

# **IMPLEMENTATION OF ARTICLE 33 and ARTICLE 41 OF DIRECTIVE 2009/73/EC regarding Gas Storage**

## **CEER Monitoring Report**

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## INFORMATION PAGE

### Abstract

This document (C12-GWG-85-03) presents CEER's monitoring of the implementation of Article 33 and Article 41 of Directive 2009/73/EC.

CEER has monitored the status of the implementation of Article 33 and identified the different criteria that are used in Europe to determine the gas storage access regime. This document highlights similarities and differences between the chosen approaches in Europe and provides a good overview of the criteria applied across Europe. The report can be used on a national level to compare approaches in Europe.

### Related Documents

#### External documents

- 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, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0094:0136:EN:PDF>
- European Commission Staff Working Paper, Interpretative Note on Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas, Third-Party Access to Storage Facilities, January 2010, [http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/implementation\\_notes/2010\\_01\\_21\\_third-party\\_access\\_to\\_storage\\_facilities.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_third-party_access_to_storage_facilities.pdf)

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## EXECUTIVE SUMMARY

### Goal of the project

Given the importance of access to gas storage, the Council of European Energy Regulators (CEER) monitors the status of the implementation of Article 33 of Directive 2009/73/EC and to identify the different criteria that are used in Europe to determine the access regime. The monitoring report highlights similarities and differences between the chosen approaches in Europe. As such, it provides a good overview of the criteria applied across Europe and can be used at national level to compare how approaches differ according to country.

### Main findings

- Although it seems that Member States have chosen an access regime based upon logical reasoning (either in the past or in the legislative process when transposing the 3<sup>rd</sup> Package), the applicable access regime was not always based on defined and published criteria. This makes it more difficult for a National Regulatory Authority (NRA) to monitor the correct use of the criteria and means that the monitoring varies in terms of execution due to varying interpretations of the criteria's proposed.
- The applicable access regime is usually described in national law. There are no specific rules as to how the applicable access regime – once chosen – needs to be published. Although publishing the applicable access regime in national law is permitted (as is now the case in several countries), this makes it more difficult to change the regime when an NRA – based upon its duty to monitor the correct use of the criteria – considers there is a strong case for revision.
- Although, the Interpretative Note on Gas Storage<sup>1</sup> published by the European Commission is not binding, in several countries it was taken into account when defining the criteria to determine the access regime. Although the criteria proposed in the Interpretative Note are not used literally, there seems to be a common understanding of how to assess the level of competition.
- Most NRAs have been designated the task of monitoring. Although in a few cases this task has a clear basis in national law (e.g. one NRA is obliged to monitor the correct use of the criteria every three years), in most cases this task seems to be fulfilled by conducting a (yearly) review of the developments that have taken place within the gas market. It must be mentioned that the monitoring varies in terms of execution due to varying interpretations of the criteria's purpose.

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<sup>1</sup> Commission Staff Working Paper, Interpretative Note on Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas, Third-Party Access to Storage Facilities, January 2010, [http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/implementation\\_notes/2010\\_01\\_21\\_third-party\\_access\\_to\\_storage\\_facilities.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_third-party_access_to_storage_facilities.pdf)

# 1 Introduction

## ***Importance of access to gas storage***

In most countries, storage is considered the most important flexibility tool for network users for supplying their customers. As a consequence, access to storage is an important prerequisite to be a successful market player in the gas market. While storage is not the only tool offering flexibility (other flexibility tools are import contracts, line pack, interruptible contracts, LNG and hub related products), it is one of the most important and often the only suitable one. Access to storage therefore needs to be well organised.

## ***New rules for access to storage in the 3<sup>rd</sup> Package***

With the entry into force of the 3<sup>rd</sup> Package (3 March 2011), new rules regarding storage have been introduced. With regard to access to storage, Article 33 of Directive 2009/73/EC<sup>2</sup> (the Gas Directive) is the core provision as far as the regulatory framework for operating storage facilities is concerned. With regard to the enforcement of these rules, Article 41 of the Gas Directive states that National Regulatory Authorities (NRAs) are responsible for monitoring the correct application of the criteria to be used to decide whether a negotiated access regime (nTPA) and/ or a regulated access regime (rTPA) will be in place for the organisation of access to storage facilities.

