

- Capacity Allocation Mechanisms –

**Draft Explanatory note of DG Energy & Transport
on Article 5, paragraph 1 and 2 as well as Annex 2.1. of
Regulation (EC) No 1775/2005 of the European Parliament
and of the Council
of 28 September 2005
on conditions for access to the natural gas transmission
networks**

THIS DOCUMENT IS NOT BINDING ON THE COMMISSION

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1. INTRODUCTION

- (1) On 28 September 2005, the European Parliament and the Council adopted Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission networks (OJ L 289 of 3.11.2005, page 1). According to its Article 17, the Regulation enters into force on the 20th day following its publication, i.e. 23 November 2005 and shall apply from 1 July 2006.
- (2) With a view to ensuring consistent application of the provisions of the Regulation, in particular on the matter of capacity allocation mechanisms, the services of DG Energy & Transport issue this document, which intends to provide explanatory comments on Article 5, paragraph 1 and 2 as well as on Annex 2.1 of the said Regulation. The remaining provisions of Article 5, namely paragraphs 3, 4 and 5 as well as Annex 2.2 are not explicitly covered by the current document, although some relevant aspects of these provisions may also be touched upon in the current note. Issues arising from them will be fully covered by separate notes dealing with congestion management procedures and transparency requirements.

2. STARTING POINT: LEGAL UNBUNDLING OF TRANSMISSION AND SUPPLY

- (3) Directive 2003/55/EC (the Internal Gas Market Directive or IGM Directive) requires the legal and functional unbundling of transmission system operators (Art 9). The underlying objective of the provisions on legal and functional unbundling of network operators is to create a structure of interests of network operators which is focused on transporting gas, no matter on whose behalf and no matter for which purpose. The main interest of a network operator should be to offer transportation services ensuring efficient use of the network, which means to contract all the capacity available as much as possible on a firm basis and, once the firm capacity is sold out, to market unused capacity¹ to the extent possible. Legal and functional unbundling is meant to aim at an configuration of interests of the network operator that is very similar, if not identical to that of a network operator also separated from any supply interests by ownership, i.e. the network would not be owned anymore by any vertically integrated company with supply interests.

¹ The term “unused capacity” is defined in the Regulation as “firm capacity which a network user has acquired under a transportation contract but which that user has not nominated by the deadline specified in the contract”.

- (4) While the functional unbundling might be considered more important in terms of achieving such an objective, legal unbundling, which provides the necessary prerequisite for functional unbundling to work properly, brings about new contractual requirements for the system users, such as shippers, suppliers, traders etc. In the system prior to liberalisation, the supply branch of a vertically integrated company usually concluded a supply contract and subsequently made sure that capacity to transport the gas under a respective supply contract would be available. There were no contractual relations involved between the incumbent supplier and the network operator, because both were part of the same company. It is obvious that this integrated approach would constitute a considerable competitive advantage vis-à-vis any newcomer or competitor. Under the new regime with access regulated and based on approved tariffs or methodologies following legal and functional separation of the network and supply business, there is now more of a level playing field².
- (5) As a consequence, each system user, including the incumbent supplier, now has usually³ to conclude two contracts, in order to serve a given customer: a supply contract and a transportation contract.⁴ While the former is concluded between the system user and its customer (possibly the final consumer of natural gas or a natural gas distribution company), the latter lays down the contractual provisions concerning the transportation service the network user⁵ is enjoying from the TSO.

3. THE CAPACITY ALLOCATION MECHANISM IN REGULATION 1775/2005

3.1. Introduction

3.1.1. Scope of the Regulation

- (6) Pursuant to its Article 1 (“Subject matter and scope”), the Regulation

“... aims at setting non-discriminatory rules for access conditions to natural gas transmission systems...”

This means that the scope of the Regulation in practice depends on the definition of “transmission” which is provided in Article 2(1), point 1 and reads

“‘Transmission’ means the transport of natural gas through a network, which mainly contains high pressure pipelines, other than an upstream pipeline network and other than the part of high pressure pipelines primarily used in the context of

² This does, however, not necessarily apply to all elements of a functioning internal gas market.

³ In the case of pure traders, there may be no supply contract involved, but pure trading contracts. This would, however, not undermine the general message conveyed by the paragraph.

⁴ In reality, it might often be the case that transportation contracts do not exactly underpin a specific supply contract, in particular if the market becomes more liquid in terms of capacity and capacity trading becomes more common. Bundled capacity (capacity contracted to underpin more than one supply contracts), in particular at entry and exit points and in a well-established entry-exit capacity system might be more conducive to and flexible for a competitive internal gas market. In such a situation, exploiting short notice market opportunities might not be possible, if a request for transportation, also on the primary market, has to be linked to a supply contract.

⁵ In the following, the term “network user” is used in line with the definition of a network user, as laid down by Article 2(11) of the Regulation.

local distribution of natural gas, with a view to its delivery to customers, but not including supply;”

- (7) As a consequence, the concept of transmission in the Regulation encompasses all high pressure pipelines, unless they are used for production or processing of gas⁶ or are primarily used in the context of local distribution of natural gas, with a view to its delivery to customers, i.e. are part of a local distribution system. The scope of the Regulation is therefore not limited to cross-border trade, but also includes high-pressure pipeline systems operating at regional scale.⁷
- (8) In a number of Member States, transmission systems not involved in imports of gas or cross-border trade exist. Thus, the scope of the regulation includes these systems, too.
- (9) In accordance with Article 10 of the 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 of this Regulation, when carrying out their responsibilities under Regulation 1775/2005.

3.1.2. Different kind of capacity situations

- (10) The capacity situation at a given entry (or exit) point to (from) the gas grid may be characterised by one of the following three situations:
- (I) **Offer exceeds requests**: there is more capacity offered than requested, so the offer (supply) of capacity exceeds the demand for capacity. Such a situation is thought not to create any problems in terms of capacity allocation, since all parties requesting capacity would get what they seek.
- (II) **Requests exceed offer (short term)**: the demand for capacity exceeds the offer of capacity, or in other words, more capacity is demanded than can be made available. Such a situation would be characterised by congestion⁸, which would be defined as short term congestion, i.e. is not supposed to economically justify any investment with a view to increasing capacity and sorting out the congestion problem.
- (III) **Requests exceed offer (long-term)**: as for II., the demand for capacity exceeds the offer of capacity. However, the capacity requests resulting in congestion would be of a nature that justifies economically viable investments, so that the congested situation could be sorted out by adding new capacity, i.e. by undertaking investments (new project or enhancement of existing projects).

