructure.*"

²⁵ D/F: reservation on "legal unbundling"

²⁶ E/P: would like to add: "transmission and supply only to eligible customers buying electricity at regulated tariffs' rates".

²⁷ Cion, agrees with FIN that para 3 only applies to DSOs which are part of a vertically integrated undertaking

responsible, directly or indirectly, for the day-to-day operation of the generation, transmission, supply ~~or resale~~²⁸ of electricity;

- (b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the distribution system operator are taken into account in a manner that ensures that they are capable of acting independently;
- (c) the distribution system operator shall have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary for the operation, maintenance and development of the network ;
- (d)²⁹ the distribution system operator must establish a compliance programme which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure its respect is adequately monitored. The programme must set out the specific obligations of employees to meet this objective.[] An annual report, setting out the measures taken, must be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority referred to in Article 22(1) and published.

[] Member States may decide not to apply [] paragraphs 2 and 3 to integrated electricity undertakings serving less than 100 000³⁰ connected customers, or serving small isolated systems.

Article 10a [moved to Art. 11(3a)]

Article 11

1. The distribution system operator shall maintain a secure, reliable and efficient electricity distribution system in its area, with due regard for the environment.
2. In any event, it must not discriminate between system users or classes of system users, particularly in favour of its subsidiaries or shareholders.
- 2a The distribution system operator shall provide system users with the information they need for efficient access to the system.**
3. A Member State may require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power.
- 3a Distribution system operators shall procure the energy they use to cover energy losses and reserve capacity in their system according to transparent, non-discriminatory and market based procedures.

²⁸ I/S/UK: question need for underlined words as already covered by "supply"

²⁹ UK/Cion: would prefer previous wording. F: scrutiny reservation

³⁰ E/FIN/NL/A/S/UK: would prefer lower threshold; FIN can however also accept the present threshold

4. Where distribution system operators are responsible for balancing the electricity distribution system, rules adopted by them for that purpose shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by distribution system operators shall be established in accordance with Article 22(2) in a non-discriminatory and cost-reflective way and shall be published.
5. When planning the development of the distribution network, energy efficiency/demand-side management measures and/or distributed generation that might supplant the need to upgrade or replace electricity capacity shall be considered by the distribution system operator.

Article 12

Without prejudice to Article 13 or any other legal duty to disclose information, the distribution system operator must preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, and shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.

Article 12a

The rules in Articles 7(4) and 10(2) do not prevent the operation of a [combined transmission and distribution system operator]³¹, which is [fully]³² independent in terms of its legal form, organisation and decision making from other activities not relating to transmission or distribution system operation and which meets the following requirements:

- (a) those persons responsible for the management of the combined system operator may not participate in company structures of the integrated electricity undertaking responsible, directly or indirectly, for the day-to-day operation of the generation, supply *or resale* of electricity;
- (b) appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the combined system operator are taken into account in a manner that ensures that they are capable of acting independently;
- (c) the combined system operator shall have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary for the *operation, maintenance and development of the network* ;
- (d)³³ the combined system operator must establish a compliance programme which sets out measures taken to ensure that discriminatory conduct is excluded, *and ensure its respect is adequately monitored*. The programme must set out the specific obligations of employees to meet this objective.[]. An annual report, setting out the measures taken, must be submitted by the *person or body responsible for monitoring the compliance programme* to the regulatory authority referred to in Article 22(1) and published.

³¹ D: wonders whether the bracketed words could relate to electricity together with gas

³² F: delete bracketed word

³³ UK/Cion: would prefer earlier formulation of this provision. F: scrutiny reservation

Chapter VI Unbundling and transparency of accounts

Article 13³⁴

Member States or any competent authority they designate, including the regulatory authorities referred to in Article 22, ~~insofar as needed to carry out their checks~~, shall have right of access to the accounts of ~~generation~~³⁵, transmission, **and** distribution undertakings *as well as supply*, **and generation** undertakings *that are part of vertically integrated undertakings*, **which they need to consult in carrying out their functions. Member States and any designated competent authority, including the regulatory authorities referred to in Article 22, shall preserve the confidentiality of commercially sensitive information. Member States may produce exceptions to the principle of confidentiality where this is necessary in order for the competent authorities to carry out their functions.**

