Comments on the Presidency texts of 10 and 11 October 2002 based on the amended proposal for a directive concerning rules for the internal markets in electricity and natural gas (COM(2002)304final of 07/06/2002) and the text of 30 July 2002 for a regulation on conditions for access to the network for cross-border exchanges in electricity (COM(2002)304final of 07/06/2002)

SECTION 1
Overview – key issues and principles

The establishment of transparent and robust wholesale markets is essential to enable substantive competition and choice of supplier for EU consumers.

The comments in this note focus on the improvements to the texts that are needed to ensure that there is fair and non-discriminatory access to national and international delivery systems and balancing services and that the framework will exist for processes that promote the development of energy trading. Without effective energy trading there will be no real competition on energy supply.

EFET agrees that successful EU-wide energy market liberalisation will require:

- Effective unbundling (including legal, financial and physical separation) of network operators from network users.
- Clear responsibilities for network operators to meet the needs of users, including information provision and interoperability.
- No undue delay in the Jan 2005 date for full opening of the EU gas and electricity markets.
- Independent Sector Regulators or Supervising Authorities with powers and duties to facilitate competition in energy supply and address anti-competitive practices.

The efficient use of infrastructure and resources, as well as the maintenance of security of supply, will only be achieved in a competitive market if the market structures and conditions encourage price transparency with energy trading by a large number of participants.

In establishing the rules for the internal energy market, there must be clarity that the purpose of strict regulation of access to infrastructure and related services is to enable the deregulation of energy supply so that a competitive market can flourish offering all consumers a choice of energy supplier.

- Monopoly services associated with the transmission, distribution and storage systems must be regulated with published tariffs or an approved transparent market-based pricing mechanism.

- Competitive services that are shown to be subject to sufficient competitive forces do not need regulatory intervention. Prices and commercial arrangements can be left to the parties involved.

SECTION 2
Key Articles for Retention or Amendment

TSO Responsibilities (Articles 8, 9 and 21 Gas) (Articles 9, 10 and 20 Electricity) (Article 5 Cross-border electricity Regulation)

EFET welcomes the new text in Article 8.1.d Gas and Article 9.1.f Electricity requiring TSOs to provide system users with the information they need for efficient access to the systems. Such information needs to be provided in a timely, meaningful and clearly non-discriminatory manner. Of particular importance to wholesale markets, is the transparent and accurate calculation and timely publication of net and available capacities, as proposed in EFET's amendment to Article 21 Gas, Article 20 Electricity and Article 5 of the Cross-border Electricity Regulation.

To ensure TSO's meet the requirements of this directive, the requirement for a "Compliance Officer" for vertically integrated undertakings should be reintroduced in Article 9.d Gas and Article 10.d Electricity. Without an identifiable person with responsibility for compliance there is no accountability and no incentive for the TSO to change behaviour. Provided the TSO employees do not discriminate between affiliates and third parties the task of the officer is straightforward.

Regulatory Authorities (Article 25 Gas) (Article 23 Electricity)

There must be an independent regulator to ensure that there is non-discriminatory access to all electricity networks and gas pipeline systems. The national and EU regulatory frameworks should both play an important role to ensure that the benefits of the single energy market reach all customers. Effective network regulation needs clear transparent rules and tariff regimes defined in advance, it also needs Member States to provide the regulator with the powers and resources to do its job.

EFET broadly supports the current Presidency drafting and has identified a number of relatively minor changes to Article 25 Gas and Article 23 Electricity.

Network Access (Article 9 Gas) (Article 10 Electricity)

Legal, financial and management unbundling, is essential to ensure effective and non-discriminatory third party access to transmission networks and must be retained in Article 9 Gas and Article 10 Electricity. The evidence for the need for this can be seen in the Commission's recent benchmarking report, that identifies that third party access and customer switching tends to be most difficult in Member States where TSOs are least unbundled.

Transit Directive (Article 31 Gas) (Article 28 Electricity)

The repealing of the Transit Directives is supported. The proposed exemption in Article 31 for gas is an anomaly and should be deleted.

Full Market Opening (Article 23 and 13 Gas) (Article 21 and 15 Electricity)

EFET supports full market opening as this will improve wholesale market liquidity and cement the benefits of competition throughout the supply chain. Suppliers to the household consumers will contract with the wholesale market to adjust their positions as consumers exercise their right of choice. Residential market opening also leads to the development of new products in combination with the wholesale market, such as green certificate trading.

EFET supports distribution unbundling for the same reasons. Distribution unbundling is essential to give customers access to a choice of gas suppliers, and this in turn benefits liquidity in the wholesale market.

Access to storage and equivalent flexibility (Article 19 Gas)

Storage infrastructure has an important role in allowing market participants to contribute to security of supply, but it also provides physical hedging and flexibility for wholesale trading. Non-discriminatory access to flexibility services, especially storage, is essential for traders not only to manage their own risks, but also to meet the energy demands of customers with varying loads and to be able to offer them risk-management services.

The Directive should seek to create the conditions for a competitive storage market that will put downward pressure on prices. Existing storage providers, that have or share dominant positions, however, must be regulated during the transition to fully competitive conditions.