## ***Goal of the project***

Given the importance of access to gas storage, Council of the European Energy regulators (CEER) decided to monitor the status of the implementation of Article 33 and to identify the different criteria that are used in Europe to determine the access regime. With regard to the latter – given the (political) sensitivity of access to storage – the project does not assess individual criteria per country. Instead, it highlights similarities and differences between the chosen approaches in Europe. Also, a check is performed to evaluate the extent to which the indicative principles that the European Commission presented in its staff working paper<sup>3</sup> are used by the different countries. As such, the report provides a good overview of the criteria applied across Europe and can be used at national level to compare approaches in countries.

## ***Research method***

This report has been drafted based upon the following approach:

- A. The requirements that are determined in Articles 33 and 41 (par. 1(s)) of the Gas Directive have been analysed;

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<sup>2</sup> 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, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0094:0136:EN:PDF>

<sup>3</sup> Commission Staff Working Paper, Interpretative Note on Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas, Third-Party Access to Storage Facilities, January 2010, [http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/implementation\\_notes/2010\\_01\\_21\\_third-party\\_access\\_to\\_storage\\_facilities.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_third-party_access_to_storage_facilities.pdf)

- B. Through an internal questionnaire, NRAs were invited to provide the status of implementation of Articles 33 and 41 in their country<sup>4</sup> and explain the criteria used to identify the access regime<sup>5</sup>;
- C. Based upon 12 responses received, a report has been drafted to explain the status of the implementation and (similarities/differences between) the criteria to determine the access regime;
- D. Each NRA has been provided the opportunity to respond to the report – in particular the description of its own country – and the report has been revised accordingly.

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<sup>4</sup> The NRAs of the following countries participated in the survey: Austria, Belgium, Czech Republic, France, Germany, Hungary, UK, Ireland, Italy, Latvia, Portugal, Spain and The Netherlands.

<sup>5</sup> Latvia indicated that it has a derogation from TPA in force until April 2014. For this reason, no further details on the state of play in Latvia will be provided in this report. Therefore, the report refers to 12 responses being received.

## 2 Legal framework

As explained in the previous chapter, new rules regarding storage (Article 33 and Article 41 (par. 1(s)) of the Gas Directive) have been introduced with effect from 3 March 2011. The implementation of these new rules is assessed in this report and explained more fully below.

### 2.1 Article 33 Gas Directive 2009/73/EC

#### Gas Directive

According to paragraph 1 of Article 33 of the Gas Directive, *if it is technically and/or economically necessary for providing efficient access to the system for the supply of customers*, Member States must decide whether an nTPA and/or rTPA will be in place for the organisation of access to storage facilities and line pack<sup>6</sup>. According to paragraph 2, NRAs (where Member States have so provided) or Member States, shall define and publish criteria<sup>7</sup> according to which the access regime applicable to storage facilities and line pack may be determined<sup>8</sup>. These two Articles introduce the possibility to adapt the applicable access regime to storage facilities when market circumstances change due to e.g. market integration. The two possible access regimes are described as follows:

- ❑ *Negotiated access*: Member States or, where Member States have so provided, NRAs shall take the necessary measures for natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system to be able to negotiate access to storage facilities and line pack. Contracts for access to storage, line pack and other ancillary services shall be negotiated with the relevant storage system operator or natural gas undertakings (Art. 33 (3) Gas Directive);
- ❑ *Regulated access*: The regulatory authorities where Member States have so provided, or Member States themselves, 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, line pack and other ancillary services, on the basis of published tariffs and/or other terms and obligations for use of that storage and line pack (Art. 33 (4) Gas Directive).

