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NOTE

from:	General Secretariat
to:	Delegations
No. Cion prop.:	16260/03 ENER 361 CODEC 1857 - (COM (2003) 741 final)
Subject:	Proposal for a Regulation of the European Parliament and of the Council on conditions for access to the gas transmission networks

Delegations will find herewith a revised version of the Articles of the above proposal, drawn up by the Presidency in the light of delegations' comments; the revised text also contains a number of legally motivated drafting changes.

New wording is marked in **bold**, wording which has changed its place in the text is underlined.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on conditions for access to the gas transmission networks

(Text with EEA relevance)

...¹

Article 1

Subject matter and scope

This Regulation aims at setting fair rules for access conditions to natural gas transmission systems taking into account the specificities of national and regional markets **with a view to ensuring the proper functioning of the internal gas market**.

This shall **include setting harmonised** principles for **tariffs** for access to the network, the **establishment of third party access** services, harmonised principles for capacity allocation and congestion management, the determination of transparency requirements, balancing **rules** and imbalance charges, and [...] facilitating **the functioning of** secondary markets for capacity trading.

Article 2

Definitions

1. For the purpose of this Regulation [...], the following definitions shall apply:
 - (1) “transmission” shall mean the transport of natural gas through a high pressure network or a regional pipeline network, which mainly contains high pressure pipelines, other than an upstream pipeline network with a view to its delivery to customers, but not including supply;
 - (2) “transportation contract” means a contract which the transmission system operator has concluded with a network user with a view to carrying out transmission;
 - (3) “capacity” means the maximum flow, expressed in normal cubic meters per time unit or in energy unit per time unit, to which the network user is entitled in accordance with the provisions of the transportation contract;
 - (4) “congestion management” means management of the capacity portfolio of the transmission system operator with a view to optimal and maximum use of the technical capacity and the timely detection of future congestion and saturation points;
 - (5) “secondary market” means the market of the capacity traded otherwise than on the primary market;

¹ The preamble will be examined at a later stage.

- (6) “nomination” means the prior reporting by the network user to the transmission **system operator** of the actual flow that he wishes to inject into or withdraw from the system;
- (7) “re-nomination” means the **subsequent** reporting of a corrected nomination;
- (8) “residual balancing” means the physical balancing to ensure system integrity during the balancing period;
- (9) “system integrity” means any situation in respect of a transmission network **including necessary** transmission facilities in which the pressure and the quality of the natural gas remain within the minimum and maximum limits laid down by the transmission system operator, so that the transmission of natural gas is guaranteed from a technical standpoint;
- (10) “balancing period” means the period within which the off-take of an amount of natural gas, expressed in units of energy, must be offset by every network user by means of the injection of the same amount of natural gas into the transmission network in accordance with the transportation contract or the network code;
- (11) “network users” means a customer **or a potential customer** of a transmission system operator [...], and transmission system operators themselves in so far as it is necessary for **them** to carry out their functions in relation to transmission [...];
- (12) “interruptible services” mean services offered by the transmission system operator, based on interruptible capacity;
- (13) “interruptible capacity” means gas transmission capacity that can be interrupted by the transmission system operator according to the conditions stipulated in the transportation contract;
- (14) “long-term services” mean services offered by the transmission system operator with a duration of one year or more [...];
- (15) “short-term services” mean services offered by the transmission system operator with a duration of less than one year;
- (16) “firm capacity” means gas transmission capacity contractually guaranteed **as uninterruptible** by the transmission system operator;
- (16a) “firm services” mean services offered by the transmission system operator based on firm capacity;**
- (17) “technical capacity” means the maximum firm capacity that the transmission, system operator can offer to the network users, taking account of the system integrity and the operational requirements of the transmission network;
- (18) “contracted capacity” means capacity that the transmission system operator has allocated to a network user by means of a transportation contract;