Electricity Dispatch Arrangements (Article 11 Electricity)

The new Presidency text of 10 October rightly recognised that Member States that have opened (or are in the process of opening) their electricity markets, might not have central dispatching of generating installations. In these cases companies holding generation facilities control the dispatching themselves to meet the needs of their customers or bilateral contracts with other market participants in the wholesale market, including spot markets.

EFET proposes an amendment that both recognises alternative dispatch arrangements and expresses a need for the TSO to facilitate price transparency for all dispatching models.

SECTION 3
Proposed changes to the gas directive
(Presidency text of 11 October 2002)

European Parliament suggestion to split directive

Splitting the directive is unnecessary and the Commission rightly decided to reject this. The approach by the Commission and the Presidency encourages harmonisation of the measures needed to create effective single markets in gas and electricity, whilst recognising technical differences.

RECITALS

Paras (2), (5), (6), (16), (18) and (19) – Non-discriminatory network access under published tariffs, the methodology for which has had ex-ante approval from the regulatory authorities, is essential and these amendments are supported.

Para (13) – Contains important provisions on balancing mechanisms (non-discriminatory, cost-reflective and ultimate move to market-based mechanisms).

Para (19) – This recognises the need for a specific deadline for the completion of the internal market, in which all gas and electricity customers will be able to choose their supplier freely.

Para (26) – The intent appears to be to ensure there is sufficient transportation capacity, therefore "supply and" should be deleted and "of gas undertakings" is unnecessary. The TSO and regulator should take into account <u>all</u> contracted and planned additional gas supply, whether this is under long-term contracts or not, in deciding on network development (cf Articles 5a and 8). The last sentence should be amended as follows.

> "It is therefore necessary to take **all contracted or expected physical gas supply** into account in the planning of **[ ]** transportation capacity **[ ]**."

Para (25) – an economic test should be added to the proposed Recital such as "to ensure that they can **economically,** technically and safely be injected".

ARTICLE 1.2

The additional wording on biogas and gas from biomass having the same rights of network access is acceptable. However, the overriding principle for the Gas Directive should be non-discriminatory access for as wide a specification of gas (irrespective of source) as technically possible. The new text rightly extends this right to all types of gas, but EFET supports the addition of an economic qualification in 1.2.

> "…can **economically**, technically and safely be injected….."

ARTICLE 2

(3) "transmission"– The phrase "with a view to its delivery to customers" is unnecessary, could cause ambiguities and therefore is best deleted. For example a network user may wish to arrange for delivery of gas for onward transportation through another network or for delivery to its own plant for its own consumption, but clearly "transmission" or "distribution" is still taking place.

> "3. "transmission" means the transport of natural gas through a high pressure pipeline network other than an upstream pipeline network [**~~with a view to its delivery to customers~~]**, but not including supply;"

"flexibility instrument" – We note that this has been deleted and that there is a reliance on access to storage, line pack and ancillary services. EFET's concern is that users have non-discriminatory and market-priced access to the physical capability to match supply with demand, both to minimise short-term energy imbalance and to enable suppliers to meet customers' seasonal variations in demand.

To avoid undue reliance on Competition Law, the directive needs to ensure that powers exist that could be used, if necessary, to enable the release of long-term flexibility in gas supply (e.g. which might physically originate outside the system).

The European Parliament recognised the need for this in amendment 152 to Article 25:

> "Member States shall ensure that regulatory authorities have the power to require the release of gas or gas transportation capacity from long-term contracts at market prices where in the view of the regulatory authority this is necessary for the development of sustainable competition."

EFET prefers an alternative amendment to require that:

> "**Member States should have the power to require the release of gas or gas transportation capacity where this is necessary to develop sustainable gas to gas competition.**"

(19) "vertically integrated undertaking" – since the definition of supply means the sale of natural gas, the introduction of the term "resale" into this definition is unnecessary and may conflict with the transmission operator reselling gas to balance the system (i.e. when the system is long).

ARTICLE 3

(4) – The provision of adequate economic incentives for network maintenance and development is supported.

(7) new – An adaptation of the wording from Article 3.3 of the Electricity Directive Presidency text of 30 July 2002 could be added.

> **"The provisions of this Article shall be implemented in a transparent and non-discriminatory way and shall not impede full market opening."**

ARTICLE 5

We support Member States or regulatory authorities monitoring network service standards and maintenance. However, it is not clear what is included in "envisaged additional capacity". We would suggest qualifying capacity as follows.

> "This monitoring shall, in particular, cover the supply/demand balance on the national market, the level of expected future demand and available supplies, envisaged additional **production, transmission, distribution and storage** capacity under planning or construction, and the quality and level of maintenance and development of the networks."

ARTICLE 8

(8.1) EFET strongly supports the new wording in 8.1.d, requiring TSOs to provide all system users with the information they need for efficient access to the system. Information should also be provided in a timely, meaningful and non-discriminatory manner.

(8.2) We welcome the statement that balancing charges must be cost-reflective, in particular these should reflect the cost of balancing the system as a whole as some imbalances of individual network users may well cancel each other out.