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<sup>6</sup> The Gas Directive states that criteria must be developed by a Member State (or an NRA if designated to do so) that should be used to determine whether storage facilities need to offer third party access at all. Although this report does not identify the different criteria that are used in Europe to determine whether third party access needs to be offered, to ensure clarity the European Commission's view on these criteria will be explained in this chapter.

<sup>7</sup> To avoid any doubt, it should be stated that the Gas Directive does not set any rules with regard to the publication itself. As such, the criteria and the applicable access regime can either be published in national law or e.g. via a Ministerial Decree.

<sup>8</sup> One NRA considers that where the Member State has exercised its right not to allow for rTPA, the requirement to "define and publish criteria" applies to the question as to whether there is a need to offer TPA or not, although in any event that Member State has defined and published its criteria as to the choice of access regime through public consultation documents.

Once the access regime has been chosen, either a Member State or an NRA shall make public, or oblige storage and transmission system operators to make public, which storage facilities, or which parts of those storage facilities, and which line pack is offered through nTPA or rTPA.

### ***The position of the European Commission***

The European Commission published a staff working paper<sup>9</sup> (a non-binding document) in January 2010 that provides information to guide implementation of the measures in the new Gas Directive relating to third-party access to gas storage. The staff working paper proposes how the technical and/or economic necessity of access to storage could be determined. In this matter, the technical necessity depends, among other things on the substitutes for storage. With regard to the economic necessity, the staff working paper states that “where there are shippers requesting access to storage, this is a strong indication that it is economically necessary. In the view of the services of the Commission, should storage nonetheless not be deemed economically necessary, despite such requests, this would need to be proven to a very high standard”<sup>10</sup>.

The next step mentioned in the interpretative note is to develop criteria for determining the access regime. The European Commission has presented indicative principles that could be used to determine the access regime for a storage facility. For the sake of clarity, the note mentions that it is therefore up to either the Member State or NRA to determine and publish the criteria that need to be used to determine the applicable access regime.

As CEER noticed that some differences of opinion exist (between NRAs and Member States) on the precise interpretation of Article 33, the European Commission was asked to provide informally their legal interpretation of Article 33. The European Commission has indicated that it shares the legal interpretation that is provided in the present monitoring report. In short, this means:

1. Criteria should exist to determine whether there is a need to offer third party access at all;
2. If there is a need to offer third party access, criteria should also exist to determine the applicable access regime (nTPA and/ or rTPA regime);
3. A Member State must choose the access regime based upon these criteria.

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<sup>9</sup> Commission Staff Working Paper, Interpretative Note on Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas, Third-Party Access to Storage Facilities, January 2010, [http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/implementation\\_notes/2010\\_01\\_21\\_third-party\\_access\\_to\\_storage\\_facilities.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_third-party_access_to_storage_facilities.pdf)

<sup>10</sup> Ibidem, p. 10



## 2.2 Article 41 Gas Directive 2009/73/EC

Article 41 of the Gas Directive determines the tasks and responsibilities of NRAs. Among other things, an NRA is – according to paragraph 1(s) – responsible for monitoring the correct application of the criteria that are used to decide whether an nTPA and/or rTPA will be in place for the organisation of access to storage facilities<sup>11</sup>. According to Article 41 (1(s)), national law should provide that NRAs can carry out a comprehensive and well-directed monitoring of the applied criteria. Moreover, it is important for the implementation to separate these requirements from those according to Article 41 (1(n)). The latter also refers to an obligation in Article 33, but the main difference according to this provision is that it obliges an NRA to monitor and assess the conditions that apply (e.g. related to tariffs) when a storage facility needs to offer third party access.

## 3 Status of implementation

In the previous chapter, the most important legal requirements of Article 33 and Article 41 (1, (s)) of the Gas Directive were presented. This chapter explains to what extent both Articles have been implemented in national law and how certain aspects are implemented in practice. As already explained in the introduction of the report, the answers have been provided by NRAs completing an internal questionnaire.

