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INTERPRETATIVE NOTE ON DIRECTIVE 2009/73/EC CONCERNING COMMON RULES FOR THE INTERNAL MARKET IN NATURAL GAS

THIRD-PARTY ACCESS TO STORAGE FACILITIES

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1. INTRODUCTION

Significant amendments have been made to the Gas Directive[1] and to the Gas Regulation[2] with regard to third-party access to storage. Article 33 of the Gas Directive requires Member States to define and publish criteria according to which the access regime may be determined. In addition, Article 15 of the Gas Directive requires storage system operators (SSOs) to be at least legally and operationally unbundled. Finally, Articles 15, 17, 19, 20 and 22 of the Gas Regulation set legally binding standards for third-party access services, capacity allocation and congestion management, and transparency concerning storage facilities.

This note provides further information to guide the implementation of measures in the new Gas Directive relating to third-party access to storage. It outlines the new requirements and procedures that are included in the legislation, and the new roles and duties of Member States, national regulatory authorities (NRAs) and SSOs.

The note presents the Commission's services' understanding of how the relevant provisions of the Gas Directive are to be interpreted. It aims to enhance legal certainty but does not create any new rules. In any event, giving binding interpretation of European Union law is ultimately the role of the European Court of Justice. The present note is not legally binding.

2. DEFINITIONS AND SCOPE

Pursuant to Article 2(9) of the Gas Directive,

> *'storage facility' means a facility used for the stocking of natural gas and owned and/or operated by a natural gas undertaking, including the part of LNG facilities used for storage but excluding the portion used for production operations, and excluding facilities reserved exclusively for transmission system operators in carrying out their functions;*

The definition restricts the scope of the application of the Directive's provisions on access to storage to those storage facilities that are not exclusively reserved for transmission system operators (TSOs) in carrying out their functions. The portion of storage facilities used for production operations is also excluded from the scope of the definition. The part of LNG facilities used for storage is included in the definition.

With a view to clearly defining storage facilities and the portion of storage facilities falling under the access to storage rule (Article 33 Gas Directive), it is necessary to delimit the definition of storage facilities.

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[1] Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211, 14.8.2009, p. 94.

[2] Regulation EC No 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211, 14.8.2009, p. 36.

2.1. Production operations

The Directive excludes from the definition those (portions of) storages that serve a function as part of production operations. Producers may need to resort to portions of storages for their exclusive use in order to smooth production swings. They may invoke exclusive use for smoothing irregularities associated with the specific process of production fields or areas.

In light of the EU's general policy goal of stimulating domestic production, such exclusive use of storage for production operations is therefore justified if it enables or improves the production process. It is the responsibility of the Member State in which the production is located to ensure that the use of storage for production operations is not abused by producers, through the creation of de facto priority access to storages.

Irregularities caused by consumption or demand are in the realm of supply and not production operations. Consequently, it is the view of the services of the Commission that such irregularities cannot justify exclusive reservation for production operations of certain portions of what would otherwise be considered a storage facility.

2.2. Exclusive reservation for TSOs

The functions carried out by TSOs are mainly listed in Article 2(4) Gas Directive, according to which a TSO is:

> *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 transportation of gas.*

Among these responsibilities, only operating the transmission system can reasonably involve the use of storage. More specifically, in this sense, a TSO will need to resort to such facilities for the purpose of ensuring that the system remains physically stable and secure, i.e. ensuring that shippers' or consumers' behaviour does not lead to a loss in pressure that could result in impediments to the functioning of the network or in supply interruption. This means that, in addition to what is covered by the definition of a TSO, maintaining the system's stability, including the procurement of the necessary energy for carrying out this function, should be included in the functions of a TSO.

In order to fulfil its tasks related to system stability, a TSO will typically need to buy and sell certain quantities of gas, and it will need to resort to certain facilities to store such gas.