Article 14

1. Member States shall take the necessary steps to ensure that the accounts of electricity undertakings are kept in accordance with paragraphs 2 to 3.
2. Electricity undertakings, whatever their system of ownership or legal form, shall draw up, submit to audit and publish their annual accounts in accordance with the rules of national law concerning the annual accounts of limited liability companies adopted pursuant to the Fourth Council Directive, 78/660/EEC, of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies^{*}. Undertakings which are not legally obliged to publish their annual accounts shall keep a copy of these at the disposal of the public in their head office.
- 3.³⁶ Integrated electricity undertakings shall, in their internal accounting, keep separate accounts for their transmission and distribution activities³⁷. **They shall also keep ~~and~~ consolidated accounts** for other activities not relating to transmission or distribution, 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 keep separate accounts for supply activities for eligible customers and supply activities for non-eligible customers]³⁸. Revenue from ownership of the transmission/distribution system shall be specified in the accounts. Where appropriate, they shall keep consolidated accounts for other, non-electricity activities. The internal accounts shall include a balance sheet and a profit and loss account for each activity.

3a. []

Article 15 [deleted]

³⁴ UK: suggests to align this Article on the respective provision for Gas

³⁵ F: suggests to place the word "generation" after the word "supply". Cion: can agree

^{*} OJ No L 222, 14.8.1978, p. 11. Directive as last amended by the 1994 Act of Accession.

³⁶ E/I: reservation on this para, which should be aligned on/is redundant with Article 13

³⁷ S: suggests to insert the word "respectively". Cion proposes to end the sentence after "activities" , to delete the following "and" and to start the following sentence with the words "They shall also keep"

³⁸ F: reservation on bracketed sentence.

Chapter VII
Organisation of access to the system

Article 16³⁹

1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution systems based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination between system users. Member States shall ensure that these tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force [~~by a regulatory authority referred to in~~]⁴⁰ **in accordance with** Article 22(4) and that these tariffs are published prior to their entry into force.
2. The operator of a transmission or distribution system may refuse access where it lacks the necessary capacity. Duly substantiated reasons must be given for such refusal, in particular having regard to Article 3. Member States shall ensure, where appropriate and when refusal of access takes place, that the transmission or distribution system operator provides relevant information on measures that would be necessary to reinforce the network. The party requesting such information may be charged a reasonable fee reflecting the cost of providing such information.
3. []

Articles 17 and 18 [deleted]

Article 19

1. []Member States shall ensure that the eligible customers are:
 - a) until the date referred to in Article 27(1)*, the eligible customers as specified in article 19(1) to 19(3) of directive 96/92/EC. Member States shall publish by 31 January each year the criteria for the definition of these eligible customers;
 - b) from the date referred to in Article 27(1), at the latest, all non-household customers⁴¹;
 - c) from 1 January 2005 at the latest, all customers.

³⁹ I: reservation; suggests adding the wording of Article 6(7 to 9) of the Regulation on cross-border exchanges in electricity (document 11404/02) along the line followed in Article 14 of the Gas Directive. In this context, I proposes a modification to para 7 of Article 6. UK: opposed to this suggestion

⁴⁰ E: suggests to replace bracketed words by "approved in accordance with"

* It is recalled that the Barcelona conclusions mention 2004 and the amended proposal stipulated 1 January 2004.

⁴¹ P: suggests to add the following words "or all customers linked to very high tension, high tension and medium tension".

2. To avoid imbalance in the opening of electricity markets:
 - (a) contracts for the supply of electricity with an eligible customer in the system of another Member State shall not be prohibited if the customer is considered as eligible in both systems involved⁴² ;
 - (b)⁴³ in cases where transactions as described in point (a) are refused because of the customer being eligible only in one of the two systems, the Commission may oblige, taking into account the situation in the market and the common interest, the refusing party to execute the requested electricity supply at the request of the Member State where the eligible customer is located.