⁶ See the definition of “upstream pipeline network” in Directive 2003/55/EC, which pursuant to Article 2(2) of the Regulation is also applied in the Regulation.

⁷ In theory, Directive 2003/55/EC would allow regional transmission pipelines to be covered by the definition of “distribution” contained in the Directive (see Article 2, point 5 of Directive 2003/55/EC). According to this definition, “distribution” means the “transport of natural gas through local or regional pipeline networks...” The definition of “transmission” used in the Regulation does not allow such an approach.

⁸ At this point, it does not matter whether it concerns contractual or physical congestion.

3.1.3. Different kind of capacity allocation mechanisms (CAM)

- (11) As also indicated in the CEER report on “Investments in gas infrastructures and the role of EU nation regulatory authorities”⁹, it is possible to conceive several capacity allocation mechanisms (CAM):
- (I) **first come, first served (fcfs)**: network users would be served in the order of contracting or requesting capacity;
 - (II) **pro rata (PR)**: all network users requesting capacity would be able to contract it, but none of them would be able to contract 100% of its request in the event of congestion. The requests of network users would be curtailed according to a specific mechanism; in most cases, it would mean that the proportion of capacity requested by a certain network user in relation to the total requests would correspond to the proportion of available capacity allocated to this network user.
 - (III) **Auction (AU)**: the available capacity would be auctioned and allocated to the network users paying the highest price for the capacity.
- (12) As set out in the progress report¹⁰ of the European Commission, “first come, first served” is by far the most common capacity allocation mechanism on the European market, while auctions and pro rata may represent the exceptions rather than the rule.

3.2. The relevant provisions of the Regulation

- (13) One of the fundamental elements for introducing competition to the EU natural gas market is non-discriminatory and transparent third party access to the network. Non-discriminatory and transparent capacity allocation mechanisms play a key role in this respect, a fact that has recently been confirmed by the progress report of the Commission¹¹. Regulation 1775/2005 requires such capacity allocation mechanisms. By that, it also responds to a wish by European regulators calling for more convergent capacity allocation procedures and a harmonisation of regulatory practices.¹²
- (14) In the following, the features and requirements of non-discriminatory and transparent capacity allocation procedures from the point of view of DG TREN services will be described in more detail. This does not necessarily mean that other capacity allocation mechanisms would not comply with the requirements of the Regulation and its relevant provisions.¹³

⁹ Council of European Energy Regulators (CEER), Investments in gas infrastructures and the role of EU national regulatory authorities, final version 12.5.2005, available under <http://www.ceer-eu.org/>

¹⁰ Communication from the Commission to the Council and the European Parliament “Report on progress in creating the internal gas and electricity market” (COM)2005) 568 final of 15.11.2005, available from http://europa.eu.int/comm/energy/electricity/report_2005/doc/2005_report_en.pdf; the technical annexes of the report are referred to as SEC(2005)1448 and are available from http://europa.eu.int/comm/energy/electricity/report_2005/doc/2005_report_technical_annex.pdf

¹¹ Cf the progress report referred to in footnote 10;

¹² see footnote 9

¹³ The 3rd subparagraph of Article 3(1) of the Regulation acknowledges the right of Member States to determine tariffs through market-based arrangements, such as auctions. It is therefore submitted that the underlying CAM in these Member States is compatible with the corresponding provisions of the Regulation contained in Article 5.

3.2.1. *Maximum and technical capacity*

- (15) For the purpose of the current analysis, Article 5(1) and 5(2) in connection with No 2.1 of the Annex represent the relevant provisions of the Regulation. Article 5 is titled “Principles of capacity allocation mechanism and congestion management procedures”. Its paragraph 1 reads:

The maximum capacity at all relevant points referred to in Article 6(3) shall be made available to market participants, taking into account system integrity and efficient network operation.

- (16) The most important message conveyed by Article 5(1) is that TSOs have to make maximum capacity available to market participants. They must not withhold any capacity they may dispose of. This is a fundamental requirement and – although it may come across as a matter of course or a banality – of utmost importance, above all for two reasons: first, TSOs – albeit legally and functionally unbundled – may still not have sufficient incentives to offer maximum capacity. Secondly, without exploiting all possibilities to enhance liquidity on the capacity market, it might be very difficult and probably impossible for newcomers to get any capacity at all. All transmission systems in Europe have been designed in line with the needs of respective markets by integrated companies controlling not only supply, but also the grid. Against this background, it is easily conceivable that without an obligation for the TSO to offer maximum capacity to the market, there might not be any capacity left for newcomers.
- (17) For the sake of clarity, it seems important to highlight the difference between the term “maximum capacity” used in Article 5(1) and the term “technical capacity”. While Article 2(3) defines “capacity” as

the maximum flow, expressed in normal cubic meters per time unit or in energy unit per time unit, to which the network user is entitled in accordance with the provisions of the transportation contract

the term “technical capacity” means pursuant to Article 2(18)

the maximum firm capacity that the transmission system operator can offer to the network users, taking account of system integrity and the operational requirements of the transmission network.

- (18) The obvious difference between the concepts of *technical* capacity and *maximum* capacity is that “technical capacity” explicitly refers to “firm capacity”, while the term “maximum capacity” as used in Article 5(1) does not introduce any specific idea of “capacity”. As a consequence, DG TREN services take the view that “maximum capacity” in Article 5(1) encompasses each kind of capacity that can be marketed and contracted on the primary market, including interruptible capacity. As such, the idea of maximum capacity as used in Article 5(1) is broader than the concept of “technical capacity” and takes account of the fact that TSOs might have a certain range of flexibility in determining what could be made available as interruptible capacity in addition to what is made available as firm capacity¹⁴. Article 5(1) therefore obliges TSOs to endeavour to offer capacity available beyond what is usually made available as firm capacity and which would fall under the definition of “technical capacity”. It can be assumed that TSO would often have a certain range of

¹⁴ It is important to note that the term “interruptible capacity” in the current context does not concern that kind of interruptible capacity that would arise by making unused capacity available.

flexibility to offer capacity beyond the technical capacity. This flexibility would accrue from the size of the network concerned, the respectively prevailing capacity situation as a result of actual nominations, the overall structure of the network, the balancing instruments available to the TSO, the flow patterns and the level of pressures of the network etc.