(8.3) - We support the wording on TSOs complying with "minimum requirements". Network users must have some reassurance that the networks will be maintained and developed to allow gas to be transported safely and economically throughout the EU networks. If the term "requirements" is broader than the previous wording - "standards" -, then it could be qualified, by the phrase "……..**in line with the objectives of this directive**".

ARTICLE 9

(9.1) - Provided Article 15 is retained, this is a sensible simplification.

(9.2d) – We welcome the retention of the important requirement of a compliance programme but stress that the requirement to appoint a Compliance Officer should be retained as the most effective method of achieving full compliance. To ensure that there is a change of behaviour, there must be penalties for any discriminatory conduct. We note that the compliance programme is not required if the TSO is already fully independent in terms of ownership.

> "the transmission system operator shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded. The programme shall set out the specific obligations of employees to meet this objective **and penalties for any discriminatory conduct**.[]. **It shall be drawn up and its respect monitored by a compliance officer.** An annual report, setting out the measures taken, shall be submitted by the **compliance officer** to the regulatory authority referred to in Article 25(1) and published."

Although not incorporated in the Commission's text, European Parliament Amendment 164 (electricity) set out ownership unbundling as a goal. We agree that separate ownership is the ideal structure for the development of sustainable competition in both electricity and gas retail and if adopted would reduce the need for sectoral regulation, compliance programmes etc.

ARTICLE 10

As a matter of clarity, in 10.1 the activities of affiliates in a vertically integrated undertaking must not be disclosed in a discriminatory manner.

> "..its own activities **or activities of its affiliates within a vertically integrated undertaking** which may be commercially advantageous being disclosed in a discriminatory manner."

It would be good practice for the measures taken to ensure this, to be set out in the compliance programme (reference could be made to Article 9.2d), but this is an implementation issue.

ARTICLE 13

The derogation from unbundling could be defined as connected customers, but the 100,000 threshold is too high, because it will not automatically lead to non-discriminatory choice of gas supplier for the majority of gas consumers in all countries. **50,000 connected customers** is a more realistic <u>initial</u> threshold, followed by further reductions.

A phased reduction in the exemption level would allow Member States to give smaller gas distribution companies, with less than 50,000 customers, additional time to implement the provisions if appropriate.

> "Member States may decide not to apply paragraph~~s~~ 1 ~~and 2~~ to integrated natural gas undertakings serving less than ~~100 000~~ **50 000** connected customers at that date**, where such undertakings are wholly independent in ownership terms from any vertically integrated gas undertakings**. **At the date at which all customers are eligible, the level at which Member States may decide not to apply paragraph 4 will be reduced to 20 000 connected customers."**

It is important that unbundling of distribution networks takes place by the time customers served off this network become eligible. Most SMEs are served from distribution networks and the date for unbundling should be no later than the date at which non-household customers become eligible (currently the amended proposal stipulates 1 January 2004). To avoid market distortions the exemption threshold must be as low as practical by the time all consumers have a choice.

ARTICLE 15

For effective application of the rules and obligations set out in this directive and development of competition, we agree that operation of combined LNG, storage and distribution facilities need not be a problem provided that there is regulated access to all the facilities operated by the single legal entity.

So the words "and for which there is regulated access to the transmission, LNG, storage and distribution systems" could be added at the end of Article 15 or the following simple amendment made.

> "The rules in Articles 9 (1) and Article 13 (1) do not prevent the operation of a combined transmission, LNG, storage and distribution system operator, which is fully independent in terms of its legal form, organisation and decision making from other activities not relating to **its regulated** transmission LNG, storage and distribution system operations and which meets the following requirements:".

The new text in points (a) to (d) is supported.

15 (a) since the definition of supply means the sale of natural gas, the introduction of the term "resale" is unnecessary and may conflict with the transmission operator reselling gas to balance the system (i.e. when the system is long).

ARTICLE 17

17.1 – Clearly, whether the derogation is based on Article 28.2 or 28.3, internal accounts should still be in accordance with this article.

17.3 – The importance of separate accounts for infrastructure operators is well made.

ARTICLE 18

18.1 Publication of transmission and distribution tariffs prior to their entry into force and the ex-ante approval of the methodology underlying such tariffs is essential. Where a genuine market has been established for certain services (e.g. entry capacity) then prices based on market-mechanisms should be encouraged. Our understanding is that the wording allows this – if not then the wording needs to be changed.

The phrase “including supply undertaking”, appears to be for the avoidance of doubt, since wholesalers and gas suppliers are non-domestic customers. The phrase “including supply undertakings” may have been introduced to ensure that the supply businesses of vertically integrated natural gas undertakings have to go through the same processes and pay the same tariffs for access to these facilities. This could be clarified by inserting

> “including **related** supply undertakings”

18.3 EFET would support the introduction of a Cross-border Gas Regulation, which would have similar objectives to the current proposed Cross-border Electricity Regulation. The paragraphs in 18.3 would be best placed in the Regulation.

To be consistent with Recital 26 and to discourage reliance on lengthy competition cases, the following wording should be added.

