

Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Text with EEA relevance)

CHAPTER X

**FINAL PROVISIONS**

*Article 46*

**Safeguard measures**

1 In the event of a sudden crisis in the energy market or where the physical safety or security of persons, apparatus or installations or system integrity is threatened, a Member State may temporarily take the necessary safeguard measures.

2 Such measures shall cause the least possible disturbance to the functioning of the internal market and shall be no wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

3 The Member State concerned shall, without delay, notify those measures to the other Member States, and to the Commission, which may decide that the Member State concerned must amend or abolish such measures, insofar as they distort competition and adversely affect trade in a manner which is at variance with the common interest.

*Article 47*

**Level playing field**

1 Measures that the Member States may take pursuant to this Directive in order to ensure a level playing field shall be compatible with the Treaty, notably Article 30 thereof, and with the legislation of the Community.

2 The measures referred to in paragraph 1 shall be proportionate, non-discriminatory and transparent. Those measures may be put into effect only following the notification to and approval by the Commission.

3 The Commission shall act on the notification referred to in paragraph 2 within two months of the receipt of the notification. That period shall begin on the day following receipt of the complete information. In the event that the Commission has not acted within that two-month period, it shall be deemed not to have raised objections to the notified measures.

*Article 48*

**Derogations in relation to take-or-pay commitments**

1 If a natural gas undertaking encounters, or considers it would encounter, serious economic and financial difficulties because of its take-or-pay commitments accepted in one or more gas-purchase contracts, it may send an application for a temporary derogation from Article 32 to the Member State concerned or the designated competent authority. Applications

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shall, in accordance with the choice of Member States, be presented on a case-by-case basis either before or after refusal of access to the system. Member States may also give the natural gas undertaking the choice of presenting an application either before or after refusal of access to the system. Where a natural gas undertaking has refused access, the application shall be presented without delay. The applications shall be accompanied by all relevant information on the nature and extent of the problem and on the efforts undertaken by the natural gas undertaking to solve the problem.

If alternative solutions are not reasonably available, and taking into account paragraph 3, the Member State or the designated competent authority may decide to grant a derogation.

2 The Member State, or the designated competent authority, shall notify the Commission without delay of its decision to grant a derogation, together with all the relevant information with respect to the derogation. That information may be submitted to the Commission in an aggregated form, enabling the Commission to reach a well-founded decision. Within eight weeks of receipt of that notification, the Commission may request that the Member State or the designated competent authority concerned amend or withdraw the decision to grant a derogation.

If the Member State or the designated competent authority concerned does not comply with that request within a period of four weeks, a final decision shall be taken expeditiously in accordance with the advisory procedure referred to in Article 51(2).

The Commission shall preserve the confidentiality of commercially sensitive information.

3 When deciding on the derogations referred to in paragraph 1, the Member State, or the designated competent authority, and the Commission shall take into account, in particular, the following criteria:

- a the objective of achieving a competitive gas market;
- b the need to fulfil public-service obligations and to ensure security of supply;
- c the position of the natural gas undertaking in the gas market and the actual state of competition in that market;
- d the seriousness of the economic and financial difficulties encountered by natural gas undertakings and transmission undertakings or eligible customers;
- e the dates of signature and terms of the contract or contracts in question, including the extent to which they allow for market changes;
- f the efforts made to find a solution to the problem;
- g the extent to which, when accepting the take-or-pay commitments in question, the undertaking could reasonably have foreseen, having regard to the provisions of this Directive, that serious difficulties were likely to arise;
- h the level of connection of the system with other systems and the degree of interoperability of those systems; and
- i the effects the granting of a derogation would have on the correct application of this Directive as regards the smooth functioning of the internal market in natural gas.

A decision on a request for a derogation concerning take-or-pay contracts concluded before 4 August 2003 should not lead to a situation in which it is impossible to find economically viable alternative outlets. Serious difficulties shall in any case be deemed not to exist when the sales of natural gas do not fall below the level of minimum offtake guarantees contained in gas-purchase take-or-pay contracts or in so far as the relevant gas-purchase take-or-pay contract can be adapted or the natural gas undertaking is able to find alternative outlets.

4 Natural gas undertakings which have not been granted a derogation as referred to in paragraph 1 of this Article shall not refuse, or shall no longer refuse, access to the system because of take-or-pay commitments accepted in a gas purchase contract. Member States shall ensure that the relevant provisions of Articles 32 to 44 are complied with.