- (19) The maximum capacity that TSOs have to offer pursuant to Article 5(1) of Regulation 1775/2005 would therefore consist of the technical capacity as defined by Article 2(18) of the Regulation and capacity that can be made available in addition to the technical capacity and at interruptible terms. The latter one can be understood as capacity emerging from technical calculations performed under less restrictive conditions than the ones applied for the calculation of technical capacity. The only restriction to this concept is that system integrity must not be endangered and efficient network operations must be ensured. Therefore, it is obvious that in the day-to-day business there is hardly anybody else than the TSO to decide what can be offered beyond the technical capacity whilst taking into account its obligation to ensure efficient TPA by offering maximum possible capacity to the market.
- (20) That means that in order to make Article 5(1) really effective, the TSO should have incentives to offer this capacity at terms and conditions that allow both the TSO and the network user to really benefit from marketing and using such additional capacity.
- (21) In this context, it is very important to highlight the crucial role regulators have to play in this respect. It is obvious that they have to ensure that TSOs comply with the requirements emerging from Article 5(1). For this reason, TSOs have to demonstrate to regulators the correct amount of technical capacity. They have to ensure compatibility of the different systems across the European market in terms of capacity allocation mechanisms and all matters related to them.
- (22) The concept of “maximum capacity” concerns all relevant points as referred to in Article 6(3) of the Regulation.

3.2.2. The Requirements of Capacity Allocation Mechanisms laid down by the Regulation in Article 5(2) and Annex 2.1 including the matter of capacity hoarding

- (23) Article 5(2) lays down the requirements of capacity allocation mechanisms (CAM), which TSOs have to implement. In the following, these requirements are recalled, before their implementation in practice will be discussed. It is worth noting that point 2.1 of the Annex to the Regulation complements the provisions of Article 5(1) and 5(2). Qualitative requirements from both Article 5 of the Regulation and point 2.1 of the Annex are treated in the following.
- (24) First of all, CAM have to be non-discriminatory and transparent and must be published (Art 5(2)). In addition, they have to
- provide economic signals for efficient and maximum use of technical capacity (Article 5(2)a and Annex 2.1. point 4)
 - facilitate investment in new infrastructure (Article 5(2)a and Annex 2.1. point 4),
 - be compatible with market mechanisms including spot markets and trading hubs (Article 5(2)b and Annex 2.1. point 1),
 - be flexible (Article 5(2)b and Annex 2.1. point 1),

- be capable of adapting to evolving market circumstances (Article 5(2)b and Annex 2.1. point 1),
- facilitate the development of competition and liquid trading of capacity (Annex 2.1. point 1),
- take into account system integrity and security of supply (Annex 2.1. point 2)
- avoid undue barriers to market entry (Annex 2.1. point 3)
- and must neither hamper entry of new market participants (Annex 2.1. point 3)
- nor hamper new market entrants from competing effectively (Annex 2.1. point 3)
- be compatible with the network access system of Member States (Article 5(2)c)
- allow network users to be advised about the type of circumstances that could affect the availability of contracted capacity (Annex 2.1. point 5)
- ensure timely information of network users by TSOs in the event of difficulties in meeting contractual delivery obligations. (Annex 2.1. point 6)
- ensure that TSOs consult network users regarding procedures prior to their implementation and agree them with the regulatory authority. (Annex 2.1 point 6)

3.2.3. Description of non-discriminatory and transparent capacity allocation mechanisms

(25) In the following, the requirements of non-discriminatory and transparent capacity allocation mechanisms will be described. The underlying idea and driving principle of these considerations is the wish to allow all capacity requests to be met to the very extent possible. Bearing in mind that

- the European natural gas market is in transition from a market characterised by integrated companies controlling essential parts of the gas chain including the network to a competitive market with network users enjoying non-discriminatory and transparent access to the grid,
- the incumbent companies enjoy a significant competitive advantage vis-à-vis newcomers simply due to the fact that they may benefit from the past in that they have contracted capacity under quasi monopoly conditions¹⁵;
- the existing infrastructure is to a large extent likely to be tailor-made to the needs of the incumbent companies due to the fact that they have developed this infrastructure in line with their needs,

it is of utmost importance that non-discriminatory and transparent capacity allocation mechanisms acknowledge the circumstances emerging from the past and provide the

¹⁵ This fact has been highlighted, among other things, by the Marathon case.

necessary mechanisms and procedures to create a level playing field, also in terms of capacity allocation, for newcomers and incumbents alike.

- (26) This, however, does not mean, subject to considerations accruing from relevant competition rules that existing transportation contracts are generally put in question. But it does mean to provide for the necessary capacity allocation mechanisms designed to level off competitive disadvantages resulting from the past to new market entrants.¹⁶
- (27) In the view of DG TREN services, the following description would result in a non-discriminatory and transparent capacity allocation mechanism fully complying with the relevant provisions of the Regulation. This, however, does not exclude that existing CAM in some Member States could also comply with the requirements of the Regulation.

3.2.3.1. Requirements of non-discriminatory and transparent capacity allocation mechanisms

- (28) Article 5(2) of the Regulation does not make any distinction between existing and new infrastructure, when it comes to non-discriminatory and transparent CAM. For practical reasons, however, it seems appropriate to distinguish between the allocation of capacity on existing and new infrastructure. In this context, the term “infrastructure” is meant to mean those facilities, which fall under the scope of the Regulation, i.e. natural gas transmission systems in the sense of Article 1(1) in connection with Article 2(1).
- (29) As the Regulation, in Article 5(2), does not distinguish between existing and new infrastructure, it can be concluded that non-discriminatory and transparent CAM have to be applied to both existing and new infrastructure and must not lead to discrimination emerging from the fact that the European natural gas system has been developed in the absence of gas-to-gas competition. As a consequence, the results of applying non-discriminatory and transparent CAM to both existing and new infrastructure must be the same. This means that a third party must enjoy a level playing field with any other party when it comes to contracting available capacity on the primary market.
- (30) In this context, it is important to underline that the legal effect of existing provisions, e.g. Article 32(1) of Directive 2003/55/EC, is not put in question by the requirements emerging from Article 5(1) and (2) of the Regulation.
- (31) The following principles and elements are considered to form an integral part of a non-discriminatory and transparent capacity allocation mechanism:
1. **Overall transparency on future available capacity:** The TSO has full information on the technical, booked and available capacities. It should publish this information¹⁷, as soon as it is available to the TSO. The period of time to be covered must extend well in the future, in order to allow comprehending how and when capacity is allocated. For this reason, publication of available capacity should cover all years where capacity is contracted up to

¹⁶ It is worth noting that the term “new market entrants” and similar terms do not exclusively mean complete newcomers to the European gas market, but would also encompass incumbent gas companies entering markets of other Member States.

