

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2003/55/EC concerning common rules for the internal market in natural gas

Article 1

Amendments to Directive 2003/55/EC

Directive 2003/55/EC is amended as follows:

(...)

(4) Article 7 is replaced by the following:

"Article 7

Unbundling of transmission systems and transmission system operators

1. Member States shall ensure that as from [date of transposition plus one year]:

(a) each undertaking which owns a transmission system acts as a transmission system operator;

(b) the same person or the same persons are not entitled:

(i) to directly or indirectly exercise control over an undertaking performing any of the functions of production or supply, and to directly or indirectly exercise control or hold any interest in or exercise any right over a transmission system operator or over a transmission system,

or

(ii) to directly or indirectly exercise control over a transmission system operator or over a transmission system, and to directly or indirectly exercise control or hold any interest in or exercise any right over an undertaking performing any of the functions of production or supply;

(c) the same person or the same persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and to directly or indirectly exercise control or hold any interest in or exercise any right over an undertaking performing any of the functions of production or supply;

(d) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production or supply and a transmission system operator or a transmission system.

2. The interests and rights referred to in paragraphs 1(b) shall include, in particular:

- (a) the ownership of part of the capital or of the business assets, or
- (b) the power to exercise voting rights, or
- (c) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, or
- (d) the right to obtain dividends or other shares of the benefits.

3. For the purpose of paragraph 1(b), the notion "undertaking performing any of the functions of production or supply" shall cover "undertaking performing any of the functions of generation and supply" within the meaning of Directive 2003/54/EC*, and the terms "transmission system operator" and "transmission system" shall cover "transmission system operator" and "transmission system" within the meaning of Directive 2003/54/EC.

* OJ L 176, 15.7.2003, p. 37

4. Member States may allow for derogations from paragraphs 1(b) and 1(c) until [date of transposition plus two years], provided that transmission system operators are not part of a vertically integrated undertaking.

5. The obligation set out in paragraph 1(a) is deemed to be fulfilled in a situation where several undertakings which own transmission systems have created a joint venture which acts as a transmission system operator in several Member States for the transmission systems concerned. No other undertaking may be part of the joint venture, unless it has been approved under Article 9a as an independent system operator.

6. Member States shall ensure that commercially sensitive information referred to in Article 10(1) held by a transmission system operator which was part of a vertically integrated undertaking, and the staff of such a transmission system operator, are not transferred to undertakings performing any of the functions of production and supply.

7. Where on the date of entry into force of this Directive, the transmission system belongs to a vertically integrated undertaking Member States may decide not to apply paragraph 1.

In such case, Member States shall either:

- a) designate an independent system operator in accordance with Article 9, or
 - b) comply with the provisions of chapter IVa.
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Vertically integrated undertakings which own a transmission system may not in any event be prevented from taking steps to comply with paragraph 1.

(8) Article 9 is replaced by the following:

*"Article 9
Independent system operators*

1. Where the transmission system belongs to a vertically integrated undertaking on entry into force of this Directive, Member States may decide not to apply Article 7(1) and designate an independent system operator upon a proposal from the transmission system owner. Such designation is subject to approval by the Commission.

(...)"

(...) The following chapter IVa is inserted after Article 12:

"CHAPTER IVa

Independent Transmission Operator

*Article 12a
Scope*

The provisions of this Chapter shall apply when a Member State decides not to apply Article 7(1) in accordance with Article 7(7) and does not designate an independent system operator in accordance with Article 9, subject to approval by the Commission.

Article 12b

Assets, equipment, staff and identity

1. Transmission system operators shall be equipped with all human, physical and financial resources necessary for fulfilling their obligations under this directive and carrying out the business of gas transmission, in particular:
 - (a) Assets that are necessary for the business of gas transmission, including the transmission network, shall be owned by the transmission system operator.
 - (b) Personnel necessary for the business of gas transmission, including the performance of all corporate tasks, shall be employed by the transmission system operator.
 - (c) Leasing of personnel and rendering of services, to and from any other parts of the vertically integrated undertaking shall be prohibited.
 - (d) Appropriate financial resources for future investment projects and/or for the replacement of existing assets shall be made available in due time by the vertically

integrated undertaking following an appropriate request from the transmission system operator.