Article 20 [deleted]

Article 21

1. Member States shall take the necessary measures to enable:
 - (a) all electricity producers and electricity supply undertakings, established within their territory to supply their own premises, subsidiaries and eligible customers through a direct line;
 - (b) any eligible customer within their territory to be supplied through a direct line by a producer and supply undertakings.
2. Member States shall lay down the criteria for the grant of authorisations for the construction of direct lines in their territory. These criteria must be objective and non-discriminatory.
3. The possibility of supplying electricity through a direct line as referred to in paragraph 1 shall not affect the possibility of contracting electricity in accordance with Article 16.
4. Member States may make authorisation to construct a direct line subject either to the refusal of system access on the basis, as appropriate, of Article 16 or to the opening of a dispute settlement procedure under Article 22.
5. Member States may refuse to authorise a direct line if the granting of such an authorisation would obstruct the provisions of Article 3. Duly substantiated reasons must be given for such refusal.

⁴² I: a Recital should further clarify that "an electricity undertaking established in a Member State may have access to the gas system and may sign contracts for the supply of electricity with eligible customers in another Member State only if the same degree of eligibility applies in both Member States".

⁴³ E: questions the competence of the Cion in this respect

Article 22

1. Member States shall designate one or more competent bodies with the function of regulatory authorities*. These authorities shall be wholly independent of the interests of the electricity industry. They shall [] be responsible for ensuring⁴⁴ non-discrimination, effective competition and the efficient functioning of the market, in particular with respect to:
 - (a) []
 - (b) the rules on the management and allocation of interconnection capacity, in conjunction with the regulatory authority or authorities of those Member States with which interconnection exists;
 - (c) any mechanisms to deal with congested capacity within the national electricity system;
 - (d) the time taken by transmission and distribution undertakings to make connections and repairs;
 - (e) the publication of appropriate information by transmission and distribution system operators concerning interconnectors, grid usage and capacity allocation to interested parties, taking into account the need to treat non-aggregated information as commercially confidential;
 - (f) the effective unbundling of accounts, as referred to in Article 14, to ensure there are no cross-subsidies between generation, transmission, distribution and supply activities⁴⁵. For this purpose they shall have access to the accounts;
 - (g) the terms, conditions and tariffs for connecting new producers of electricity to guarantee that these are objective, transparent and non-discriminatory, in particular taking full account of the benefits of the various renewable energy sources technologies, distributed generation and combined heat and power.

2. The regulatory authorities⁴⁶ shall be responsible for fixing *or* approving [] prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions for :
 - (a) connection and access to national networks, including transmission and distribution tariffs;
 - (b) the provision of balancing services.

* Recital to clarify that "regulatory authorities act according to criteria and guidelines from the government"

⁴⁴ D/LUX: would prefer previous text, as in 10686/02, in particular the word "monitoring" instead of "ensuring"

⁴⁵ P: suggests to add the words "and between different groups of customers"

⁴⁶ E: notes that other competent bodies may be involved

- 2a. Where prescribed by national administrative requirements the regulatory authorities shall be responsible for submitting, for formal decision, to the relevant body in the Member State the tariffs or at least the methodologies⁴⁷ referred to in paragraph 2 as well as the modifications referred to in paragraph 3 . These submissions shall be published together with the decision.
3. Regulatory authorities shall have the authority to require transmission and distribution system operators, if necessary, to modify the terms and conditions, tariffs, rules, mechanisms and methodologies referred to in paragraphs 1, 2 and 2a, to ensure that they are reasonable⁴⁸ and applied in a non-discriminatory manner.
4. Any party having a complaint against a transmission or distribution system operator with respect to the issues mentioned in paragraphs 1, 2 and 3 may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within two⁴⁹ months after receipt of the complaint. This period may be extended by two months where additional information is sought by the regulatory authority. This period may be further extended with the agreement of the complainant. Such a decision shall [] have binding effect unless and until overruled on appeal. [~~Appeal on complaints concerning methodologies shall be decided within two months after the appeal has been lodged.~~]⁵⁰ **Complaints concerning methodologies must be received within two months following their approval and publication. Member States shall take appropriate measures to ensure that any such complaint is treated expeditiously. In any event, a decision on such an appeal shall be taken within 4 months. Any appeal shall not have suspensive effect.**

Where a complaint concerns connection tariffs for major new generation facilities, the two-month period may be extended by the regulatory authority.

