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Subject : Proposal for a Regulation of the European Parliament and of the Council on  
conditions for access to the gas transmission networks

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Delegations will find herewith the comments from the German delegation regarding the abovementioned proposal.

## **German Amendments to the Proposal for a Regulation on Conditions for Access to the Gas Transmission Networks (7491/04)**

### **I. General (Scrutiny) Reservation**

Germany believes that, owing to the regulatory requirements for national gas markets as contained in the Commission's proposal for a Regulation, it would be acceptable - if at all - only as a (new) proposal for a Directive.

Germany realises that the Guidelines for Good Practice which were adopted on a voluntary basis (not always with the agreement of all participants) in the Madrid Forum and which partially form the basis of the proposal for a Regulation contain what are largely constructive suggestions and pointers for regulating the national gas markets. But it remains to be seen how the new Internal Market Directive (2003/55/EC), which was adopted only recently after intensive discussions, will be transposed into national law. Moreover, the proposal for a Regulation, some of whose elements extend considerably beyond the requirements of the Directive, encroaches significantly on the competencies of national lawmaking bodies, including Germany's Bundesrat, which cited this as its reason for opposition to the Regulation. The envisaged commitology procedure (proposed Regulation Article 14 and Article 9) would ultimately perpetuate this encroachment on national competencies. The Commission is granted the possibility in the future of undertaking even farther reaching and more detailed intervention on national gas markets without the co-decision-making process of the Council and European Parliament. This is also facilitated by the fact that the proposed Regulation is not sufficiently precise and contains provisions and definitions differing somewhat from those in the Guidelines for Good Practice and the Acceleration Directive, upon which the commitology is then to be extended and imposed.

The danger remains that the parallel existence of different Directive and Regulation requirements will create considerable legal uncertainty for market participants. Finally, it should be noted that the constructive cooperation of the market players in the Madrid Forum was chiefly the result of the fact that the rules were adopted on a voluntary basis - in order to prevent a Regulation from being enacted.

For this reason, Germany rejects the proposed Regulation, which represents directly binding law, in its present form and at the present time. It is our position that agreement should be reached on this

package of measures only if the envisaged rules were discussed (at a later point in time) in the context of a Directive. This would appear to offer itself in legal terms since such a procedure was prescribed in Article 31 of the Acceleration Directive. The Commission would accordingly be required to submit a detailed report on progress made in establishing the internal market for gas. On this basis, the Commission could possibly recommend farther reaching measures, the transposition of which could take into consideration the characteristics and unique features of national markets.

Only such a procedure would be consistent with the "Conclusions" on Guidelines for Good Practice adopted at the Seventh Madrid Meeting on September 24,25, 2003, which were otherwise taken out of their larger context. As worded by the Commission and supported by Germany, *"it is vital that all parties pay careful attention to the implementation of these principles in practice to ensure that they fully meet the requirements of the Directive, thus avoiding the need for any enforcement action by the Commission"*.

## II. Detailed Amendments

Notwithstanding our above mentioned general position there are some possible drafting suggestions which we recommend to be considered if the Presidency prefers to develop the currently discussed text. In this context further rules concerning Interoperability (Madrid – Forum) and New Infrastructure (Art. 22 of the Directive) should be reflected also. At this stage we will not make any drafting suggestions but we encourage the Presidency to make appropriate proposals.

The German Detailed Amendments take into account some of the suggestions already forwarded by other delegations, namely by France and Austria.

### *Article 1*

#### *Subject matter and scope*

This Regulation aims at setting rules for access conditions to natural gas transmission systems **for cross border exchanges in natural gas** 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 **conditions** for access to the network, the **definition of third party access** services, 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 **pipeline** network , 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 **cross border** transmission;
  - (3) “capacity” means the maximum flow, expressed in normal cubic meters per time unit or

- (4) in energy unit per time unit, to which the network user is entitled **to use at cross border points**;
- (5) “secondary market” means the market of the **cross border points** capacity traded otherwise than on the primary market;
- (6) “nomination” means the prior reporting by the network user to the **TSO to which extent the network user wishes to use its capacity at cross border points**;
- (7) “re-nomination” means the **subsequent** reporting of a corrected nomination;
- (8) “residual balancing” means the physical balancing to ensure **cross border** 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 **at cross border points** 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 **cross border** transmission network in accordance with the transportation contract or the network code;
- (11) “network users” means a 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 **at cross border points**[...];
- (12) “interruptible services” mean services offered by the transmission system operator, based on interruptible capacity **at cross border points**;
- (13) “interruptible capacity” means capacity **at cross border points** that can be interrupted by the transmission system operator according to the conditions stipulated in the transportation contract;
- (14) “long-term services” mean services **at cross border points** offered by the transmission system operator with a duration of one year or more [...];