¹⁷ This goes without prejudice to Article 6(5) of the Regulation, the implementation of which will be discussed in an explanatory note on Article 6 as well as Annex 3 of Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks.

the first year where no capacity has been contracted, i.e. the first year, where 100% of the technical capacity can be made available to system users and where this would also go for the subsequent years. For instance, if a TSO has contracted a certain portion of the capacity in its system up to x years ahead from today, but has not yet sold any capacity in year x+1 and following years, it should publish available capacities for the next x+1 years to come. Users would then actually be informed about the capacity situation for the whole foreseeable future: it would be explicitly indicated for the next x+1 years implying that for year “x+1 plus y” the entire capacity is available. If a TSO has allocated capacity up to 25 years in the future, he should publish the capacity situation for the next 26 years and so on.

The Commission services are aware of the Annex to the Regulation, in particular point 3.3.3 requiring publication of forecasts of available capacities for up to 10 years. Against this background, the Commission services have always taken the view that the conditions for access to the natural gas transmission networks laid down in Regulation 1775/2005 represent minimum requirements for non-discriminatory and transparent access to the grid. It is therefore worth pointing out that providing the transparency level described above would fully comply with the Regulation. The Commission services would therefore expect national regulatory authorities to ensure the required level of transparency, provided they are empowered to do it, or, where this is not the case, transmission system operators to provide the required level of transparency on a voluntary basis with a view to facilitating the development of competition.

This transparency requirement is crucial for non-discriminatory and transparent capacity allocation. It would exclude the tacit prolongation of existing contracts and would provide the necessary transparency for network users. In addition and with respect to imports from external sources, it would deliver valuable insight in the overall security of supply situation of the EU.

2. In the case of new infrastructure, the core element of non-discriminatory and transparent CAM is an open season, which should be principally applied, when it comes to new infrastructure entailing a new line, i.e. connects two points not connected so far. In addition and where expected market developments (growing demand) including possibly other considerations (e.g. security of supply) justify, the launch of an open season to identify market demand for capacity might also be appropriate. It could even follow an open subscription period, if there is reason to believe that capacity requests submitted during the open subscription period do not fully allow accommodating all expected future capacity requests.

The elements of the open season procedure should be harmonised at European level, in order to provide a level playing field across the EU internal market for natural gas.

An open season would also be recommended to new infrastructure exempted from TPA provisions under Article 22 of Directive 2003/55/EC as a condition to grant the exemption.

3. In the case of existing infrastructure, the core element of non-discriminatory and transparent CAM is setting up an open subscription period for capacity requests. Its objective is to accommodate all requests for capacity on condition that they turn out to be

economically viable. Regulatory guidelines have to provide guidance in this respect.¹⁸ The TSO must publish the accurate deadline for submitting capacity requests, until the expiry of which each interested network user is invited to indicate his interest in contracting how much capacity. This period should be considered the open subscription period for submitting capacity requests. The requests must be submitted in a manner allowing the TSO to decide on the appropriate allocation mechanisms, once the deadline for submitting requests has expired.

It is worth noting that the open subscription period is not meant to jeopardise existing transportation contracts. Its objective is rather to ensure that new capacity requests can be accommodated in a non-discriminatory and transparent manner without questioning existing transportation contracts. Of course, this means that unless capacity situation I prevails, congestion management procedures, as described in the note on the relevant provisions of the Regulation (see footnote 18) would need to be applied.

In function of the duration of the contracts, the open subscription period procedure is a permanent process. Open subscription periods for short-term contracts (a year and less) may be set on a rolling basis and in function of the capacity that can be made available and are considered to be independent of those for multi-annual contracts.

4. **End of open subscription period and date of allocating capacity:** The TSO has to publish both the end of the open subscription period and the date of allocating capacity in relation to each open subscription period. The end of the open subscription period is followed by the date of allocating the capacity. The time between the end of the open subscription period and the date of allocating capacity must not be too long, since *its main purpose is to apply the relevant allocation rules to the given capacity situation as a function of the prevailing capacity situation* (see below).
5. **Relation between end of open subscription period/date of allocating capacity and start of the contract (the lead time):** There must be an appropriate relation between the publication of available capacity, the allocation of available capacity and the duration of the contract. Long-term transportation contracts require a long preparatory phase often involving upfront investments and commitments not directly related to transportation. A contract running over a period of 10 years and more is not likely to be decided on a short term or ad hoc basis becoming effective already a couple of month after the decision on the contract has been taken. On the other hand, short-term contracts (one year and less) are not likely to emerge very long in advance, but would presuppose the possibility to book capacity at short or at least shorter notice than it would be the case for long or longer-term contracts.

A non-discriminatory and transparent CAM must reconcile the different requirements of transportation contracts underpinning supply contracts with various durations in line with the principle of treating equal things equally. That means that the allocation mechanism

¹⁸ It is obvious that in the case of existing infrastructure, such an approach will almost necessarily result in short term congestion (capacity situation II) or long-term congestion (capacity situation III). The procedures to be applied in these situations will be explained in the draft “Explanatory note of DG Energy & Transport on Article 5 “Principles of capacity allocation mechanisms and congestion management procedures” paragraph 3, 4 and 5 as well as Annex 2.2. of Regulation (EX) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks”.

must be non-discriminatory in allocating capacity for a long-term contract to various users as well as in allocating capacity for short-term contracts.

The period between the end of the subscription period/allocation of capacity and the start of the transportation contract (lead time) must differ for the following reasons:

1. If short and long term capacity requests were allocated at the same time and under the same timing schedule for the same start of the contract, there would always be considerable and inevitable shortcomings to be attributed to the capacity allocation mechanism. Efficient use of capacity cannot be ensured, for instance, in the case that allocation of capacity to short-term contracts would render it impossible to allocate capacity to long-term transportation contracts; on the other hand, long-term contracts might constantly exclude short- or shorter-term contracts, since they promise a more efficient use of capacity. Abuse of the system should also be denied. It would, for instance, occur in the event that a network user books all available capacity of a certain pipeline for a short term contract (e.g. one month) inappropriately in advance (for instance a number of years). This would have the effect that long-term contracts could not be allocated anymore, thereby possibly jeopardising security of supply. While, theoretically, the economic problem occurring for the TSO in this event could be sorted out through the price¹⁹, such behaviour would not comply with the requirement laid down in the Regulation to make efficient use of capacity²⁰.
2. For the same reasons, either security of supply or competition would suffer depending on whether long or short-term contracts would take precedence at a given allocation mechanism.