As Article 2(9) Gas Directive points out, such facilities may be reserved exclusively for TSOs[3]. Unlike the reservation for production purposes, Article 2(9) Gas Directive does not allow the exclusive reservation of only portions of a facility for TSOs in carrying out their functions. Rather, it takes an all-or-nothing approach, either reserving an entire facility exclusively for TSOs or labelling it a 'storage facility'.

Since this approach chosen by the legislator will lead to entire facilities being reserved for a TSO, this reservation can only apply to such facilities which by their function and dimension

[3] Of course, this does not mean that TSOs are precluded from resorting to storage facilities within the scope of the definition for balancing operations.

are conceptualised as tools to guarantee system stability. This will, *a priori*, not allow exclusive reservation of such facilities that serve mainly for seasonal purposes and facilities in general that do not respond quickly enough to be able to fulfil system stability purposes. Neither will it allow exclusive reservation of facilities that are too large to serve as a system stability facility, because such withdrawal from the definition would turn the exceeding portion of the facility into something other than a 'storage facility'. Consequently, facilities reserved exclusively for TSOs can only be those that are technically and in terms of size designed and suitable for system stability purposes. This may in particular include fast responding overground facilities with limited capacity. The remainder (and in most Member States the majority) of facilities will consequently be treated as 'storage facilities' under the definition of the Directive.

In case TSOs could not guarantee the same level of reliability and consistency in operating the network when they have to resort to facilities qualifying as storage facilities, Member States may resort to measures in accordance with Article 3 of the Gas Directive on SSOs to the benefit of TSOs. The TSO could then be given priority with regard to storage capacities to be allocated to it whilst the charges incurred would be those applicable to parties other than the TSO.

In the view of the Commission services, the use of storage facilities for balancing purposes does not fall under the exclusive use by a TSO. Balancing is a task distinct from ensuring system stability. Balancing must be market-based, since Article 13(5) Gas Directive requires with respect to gas procurement for balancing purposes by TSOs that:

> *Transmission system operators shall procure the energy they use for the carrying out of their functions according to transparent, non-discriminatory and market based procedures.*

In addition, Article 21(1) of the Gas Regulation states that:

> *Balancing rules shall be market-based.*

and Article 21(3) of the Gas Regulation specifies that:

> *Imbalance charges shall be cost-reflective to the extent possible, whilst providing appropriate incentives on network users to balance their input and off-take of gas.*

Therefore, cost reflectivity of imbalance charges can only be ensured if the TSO charges the network users for its costs for using the storage capacity. Those costs have to be market-based, which means that TSOs have to purchase storage capacity in the market, ruling out *a priori* any exclusive use of a storage facility by a TSO for balancing purposes.

2.3. The part of liquefied natural gas (LNG) facilities used for storage

LNG facilities need storage of liquefied gas in order to operate effective re-gasification and send-out of gas into the transmission system. In determining which parts of LNG facilities are to be considered 'storage facilities' in the sense of the definition, and which parts belong exclusively to the LNG facility, Article 2(11) of the Gas Directive provides guidance:

> *'LNG facility' means a terminal which is used for the liquefaction of natural gas or the importation, offloading, and re-gasification of LNG, and includes ancillary services and temporary storage necessary for the re-gasification process and*

subsequent delivery to the transmission system, but does not include any part of LNG terminals used for storage;

Since, under this definition, an LNG facility includes temporary storage necessary for the re-gasification process, such storage is outside the scope of the definition of 'storage facility'. On the other hand, the definition of 'LNG facility' explicitly excludes any other part of the terminals used for storage. Such part consequently falls under the definition of 'storage facility' in Article 2(9) of the Gas Directive, which in turn covers it as 'including the part of LNG facilities used for storage'.

Even if physical injection from the grid into the storage is not possible, as gas cannot be liquefied at the LNG facility, access to such storage can be offered through virtual (interruptible) entry capacity.