### 3.1 Requirement to define and publish criteria (and monitor correct use)

Most countries have now transposed Articles 33 and 41 (1) (s) of the Gas Directive into national law<sup>12</sup>

Of the twelve NRAs that participated in the survey, only one NRA reported that the obligation in Article 33 to define and publish criteria to determine the access regime, as well as the obligation in Article 41 (1(s)) to monitor the correct use of the criteria, were implemented in national law by 3 March 2011. In seven other countries, the two obligations in Articles 33 and 41 (as mentioned above), though not completed at the time of the entry into force of the 3<sup>rd</sup> Package, were implemented in national law *in the course* of 2011. One NRA reported that both obligations have recently been implemented in national law, but emphasised – as was done by several other NRAs – that both obligations were already part of national law before the 3<sup>rd</sup> Package was introduced.

In some countries, Articles 33 and 41 have been partly (or not) transposed into national law

Two (out of twelve) countries reported that both obligations are not (or are partly) implemented into national law. The two NRAs have reported that Article 33 in itself is implemented (meaning: an access regime has been chosen), but that (at this point in time) the criteria that need to be in place to choose the applicable access regime have not yet

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<sup>11</sup> Based upon this task, an NRA may conclude that a change in access regime (e.g. from rTPA towards nTPA) is justified.

<sup>12</sup> To avoid any doubt: this paragraph only explains to what extent Article 33 and Article 41 (1(s)) were implemented on time. The question of whether the criteria have actually been defined and published will be explained in chapter 3.4.

been defined and published. One of these NRAs indicated that the criteria will be defined in a later stage and emphasised that the obligation to monitor the correct use of these criteria is already in place; it comes within the general monitoring duty given to this NRA regarding access to storage. The other NRA reported that it is not foreseen that any criteria will be published and that – as such – the obligation to monitor the correct use of these criteria will not become part of national law.

One country still needs to implement the 3<sup>rd</sup> Package

Finally, one NRA has reported that the implementation of the 3<sup>rd</sup> Package into national law will be completed in 2012. However, this NRA indicated that based upon the draft Gas Act, no criteria will be defined and published that are to be used to determine the access regime. The reason for this is that the Member State has concluded that only if both access regimes were in place, would criteria need to be defined to determine which access regime should prevail. Although the access regime shall be defined in national law and a reasoned opinion for the applicable access regime has been provided in the draft preamble of the Gas Act, no actual criteria will be defined and published. As such, no task has been defined for the NRA in question to monitor the correct use of the criteria.