In order to safeguard and preserve the principle of non-discrimination, but also with a view to ensuring the efficient use of capacity and denying any misuse of the system, the deadline for submitting capacity requests has to be set with respect to the presumed duration of the contract. The deadline to express interest in a long-term transportation contract (for example, ten years and more) would need to be set sufficiently in advance, in order to cope with capacity requests turning into capacity situation III, while that for a short term contract (e.g. one-month or less) may only be set a couple of days (or in the case of daily contracts day-ahead) before the contract starts.

Such a CAM would prevent a short-term capacity request to compete with a long-term request. If a short- and a long-term capacity request would be subject of the same end of the open subscription period or allocation of the respective capacity would take place at the same time, they would in any case have various starting points and thus various lead times. In such a case, it is very likely that the short-term contract has already expired before the long-term contract starts. If both a short-term and a long-term contract would start at the same time, the allocation procedure took place at different times in the past; meaning capacity of the long-term contract has been allocated before the capacity request for the short-term contract was submitted.

¹⁹ The price for such a service under the circumstances described would then include also the price of the capacity which cannot be used efficiently anymore.

²⁰ See Article 5(2)a

6. **Lead-time or investment period:** this is the period between the end of the open subscription period/allocation of capacities and the start of the contract. Bearing in mind the necessary relation between submitting and allocating a capacity request on the one hand and the start of the contract on the other (see point 5 above), the lead time would very much differ depending on the duration of the contract: for a short-term contract (one year and less), it might only be a matter of days, while a long-term contract (five years and more) may easily require a lead time in terms of months or years, depending on a number of reasons, among others on how much time may be needed, if case may be, in order to provide the capacity requested by means of investments. The time periods indicated are only meant for the sake of demonstration. They would only represent very rough indications, which may not need to be respected in reality, as long as non-discrimination and transparency are maintained. However, it is important to ensure the application of the underlying principle, i.e. the relation between the length of the lead-time and the duration of the contract, or in other words, the longer the duration of the contract, the longer the lead-time.

The TSO has to set the lead-time in function of the time needed to carry out the necessary investments. The scope of the investment may depend on the amount of incremental capacity required, which means that the waiting period may differ and consequently either the allocation of capacity may need to be brought forward or the start of the contract may need to be shifted towards the future.

In this context, it is important to make reference to Article 2(4) and 8(1a) of Directive 2003/55/EC, according to which TSOs have to develop their system including “ensuring the long-term ability of the system to meet reasonable demands for the transportation of gas”.

- (32) The Commission services are aware of the fact that some TSOs have introduced a very flexible CAM system (“click & book”), which would not necessarily be compatible with all the requirements outlined above. The Commission services understand that these systems have been introduced with a view to facilitating market developments and enhancing flexibility in terms of capacity booking. This may also go for other CAM systems recently introduced. In these cases, it should be left to the relevant national regulatory authority to decide whether these systems would be compatible with the requirements of non-discriminatory and transparent CAM. The relevant national regulatory authority should take into account the views of the relevant network users as well as the cost-benefit ratio in the event of revising the systems.

3.2.3.2. The various capacity situations determining the capacity allocation mechanisms

- (33) In the preceding chapter, the various stages of the CAM have been set out and described. The capacity requests submitted during the open subscription period would allow the TSO to decide on the prevailing capacity situation. The capacity allocation mechanism should then be determined in function of the prevailing capacity situation.
- (34) As set out above, there are three different capacity situations conceivable:
- ◆ **Capacity situation I: Offer exceeds requests:**
- (35) All capacity requests can be met, the capacity could be allocated through the first-come-first-served mechanism without compromising the principle of non-discrimination, as long

as the various stages of the CAM set out above are properly executed, in particular with respect to transparency and the deadlines for the various stages of the CAM. The difference between long- and short-term contracts is honoured, i.e. if capacity for both types of contracts is allocated at the same time, they could not start at the same time, or, if capacity is allocated at different times, they could start at the same time. In none of these cases, they would impede or negatively affect each other, all contracts can be properly and in an unimpeded manner executed.

- (36) TSOs should also employ interruptible UIOLI rules with a view to making maximum capacity available, even if firm capacity has not yet been fully contracted. This would increase the liquidity of capacity on the market. This goes without prejudice to Article 4(1)b providing that the price of interruptible contracts shall reflect the probability of interruption. The probability of interruption, the underlying risk circumstances and the time notice for interruptions have to be communicated to the market.
- (37) Secondary markets or trading of capacity rights between network users must also be possible for network users, even if firm capacity is still available on the primary market. It would allow network users to optimise their capacity portfolio on very short notice and in a very flexible manner.²¹

◆ **Capacity situation II: Requests exceed offer (short-term congestion):**

- (38) In this situation, the demand for capacity exceeds the amount of capacity available. Congestion would arise from transportation requests, the extent of which, however, would not justify new investments. How to deal with this situation is subject to the note on congestion management procedures (see footnote 18).

◆ **Capacity situation III: Requests exceed offer (long-term congestion)**

- (39) Capacity situation III would be characterised by a number of competing transportation requests the aggregated capacity of which would exceed the capacity available during the period of time requested. The question of whether capacity situation I, II (short term congestion) or III (long term congestion) is prevailing would need to be decided by the TSO and supervised by the regulatory authority. The decision on the prevailing capacity situation can only be done at the end of the open subscription period, when the TSO has a clear picture on all capacity requests submitted. As for capacity situation II, details on how to deal with it and capacity situation III will be set out in the note on congestion management procedures.

3.2.3.3. Summary on Principles and General Features

- (40) In the following, the main principles and general features of CAM complying with the requirements of non-discrimination and transparency, as laid down in Article 5(2) of the Regulation can be summarised as follows:

1. Full transparency on the current and future capacity situation at any relevant point of a given transmission system

²¹ In the light of the findings of DG COMP's sector inquiry (see issue paper from November 2005), it seems necessary to define a number of minimum requirements for secondary capacity trading, in order to exclude any misuse or undue behaviour of primary capacity holders.

2. Distinction between long-term and short-term capacity contracts when allocating the capacity
3. Efficient use of capacity, i.e. no capacity hoarding
4. Clear and transparent rules and procedures, in order to determine the capacity situation;
5. The actually applied CAM is determined in function of the actually prevailing capacity situation;

(41) These principles and features should contribute to ensuring the overall objective, i.e. make everybody get what he wants to the extent possible.