5 Any derogation granted under the above provisions shall be duly substantiated. The Commission shall publish the decision in the *Official Journal of the European Union*.

6 The Commission shall, within 4 August 2008, submit a review report on the experience gained from the application of this Article, so as to allow the European Parliament and the Council to consider, in due course, the need to adjust it.

### *f<sup>1</sup>* Article 48a

#### **Technical agreements regarding the operation of transmission lines**

This Directive does not affect the freedom of transmission system operators or other economic operators to maintain in force or to conclude technical agreements on issues concerning the operation of transmission lines between a Member State and a third country, insofar as those agreements are compatible with Union law and relevant decisions of the national regulatory authorities of the Member States concerned. Such agreements shall be notified to the regulatory authorities of the Member States concerned.]

#### **Textual Amendments**

- F1** Inserted by [Directive \(EU\) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas \(Text with EEA relevance\)](#).

### *Article 49*

#### **Emergent and isolated markets**

1 Member States not directly connected to the interconnected system of any other Member State and having only one main external supplier may derogate from Articles 4, 9, 37 and/or 38. A supply undertaking having a market share of more than 75 % shall be considered to be a main supplier. Any such derogation shall automatically expire where at least one of the conditions referred to in this subparagraph no longer applies. Any such derogation shall be notified to the Commission.

Cyprus may derogate from Articles 4, 9, 37 and/or 38. Such derogation shall expire from the moment when Cyprus is not qualifying as an isolated market.

Articles 4, 9, 37 and/or 38 shall not apply to Estonia, Latvia and/or Finland until any of those Member States is directly connected to the interconnected system of any Member State other than Estonia, Latvia, Lithuania and Finland. This subparagraph is without prejudice to derogations under the first subparagraph of this paragraph.

2 A Member State, qualifying as an emergent market, which, because of the implementation of this Directive, would experience substantial problems may derogate from Articles 4 and 9, Article 13(1) and (3), Articles 14 and 24, Article 25(5), Articles 26, 31 and 32, Article 37(1) and/or Article 38. Such derogation shall automatically expire from the moment

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when the Member State no longer qualifies as an emergent market. Any such derogation shall be notified to the Commission.

Cyprus may derogate from Articles 4 and 9, Article 13(1) and (3), Articles 14 and 24, Article 25(5), Articles 26, 31 and 32, Article 37(1) and/or Article 38. Such derogation shall expire from the moment when Cyprus is not qualifying as an emergent market.

3 On the date at which the derogation referred to in the first subparagraph of paragraph 2 expires, the definition of eligible customers shall result in an opening of the market equal to at least 33 % of the total annual gas consumption of the national gas market. Two years thereafter, Article 37(1)(b) shall apply, and three years thereafter, Article 37(1)(c) shall apply. Until Article 37(1)(b) applies the Member State referred to in paragraph 2 of this Article may decide not to apply Article 32 as far as ancillary services and temporary storage for the re-gasification process and its subsequent delivery to the transmission system are concerned.

4 Where the implementation of this Directive would cause substantial problems in a geographically limited area of a Member State, in particular concerning the development of the transmission and major distribution infrastructure, and with a view to encouraging investments, the Member State may apply to the Commission for a temporary derogation from Articles 4 and 9, Article 13(1) and (3), Articles 14 and 24, Article 25(5), Articles 26, 31 and 32, Article 37(1) and/or Article 38 for developments within that area.

5 The Commission may grant the derogation referred to in paragraph 4, taking into account, in particular, the following criteria:

- the need for infrastructure investments, which would not be economic to operate in a competitive market environment,
- the level and pay-back prospects of investments required,
- the size and maturity of the gas system in the area concerned,
- the prospects for the gas market concerned,
- the geographical size and characteristics of the area or region concerned, and socioeconomic and demographic factors,

For gas infrastructure other than distribution infrastructure, a derogation may be granted only if no gas infrastructure has been established in the area or if gas infrastructure has been established for less than 10 years. The temporary derogation shall not exceed 10 years from the time gas is first supplied in the area.

For distribution infrastructure a derogation may be granted for a period not exceeding 20 years from when gas is first supplied through the said infrastructure in the area.

6 Article 9 shall not apply to Cyprus, Luxembourg and/or Malta.

7 The Commission shall inform the Member States of applications made under paragraph 4 prior to taking a decision pursuant to paragraph 5, taking into account respect for confidentiality. That decision, as well as the derogations referred to in paragraphs 1 and 2, shall be published in the *Official Journal of the European Union*.