> “The provisions of this Directive do not prevent the conclusion of long-term contracts in so far as they comply with Community competition rules **and do not undermine the objectives of this Directive.”**

ARTICLE 19

Non-discriminatory third party access supervised by an independent authority is essential for any storage or equivalent facility that has a monopoly in the supply of seasonal swing or flexibility services in a given area of the system, where a supplier is required to achieve an energy balance. If there is a competitive secondary storage market or competitive market mechanism, then market prices for storage can be established within a regulatory framework.

An obligation to negotiate “in good faith” is not sufficient where market dominance exists and could be in conflict with a monopoly storage service company’s duty to maximise commercial value to their shareholders.

For both these reasons, paragraph 2 of Article 19 of the Amended proposal {COM(2002) 304 final} for a directive incorporating amendments to directive 98/30/EC (gas) should be deleted and the role of a competitive market recognised in the existing paragraph 3. With these changes paragraph 1 is redundant and can also be deleted.

> “19.1
> [deleted]
>
> 19.2
> [deleted]
>
> 19.3
> Member States **[ ]** shall take the necessary measures to give natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system a right to access to storage and equivalent flexibility instruments, on the basis of published tariffs**, [ ]** terms and **conditions fixed or approved by the competent authority or if the competent authority deems that sufficient competition has been established then prices terms and conditions may be set by any transparent and non-discriminatory mechanisms.** This right of access for eligible customers may be given by enabling them to enter into supply contracts with competing natural gas undertakings other than the owner and/or operator of the system or a related undertaking.”

Thus, if there is insufficient competition in the local storage market there will need to be a traditional approach to regulating access to that storage (such as a single tariff level) or prior approval of transparent pro-competitive market-based mechanisms, (such as auctions). As

competition develops, features like storage bulletin boards that facilitate secondary-trading can be expected to emerge and regulatory intervention should then be phased out.

ARTICLE 21

Parliamentary Amendment 146 is an essential principle, i.e. that all available capacity should be made available to system users. Infrastructure owners should not be able to refuse access if capacity is available. But the text from this amendment needs to be improved by referring to unused and forecast to be unused capacity.

> "2a. Access may be refused only in the cases listed in paragraph 1. Member States shall ensure that, within the safety **and prudent operational** limits of the system, the full available capacity of the networks and, where necessary, of the storage facilities, is made accessible to system users. **For this purpose,** the method of calculating net capacity and available capacity shall be published and subject to the approval of the regulatory authority referred to in Article 25(1). **Available capacity shall include capacity that is unused or forecast to be unused.**
>
> For that purpose, the authorities referred to in Article 25 shall request transmission system and storage facility operators to notify them of available capacity on a regular basis and whenever additional capacity becomes available. Information on **net and** available **capacities** shall be published **and for each given section of the network shall include the total physical capacity, the aggregate booked capacity and the aggregate capacity forecast to be used for each day. "**

This principle should be in the directive and the details of implementation can be left to the Council of European Energy Regulators (CEER).

The Commission states that this is being dealt with in the Madrid Forum. However there is insufficient progress by GTE in providing capacity information (including net and available capacity figures) and ensuring all capacity is made available. For this reason, wording on capacity availability should be included in the directive.

ARTICLE 22

EFET supports the clear statement that an exemption to be appropriate only where "necessary to enable investment that will enhance competition in gas supply".

Whilst access to storage and investment in storage is important it would be inconsistent to add this to 22. A better approach would be the amendments we have suggested to Article 19.

> "Where necessary to enable investment that will enhance competition in gas supply and security of supply the regulatory authority referred to in Article 25 may, on a case by case basis, decide that major new gas infrastructure, such as interconnectors between Member States, transmission pipelines, **and** LNG ***~~and storage~~*** facilities, may be exempted from the provisions of Article 18, Article 19 and Article 25(2), (3) and (4). Such an exemption may also be granted in case of significant increase of capacity of existing infrastructure or its modification to enable the development of new sources of gas supply."

N.B. The omission of storage facilities from 22 must be accompanied by improvements to Article 19.

22.2 Clearly the exemption must be for a separate legal entity from the TSO as set out in 22.2a. But the situation must be avoided where the TSO simply establishes a separate legal entity to carry out an investment that should have been made by one or more TSOs. So 22.2b could be deleted and replaced with

"An exemption shall be excluded where **the investment should be made by one or more TSOs in fulfilment of its obligations**."

22.2c would be better stated as a positive test, i.e.

"….an exemption will **[ ]** be to the **benefit** of competition **and** the effective functioning of the internal gas market, **and will not be to the detriment of** the efficient functioning of the regulated system to which the infrastructure is connected."

ARTICLE 23

We note that the market opening date of 1 January 2005 for residential customers was neither rejected nor approved by the Heads of Government/State at Barcelona, and is rightly maintained in the text. There should be no undue delay to the dates set out in the Commission's amended text.

- from 1 January 2004, all non-household customers;
- from 1 January 2005, all customers.

ARTICLE 25

(25.1) – Overall, this is a good description of the responsibilities of the regulator. The first paragraph of 25.1 is now clearer and is supported. The regulator now has a clear responsibility for ensuring effective competition. The text in 25.1a "the level of competition" should be retained and additional wording added to complement the revised first paragraph:

"a) regular monitoring of the level of competition"

(25.2) – The Presidency recently considered a text which allowed regulatory authorities to propose methodologies, in addition to fixing or approving them. This was a logical addition and could be reintroduced.