2.4. Transparency in defining 'storage facilities'

In the view of the services of Commission, and for the avoidance of doubt, SSOs running facilities both within and outside the definition of 'storage facility' under Article 2(9) of the Gas Directive, should as a good practice indicate and substantiate which portion of the storage facility concerned would be necessary for production purposes or which entire facility would be for exclusive TSO use and would therefore not be available for third-party access (TPA).

3. DESIGNATION AND TASKS OF SYSTEM OPERATORS

Pursuant to Article 2(13) of the Gas Directive,

'system' means any transmission networks, distribution networks, LNG facilities and/or storage facilities owned and/or operated by a natural gas undertaking, including linepack and its facilities supplying ancillary services and those of related undertakings necessary for providing access to transmission, distribution and LNG;

Article 12 of the Gas Directive requires Member States to designate system operators, or to ask gas undertakings to designate system operators (which includes SSOs), and stipulates that the designated system operators must act in accordance with Articles 13, 15 and 16 of the Gas Directive. Such designation is for the purpose of ensuring effective TPA, and therefore it is the party responsible for commercialisation of the capacity that is logically designated as the SSO. Where there are more operators for (parts of) the same storage facility, Member States and national regulatory authorities (NRAs) are encouraged to ensure that such shared operator does not work to the detriment of access to the storage facility and that commercialisation of capacity to third parties is optimised for the whole facility.

Article 13 of the Gas Directive lays down the tasks of system operators, including SSOs. Article 13(1) Gas Directive reads:

1. Each transmission, storage and/or LNG system operator shall:

(a) operate, maintain and develop under economic conditions secure, reliable and efficient transmission, storage and/or LNG facilities to secure an open market, with due regard to the environment, ensure adequate means to meet service obligations;

(b) refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;

(c) provide any other transmission system operator, any other storage system operator, any other LNG system operator and/or any distribution system operator, sufficient information to ensure that the transport and storage of natural gas may take place in a manner compatible with the secure and efficient operation of the interconnected system; and

(d) provide system users with the information they need for efficient access to the system.

Beyond the general obligations of SSOs listed above, further obligations with respect to TPA to storage facilities are laid down in Articles 15, 17, 19, 20 and 22 of the Gas Regulation.

Those obligations apply to both regulated and negotiated TPA, as is stated in the penultimate paragraph of Article 1 of the Gas Regulation:

> *This Regulation, with the exception of Article 19(4)*[4]*, shall apply only to storage facilities falling under Article 33(3) or (4) of Directive 2009/73/EC.*

Moreover, SSOs have the obligation to consult with system users when developing access conditions. In the view of Commission services, the correct implementation of these provisions requires SSOs to make use of a standard contract or a storage code.

4. LEGAL AND FUNCTIONAL UNBUNDLING

Article 15 of the Gas Directive requires SSOs which are part of a vertically integrated undertaking to be legally and functionally unbundled from other activities not related to transmission, distribution, and storage. It can be concluded that a fully ownership unbundled SSO (which is at the same time the owner of the storage facility) is compliant, irrespective of whether it is the same company as the fully ownership unbundled TSO or a separate one. In accordance with Article 15(1) of the Gas Directive, the unbundling obligation only applies to operators of those storage facilities that are technically and/or economically necessary for providing efficient access to the system for the supply of customers pursuant to Article 33 of the Gas Directive. Therefore, the obligation to unbundle legally and functionally does not apply to those operators of storage facilities that have no obligation under the Gas Directive to grant TPA either on a negotiated or on a regulated basis[5].

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4 Article 19(4) of the Gas Regulation concerns transparency in storage capacity and use. It applies to all storage facilities, including those where access is not economically or technically necessary.

5 See for further details on the Commission services' interpretation of the unbundling rules the Commission Staff Working Paper: Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas — The unbundling regime, 22 January 2010 (http://ec.europa.eu/energy/gas_electricity/interpretative_notes/interpretative_note_en.htm).