8 Greece may derogate from Articles 4, 24, 25, 26, 32, 37 and/or 38 of this Directive for the geographical areas and time periods specified in the licences issued by it, prior to 15 March 2002 and in accordance with Directive 98/30/EC, for the development and exclusive exploitation of distribution networks in certain geographical areas.

## *f<sup>1</sup>* Article 49a

### **Derogations in relation to transmission lines to and from third countries**

1 In respect of gas transmission lines between a Member State and a third country completed before 23 May 2019, the Member State where the first connection point of such a transmission line with a Member State's network is located may decide to derogate from Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10) for the sections of such gas transmission line located in its territory and territorial sea, for objective reasons such as to enable the recovery of the investment made or for reasons of security of supply, provided that the derogation would not be detrimental to competition on or the effective functioning of the internal market in natural gas, or to security of supply in the Union.

The derogation shall be limited in time up to 20 years based on objective justification, renewable if justified and may be subject to conditions which contribute to the achievement of the above conditions.

Such derogations shall not apply to transmission lines between a Member State and a third country which has the obligation to transpose this Directive and which effectively implements this Directive in its legal order under an agreement concluded with the Union.

2 Where the transmission line concerned is located in the territory of more than one Member State, the Member State in the territory of which the first connection point with the Member States' network is located shall decide whether to grant a derogation for that transmission line after consulting all the Member States concerned.

Upon request by the Member States concerned, the Commission may decide to act as an observer in the consultation between the Member State in the territory of which the first connection point is located and the third country concerning the consistent application of this Directive in the territory and territorial sea of the Member State where the first interconnection point is located, including the granting of derogations for such transmission lines.

3 Decisions pursuant to paragraphs 1 and 2 shall be adopted by 24 May 2020. Member States shall notify any such decisions to the Commission and shall publish them.

#### **Textual Amendments**

- F1** Inserted by [Directive \(EU\) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas \(Text with EEA relevance\)](#).

## *Article 49b*

### **Empowerment procedure**

1 Without prejudice to other obligations under Union law, and to the allocation of competence between the Union and the Member States, existing agreements between a Member State and a third country on the operation of a transmission line or an upstream pipeline network may be maintained in force until the entry into force of a subsequent agreement between the

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Union and the same third country or until the procedure under paragraphs 2 to 15 of this Article applies.

2 Without prejudice to the allocation of competence between the Union and the Member States, where a Member State intends to enter into negotiations with a third country in order to amend, extend, adapt, renew or conclude an agreement on the operation of a transmission line with a third country concerning matters falling, entirely or partly, within the scope of this Directive, it shall notify the Commission of its intention in writing.

Such a notification shall include the relevant documentation and an indication of the provisions to be addressed in the negotiations or to be renegotiated, the objectives of the negotiations and any other relevant information, and shall be transmitted to the Commission at least five months before the intended start of the negotiations.

3 Further to any notification pursuant to paragraph 2, the Commission shall authorise the Member State concerned to enter into formal negotiations with a third country for the part which may affect Union common rules unless it considers that the opening of such negotiations would:

- a be in conflict with Union law other than the incompatibilities arising from the allocation of competence between the Union and the Member States;
- b be detrimental to the functioning of the internal market in natural gas, competition or security of supply in a Member State or in the Union;
- c undermine the objectives of pending negotiations of intergovernmental agreements by the Union with a third country;
- d be discriminatory.

4 When carrying out the assessment under paragraph 3, the Commission shall take into account whether the intended agreement concerns a transmission line or an upstream pipeline that contributes to the diversification of natural gas supplies and suppliers by means of new natural gas sources.

5 Within 90 days of receipt of the notification referred to in paragraph 2, the Commission shall adopt a decision authorising or refusing to authorise a Member State to enter into negotiations in order to amend, extend, adapt, renew or conclude an agreement with a third country. Where additional information is needed to adopt a decision, the 90-day period shall run from the date of receipt of such additional information.

6 In the event that the Commission adopts a decision refusing to authorise a Member State to enter into negotiations in order to amend, extend, adapt, renew or conclude an agreement with a third country, it shall inform the Member State concerned accordingly and shall give the reasons therefor.

7 Decisions authorising or refusing to authorise a Member State to enter into negotiations in order to amend, extend, adapt, renew or conclude an agreement with a third country shall be adopted, by means of implementing acts, in accordance with the procedure referred to in Article 51(2).