"The regulatory authorities shall be responsible for fixing**, ~~or~~** approving **or proposing** prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions for:"

(25.2) – "Balancing services" need to be defined, or replaced with the provision of "**services that can be used by suppliers to reduce their energy imbalance**".

(25.2), (25.4) – We support the specific powers of the regulator to approve ex-ante tariff methodologies and to be able to amend terms and conditions.

(25.3), (25.4), (25.5) – These should apply to storage operators.

"3 – "…….conditions and tariffs for access to LNG facilities **and storage facilities**."
4 – "Regulatory authorities shall have the authority to require transmission, LNG**, storage** and distribution operators, if necessary, to modify……"
5 – "Any party having a complaint against a transmission, LNG**, storage** or distribution system operator with respect to the issues mentioned……""

N.B. There might be some concern about including storage in this article, but because the regulator now has a responsibility for ensuring efficient competition, it will not be able to impose undue regulatory controls on competitive storage facilities.

(25.4) - One improvement to remove the potential for any lack of tariff cost-reflectivity, would be to amend Article 25.4 to ensure that tariffs are cost-reflective. The use of the word "proportionate" is not sufficient to ensure that they are fair or reasonable for network users: the work "reasonable" should therefore be reintroduced.

> "4. Regulatory authorities shall have the authority to require transmission, LNG and distribution system operators, if necessary to modify the terms and conditions, including tariffs and methodologies referred to in paragraph **1 and** 2 to ensure that they are proportionate, **reasonable and cost-reflective** and applied in a non discriminatory manner"

25.5 and 25.10 – The text is now clearer in both clauses.

ARTICLE 30

30 d We support the specific inclusion of storage in Article 30. However, the emphasis of 28 c is on security of supply, whilst issues surrounding "proportionality of market regulation" of storage should relate to effective network access and the development of competition.

Possible wording changes are:

> "c) the extent to which the unbundling and tarification requirements contained in this Directive have been successful in ensuring fair and non-discriminatory access to the Community's gas system **including access to storage** and equivalent levels of competition, as well as the economic, environmental and social consequences of the opening of the gas market for customers.
>
> d) an examination of issues relating to system capacity levels and security of supply of natural gas in the Community, and in particular the existing and projected balance between demand and supply, taking into account the physical capacity for exchanges between areas and the development of storage (including the question regarding proportionality of market regulation ~~in this field~~ **referred to in Article 19)**; "

We agree with the concept of "proportionality of market regulation." However, the regulator should only opt not to impose regulated tariffs on those facilities that are clearly operating in a substantive competitive market or on new facilities that will compete with existing dominant storage providers as we have said in our comments on Article 19.

ARTICLE 31

We note that the Transit Directive is repealed for consistency and to remove an anomaly. Regulatory approval of non-discriminatory and transparent access processes is needed on a consistent basis for all downstream pipelines, but this does not mean that the processes and tariffs for all transportation services must be identical. For example, if a pipeline is dedicated solely to transporting gas across a country, and therefore provides a different service from that offered by a pipeline delivering to both customers within a country and interconnected networks, then the access processes and the charges might also be different. This can be left to subsidiarity and implementation by the CEER.

EFET does not support the new exemption in 31.2, allowing contracts concluded prior to 1 January 2002 to continue to be applied as if the Transit Directive were not repealed. EFET sees not reason for the explicit mention of existing contracts, but for the avoidance of doubt, it could be clarified that the repeal of the Transit Directive should not prevent the relevant parties obtaining non-discriminatory access to the relevant networks. Some of these contracts may be proved to be anti-competitive and should not be given special status.

> "1. Directive 91/296/EEC is repealed with effect from the date referred to in Article 32(1)

2. **Paragraph 1 shall be without prejudice to rights of non-discriminatory access to the capacity required for the physical delivery of gas under existing contracts into the transmission system of another Member State."**

ARTICLE 32

Since the provisions of the directive relate to events that must be completed as early as 1 January 2004, we note that the date by which Member States shall bring into force the laws to comply with the directive will need to be prior to this.

New 32.2 allows Member States to delay distribution system operator legal unbundling until 1 January 2005. This not acceptable, see comments on Article 13. The date for unbundling should be no later than the date at which non-household customers become eligible (i.e. 1 January 2004 in the amended proposal).

SECTION 4
Proposed changes to the electricity directive

European Parliament suggestion to split directive

Splitting the directive is unnecessary and the Commission rightly decided to reject this. The approach by the Commission and the Presidency encourages harmonisation of the measures needed to create effective single markets in gas and electricity, whilst recognising technical differences.

RECITALS

Paras (2), (5), (6), (16), (18) and (19) – Non-discriminatory network access under published tariffs, the methodology for which has had ex-ante approval from the regulatory authorities, is essential and these amendments are supported.

Para (13) – Contains important provisions on balancing mechanisms (non-discriminatory, cost-reflective and ultimate move to market-based mechanisms).

Para (19) – This recognises the need for a specific deadline for the completion of the internal market, in which all gas and electricity customers will be able to choose their supplier freely.