5. CONFIDENTIALITY

Article 16 of the Gas Directive, concerning confidentiality for TSOs and transmission system owners, applies explicitly to storage operators. The requirement of confidentiality and, as a consequence, the setting-up of effective 'Chinese walls'between the SSO and remaining parts of the undertaking[6] is particularly important where an SSO forms part of a vertically integrated company containing storage and supply undertakings.

With a view to ensuring compliance with the confidentiality requirement, the relevant authorities should at least require sufficient evidence from the companies concerned that well-functioning 'Chinese walls' have effectively been established between the SSO and the supply branch of the vertically integrated company as defined in Article 15 of the Gas Directive. The confidentiality requirement of Article 16 of the Gas Directive applies in the same manner to combined operators (cf. Article 29 Gas Directive) encompassing an SSO, in particular since SSOs owned by a TSO may be competing with other SSOs.

6. ACCESS TO STORAGE FACILITIES

6.1. Background

Article 33 of the Gas Directive is the core provision as far as the regulatory framework for operating storage facilities is concerned:

> *Access to storage*
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> *1. For the organisation of access to storage facilities and linepack when technically and/or economically necessary for providing efficient access to the system for the supply of customers, as well as for the organisation of access to ancillary services, Member States may choose either or both of the procedures referred to in paragraphs 3 and 4. Those procedures shall operate in accordance with objective, transparent and non-discriminatory criteria.*
>
> *The regulatory authorities where Member States have so provided or Member States shall define and publish criteria according to which the access regime applicable to storage facilities and linepack may be determined. …*

Article 33(1) of the Gas Directive establishes the right of access to storage 'when technically and/or economically necessary … for the supply of customers', while leaving it to Member States to determine whether a negotiated or regulated access regime should be implemented.

The goal of these provisions is to ensure a well-functioning European storage market that contributes to a competitive and integrated gas market. Therefore, these provisions also need to be implemented in a way that does not distort market integration and competition across national borders, and that can adapt to changing circumstances[7].

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[6] This excludes, for instance, personnel working for the supply business having privileged access to databases containing information which could be commercially advantageous, such as details on actual or potential storage users.

[7] Recital 23 of the Gas Directive explains: '*It is also necessary to increase transparency in respect of the storage capacity that is offered to third parties, by obliging Member States to define and publish a non-*

In practice, three different situations can be derived from Article 33 of the Gas Directive. Either access is not technically and/or economically necessary or it is, in which case access can be regulated or negotiated. The choice of access procedure is explicitly left to Member States, as the use of storage, the geological potential for storage, and the function of storage differ between Member States. Moreover, as markets integrate, the geographical scope of that market may change, as may the uses and functions of storage. Therefore, Member States should be able to adapt their rules for access to storage based on changing market circumstances. Precisely for that reason, criteria have to be published, so as to ensure that under changing market circumstances, the rules governing access to storage facilities will be adapted accordingly. Such criteria are moreover needed for investors in storage facilities, to give certainty as to the access regime that will be applied to them when operating a storage facility.

The obligation to establish delineating criteria refers not only to the determination of the choice between the options provided in Article 33(3) or (4) of the Gas Directive. Rather, the regulatory authorities (where Member States have so provided) or the Member States are also required to define and publish criteria according to which the technical or economic necessity may be determined. This follows from the wording of recital 23 and Article 33(1), second subparagraph Gas Directive, which establishes this obligation with respect to the access regime as a whole, rather than limiting it to the choice between regulated or negotiated TPA. Moreover, the obligation to establish criteria for the choice between regulated or negotiated TPA cannot be sensibly fulfilled without addressing in the same manner the overriding and arguably more crucial of the two questions, i.e. whether TPA is technically and economically necessary.