- (19) “available capacity” means the part of the technical capacity that is not allocated and is still available to the system at that moment;
 - (20) “contractual congestion” means a situation where the level of firm capacity demand exceeds the technical capacity [...];
 - (21) “primary market” means the market of the capacity traded directly by the transmission system operator;
 - (22) “physical congestion” means a situation where the level of demand for actual deliveries exceeds the technical capacity at some point in time;
 - (23) “new market entrants” means undertakings that are not yet active in gas supply in the Member State concerned [...] or have only entered the market within 2 years **from the date on which they conclude their first gas sales contract within the Member State concerned** and which **have** a market share of less than 3% of the national gas market on which they are active, **and are not affiliated with or owned by an existing gas undertaking on the market of the Member State concerned**;
 - (24) [...]
2. The **relevant** definitions contained in Article 2 of Directive 2003/55/EC shall also apply **with the exception of the definition of *transmission* in Article 2(3) of Directive 2003/55/EC**.

Article 3

Tariffs for access to networks

1. **Notwithstanding Article 25(2) of Directive 2003/55/EC, tariffs** applied by transmission system operators for access to networks shall be transparent, take into account the need for system integrity **and its improvement** and reflect **actual** costs incurred, including appropriate return on investments, and where appropriate taking **account of the benchmarking of tariffs by the regulatory authorities**, and **shall be applied in a non-discriminatory manner**.
- The **tariffs** shall facilitate efficient gas trade and competition, while at the same time avoiding cross-subsidies between network users.
2. **Tariffs** for network access shall not restrict market liquidity or distort trade across borders of different transmission systems.

Article 4

Third Party Access services

1. **Each** transmission system operators shall offer third party access services on the same contractual basis to all network users, either using standard transportation contracts or a [...] network code.

2. **In the case of contractual congestion**, transmission system operators shall provide both firm and interruptible third party access services. The price of interruptible capacity shall reflect the probability of interruption, if not otherwise laid down by the [...] regulatory authorities.
3. Transmission system operators shall offer to network users both long and short-term services.
4. Transportation contracts signed [...] with non-standard start dates or with a shorter duration than a standard **annual** transportation contract shall not result in arbitrarily higher tariffs **not reflecting the market value of the service**.

Article 5

Principles of Capacity allocation mechanisms and congestion management procedures

1. Transmission system operators shall implement and publish non-discriminatory and transparent capacity allocation mechanisms.
2. When transmission system operators conclude new transportation contracts **or renegotiate existing transportation contracts**, these contracts shall take into account the following principles, which shall apply in cases of contractual congestion:
 - a) the transmission system operator shall offer unused capacity on the primary market;
 - b) network users who wish to re-sell their unused contracted capacity on the secondary market shall be entitled to do so.
3. When capacity contracted under existing transportation contracts remains unused and contractual congestion occurs, transmission system operators shall apply Article 5(2)(a) and (b) unless this would infringe the requirements of the existing transportation contracts. Where this would infringe the existing transportation contracts, transmission system operators shall **submit a request to the network user for the use on the secondary market of unused capacity, following** consultation with the competent authorities, **in accordance with paragraph (2)(a) and (b) [...]**.
4. In the event that physical congestion exists, non-discriminatory, market-based solutions shall be applied **by the transmission system operator or, as appropriate, the regulatory authorities**.

Article 6

Transparency requirements

1. Transmission system operators shall **make public**² detailed information regarding the services they offer and the relevant conditions applied, together with the technical information necessary for network users to gain effective network access.
2. For the services provided, **each** transmission system operators shall **make public** information on technical, contracted and available capacities on a numerical basis for all relevant points **including entry and exit points** on a regular and rolling basis and in a user-friendly standardised manner.

² The Presidency suggests the addition of a recital which would state that making public information can also be done by electronic means.

3. The relevant points of a transmission system **the information on which** must be **made public** shall be approved by **the competent** authorities. [...] ³
4. Where a transmission system operator considers that **it** is not entitled for confidentiality reasons to **make public** all the data required, it shall seek the **authorisation** of the [...] regulatory authorities to limit publication **with respect to** the point or points in question.