ARTICLE 2

(3) "transmission" – The phrase "with a view to its delivery to final customers" is unnecessary, could cause ambiguities and therefore is best deleted. E.g. A network user may wish to arrange for delivery of electricity for onward transportation through another network or for delivery to its own plant for its own consumption, but clearly "transmission" or "distribution" is still taking place.

> "2.3 "transmission" means the transport of electricity on the extra high-voltage and high-voltage interconnected system [~~**with a view to its delivery to final customers or to distributors]**~~, but not including supply;"

ARTICLE 3

(7) – The provision of adequate economic incentives for network maintenance and development is supported.

To avoid undue reliance on Competition Law, the directive needs to ensure that powers exist that could be used, if necessary, to enable the release of long-term capacity. The following wording could be added to Article 3 as a new paragraph 10.

> **"Member States should have the power to require the release of electricity generation or transportation capacity where this is necessary to develop sustainable competition."**

ARTICLE 4

We support Member States or regulatory authorities monitoring network service standards and maintenance. However, it is not clear what is included in "envisaged additional capacity". We would suggest qualifying capacity as follows.

> ". . . This monitoring shall, in particular, cover the supply/demand balance on the national market, the level of expected future demand and envisaged additional **generation, transmission and distribution** capacity under planning or construction, and the quality and level of maintenance and development of the networks. . ."

ARTICLE 9

(c) – It is the TSOs responsibility to provide ancillary services, whether these originate within its own system or are contracted from an interconnected system. The new text in 9c "in so far as this availability is independent of any other transmission system with which its system is interconnected" should be deleted. The Recital (9) could be amended as follows:

> "…in the case of small systems the provision of ancillary services may have to be ensured by **the transmission system operator contracting for the provision of such services via another transmission system** interconnected with the small system."

(f) – Transmission system operator responsibilities – **EFET strongly supports the new wording in 9f ensuring system users are provided with the information they need by TSOs**.

ARTICLE 10

10.2d) – We welcome the retention of the important requirement of a compliance programme **but stress that the requirement to appoint a Compliance Officer should be retained as the most effective method of achieving full compliance**. To ensure that there is a change of behaviour, there must be penalties for any discriminatory conduct. We note that the compliance programme is not required if the TSO is already fully independent in terms of ownership.

> "d) the transmission system operator shall establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure its respect is adequately monitored. The programme shall set out the specific obligations of employees to meet this objective **and penalties for any discriminatory conduct**. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme to the regulatory authority referred to in Article 23(1) and published."

Although not incorporated in the Commission's text, European Parliament Amendment 164 (electricity) set out ownership unbundling as a goal. We agree that separate ownership is the ideal structure for the development of sustainable competition in both electricity and gas retail and if adopted would reduce the need for sectoral regulation, compliance programmes etc.

ARTICLE 11

(11.1 + 11.2) The TSO is not always responsible for dispatching generating plant, indeed in a fully developed market the TSO would not normally be involved in this process. However, so that the market can operate efficiently there must be price transparency and the TSO has a key role to facilitate this. The new Presidency wording "where it has this function" now rightly recognises that Member States that have opened (or are in the process of opening) their electricity markets, may not have central dispatching of generating installations. EFET considers the following alternative wording would both recognise this and support transparency in all dispatching models.

> "1. **[ ]**The transmission system operator shall **facilitate the development of price transparency to enable the optimal use of** [] generating installations in its area and for determining the use of interconnectors with other systems.
>
> 2. **Without prejudice to the supply of electricity on the basis of contractual obligations, including those which derive from the tendering specifications, any** dispatching of generating installations **by a transmission system operator**

> **where it has this function** and the use of interconnectors shall be determined on the basis of criteria which may be approved by the Member State and which must be objective, published and applied in a non-discriminatory manner which ensures the proper functioning of the internal market in electricity. They shall take into account the economic precedence of electricity from available generating installations or interconnector transfers and the technical constraints on the system."

(11.7) We welcome the statement that balancing charges must be cost-reflective, in particular these should reflect the cost of balancing the system as a whole as some imbalances of individual network users may well cancel each other out.

ARTICLE 12

As a matter of clarity, in 12 the activities of affiliates in a vertically integrated undertaking must not be disclosed in a discriminatory manner.

> "..its business **or the business of its affiliates within a vertically integrated undertaking** which may be commercially advantageous being disclosed in a discriminatory manner."

It would be good practise for the measures taken to ensure this is set out in the compliance programme (reference could be made to Article 10.3d), but this is an implementation issue.

ARTICLE 15

The derogation from unbundling could be defined as connected customers, but the 100,000 threshold is too high, because it will not automatically lead to non-discriminatory choice of electricity supplier for the majority of electricity consumers in all countries. **50,000 connected customers** is a more realistic threshold.

> "Member States may decide not to apply paragraph**s** 2 ~~**and 3**~~ to integrated natural electricity undertakings serving less than ~~**100 000**~~ **50 000** connected customers, or serving small isolated systems**, where such undertakings are wholly independent in ownership terms from any vertically integrated electricity undertakings**."