- (15) “short-term services mean services at cross border points offered by the transmission system operator with a duration of less than one year;
- (16) “firm capacity” means capacity at cross border points contractually guaranteed as **uninterruptible** by the transmission system operator;
- (15a) “firm services” mean services offered by the transmission system operator based on firm capacity;**
- (16) “technical capacity” means the maximum firm capacity at cross border points that the transmission system operator can offer to the network users, taking account of the system integrity and the operational requirements of the transmission networks;
- (17) “contracted capacity” means capacity at cross border points that the transmission system operator has allocated to a network user by means of a transportation contract;
- (18) “available capacity” means the part of the technical capacity that is not allocated and is still available to the system at that moment at cross border points;
- (19) “contractual congestion” means a situation where the level of firm capacity demand exceeds the technical capacity at cross border points[...];
- (20) “primary market” means the market of the cross border capacity traded directly by the transmission system operator;
- (21) “physical congestion” means a situation where the level of demand for actual deliveries exceeds the technical capacity cross border points ;
- (22) **“cross border exchange” shall mean the transport of natural gas at cross border points of transmission network across frontiers of directly neighbored Member states;**
- (23) **“cross border points” means the interconnection of different transmission systems for the exchange of natural gas between directly neighbored Member States.**

### Article 3

#### *Tariffs for access to networks*

1. **Tariffs or tariff methodologies** applied by transmission system operators for access to networks shall be transparent, take into account the need for system integrity **and its**

**improvement** and – *in the absence of effective pipeline-to-pipeline competition* – reflect **actual** cost 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** *or the tariff methodology* shall facilitate efficient gas trade and competition, while at the same time avoiding cross-subsidies between network users, *promote efficient use of the network and shall not distort trade across borders of different transmission systems.*

2.

#### *Article 4*

##### *Third Party Access services*

1. **Each** transmission system operators shall offer third party access services *for cross border exchange* 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 interruptable third party access services. The price of interruptable 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 *for cross border exchange.*
4. Transportation contracts *for cross border exchange* 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 at cross-border points*

1. Transmission system operators shall implement and publish non-discriminatory and transparent capacity allocation mechanisms. *at cross-border points, which should*

- **provide appropriate economic signals for efficient and maximum use of technical capacity at cross-border points and facilitate investment in new infrastructure at cross-border points;**
  - **provide compatibility with the market mechanisms including spot markets and trading hubs while being flexible and capable of adapting to evolving market circumstances;**
  - **provide compatibility with the network access regimes in the Member States.**
2. When transmission system operators conclude new transportation contracts **for cross border exchange or renegotiate existing transportation contracts for cross border exchange**, 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 **on a day-ahead and interruptible basis;**
  - 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 **in case of prolonged and significant** 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 and the network user, endeavour to free up this capacity, in order for the principles laid down in Article 5(2)(a) and (b) to be applied ~~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** detailed information regarding the services they offer and the relevant **principles of cross border exchange** conditions applied, together with the technical information necessary for network users to gain effective network access **at cross border points**.
2. For the service provided, **each** transmission system operators shall **make public** information on technical, contracted and available capacities on a numerical basis for all **cross border** points on a regular and rolling basis and in a user-friendly standardised manner . **This information shall refer to entry points, exit points or entry and exit points as the case may be.**
3. The relevant **cross border** points of a transmission system **the information on which** must be **made public** shall be approved by **the competent** authorities. **They shall include all cross border points that interconnect transmission systems or a LNG Terminal with a transmission system.**
4. Where a transmission system operator consider that **it** is not entitled for confidentiality reasons to **make public** all the data required, it shall seek the **authorisation** of the [...] 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. **As a general rule legitimated confidentiality interest are given when less than 3 network users have contracted at a cross border 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. **The regulatory authorities 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 the provisions of balancing services.**
2. In case of non-market based balancing systems, tolerance levels l **should** [...] be designed in a way that **either** reflect 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. .
3. **Imbalance** charges **should** be broadly cost-reflective, whilst providing appropriate incentives on network users to balance t heir input and off-take of gas. **Imbalance** charges **or the calculation method for 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.
- 5.
6. **In order** to enable network users to take corrective actions. transmission system operators [...] shall provide sufficient, 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.  
[...]

## Article 8

### Secondary markets

Transmission system operators shall take reasonable steps to allow and facilitate capacity rights to be freely tradable users in a secondary market. The standardised transportation contracts and procedures shall be **notified to** the [...] **competent** authorities.

## Article 9

### Guidelines

1. Where appropriate, guidelines **on the implementation of** this Regulation **could** specify:

**(a)** the definition of the technical information necessary for network users to gain effective access to the system and the definition of all **cross border** points for transparency requirements, including the information to be published at all **cross border** points and the time schedule accordance to which this information shall be published, in accordance with Article 6;

**(b)** **principles** on balancing rules and imbalance charges, in accordance with Article 7;

**(c)** **principles** on secondary markets, in accordance with Article 8.

2. Guidelines on the issues listed in paragraph 1, **(a)** are laid down in the Annex. They **may** be amended **if appropriate** 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 **amended** guidelines on the issues listed in paragraph 1, **(b)** and **(c)**.

## ~~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.~~

~~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 2005-6.

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

Done at Brussels, [...]

*For the European Parliament*

*For the Council*

The President