3.2.4. Detailed Requirements

(42) In the following, the various requirements emerging from the Regulation in addition to those discussed above will be examined in detail. The order corresponds broadly, but not strictly to their appearance in the Regulation.

3.2.4.1. Appropriate economic signals for efficient and maximum use of technical capacity (Article 5(2)a and Annex 2.1(4))²²

(43) The CAM must be designed in a manner that provides appropriate economic signals for efficient and maximum use of capacity. While the TSO is interested in selling its entire available capacity at any time, it also ought to seek efficient use of capacity, i.e. to market unused capacity.

(44) Article 5(2)a and Annex 2.1(4) of the Regulation call for CAM entailing appropriate economic signals for efficient and maximum use of technical capacity. This requirement does not concern the maximum capacity addressed in Article 5(1) and would only relate to the technical capacity in the sense of the definition laid down in Article 2(18).

(45) Efficient use of capacity would mean that capacity is effectively utilised to the extent possible. This excludes any kind of capacity hoarding, but would also mean that capacity on the primary market must not be withheld, but offered at a tariff (where appropriate emerging from tariff methodologies) providing network users with efficient access to the system²³.

(46) Efficient and maximum use of technical capacity would mean that the level of unused capacity in the sense of the definition laid down in Article 2(4) would be reduced to the extent possible. The provision of Article 5(2)a translates this consideration into a legal requirement. As a consequence, TSOs have to ensure that unused capacity is also offered to the market under terms and conditions as attractive as possible.

(47) Regulators and transmission system operators alike would have a very important role to play in this respect. Regulators have to decide upon the “appropriate economic signals” addressed by Article 5(2)a, while TSOs have to implement and publish non-discriminatory and

²² In the following, the matter of secondary markets is not taken into account, which means that the following would only apply, if the capacity holder does not sell unused capacity on the secondary market.

²³ As for tariffs, see separate note on Article 3 „Tariffs for access to networks“ of Regulation 1775/2003

transparent CAM, which shall provide these appropriate economic signals for efficient and maximum use of technical capacity. In this context, Annex 2.2(2) reading

Revenues from released interruptible capacity shall be split according to rules laid down or approved by the relevant regulatory authority. These rules shall be compatible with the requirement of an effective and efficient use of the system.

is of utmost importance. Pursuant to this provision, the relevant regulatory authority is responsible for setting the appropriate economic signal to the TSO by deciding on the share of additional revenues gained from selling unused capacity that would be left with the TSO and how much must be allocated to other objectives, such as the reduction of congested points in the system, lowering overall transport tariffs etc.

3.2.4.2. Investment in new infrastructure (Article 5(2a) and Annex 2.1.(4))

- (48) In order to allow the CAM to facilitate investment in new infrastructure, a sufficient level of transparency in combination with certain procedures, as described above, is indispensable. It must allow all network users to come forward with their capacity requests via an open subscription period or, where appropriate, an open season, as outlined above, and so enable the TSO to take a timely decision which and from when new capacity will be needed in order to match supply and demand. This seems to be best ensured by the procedure described above. A situation characterised by capacity situation III would allow identifying investments required in order to increase capacity in line with market demand.
- (49) In this context, it is clear that there are two different kinds of investments resulting in new infrastructure: one which would be subject of an open season and another one which would result from submitting requests for capacity at an existing line. While most of the investment requirements emerging from the open subscription period should be coped with by the scope of investments in line with Article 8(1a) and 2(4) of Directive 2003/55/EC, i.e. development of the system in the sense that growing gas demand may require increasing the capacity of the transmission system, an open season, as outlined above²⁴, may also be appropriate, if there is reason to believe that capacity requests submitted during the open subscription period do not fully allow accommodating expected future capacity requests. Guidance on the criteria on whether a specific investment might be subject to an open season or might only result from an open subscription period should be left to the relevant national regulatory authorities, which should be asked to ensure consistency of the matter at European level.
- (50) Consultation between all relevant parties (TSO(s), network users, regulators) taking into account relevant market developments may precede the decision to launch an open season for a specific project.

3.2.4.3. Compatibility with market mechanisms including spot markets and trading hubs (Article 5(2)b and Annex 2.1(1))

- (51) The Regulation requires CAM to be compatible with spot markets and trading hubs and vice versa, which represent indispensable ingredients of a well functioning internal market for gas. This presupposes at least that

²⁴ see no 30.2.

- short term contracts as well as provisions for capacity trading must be possible and must be made available to network users
- nomination/re-nomination procedures must be as flexible as possible and must correspond to the relevant hubs

(52) Albeit in general very flexible, there may be differences among trading hubs and spot markets with respect to certain technical requirements. It is obvious that CAM cannot take into account all these technical requirements emerging from trading hubs and spot markets on the European market. However, what ought to be taken into account are those requirements which are most relevant for a given TSO system. The most relevant hubs are those to which the system is directly connected or provides effective access.

(53) In the case that a TSO system is connected to more than one hub (for example at both ends of the system), the interests of the hub operators should ensure that trade can be effectively arranged at both hubs and that for this reason, the technical requirements of both the CAM and the hubs are made compatible. Where appropriate and necessary, regulatory oversight may finally remedy any kind of incompatibility.

3.2.4.4. Being flexible and capable of adapting to evolving market circumstances (Article 5(2)b and Annex 2.1.(1)) and facilitate the development of competition (Annex 2.1.(1))

(54) The same provisions as discussed in the preceding chapter also stipulate that CAM shall be

flexible and capable of adapting to evolving market circumstances.

(55) CAM may be carried out in a way entailing different level of flexibility²⁵, as set out in a study carried out for the European Commission²⁶. In this study, three different capacity systems²⁷ with various levels of flexibility are described:

- point-to-point:

A point-to-point transportation contract gives shippers the right to enter gas at a particular entry point and to take it off at a particular exit point. ...If a shipper held a contract for transportation, it would not be able to switch either entry or exit points unless it obtained a new transportation contract²⁸.