It is important that unbundling of distribution networks takes place by the time customers served off this network become eligible. Most SMEs are served from distribution networks and the date for unbundling should be no later than the date at which non-household customers become eligible (currently the amended proposal is based on the European Council agreement on the date of 1 January 2004). To avoid market distortions the exemption threshold must be as low as practical by the time all consumers have a choice.

ARTICLE 19

19.3 – The importance of separate accounts for infrastructure operators is well made.

ARTICLE 20

20.1 Publication of transmission and distribution tariffs prior to their entry into force and the ex-ante approval of the methodology underlying such tariffs is essential. Where a genuine market has been established for certain services (e.g. border capacity) then prices based on market-mechanisms should be encouraged. Our understanding is that the wording allows this – if not then it needs to be changed.

The phrase "**including related supply undertakings**" could be introduced to ensure that the supply businesses of vertically integrated electricity undertakings have to go through the same processes and pay the same tariffs for access to these facilities. This could be clarified by inserting

> **". . .** applicable to all eligible customers**, including related supply undertakings,** and applied objectively. . ."

20.3 (new) EFET believes that all available transmission capacity (ATC) should be made available to system users. At many continental border points significant amounts of further capacity could be made available to system users by revisiting net transmission capacity (NTC) used in the calculation of ATC.

To ensure the maximum amount of capacity is made available, TSOs should be obliged not only to reduce security factors to the minimum needed, but also to net anticipated counter and loop flows against the dominant flow per interconnection point, to consider the extra capacity which could be declared if they re-dispatch plant (including in co-ordination with neighbouring TSOs) and to ensure that more capacity is firm by counter-trading when necessary.

The following new paragraph could be added to ensure that all capacity is made available to system users and market participants are fully aware of the aggregate capacity levels in the system.

> **"Access may be refused only in the cases listed in paragraph 2. Member States shall ensure that, within the safety and prudent operational limits of the system, the full available capacity of the networks is made accessible to system users. For this purpose, the method of calculating net capacity and available capacity shall be published and subject to the approval of the regulatory authority referred to in Article 23(1). Available capacity shall include capacity that is unused or forecast to be unused, taking into account net anticipated counter and loop flows and the additional capacity that could be made available by re-dispatching generation plant in co-ordination with neighbouring TSOs.**
>
> **In circumstances where a shortage of capacity exists or is forecast to occur, the authorities referred to in Article 23 shall request transmission system operators to notify them of net and available capacity on a regular basis and whenever additional capacity becomes available. Such information on net and available capacity shall be published and for each relevant section of the network shall include the total physical capacity, the aggregate booked capacity and the aggregate capacity forecast to be used for each balancing period."**

This principle should be in the directive and the details of implementation can be left to the Council of European Energy Regulators (CEER).

ARTICLE 21

We note that the market opening date of 1 January 2005 for residential customers was neither rejected nor approved by the Heads of Government/State at Barcelona, and is rightly maintained in the text. There should be no undue delay to the dates set out in the Commission's amended text.

- from 1 January 2004, all non-household customers;
- from 1 January 2005, all customers.

ARTICLE 23

(23.1) – Overall, this is a good description of the responsibilities of the regulator. The first paragraph of 23.1 is now clearer and is supported. The regulator now has a clear responsibility for ensuring effective competition. The text in formerly in 23.1a "the level of competition" should be retained and additional wording added to complement the revised first paragraph as a new 23.1g:

> **"g) regular monitoring of the level of competition"**

(23.2) – The Presidency recently considered a text which allowed regulatory authorities to propose methodologies, in addition to fixing or approving them. This was a logical addition and could be reintroduced.

"Balancing services" need to be defined, or replaced with the provision of "**services that can be used by suppliers to reduce their energy imbalance**".

> "The regulatory authorities shall be responsible for fixing**, ~~or~~** approving **or proposing** prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions for:
>
> (a) connection and access to national networks, including transmission and distribution;
> (b) the provision of **services that can be used by suppliers to reduce their energy imbalance**."

(23.2), (23.4) – We support the specific powers of the regulator to approve ex-ante tariff methodologies and to be able to amend terms and conditions.

(23.4) – The supervisory authorities should have an explicit power and responsibility to ensure that tariffs, or tariff methodologies, are cost reflective. The use of the word "proportionate" is not sufficient to ensure that they are fair or reasonable for network users: the word "reasonable" should therefore be reintroduced.

> "4. Regulatory authorities shall have the authority to require transmission and distribution system operators, if necessary to modify the terms and conditions, tariffs, rules, mechanisms and methodologies referred to in paragraphs 1, 2 and 3 to ensure that they are proportionate, **reasonable and cost-reflective** and applied in a non discriminatory manner"

23.5, 23.6 and 23.10 – The text is now clearer in both clauses.

ARTICLE 26

The existing derogations are sufficient. The additional derogation introduced in para 2 is both unnecessary and fundamentally flawed: it should be deleted.

The text in para 2 might encourage companies to delay implementing necessary technical changes until they have left too little time for proper implementation.

The text also seems flawed since it allows a delay of <u>legal</u> opening (the right to choose) for part of the market, on <u>technical</u> grounds.