The criteria under Article 33(1) of the Gas Directive must be established by the regulatory authorities (where Member States have so provided) or by the Member States and they must be applied correctly. It is left to Member States to decide who (e.g. the Member State, the National Regulatory Authority [NRA], or the SSO) determines, on the basis of the published criteria, the rules governing access to a specific storage facility, but this access regime has to be made public, pursuant to Article 33(1) second subparagraph of the Gas Directive:

> *They* [i.e. Member States or NRAs] *shall make public, or oblige storage and transmission system operators to make public, which storage facilities, or which parts of those storage facilities, and which linepack is offered under the different procedures referred to in paragraphs 3 and 4.*

There is no discretion left to Member States, NRAs, or SSOs as to whether and how these criteria, once established, are applied. Article 41(1)(s) of the Gas Directive requires the NRA to monitor whether these criteria are correctly applied in practice:

> *Monitoring the correct application of the criteria that determine whether a storage facility falls under Article 33(3) or (4);*

This monitoring automatically includes a duty for NRAs to examine whether the definition of storage facility has been correctly applied. In order to do so, NRAs will need an overview of all existing facilities in their jurisdiction, including any found to be outside the scope of the

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> *discriminatory, clear framework that determines the appropriate regulatory regime applicable to storage facilities. That obligation should not require a new decision on access regimes but should improve the transparency regarding the access regime to storage. …*'

definition. The monitoring power of NRAs must be effective also where a Member State itself decides to determine the access regime instead of leaving this decision to the NRA or the SSO. Where institutional arrangements do not allow the NRA to monitor actions by the Member State, the determination of the access regime may not be made by the Member State, but will rather need to be made by an actor subject to NRA supervision.

Finally, it is worth noting that the storage facility to which access is requested and the customer who is supplied from this storage facility need not necessarily be situated in the same Member State. This requires Member States, when choosing the criteria to determine technical and economic necessity of access to storage and the type of access regime, to take due account of the market situation in the relevant area or areas for which storage facilities may be economically or technically necessary to supply customers. Depending on the geographical situation and the connection of the storage, this area or these areas will normally be the balancing area or areas to which the storage facility is connected, whereas possible effects on neighbouring areas will also need to be examined. In the process, relevant provisions with respect to the cooperation of Member States and NRAs need to be taken into account.

6.2. Criteria to determine the access regime

6.2.1. Technical and economic necessity of access to storage

A certain degree of flexibility in supplying gas to consumers is indispensable for the gas business. While storage is not the only tool offering flexibility to network users for supplying their customers, it is one of the most important ones and, considering the underlying economics, often the only suitable one. Supply flexibility in the sense of production or import flexibility, linepack and spot gas may also in principle be available, but would often not suit the needs of the customer/network user due to either the scale and the short notice of the flexibility required or the underlying economics. For example, providing the entire seasonal flexibility by import flexibility would mean that considerable pipeline capacity is left unused, thereby exorbitantly increasing capital costs and rendering gas supply uneconomic and no longer competitive. Production flexibility would usually not allow short-term demand hikes to be met, no matter whether they are foreseen or not. Neither can balancing regimes fully compensate the functions of storage with respect to the supply of consumers.

Finally, whereas a combination of the alternative measures above may allow all customers to be supplied from a technical point of view, thus rendering access to storage not technically necessary, it is difficult to conceive a scenario where access to storage would not be economically necessary, i.e. where it is not at lower costs and/or risks. But even if a combination of the alternative measures above may allow supply to all customers at reasonable costs, a competitive advantage would remain for those suppliers who (can additionally) resort to storage. Therefore, the dispensability of storage for some suppliers with superior access to other means of flexibility (e.g. very flexible upstream contracts and sufficient import capacity) cannot be equated with a general conclusion that access to storage is not necessary. Hence, even where access to storage may not be necessary for larger suppliers, who can, for example, benefit from greater portfolio effects, storage may still be necessary for smaller suppliers. Where there are shippers requesting access to storage, this is a strong indication that it is economically necessary. In the view of the services of the Commission, should storage nonetheless not be deemed economically necessary, despite such requests, this would need to be proven to a very high standard.