The [...] regulatory authorities shall grant or refuse the **authorisation on a case by case basis**, taking into account **in particular** the need to respect legitimate commercial confidentiality and the objective of creating a competitive internal gas market. **If the authorisation is granted**, available capacity shall be published without indicating the numerical data that would contravene confidentiality.

No **such authorisation as referred to in this Article shall be granted** where three or more network users have contracted capacity at the same point.

Article 7

Balancing rules and imbalance charges

1. Balancing rules shall be designed in a fair, non-discriminatory, and transparent manner and shall be based on objective criteria. Balancing rules shall reflect genuine system needs taking into account the resources available to the transmission system operator.
2. In case of non-market based balancing systems, tolerance levels shall [...] be designed in a way that **either** reflects seasonality **or that results in a tolerance level higher than that resulting from seasonality**, and **that reflects** the actual technical capabilities of the transmission system. Tolerance levels shall reflect genuine system needs taking into account the resources available to the transmission system operator.
3. **Imbalance** charges shall be broadly cost-reflective, whilst providing appropriate incentives on network users to balance their input and off-take of gas. They shall avoid cross-subsidisation between network users and shall not hamper the entry of new market entrants.
Imbalance charges shall be **made public by the competent authorities or the transmission system operator**.
4. Transmission system operators may **impose** penalty **charges on** network users whose input into and off-take from the transmission system is not in balance **with its booked contracted capacity** according to the balancing rules **referred to** in paragraph 1.

³ The deleted text will go to point 3.2.(b) of the Annex which would read as follows:
"The most important exit points **and exit zones** covering at least 50% of total exit capacity of the network of a given transmission system operator, **including all exit points or exit zones covering more than 2% of total exit capacity of the network.**"

5. Penalties which exceed the **actual** balancing costs incurred shall be re-distributed to the network users on a non-discriminatory basis. The method for re-distributing those costs shall be approved by the **competent** authorities.
6. **In order to enable network users to take timely corrective actions**, transmission system operators [...] shall provide sufficient, well-timed and reliable on-line based information on the balancing status of network users [...]. The level of information provided shall reflect the level of information available to the transmission system operator. Charges for the provision of such information shall be approved by the [...] **competent** authorities and **shall be made public by the transmission system operator**.

[...]

Article 8
Secondary markets

Transmission system operators shall take reasonable steps to allow and facilitate capacity rights to be freely tradable between registered network users in a secondary market. They shall develop standardised transportation contracts and procedures on the primary market to facilitate secondary trade of capacity and recognise the transfer of primary capacity rights where notified by network users. The standardised transportation contracts and procedures shall be **notified to the [...]** regulatory authorities.

Article 9
Guidelines

1. Where appropriate, guidelines providing the minimum degree of harmonisation required to achieve the aim of this Regulation shall specify:
 - (a) details of tariff methodology, in accordance with Article 3;
 - (b) details of third party access services including the character, duration and other requirements of these services, in accordance with Article 4;
 - (c) details of the principles underlying capacity allocation mechanisms and on the application of congestion management procedures in case of contractual congestion, in accordance with Article 5;
 - (d) details on the definition of the technical information necessary for network users to gain effective access to the system and the definition of all relevant points for transparency requirements, including the information to be published at all relevant points and the time schedule according to which this information shall be published, in accordance with Article 6;
 - (e) details on balancing rules and imbalance charges, in accordance with Article 7;
 - (f) details on secondary markets, in accordance with Article 8.
2. Guidelines on the issues listed in paragraph 1(b), (c) and (d) **are** laid down in the Annex. They shall be amended by the Commission in accordance with the procedure referred to in Article 14(2).

3. The Commission shall in accordance with the procedure referred to in Article 14(2), adopt **and amend** guidelines on the issues listed in paragraph 1(a), (e) and (f).⁴

Article 10
Regulatory authorities

When carrying out their responsibilities under this Regulation, the regulatory authorities of the Member States **established under Article 25 of Directive 2003/55/EC** shall ensure compliance with this Regulation and the guidelines adopted pursuant to Article 9.