Point-to-point ... is always unnecessarily restrictive, because of the availability of alternative approaches that preserve all the advantages imputed to point-to-point while allowing greater flexibility to shippers.²⁹

²⁵ see footnote 16 p 56ff

²⁶ idem

²⁷ In this context, it is more appropriate to refer to capacity systems. This corresponds to the underlying objectives and intention of the Regulation bearing in mind that it has to be considered a direct result of the Madrid process (see consideration 2 and 3 of the Regulation) and the discussions conducted there. The technical and commercial aspects of capacity systems have always been discussed under the heading of capacity allocation. As a consequence, also the requirements of capacity systems are covered under the heading of capacity allocation (see point 4 of the “Guidelines for Good TPA Practice – revised version; annexed to the conclusion of the 7th Madrid Forum, see http://europa.eu.int/comm/energy/gas/madrid/doc-7/00_madrid7_conclusions.pdf

²⁸ see footnote 16 p 57

²⁹ idem p 63

In a point-to-point capacity allocation system, there is no switch to other entry or exit points possible.

- entry-exit:

*An entry capacity contract ties shippers to specific entry points, but gives them access to customers who have booked exit capacity at any exit point.*³⁰

A shipper might be bound to a specific entry point (or entry zone), but once his gas has entered the system, it can be delivered to any exit point of the system concerned.

- postage stamp

*A postal transportation contract gives shippers the right to enter gas at any entry ... and take it off at any exit point... Under this system, shippers can change entry or exit points without the need to sign new transportation contracts.*³¹

The key trade off between less and more flexible systems is seen in “greater flexibility [that] fosters competition, but can reduce the amount of capacity that can be made available.”³² The appropriate choice depends inter alia on the extent of congestion in the system.

- (56) The benefits of flexibility accruing to network users can be set out as follows:

*Shippers with a large portfolio of customers have a competitive advantage. A large customer base enables the shipper to perform internal swaps that maintain high utilisation of the particular entry and exit points identified in its transportation contracts. By contrast, a shipper with only one customer may waste transportation capacity if the customer consumes much less gas than anticipated. The shipper may try to sell the transportation capacity that is no longer needed, but a point-to-point system makes it difficult to find a buyer. The transportation capacity will only have value to another shipper who is interest in precisely the same combination of points. By contrast, postal capacity rights offer value to all shippers on a network, regardless of the location of their customers or the entry points used. Postal capacity rights therefore facilitate trading, and reduce the likelihood that a small shipper may end up wasting transportation capacity.*³³

- (57) Flexibility of capacity allocation systems permits new market entrants to enter the market without having a large portfolio (which would be unrealistic to assume) and to compete with the incumbent companies. In the absence of flexibility, a new market entrant is likely to experience a serious competitive disadvantage vis-à-vis the established companies disposing of a large portfolio.
- (58) Against this background, it is also obvious that the development of competition can be best facilitated by the introduction of flexible capacity systems.

³⁰ idem, p 56

³¹ idem

³² idem, p57

³³ idem, p 57f

(59) This is the background against which the relevant provisions of the Regulation have to be seen. The stipulation for flexible CAM adapting to evolving market circumstances finds its justification in the need for non-discriminatory CAM providing a level playing field for all network users to compete effectively on the internal market for gas. As the different capacity systems entail various levels of flexibility, it is obvious that a point-to-point system implying no flexibility would not comply with the requirements of the Regulation. On the other hand, a postage stamp system, as briefly set out above, might not be appropriate (but might also not be fully excluded) across the entire internal market due to a number of technical and economic constraints. Therefore and given the current state of the market, a capacity allocation mechanism based upon an entry-exit system as set out above might comply most with the respective provisions of the Regulation.

3.2.4.5. No undue barriers to market entry nor hampering new market participants, but effective competition among market participants (Annex 2.1(3))

(60) Capacity allocation mechanisms and congestion management procedures shall neither hamper the entry of new market participants nor create undue barriers to market entry. In terms of capacity allocation, this means:

- The system must not be inflexible to an extent that would prevent new market participants from exploiting market opportunities. New market entrants would usually not dispose of a large customer portfolio, but have to acquire customers successively. They need a certain level of flexibility in the capacity system, as otherwise they could not develop their business or would be forced into contracting more capacity than actually needed, in order to accommodate possibly upcoming capacity demands implying a quite high commercial risk. These requirements seem to be best met by an entry-exit capacity system as set out above.
- The capacity allocation mechanisms must allow market participants to contract capacity. In this respect, this provision reinforces the principle of non-discrimination when it comes to allocating capacity. A level playing field in terms of capacity allocation is therefore indispensable.

(61) In the light of the findings contained in chapters 3.2.4.4 and 3.2.4.5, it can be concluded that the relevant provisions of the Regulation (i.e. Article 5(2)b) and the Guidelines (Annex 2.1.(1) and 2.1.(3)) annexed to it require the mandatory introduction of a capacity system based on entry-exit. Constraints emerging from a considerable share of transit in overall gas flows may need to be taken into account, thereby restricting the unimpeded implementation of an entry-exit capacity system. Where this may occur, it should be discussed and agreed with the relevant national regulatory authority.

3.2.4.6. System integrity, efficient network operation and security of supply (Article 5(1) and Annex 2.1(2))

(62) Paragraph (2) of point 2.1 of the Annex stipulates that capacity allocation mechanisms and congestion management procedures shall take into account the integrity of the system as well as security of supply. From the above, it is clear that there is a trade off between the flexibility offered by a certain capacity allocation mechanism and the capacity that can be made available on a firm basis.

- (63) While a postage stamp system in terms of capacity would bring about most flexibility for system users (see above), a TSO would not be able to offer that amount of firm capacity which could be made available by means of an inflexible, but more stable capacity allocation mechanism, such as point-to-point. In a point-to-point system, the flows of gas are more predictable and as a consequence, the TSO could optimise the physical flows with a view to making as much firm capacity available as possible.
- (64) In a postage stamp system, however, the physical flows are far less predictable, since network users may change entry and exit points at rather short notice³⁴. This means that a TSO can only offer firm capacity to the extent that can be held firm under all potentially possible combinations of physical flows between the various entry and exit points, which may possibly occur in line with the actual nominations of network users. As a consequence, the TSO may offer a large proportion of capacity on an interruptible basis, though not on a firm basis, as otherwise changing nominations may easily lead to physical congestion at certain entry or exit points, but also within the system. In such an event, firm transportation capacity could not be honoured anymore.
- (65) For these reasons, there is a clear trade-off between the level of flexibility and the amount of available firm capacity in a given transmission system. The extreme poles of both can be seen in a point-to-point system (least flexibility, maximum capacity) on the one hand and a postage stamp system (maximum flexibility, least capacity) on the other.
- (66) The relevant provisions in the Annex of the Regulation (see no 59) must be seen against this background. The inherent flexibility of a capacity allocation mechanism is restrained by the necessity to maintain system integrity and security of supply. In other words, the CAM must not jeopardise the technical operation of the system. The minimum and maximum pressures, the line pack necessary for its operation etc must not be affected by the capacity allocation mechanism in a manner that would endanger the integrity of the system.
- (67) Neither must security of supply be endangered. This means that firm capacity must be honoured. It must not be harmed or reduced on the grounds of flexibility requirements.
- (68) It is therefore clear that a TSO has to strike an appropriate balance between flexibility and available firm capacity. Regulatory authorities would need to closely oversee the actual approach applied by the TSOs, since they might tend towards increasing firm capacity at the expense of flexibility. However, as set out above, flexibility accruing from the capacity allocation mechanism is a legally binding requirement and indispensable in order to arrive at a competitive internal market for gas. Article 10 of the Regulation does not only grant the right, but imposes the duty on regulatory authorities to “ensure compliance” with the provisions of the Regulation and the Guidelines in the Annex.