2. The business of gas transmission shall at least include the following activities in addition to those listed in Article 8:
 - (a) representation of the transmission system operator and contacts to third parties and the regulatory authorities
 - (b) representation of the transmission system operator within the European Network of Transmission system operators
 - (c) granting and managing third party access
 - (d) collection of all the transmission system related charges including the access charges, balancing charges for ancillary services such as gas treatment, purchasing of services (balancing costs, energy for losses)
 - (e) operation, maintenance and development of the transmission system
 - (f) investment planning ensuring the long-term ability of the system to meet reasonable demand and guaranteeing security of supply
 - (g) setting up appropriate joint ventures, including with one or more Transmission system operators, gas exchanges, etc. pursuing the objective to develop the creation of regional markets or to facilitate the liberalization process
 - (h) all corporate services, including legal services, accountancy and IT services.
3. Transmission system operators shall be organised in the legal form of a limited liability company as referred to in Article 1 of Directive 68/151/EEC.
4. The transmission system operator shall not, in its corporate identity, communication, branding and premises, create confusion in respect of the separate identity of the vertically integrated undertaking.
5. The accounts of transmission system operators shall be audited by an auditor other than the one auditing the vertically integrated undertaking or any part of it.

Article 12c

Independence of the transmission system operator

1. The transmission system operator shall have effective decision-making rights, independent from the integrated gas undertaking, with respect to assets necessary to operate, maintain or develop the network. Without prejudice to the powers of the member of the Supervisory body appointed by the vertically integrated undertaking under Article 12e(3), the transmission system operator shall have the power to independently adopt its annual investment plan and to raise money on the capital market in particular through borrowing and capital increase. ||
2. Subsidiaries of the vertically integrated undertaking performing functions of production or supply shall not have any direct or indirect shareholding in the transmission system

operator. The transmission system operator shall neither have direct or indirect shareholding in any subsidiary of the vertically integrated undertaking performing functions of production or supply, nor receive dividends or any other financial benefit from this subsidiary.

3. The overall management structure of the transmission system operator and its corporate statutes shall ensure effective independence of the transmission system operator in compliance with this Chapter.
4. Any commercial and financial relations between the vertically integrated undertaking and the transmission system operator, including loans from the transmission system operator to the vertically integrated company, shall comply with market conditions.
5. The transmission system operator shall submit for approval by the regulatory authority all commercial and financial agreements with the vertically integrated undertaking.
6. The transmission system operator shall inform the regulatory authority of the financial resources, referred to in Article 12b(1)d), available for future investment projects and/or for the replacement of existing assets.
7. An undertaking which has been certified by the regulatory authority as being in compliance with the requirements of this Chapter shall be approved and designated as a transmission system operator by the Member State concerned. The certification procedure in Article 7b shall be applicable. Where the Commission has taken a decision in accordance with the procedure in Article 7b and finds that the regulatory authority has not complied with its decision within two months, it may revoke any explicit or implicit decision taken by the regulatory authority pursuant to this Article and may exercise the rights conferred to the regulatory authority by this Article until such time as the regulatory authority has complied with the Commission's decision.

Article 12d

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

1. Decisions regarding appointment and renewal, working conditions including remuneration and termination of the term of office of the persons responsible for the management and/or members of the administrative bodies of the transmission system operator shall be taken by the Supervisory Body of the transmission system operator appointed in accordance with Article 12f.
2. The identity and the conditions governing the term, the duration and the termination of office of the persons nominated by the Supervisory Body to be responsible for the management and/or as members of the administrative bodies of the transmission system operator, and the reasons for any proposed decision terminating such term of office, shall be notified to the regulatory authority. These conditions and the decisions referred to in paragraph 1 shall become binding only if, within a period of 3 weeks after notification, the regulatory authority has not objected to them. The regulatory authority may object if serious doubts arise as to the professional independence of a nominated person responsible for the management and/or member of the administrative bodies, or in the case of premature termination of a term of office, if serious doubts exist regarding its justification.