Without prejudice to the regulatory authorities' (where Member States have so provided) or the Member States' right and obligation to determine whether access to storage is technically and/or economically necessary, in the view of the Commission's services such necessity could be determined along the lines of the following indicative principles:

- Per type of storage. The key question is whether there are other instruments available for suppliers to obtain the same level of technical and economic flexibility as through a storage facility. This depends on the availability and price of transport capacity (including, but not limited to, the LNG supply chain), liquidity of hubs and other traded markets. While differentiation between different types of storage needs and facilities corresponding to those needs (short-term vs. seasonal storage) is possible, partial substitution between them should be considered (large salt caverns may for example also be used for seasonal flexibility). Importing the entire seasonal flexibility would usually not be feasible, as this would mean that considerable pipeline capacity is left unused, thereby disproportionately increasing capital costs and rendering gas supply uneconomic. Furthermore, short-term flexibility needs of gas-fired power plants will often also require storage in a balancing area[8]. It is hard to conceive a situation in which access to storages primarily used for seasonal balancing, such as depleted fields and aquifers, is not technically and/or economically necessary.

- Per storage facility. A general assessment of the market and the flexibility needs of customers in one or more relevant areas within and beyond a Member State can lead to criteria that determine that access is required to only a part of the storage facilities, as there is no other technical or economic alternative for access to storage for only a certain part of the market. However, utmost caution and constant surveillance of market development is necessary in such an assessment.

- Not per storage client and not excluding storage clients on the basis of their portfolio of customers. The internal market legislation decouples infrastructure operation from supply. Therefore, the access regime and the basic rules for access may not depend on which customers a supplier intends to supply. It is therefore not possible to exclude certain suppliers from access to storage based on the customer portfolio.

- Investment in new storage and geological potential. The possibility to invest in new storage is no reason to state that access to existing storage is not necessary, as new investment is no alternative at the moment of supply. Investment in storage typically takes more than five years and therefore cannot be used as a criterion. However, after a new storage facility has been made available, the assessment related to the appropriate access regime may change as a consequence. In that case the market may become more competitive and negotiated TPA may be more appropriate than regulated TPA.

The decision as to whether storage is technically and economically necessary will not only entail consequences with respect to the obligation to grant TPA. It will also determine whether, pursuant to Article 15(1) of the Gas Directive, respective storage facilities are subject to the unbundling obligations laid down therein.

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[8] This need for flexibility is expected to increase due to the complementarity of wind and gas-fired power production.

6.2.2. Negotiated or regulated third-party access

The Gas Directive allows both a negotiated and a regulated access regime without discriminating against either of them. This means that the results of both regimes should comply with the principle of non-discrimination and competition enshrined in the Gas Directive. It should be noted that under Article 1 of the Gas Regulation, the provisions of the Gas Regulation on storage apply in the case of both negotiated and regulated TPA.

Pursuant to Article 41(1)(n) Gas Directive, in the case of negotiated TPA, NRAs do not have the power to review tariffs. However, in the view of the Commission services, under default competences of regulatory oversight, NRAs are entitled and required to ensure compliance with the general principle of non-discrimination, including as regards tariff setting. This derives *inter alia* from Article 15 of the Gas Regulation, according to which the same service must be offered to different customers under equivalent terms and conditions. With respect to transparency requirements, only Article 33(4) of the Gas Directive expressly requires tariffs to be published. Nonetheless, in the case of negotiated TPA, in the view of the Commission services, the obligation to publish 'main commercial conditions' pursuant to Article 33(3) Gas Directive includes at least the publication of prices for standard services.