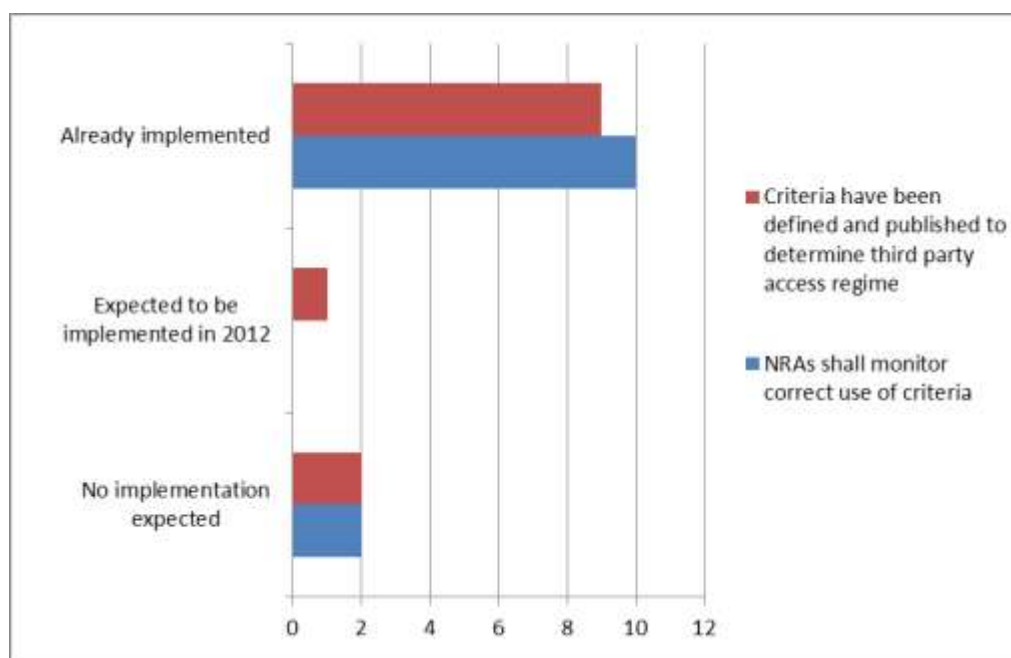


Figure 1: Status of implementation Articles 33 and 41 (1(s)) (12 responses received)

**3.2 Task to define and publish criteria**

In most cases, Member States define the criteria for choosing the third party access regime

Four NRAs – out of twelve who participated in the survey– reported that they have been designated the task to define and publish criteria that are to be used to determine the third party access regime. In six other countries, this task has been designated to the Member

State, while in two countries (where the obligation to define and publish criteria to determine the access regime criteria has not been transposed into national law) this task has not been assigned. With regard to the way of publishing the criteria, eight NRAs have reported that the criteria have been (or will be) published in the (preamble of the) national law itself or through a Ministerial Decree<sup>13</sup>. Two NRAs that have been assigned the task to define criteria reported that the criteria will be published on their own website, while in two countries no criteria – as explained earlier – will be published.

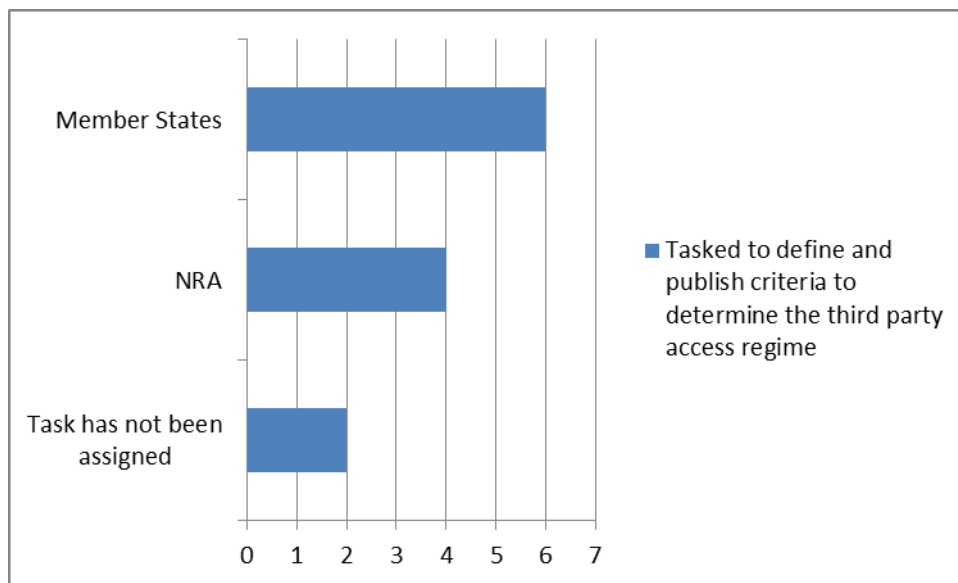


Figure 2: Responsibility for defining and publishing criteria (12 responses received)

### 3.3 Criteria to determine the access regime

In only a few countries, the criteria to be used to determine the access regime were known at the time of drafting this report<sup>14</sup>. However, one NRA explained that the main criteria used were known but they had not yet been officially published by the Ministry. Therefore, this NRA provided preliminary information on the main criteria used and pointed out that the publication of the Ministry may ultimately differ.