3. The persons responsible for the management and/or members of the administrative bodies of the transmission system operator shall not have had any professional position or responsibility, interest or business relationship, directly or indirectly, with the vertically integrated undertaking or any part of it or its controlling shareholders other than the transmission system operator for a period of 5 years before their appointment.
4. The persons responsible for the management and/or members of the administrative bodies of the transmission system operator may not have any other professional position or responsibility, interest or business relationship, directly or indirectly, with any part of the vertically integrated undertaking or with its controlling shareholders.
5. The persons responsible for the management and/or members of the administrative bodies, and employees of the transmission system operator shall not hold any interest in or receive any financial benefit, directly or indirectly, from any part of the vertically integrated undertaking other than the transmission system operator. Their remuneration shall not depend on activities or results of the vertically integrated undertaking other than those of the transmission system operator.
6. Effective rights of appeal to the regulatory authority shall be guaranteed for any complaints by the persons responsible for the management and/or members of the administrative bodies of the transmission system operator against premature terminations of their term of office.
7. After termination of their term of office in the transmission system operator, the persons responsible for its management and/or members of its administrative bodies shall not have any professional position or responsibility, interest or business relationship with any part of the vertically integrated undertaking other than the transmission system operator, or with its controlling shareholders for a period of not less than 5 years.

Article 12e

Trustee

1. An independent Trustee shall be appointed by the regulatory authority on a proposal by and at the expense of the vertically integrated undertaking. The Trustee shall act exclusively in the legitimate interest of the vertically integrated undertaking in the preservation of the asset value of the transmission system operator, while safeguarding the independence of the transmission system operator from the vertically integrated undertaking. In the exercise of its functions, the Trustee shall not have regard to the interest of the production and supply business of the vertically integrated undertaking.
2. The Trustee shall not have had any professional position or responsibility, interest in or business relationship, directly or indirectly, with the vertically integrated undertaking or any part of it, or its controlling shareholders, or with any undertaking performing functions of production or supply, for a period of 5 years before its appointment.

The terms of the mandate of the trustee, including the duration, the conditions for termination and the financial conditions, shall be subject to approval by the regulatory authority.

During its mandate, the Trustee may not have any other professional position or responsibility, interest or business relationship, directly or indirectly, with any part of the vertically integrated undertaking or with its controlling shareholders.

Following termination of the mandate, the trustee shall not have any professional position or responsibility, interest or business relationship, directly or indirectly, with any part of the vertically integrated undertaking or its controlling shareholders for a period of not less than 5 years.

3. The Trustee shall be responsible for:

- (a) the appointment, renewal and dismissal of the members, other than the one referred to in Article 12f(3), of the Supervisory Body of the transmission system operator, and
- (b) the exercise of the voting rights of the vertically integrated undertaking within the transmission system operator.

Article 12f
Supervisory Body

transmission system operator

1. The transmission system operator shall have a Supervisory Body which shall be in charge of taking all decisions which may have a significant impact on the value of the assets of the shareholders within the transmission system operator. The Supervisory Body shall not determine directly or indirectly either the competitive behaviour of the transmission system operator or the day to day activities of the transmission system operator and management of the network.
2. The Supervisory Body shall have a minimum of five members. Paragraphs (2) to (7) of Article 12d shall apply to the members of the Supervisory Body appointed by the Trustee in accordance with Article 12e(3).
3. Member States may allow the vertically integrated undertaking to appoint one member of the Supervisory body in addition to the members appointed by the Trustee according to Article 12e(3). This member shall have a veto right with respect to decisions that in his view may significantly reduce the asset value of the transmission system operator. When assessing whether a decision may significantly reduce the value of the assets, the annual financial plan and the amount of debts of the transmission system operator shall be of particular importance. Two thirds of the Members of the Supervisory Body excluding the member appointed by the vertically integrated undertaking may overrule such veto, in which case Article 12(h)(7) applies. *handwritten note: hand out to*
4. When the member of the Supervisory body appointed by the vertically integrated undertaking has exercised the right to veto a decision in accordance with paragraph 3 of this Article, with the effect of preventing or delaying investments in the network, Article 12h(7) shall apply.
5. The member of the Supervisory body appointed by the vertically integrated undertaking may not have any other professional position or responsibility, directly or indirectly, in any part of the vertically integrated undertaking performing functions of production or supply. This member shall not communicate any information to the vertically integrated undertaking or any part thereof other than that which is strictly necessary to assess whether a proposed decision could significantly reduce the asset value of the transmission system operator. Such information shall not in any case include commercially sensitive information of third parties.