Without prejudice to the regulatory authorities' (where Member States have so provided) or the Member States' right and obligation to decide whether negotiated or regulated TPA should be applied, in the view of the Commission's services, this could be determined along the lines of the following indicative principles:

- Existence of a flexibility market. Does effective competition between facilities or between facilities and other flexibility services in the market area exist? Is there competitive pressure between storage facilities or between facilities and other flexibility services such that efficient tariffs, products, product variety and access to the services offered is a result of market mechanisms? Such an outcome would normally require a sufficient number of independent providers of storage services.

- Effective access to storage. Is there a high proportion of storage capacity booked long-term without having previously been allocated in a non-discriminatory manner, and is only a comparatively small amount of capacity offered to the market each year?

- Degree of dispersion of storage clients. Is capacity largely booked by one or very few large undertakings? Are storage pricing and the access regime distorted by such concentrated interest and does it thus not result in efficient use of the storage?

Barriers to entry into the storage market can be a relevant criterion for opting for either negotiated or regulated TPA. Such barriers can be technical, administrative or economic in nature. Technical barriers would exist if all potential storage fields have been explored, leaving no additional geological potential. Administrative barriers could exist if necessary permits cannot realistically be obtained. Economic barriers could exist if the cost structures of possible new storages were substantially higher than those of existing ones, or the lumpiness of new storage capacity would make their development uneconomic. Analysis of such economic barriers needs to take into account the demand for storage as high demand may result in lower economic barriers.

- High entry barriers would normally be likely to prevent the emergence of a competitive market, except if the existing capacity is sufficient to cover all the market demand at a reasonable price.

- A finding of low entry barriers still requires an assessment of the timeliness of such entry. Storage capacity that may enter the market in five years' time does not necessarily constrain the existing market players in the meantime. In such cases, it might stimulate investment in new storages if the requirements for the future replacement of a regulated access system by a negotiated one were laid down in a transparent manner.

6.2.3. Definition of criteria

The definition of criteria as required in Article 33(1) Gas Directive therefore consists at least of the following:

- An analysis of the availability and need for (different types of) flexibility for gas supply;

- An analysis of the available instruments to meet the different types of flexibility;

- A checklist according to which the access regime is determined.

6.3 Access obligations

Irrespective of the system chosen (negotiated or regulated), it has to operate in accordance with the specific requirements established by the Gas Regulation and be objective, transparent and non-discriminatory. These conditions refer to the access regime itself and should not be confused with the criteria that need to be established in order to determine the access regime.

'Objective' in this respect means that the criteria for access have to relate to the factual characteristics of the storage facilities, such as existing technical features or quality requirements. They have to be comprehensible for any third party and need to be technically justified.

'Transparent' means that all criteria have to be published *ex ante*, in order to allow a third party to evaluate the technical and economic consequences of TPA to storage facilities. They also have to allow insight into derivation of the criteria, i.e. the underlying technical and economic reasons for establishing them.

'Non-discriminatory' means that the SSO provides the same objective service on equal terms to all customers, whether affiliated undertakings or third parties. This non-discrimination obligation would equally cover pricing and other access conditions.

The precise requirements regarding the offering of TPA services, how to allocate capacity and how to deal with congestion, as well as the requirements on transparency of the use of the storage facilities and the trading of storage capacity rights, are laid down in Articles 15, 17, 19, 20 and 22 of the Gas Regulation.

7. STORAGE AND SECURITY OF SUPPLY OBLIGATIONS

Should a Member State decide to maintain a gas reserve in a storage that cannot be used for commercial purposes but is left aside for exceptional emergencies (e.g. strategic storages or strategic stocks), such storage is still considered a storage facility under the definition of the Gas Directive. The Directive does not provide for special treatment of such storages but it allows Member States to take such measures under Article 3(2) Gas Directive under strict conditions, requiring a notification to the Commission under Article 3(11) Gas Directive.

Further requirements for such measures are laid down in Council Directive 2004/67/EC concerning measures to safeguard security of natural gas supply, to ensure that they do not distort competition and are not discriminatory. It has to be noted that the Commission has proposed a Regulation on security of gas supply [COM(2009) 363] to replace this Directive.