5. Member States shall take measures to ensure that regulatory authorities are able to carry out their duties referred to in paragraphs 1 to 4 in an efficient and expeditious manner.
6. Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of dominant position, in particular to the detriment of consumers, and any predatory behaviour. These mechanisms shall take account of the provisions of the Treaty, and in particular Article 82 thereof.
7. 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.

⁴⁷ E: positive scrutiny reservation; this provision should also cover the modifications referred to in para 3.

⁴⁸ E: "reasonable" should be clarified

⁴⁹ E: replace "two" by "three"

⁵⁰ Cion, in reply to FIN/NL/S: suggests to replace this sentence by adding a new para 4a reading as follows: "Complaints must be received and admissible within two months. Member States shall ensure that any complaint is dealt with in an efficient and expeditious manner. Any complaint shall not have suspensive effect"

8. In the event of cross-border disputes, the regulatory authority shall be the regulatory authority ~~which regulates~~⁵¹ **is responsible for** the system operator which refuses use of, or access to, the system.
9. Recourse to the regulatory authority shall be without prejudice to the exercise of rights of appeal under Community and national law.

Chapter VIII Final provisions

Article 23

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

Such measures must cause the least possible disturbance in the functioning of the internal market and must not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

The Member State concerned shall without delay notify these 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 23a

Member States shall inform the Commission every three months of imports of electricity, in terms of physical flows, that have taken place during the previous 3 months from third countries.

Article 24

1. Member States which can demonstrate, after the Directive has been brought into force, that there are substantial problems for the operation of their small isolated systems, may apply for derogations from the relevant provisions of Chapters IV, V, VI, VII, which may be granted to them by the Commission. The latter shall inform the Member States of those applications prior to taking a decision, taking into account respect for confidentiality. This decision shall be published in the Official Journal of the European Communities. This Article shall also be applicable to Luxembourg.

⁵¹ Cion, in reply to F: proposes to replace "regulates" by "is responsible for" or "has jurisdiction on"

2. A Member State which, after the Directive has been brought into force, for reasons of a technical nature has substantial⁵² problems in opening its market for certain limited groups of the non-household customers referred to in Article 19(1)b may apply for derogation from this provision, which may be granted to it by the Commission for a period of maximum ~~one~~⁵³ year **18 months** after the date referred to in Article 27(1). In any case, such derogation shall end at the date referred to in Article 19 (1c)

Article 25 [deleted]

Article 26

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 before the end of the first year following the entry into force of this Directive, and thereafter on an annual basis. The report shall at least cover:
- (a) the experience gained and progress made in creating a complete and fully operational internal market in electricity and the obstacles that remain in this respect, including aspects of market dominance, concentration in the market, predatory or anti-competitive behaviour;
 - (b) the extent to which the unbundling and tarification requirements contained in this Directive have been successful in ensuring fair and non-discriminatory access to the Community's electricity system and equivalent levels of competition, as well as the economic, environmental and social consequences of the opening of the electricity market for customers;
 - (c) an examination of issues relating to system capacity levels and security of supply of electricity in the Community, and in particular the existing and projected balance between demand and supply, taking into account the physical capacity for exchanges between areas;
 - (d) a general assessment of the progress achieved with regard to bilateral relations with third countries which produce and export or transport electricity, including progress in market integration, trade and access to the networks of such third countries;
 - (e) the need for possible harmonisation requirements that are not linked to the provisions of this Directive.

Where appropriate, this report may include recommendations.

2. Every two years, the report referred to in paragraph 1, shall also cover an analysis of the different measures taken in the Member States to meet public service obligations, together with an examination of the effectiveness of those measures and, in particular their effects on

⁵² F: scrutiny reservation on this para, and reservation with respect to "substantial" which is too vague

⁵³ GR: suggests to replace "one" by "three", but could accept "two"

competition in the electricity market. Where appropriate, this 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.