Article 12g

Compliance programme and compliance officer

1. Member States shall ensure that transmission system operators establish and implement a compliance programme which sets out the measures taken in order to ensure that discriminatory conduct is excluded, and ensure that the compliance with this programme is adequately monitored. The programme shall set out the specific obligations of employees to meet this objective. It shall be subject to approval by the regulatory authority. Without prejudice to the powers of the national regulator, compliance with the program shall be independently monitored by the compliance officer.
2. The Supervisory Body, without the participation of the member appointed by the vertically integrated undertaking, shall appoint a compliance officer. The compliance officer may be a natural or legal person. Paragraphs (2) to (7) of Article 12d shall apply to the compliance officer. The regulatory authority may object to the appointment of a compliance officer for reasons of lack of independence or professional capacity.
3. The compliance officer shall be in charge of :
 - (i) monitoring the implementation of the compliance programme ;
 - (ii) elaborating an annual report, setting out the measures taken in order to implement the compliance programme and submitting it to the regulatory authority ;
 - (iii) reporting to the Supervisory body and issuing recommendations on the compliance programme and its implementation;
 - (iv) reporting to the regulatory authority on any commercial and financial relations between the vertically integrated undertaking and the transmission system operator
4. The conditions governing the mandate or the employment conditions of the compliance officer shall be subject to approval by the regulatory authority and shall ensure the independence of the compliance officer.
5. The compliance officer shall regularly report, either orally or in writing, to the regulatory authority and shall have the right to regularly report, either orally or in writing, to the supervisory body of the transmission system operator.
6. The compliance officer may attend all meetings of the management or administrative bodies of the transmission system operator. The compliance officer shall attend all meetings that address the following matters :
 - (i) conditions for access to the network, as defined in Regulation (EC) No 1775/2005, in particular regarding tariffs, third party access services, capacity allocation and congestion management, transparency, balancing and secondary markets;
 - (ii) projects undertaken in order to operate, maintain and develop the transmission grid system, including investments in new transport connections, in expansion of capacity and in optimisation of existing capacity;

- (iii) energy purchases or sales necessary for the operation of the transmission system.
- 7. The compliance officer shall monitor the compliance of the transmission system operator with Article 10.
- 8. The compliance officer shall have access to all relevant data and to the offices of the transmission system operator and to all the information necessary for the fulfilment of its task.
- 9. After prior approval by the regulatory authority, the Supervisory Body, without the participation of the member appointed by the vertically integrated undertaking, may dismiss the compliance officer.

Article 12h

Network development and powers to make investment decisions

1. Every year, transmission system operators shall submit to the regulatory authority a 10-year network development plan based on existing and forecast supply and demand after having consulted all the relevant stakeholders. The plan shall contain efficient measures in order to guarantee the adequacy of the system and the security of supply.
2. The 10-year network development plan shall in particular :
 - (a) indicate to market participants the main transmission infrastructures that need to be built or upgraded over the next ten years.
 - (b) contain all the investments already decided and identify new investments which have to be executed in the next three years.
 - (c) provide for a time frame for all investment projects.
3. When elaborating the 10-year network development plan, the transmission system operator shall make reasonable assumptions about the evolution of its production, supply, consumption and exchanges with other countries, taking into account investment plans for regional and European-wide networks, as well as investment plans for storage and LNG regasification facilities.
4. The regulatory authority shall consult all actual or potential network users on the 10-year network development plan in an open and transparent manner. Persons or undertakings claiming to be potential users may be required to substantiate such claims. It shall publish the result of the consultation process, in particular possible needs for investments.
5. The regulatory authority shall examine whether the 10-year network development plan covers all investment needs identified during the consultation process, and whether it is consistent with the Community-wide 10-year network development plan referred to in Article 2c(1) of Regulation (EC) No 1775/2005. If any doubt arises as to the consistency with the Community-wide 10-year network development plan, the regulatory authority shall consult the Agency. The regulatory authority may require the transmission system operator to amend its plan.