3.2.4.7. Liquid trading of capacity (Annex 2.1(1))

- (69) Article 8 of the Regulation titled “Trading of capacity rights” concerns measures aiming at the free trade of capacity rights among capacity holders. Notwithstanding Article 8, Annex 2.1.(2) stipulates that CAM “shall facilitate ... liquid trading of capacity...”. Against this background, it is important to identify how CAM could facilitate trading of capacity bearing

³⁴ Although this is not likely to affect the physical flow at the entry and exit points, new combination of entry and exit points accruing from the flexibility offered by a postage stamp capacity system may result in congestion occurring at some points in the system.

in mind that a full list of features and requirements for liquid trading of capacity might only be made available through a note explicitly dealing with Article 8 of the Regulation.

- (70) In compliance with previous considerations (see above), CAM must be non-discriminatory and transparent, as otherwise capacity trading is restricted and would never attain the level of liquidity possible. Contracting capacity on the primary market should entail the right to both trading capacity on the secondary market and receiving relevant information on the capacity available for trade on the secondary market. It should also be possible for parties not contracting capacity on the primary market to have access to it on the secondary market
- (71) Capacity trades among registered network users must be fully acknowledged by the TSO, if notified to the TSO. This also means that the TSO must put a mechanism in place to make it fully aware of capacity trades, if they result in a transfer of title of the relevant capacity. Facilitating capacity trades also means to provide network users with the possibility to be fully informed on the capacity available for trade on the secondary market. With respect to the duration of capacity rights acquired on the secondary market, they should not be more restrictive than those acquired on the primary market. Furthermore, there must not be any un-proportionate fee for capacity trades carried out on the secondary market.

3.2.4.8. Compatibility with network access system of the Member States (Article 5(2)c)

- (72) Almost as a matter of course, Article 5(2)c of the Regulation stipulates that CAM have to be compatible with the network access systems of Member States. This provision refers to the fundamental requirements of access based on ex-ante approved tariffs or tariff methodologies as laid down by Directive 2003/55/EC.
- (73) It also highlights the need for co-ordinated cross border measures and calls for a minimum level of harmonisation of TSOs to coordinate operations with upstream TSOs and coordinated regulatory implementation of CAM on a cross-border basis. Such coordination is moreover needed in the light of both security of supply and competition.
- (74) As a consequence, the tariffs for contracting capacity must be set up in line with Directive 2003/55/EC and must not be put in question by the CAM emerging from the Regulation and the explanatory notes of the relevant Commission services.

3.2.4.9. Circumstances affecting the availability of contracted capacity, information on interruption (Annex 2.1(5))

- (75) For network users, it is important to be informed about any circumstances affecting the proper execution of their transportation contracts as close as possible to the occurrence of these events, in order to adapt to the new circumstances and, if case may be, limit potential or actual damages accruing from these events to his commercial and contractual obligation vis-à-vis customers.
- (76) Annex 2.1(5) imposes an obligation on the TSO (without naming it explicitly) to advise his customers, the network users, prior to the start of the contract about the type of circumstances “that could affect the availability of contracted capacity”. While the first sentence of this provision is rather general and is supposed to include overall difficulties related to system integrity (see also chapter 3.2.4.11.), the second sentence explicitly addresses a specific case, namely interruption of supply. It stipulates that

Information on interruption should reflect the level of information available to the transmission system operator.

- (77) As a consequence, the TSO has to provide all relevant information to his customers that is available to himself. The TSO must not withhold any information on interruption or probability of interruption. In this context, it is important to highlight that the provision in Annex 2.1.(5) deals with information to be given ex ante, i.e. prior to the start of the contract. Information on interruptions has to continue to be communicated to customers after the start of the contract. It has to be stressed that this information should not only correspond to the level of information available to the TSO, but should also be communicated as soon as it is available to the TSO.

3.2.4.10. Notification of network users in the event of difficulties in meeting contractual delivery obligations (Annex 2.1.(6))

- (78) Annex 2.1.(6) reads

Should difficulties in meeting contractual delivery obligations arise due to system integrity reasons, transmission system operators should notify network users and seek a non-discriminatory solution without delay.

- (79) The purpose of this provision is to ensure non-discriminatory treatment of all network users by the TSO, if system integrity cannot be maintained and, as a consequence, the TSO cannot anymore meet his contractual obligations. In such circumstances, it is of utmost importance for all system users to learn as quickly as possible about the new situation, in order to be able to take the necessary measures at the same time.

- (80) Without such an obligation imposed upon the TSO, it cannot be excluded that only the affiliated supply company, usually the incumbent, would be informed or would be informed considerably in advance compared to the remaining system users. As a consequence, the affiliated supply company could react earlier and limit potential damages more effectively than other network users. The above provision requires informing all network users by the same means and schedule. Furthermore, it obliges the TSO to seek a non-discriminatory solution rather than one advantaging any particular network user.

3.2.4.11. Consultation of network users (Annex 2.1.(6))

- (81) The last sentence of Annex 2.1.(6), i.e.

Transmission system operators shall consult network users regarding procedures prior to their implementation and agree them with the regulatory authority.

The provision imposes a duty on the TSO to consult and thus involve network users in the design and establishment of capacity allocation procedures. The consultation has to be carried out prior to the implementation of the procedures in question and aims at ensuring that the views of network users is properly taken into account, when it comes to defining and setting up CAM. While the Regulation does not suggest any specific procedure on how the consultation process should be organised, it is clear that its result have to be agreed with regulatory authority following the consultation process among TSO and system users.