Article 26a

[1]

Article xx

Directive 90/547/EEC is repealed with effect from the date referred to in Article 27(1).

Directive 96/92/EC is herewith repealed from the date referred to in Article 27(1) without prejudice to the obligations of Member States concerning the deadlines for transposition and application of the said Directive. References to the Directive 96/92/EC shall be construed as references to this Directive.

Article 27

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 12⁵⁴ months after the date referred to in Article 28. They shall forthwith inform the Commission thereof.
- 1a. Member States may postpone the implementation of Article 10(2) until [1 January 2005]⁵⁵.
2. When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 28

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

Article 29

This Directive is addressed to the Member States.

Done at Brussels, [...]

For the European Parliament

The President

[...]

For the Council

The President

[...]

⁵⁴ B, supported by E: suggests to replace "12" by "24". LUX: could accept a period between "18 and 24". GR/NL/P: suggest "18". D: wants to keep "12" (*N.B.: under the assumptions used in the timetable circulated on 3 September an 18-month transposition period would correspond to August 2004*).

⁵⁵ D/GR/LUX: propose to replace bracketed words by "the date referred to in Article 19(1) c". Cion: does not see a logical link between this derogation and full market opening. B/NL/S/UK: reservation on this para. A: the date should be 1.1.2005 or earlier.

ANNEX to Annex (Article 3)

Without prejudice to Community rules on consumer protection, in particular Directives 97/7/EC of the European Parliament and of the Council* and Council Directive 93/13/EC**, the measures referred to in Article 3 are to ensure that [] customers:

- (a) have a right to a contract with their electricity service provider that specifies:
- the identity and address of the supplier;
 - services provided, the service quality levels offered, as well as the time for the initial connection;
 - the types of maintenance¹ service offered;
 - the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained;
 - the duration of the contract, the conditions for renewal and termination of services and of the contract, the existence of any right of withdrawal;
 - any compensation and the refund arrangements which apply if contracted service quality levels are not met; and
 - the method of initiating procedures for settlement of disputes in accordance with point (e)

Conditions shall be fair and well-known in advance. In any case, this information should be provided prior to the conclusion **or confirmation** of the contract. Where contracts are concluded through intermediaries, the above information shall also be provided prior to the conclusion of the contract.

- (b) are given adequate notice of any intention to modify contractual conditions [] and are informed about their right of withdrawal when the notice is given. Service providers shall notify their subscribers directly of any increase in charges, at an appropriate time no later than one normal billing period after the increase comes into effect. Member States shall ensure that [] customers are free to withdraw from contracts if they do not accept the new conditions, notified to them by their electricity service provider.
- (c) receive transparent information on applicable prices and tariffs and on standard terms and conditions, in respect of access to and use of electricity services.
- (d) are offered a [full]² **wide** choice of payment methods. ~~The terms of this choice shall not discriminate between the methods proposed³.~~ **Any difference in terms and conditions shall reflect the costs to the supplier of the different payment systems.** General terms and conditions shall be fair and transparent. They shall be given in clear and comprehensible language. [] Customers shall be protected against unfair or misleading selling methods.

(da) shall not be charged for changing supplier.

* OJ L 144, 4.6.1997, p. 19

** OJ L 95, 21.4.1993, p. 29

¹ UK: questions this provision as this type of service is not always offered

² Cion, in reply to NL: suggests to replace "full" by "appropriate". E: suggests "real"

³ UK: proposes to add the following sentence "Customers shall not be charged for changing supplier".

- (e) benefit from transparent, simple and inexpensive procedures for dealing with their complaints. Such procedures shall enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation. They should follow, wherever possible, the principles set out in Commission Recommendation 98/257/EC^{***}.
- (f)⁴ when having access to universal service pursuant to the provisions adopted by Member States in application of Article 3(3), are informed about their rights regarding universal service.
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^{***} OJ L 115, 17.4.1998, p. 31

⁴ A: reservation on para (f)