6. The regulatory authority shall monitor and evaluate the implementation of the 10-year network development plan.
7. In circumstances where the transmission system operator, other than for overriding reasons beyond its control, does not execute an investment, which, according to the 10-year network development plan, was supposed to be executed in the following three years Members States shall ensure that the regulatory authority has the obligation to take at least one of the following measures to ensure that the investment in question is made:
 - (a) require the transmission system operator to execute the investments in question, or
 - (b) organise a tender procedure open to any investors for the investment in question, or
 - (c) oblige the transmission system operator to accept a capital increase to finance the necessary investments and allow independent investors to participate in the capital.

When the regulatory authority has made use of its powers under point (b), it may oblige the transmission system operator to accept the following:

- financing by any third party,
- construction by any third party,
- building the respective new assets,
- operating the respective new asset.

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

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

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

Article 12i

Decision making powers regarding the connection of storage facilities, LNG regasification facilities and industrial consumers to the transmission network

1. Transmission system operators shall be obliged to establish and publish transparent and efficient procedures and tariffs for non-discriminatory connection of storage facilities, LNG regasification facilities and industrial consumers to the network. The procedures shall be subject to approval by the regulatory authority
2. Transmission system operators shall not be entitled to refuse the connection of a new storage facility, LNG regasification facility or industrial consumer on the grounds of possible future limitations to available network capacities or additional costs linked with

necessary capacity increase. The transmission system operator shall be obliged to ensure sufficient entry and exit capacity for the new connection.

Article 12j

Regional cooperation¹

1. Member States shall ensure, through the implementation of this Directive, that the transmission system operators have one or more integrated system(s) at regional level covering several Member States for capacity allocation and for checking the security of the network.
2. No vertically integrated transmission system operator may have, alone or jointly, control over any body responsible for the cooperation referred to in paragraph 1.
3. In case a vertically integrated transmission system operator participates in it, the body responsible for the cooperation shall establish and implement a compliance programme which sets out measures taken to ensure that discriminatory and anticompetitive conducts are excluded and ensure that observance of it is adequately monitored. The programme shall set out the specific obligations of employees to meet this objective. It shall be subject to approval of the Agency. Compliance of the program shall be independently monitored by a compliance officer appointed upon prior approval by the Agency. The independence of the compliance officer shall be guaranteed in particular by the terms of his employment contract which shall be approved by the Agency.

(...)

¹ This could be made applicable to all unbundling options.

(14) The following Chapter VIa is inserted after Article 24:

"CHAPTER VIa

NATIONAL REGULATORY AUTHORITIES

(...)

Article 24c

Duties and powers of the regulatory authority²

(...)

3a. In addition to the tasks and powers conferred on it under paragraphs 1 and 3, when a transmission system operator has been designated in accordance with Chapter IVa, the regulatory authority shall be granted at least the following tasks and powers:

- (a) to issue penalties of up to 10% of the transmission system operator's yearly turnover for non compliance by the transmission system operator with its obligations or discriminatory behaviour in particular in favour of the vertically integrated undertaking;
- (b) to monitor communications between the transmission system operator and the vertically integrated undertaking so as to ensure compliance of the transmission system operator with its obligations;
- (c) to act as a dispute settlement authority between the vertically integrated undertaking and the transmission system operator in respect of any complaint submitted pursuant to paragraph 7;
- (d) to monitor commercial and financial relations including loans between the vertically integrated undertaking and the transmission system operator,
- (e) to approve all commercial and financial agreements on the condition that they comply with market conditions;
- (f) to carry out inspections on the premises of the vertically integrated undertaking and the transmission system operator;
- (g) to assign all or specific tasks of the transmission system operator to an independent system operator appointed in accordance with Article 9 in case of a persistent breach by the transmission system operator of its obligations under this Directive, in particular in case of repeated discriminatory behaviour to the benefit of the vertically integrated undertaking.

² Some parts of this could be made applicable to all unbundling options.