8 The Commission may provide guidance and may request the inclusion of particular clauses in the agreement envisaged, in order to ensure compatibility with Union law in accordance with Decision (EU) 2017/684 of the European Parliament and of the Council<sup>(1)</sup>.

9 The Commission shall be kept informed of the progress and results of the negotiations to amend, extend, adapt, renew or to conclude an agreement throughout the different stages of such negotiations and may request to participate in such negotiations between the Member State and the third country in accordance with Decision (EU) 2017/684.

10 The Commission shall inform the European Parliament and the Council of the decisions adopted pursuant to paragraph 5.

11 Before signing an agreement with a third country, the Member State concerned shall notify the Commission of the outcome of negotiations and shall transmit the text of the negotiated agreement to the Commission.

12 Upon notification pursuant to paragraph 11, the Commission shall assess the negotiated agreement pursuant to paragraph 3. Where the Commission finds that the negotiations have resulted in an agreement which complies with paragraph 3, it shall authorise the Member State to sign and conclude the agreement.

13 Within 90 days of receipt of the notification referred to in paragraph 11, the Commission shall adopt a decision authorising or refusing to authorise a Member State to sign and conclude the agreement with a third country. Where additional information is needed to adopt a decision, the 90-day period shall run from the date of receipt of such additional information.

14 Where the Commission adopts a decision pursuant to paragraph 13, authorising a Member State to sign and conclude the agreement with a third country, the Member State concerned shall notify the Commission of the conclusion and entry into force of the agreement, and of any subsequent changes to the status of that agreement.

15 In the event that the Commission adopts a decision refusing to authorise a Member State to sign and conclude the agreement with a third country pursuant to paragraph 13, it shall inform the Member State concerned accordingly and shall give the reasons therefor.]

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#### **Textual Amendments**

- F1** Inserted by [Directive \(EU\) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas \(Text with EEA relevance\)](#).

### *Article 50*

#### **Review procedure**

In the event that in the report referred to in Article 52(6), the Commission reaches the conclusion that, given the effective manner in which network access has been carried out in a Member State — which gives rise to fully effective, non-discriminatory and unhindered network access — certain obligations imposed by this Directive on undertakings (including those with respect to legal unbundling for distribution system operators) are not proportionate to the objective pursued, the Member State in question may submit a request to the Commission for exemption from the requirement in question.

Such request shall be notified, without delay, by the Member State to the Commission, together with all the relevant information necessary to demonstrate that the conclusion reached in the report on effective network access being ensured will be maintained.

Within three months of its receipt of a notification, the Commission shall adopt an opinion with respect to the request by the Member State concerned, and where appropriate, submit proposals to the European Parliament and to the Council to amend the relevant provisions of this Directive. The Commission may propose, in the

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proposals to amend this Directive, to exempt the Member State concerned from specific requirements subject to that Member State implementing equally effective measures as appropriate.

#### *Article 51*

#### **Committee**

- 1 The Commission shall be assisted by a committee.
- 2 Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.
- 3 Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

#### *[<sup>F2</sup>Article 52*

#### **Reporting**

The Commission shall monitor and review the application of this Directive and submit an overall progress report to the European Parliament and to the Council as an annex to the State of the Energy Union Report referred to in Article 35 of Regulation (EU) 2018/1999 of the European Parliament and of the Council<sup>(2)</sup>.]

#### **Textual Amendments**

- F2** Substituted by Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (Text with EEA relevance).

#### *Article 53*

#### **Repeal**

Directive 2003/55/EC is repealed from 3 March 2011 without prejudice to the obligations of Member States concerning the deadlines for transposition and application of the said Directive. References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.



#### *Article 54*

### **Transposition**

1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 3 March 2011. They shall forthwith inform the Commission thereof.

They shall apply those measures from 3 March 2011 with the exception of Article 11, which they shall apply from 3 March 2013.

Where Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2 Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 55*

### **Entry into force**

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

#### *Article 56*

### **Addressees**

This Directive is addressed to the Member States.

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- (1) [<sup>F1</sup>Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU (OJ L 99, 12.4.2017, p. 1).]
- (2) [<sup>F2</sup>Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (OJ L 328, 21.12.2018, p. 1).]

#### **Textual Amendments**

- F1** Inserted by [Directive \(EU\) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas \(Text with EEA relevance\)](#).
- F2** Substituted by [Regulation \(EU\) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations \(EC\) No 663/2009 and \(EC\) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and \(EU\) 2015/652 and repealing Regulation \(EU\) No 525/2013 of the European Parliament and of the Council \(Text with EEA relevance\)](#).