8. TRANSPARENCY

Whereas most rules in the Gas Regulation apply only to storage facilities that grant regulated or negotiated access (cf. Article 1 Gas Regulation), this is not the case for rules on transparency regarding use, availability, and gas in stock, as laid down in Article 19(4) Gas Regulation. As explicitly stated in that Article, this obligation applies to all storage facilities, regardless of whether or not TPA is in place.

Pursuant to Article 19(4) Gas Regulation, in cases where there is only one storage user, certain transparency requirements do not apply, if the NRA has found that confidentiality interests prevail over market transparency, in accordance with the procedure laid down in this provision. The TSO still has to include information on such a storage facility in its aggregated information, except in cases where the aggregated data are identical to the data of the individual storage facility, i.e. when the storage facility is the only storage facility in the system.

If storage facilities are offered jointly, for example in the case of a virtual offering of storage based on multiple individual storage facilities, this would entail an obligation to publish the required data on an aggregated basis.

Transparency is key, which is why it is mentioned explicitly in Article 41(1)(i) of the Gas Directive as a task for NRAs to monitor:

> *Monitoring the level of transparency […], and ensuring compliance of natural gas undertakings with transparency obligations.*

9. REFUSAL OF ACCESS

Under Article 35 of the Gas Directive, access to storage facilities can be refused on the same grounds as access to the network system, i.e. lack of capacity, public service obligations (PSOs) and take-or-pay problems. A number of conditions must be met if it is to be ensured that any refusal is compatible with the overall objectives of the Directive. In order to justify refusal of access to storage facilities on the grounds of lack of capacity, these conditions are:

1. Objectivity and transparency. The storage operator must comprehensibly prove that no capacity is available. Minimum requirements for such proof would include

regularly published data on available capacity (injection, withdrawal, volume) over a certain period of time, including historical data and distinguishing, as the case may be, between firm and interruptible storage capacity. The data should show that the entire working capacity of the storage facility concerned is contractually booked (no availability of firm capacity) or physically used (no availability of interruptible capacity).

2. Non-discrimination. This means that the outcome of a request for access to storage submitted to an SSO or a combined operator running a storage facility would be the same (i.e. refusal on the grounds of lack of capacity), no matter who is behind the third party submitting a request (a marketing affiliate of the SSO or a company not related to the SSO). It also means that a change in terms of available capacities would be made known to all parties concerned/interested in a non-discriminatory manner, so that all parties concerned/interested would be able to submit their request under a non-discriminatory capacity allocation mechanism.

3. Depending on the situation in each Member State, a Member State may take measures necessary to ensure that lack of capacity is remedied through cost-efficient measures, as laid down in Article 35(2) Gas Directive. Under this provision, Member States may decide that an SSO cannot refuse access on grounds of lack of capacity, if the required capacity could be provided by enhancements. This requires that such enhancements are economically feasible or that a potential customer is willing to pay for them.

A clear and transparent definition of PSOs, as required by Article 3(2) Gas Directive, in terms of storage capacities is considered an indispensable prerequisite for refusal of access to storage facilities on grounds of PSOs. If PSOs are not in line with the requirements of Article 3(2) Gas Directive, as well as the proposed Security of Gas Supply Regulation, they cannot constitute grounds for refusing access to storage. In that respect, it should also be taken into account whether the relevant PSOs (for example for security of supply) could be achieved by using other instruments, such as, in the case of security of supply, supply flexibility, spot markets or interruptible contracts, provided this can economically be justified. In determining the storage needs for fulfilling PSOs, there must be no discrimination against newcomers, i.e. new market entrants taking PSOs must be given the same right and their storage needs for PSOs must be taken into account in the same manner as for the incumbent companies. In view of the separation between supply and storage functions, TPA to storage is not likely to be refused on grounds of take-or-pay obligations.