Where appropriate they shall cooperate with each other and with the Commission.

Article 11
Provision of information and confidentiality

1. Member States and the regulatory authorities shall, on request, provide to the Commission all information necessary for the purposes of Article 9.

The Commission shall fix a reasonable time limit within which the information is to be provided, taking into account the complexity of the information required and the urgency with which the information is needed.

2. If the Member State or the regulatory authority concerned does not provide this information within the given time-limit pursuant to paragraph 1, the Commission may request all information necessary for the purpose of Article 9 directly from the undertakings concerned.

When sending a request for information to an undertaking, the Commission shall at the same time forward a copy of the request to the regulatory authorities of the Member State in whose territory the seat of the undertaking is situated.

In its request for information, the Commission shall state the legal basis of the request, the time limit within which the information is to be provided, the purpose of the request and also the penalties provided for in Article 13(2) for supplying incorrect, incomplete or misleading information. The Commission shall fix a reasonable time limit taking into account the complexity of the information required and the urgency with which the information is needed.

3. The owners of the undertakings or their representatives and, in the case of legal persons, the persons authorised to represent them by law or by their instrument of incorporation, shall supply the information requested. Lawyers duly authorised to act may supply the information on behalf of their clients, in which case the client shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.
4. Where an undertaking does not provide the information requested within the time-limit fixed by the Commission or supplies incomplete, **incorrect or misleading** information, the Commission may by decision require the information to be provided. The decision shall specify what information is required and fix an appropriate time-limit within which it is to be supplied. It shall indicate the penalties provided for in Article 13(2). It shall also indicate the right to have the decision reviewed by the Court of Justice of the European Communities.

⁴ The Presidency suggests amending recitals 2 and 3 to make clear the role of the Madrid Forum and the European Regulators Group in the ongoing revision of the Guidelines.

The Commission shall at the same time send a copy of its decision to the regulatory authorities of the Member State within the territory of which the residence of the person or the seat of the undertaking is situated.

5. The Commission shall use the information collected pursuant to this Regulation only for the purposes of Article 9.

The Commission shall not disclose information acquired pursuant to this Regulation of the kind covered by the obligation of professional secrecy.

Article 12

Right of Member States to provide for more detailed measures

This regulation shall be without prejudice to the rights of Member States to maintain or introduce measures that contain more detailed provisions than those set out in this Regulation and the guidelines referred to in Article 9.

Article 13

Penalties

1. **Without prejudice to paragraph 2, the Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 1 July 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.**
2. The Commission may by decision impose on undertakings fines not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently, they supply incorrect, incomplete or misleading information in response to a request made pursuant to Article 11(2) or fail to supply information within the time-limit fixed by a decision adopted pursuant to the first subparagraph of Article 11(4).

In setting the amount of a fine, regard shall be had to the gravity of the failure to comply with the requirements of the first subparagraph.

3. Penalties provided for pursuant to paragraph 1 and decisions taken pursuant to paragraph 2 shall not be of a criminal law nature.

Article 14

Committee

1. The Commission shall be assisted by the Committee set up by Article 30 of Directive 2003/55/EC.

2. Where reference is made to this paragraph, Article 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.
- The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.
3. **The Committee shall adopt its rules of procedure.**

Article 15
Commission Report

The Commission shall monitor the implementation of this Regulation. It shall submit to the European Parliament and the Council no more than three years after the entry into force of this Regulation a report on the experience gained in its application. In particular the report shall examine to what extent the Regulation has been successful in ensuring non-discriminatory and cost-reflective network access conditions for gas transmission networks in order to contribute to customer choice in a well functioning internal market and to long-term security of supply. If necessary, the report shall be accompanied by appropriate proposals and/or recommendations.

Article 16
Entry into force

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

It shall apply from 1 July 2005.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

For the European Parliament
The President

For the Council
The President

[...] [...]