ARTICLE 29

Since the provisions of the directive relate to events that must be completed as early as 1 January 2004, we note that the date by which Member States shall bring into force the laws to comply with the directive will need to be prior to this.

29.2 allows Member States to delay distribution system operator legal unbundling until 1 January 2005. This is not acceptable, see comments on Article 15. The date for unbundling should be no later than the date at which non-household customers become eligible (i.e. 1 January 2004 in the amended proposal).

SECTION 5
Proposed changes to the regulation for access to the network for cross-border exchanges in electricity (Presidency text of 30 July 2002)

RECITALS

Recital 12 could be strengthened by adding in cost reflectivity.

> The precondition for effective competition in the internal market is non-discriminatory**,** **cost-reflective** and transparent charges for network use. . .

ARTICLE 2

The definition of "cross-border flow" in 2a could potentially exclude flows resulting from sales activity into a pool or spot market. This potential discrepancy could easily be resolved by adding a reference to wholesale customers:

> (a) "cross-border flow" means a physical flow of electricity on a transmission network of a Member State that results from the activity of ~~either~~ generators**, wholesale customers** or consumers outside of that Member State.

ARTICLES 3.6 and 4.1

Both these articles contain references to security of supply that are not appropriate for this Regulation and should be deleted. Issues relating to security of supply are covered in the proposed Directive.

> 3.6 The costs incurred as a result of hosting cross-border flows shall be established on the basis of the forward looking long-run average incremental costs, taking into account losses, investment in new infrastructure~~, security of supply~~ and an appropriate. . .

> 4.1 Charges applied by network-operators for access to networks shall be transparent and reflect actual costs incurred in so far as they correspond to those of an efficient and structurally comparable network operator and applied in a non-discriminatory manner. They shall not be distance-related ~~and shall take into account the need for network security~~.

ARTICLE 5

Capacity information should be provided, ex-ante, by Transmission System Operators (TSOs) on a day-ahead basis. In addition, TSOs, should publish ex-post within hours the actual aggregate flows per interconnection point.

> "Transmission system operators shall publish estimates of available transfer capacity for each day, indicating any available transfer capacity already reserved. These publications shall be made at specified time intervals before the day of transport and shall include, in any case, **day-ahead,** week-ahead and month-ahead estimates, as well as a quantitative indication of the expected reliability of the available capacity. **Transmission system operators shall promptly publish aggregate actual cross-border flows for each border point.**"

ARTICLE 6

We welcome the additions to the article on the general principles of congestion management. In particular 6.4 notification and reattribution to the market of planned to be unused capacity and 6.6.c the inclusion of revenues from this regulation in determination of transmission tariffs.

6.7 allows Member States to grant a full or partial exemption to 6.6 and 22.2 and 22.3 of the Directive 96/92/EC. 22.2 and 22.3 cover the regulatory authorities' power to approve ex-ante tariff methodologies and to amend tariffs, terms and conditions.

These exemptions should only be granted if they will benefit the completion of the internal electricity market. The essential condition in 6.8.d could be further strengthened by an obligation to show the exemption will benefit competition.

> (d) the authorities concerned are satisfied that the granting of an exemption will **[]**be to the **benefit** of competition **and** the effective functioning of the **internal** electricity market.

To ensure that 6.8.a is not unfairly abused by transmission system operators to exclude an interconnector from the provisions of 6.6 of this regulation and 22.2/22.3 of the directive, the following should be added to 8.8

> **An exemption shall be excluded where the investment should be made by one or more TSOs in fulfilment of its obligations in Directive 96/92/EC.**

ARTICLE 9

EFET believes that the proposed amendments could slow down the provision of information and prefers the original text.

ARTICLE 12

We support the rationalisation of the Committee provisions to a single committee under the regulatory procedure.

ANNEX – Guidelines

Several deletions have been made to the Guidelines in the Annex. Several of these deletions covered important principles relating to electricity networks, that are essential for the development of sustainable competition in electricity supply.

General
Specifically, the following paragraphs on capacity allocation should be retained:

6. Every effort should be made to net the capacity requirements of any power flows in the opposite direction over the congested tie line in order to use the congested tie line to its maximum capacity. In any adopted congestion management scheme, transactions that relieve the congestion should never be denied.

7. Any unused capacity must become available to other agents (the use-it-or-lose-it principle). This may be implemented by devising notification procedures.

Position of long-term contracts
Concerns about the position of long-term contracts could be alleviated by including release provisions in the amended Electricity Directive. The following text could be inserted in Article 3 of the directive:

> **Member States should have the power to require the release of electricity generation or transportation capacity where this is necessary to develop sustainable competition.**

And a reference to this text could be added, as a new paragraph 3, to this section in the Regulation.

3. Where necessary to develop sustainable competition Member States may require interconnection capacity to be released from long-term contracts in accordance with Article 3 of Directive 96/92/EC.

Principles governing methods for congestion management
The original paragraph 1 should be retained, recognising the importance of market-based solutions and the resulting price signals.

> 1. Network congestion problems should in principle be addressed with market-based solutions. More specifically, congestion management solutions are preferred which give appropriate price signals to the market parties and the TSOs involved.