In most countries, the criteria to define the access regime have been (or will be) applied as “one size fits all”: the storage market is assessed as a whole (rather than each storage infrastructure individually) and based upon these results the decision is taken whether all storage infrastructure will have an nTPA or rTPA regime. The precise criteria that were brought forward by NRAs for the assessment of the third party access regimes are explained in Annex III. Given the limited number of countries that already have criteria, it has proven difficult to make a thorough judgement of the criteria. Nonetheless, through the assessment of the existing criteria for determining the access regime that were already known at the time of drafting this report, the following categories emerge:

<sup>13</sup> See footnote 8 for the explanation of the remaining two NRAs.

<sup>14</sup> To avoid any doubts, we repeat that in two countries no criteria will be defined and published.

- ❑ **Competition of storage with other sources of flexibility:** Storage is not seen as a stand-alone product market but as part of the flexibility market. LNG import capacity, import contracts and trading at gas hubs are seen as substitutes for storage. The access to these substitutes can differ from Member State to Member State and influences the choice of the storage access regime;
- ❑ **Storage market conditions:** The comparison of storage prices, number of providers of storage services, number of storage clients, market concentration, effective access to storage and the significance of long-term contracts are taken into account when choosing the third party access regime. In some situations, the intention to promote investment in additional storage capacity has had an influence on the choice of the access regime. For instance, when an nTPA was already in place, it could be considered that the shift to a rTPA would risk reducing the visibility of storage operators for projects with significant risk levels (given their long, costly and technically complex nature);
- ❑ **Role of storage in the gas market:** The comparison in the supply markets is also taken into account; the storage system has to fit in the market model. In some countries, for instance, the ability for storage operators to quickly adapt their commercial offers is considered crucial to ensure that the storage offer is consistent with the rapidly changing characteristics and costs of the other flexibility tools, in particular forward markets. This consideration may call for an nTPA access regime in the concerned Member States;
- ❑ **Role of storage for security of supply:** One NRA stated that storage plays a major role for security of supply in its country. Storage capacity is therefore distributed to suppliers as a strategic reserve. Additional storage capacity is allocated to suppliers of residential customers.

#### Two Member States have a different approach

In two Member States, a different approach has been chosen: the criteria mentioned in Article 33 should be used to determine whether third party access to a storage facility is technically or economically necessary or if an exemption can be granted, and not to choose the access regime for the whole storage market. This approach differs from how other Member States interpreted Article 33. Also, the Commission's interpretative note does not deal in detail with these criteria.

One NRA has published a guideline on this topic. One main criterion in this approach is to analyse whether the exemption would appreciably impact on competition. The second main criterion is the likely impact of an exemption on effective market signals and the economic use of storage capacity.

#### **3.4 Use of interpretative note**

In its interpretative note, the European Commission has given indicative principles for criteria to determine the access regime, but also expressly declared that Member States have the

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right to use other criteria to decide whether an nTPA and/or rTPA access regime should be in place.

CRITERION	EXPLANATION
Existence of a flexibility market	<input type="checkbox"/> Does effective competition between facilities or between facilities and other flexibility services in the market area exist? <input type="checkbox"/> Is there competitive pressure between storage facilities or between facilities and other flexibility services such that efficient tariffs, products, product variety and access to the services offered is a result of market mechanisms?
Effective access to storage	<input type="checkbox"/> Is there a high proportion of storage capacity booked long-term without having previously been allocated in a non-discriminatory manner, and is only a comparatively small amount of capacity offered to the market each year?
Degree of dispersion of storage clients	<input type="checkbox"/> Is capacity largely booked by one or very few large undertakings? <input type="checkbox"/> Are storage pricing and the access regime distorted by such concentrated interest and does it thus not result in efficient use of the storage?
Existing barriers into the storage market	<input type="checkbox"/> Technical barriers: no additional geological potential <input type="checkbox"/> Administrative barriers: permits cannot realistically be obtained <input type="checkbox"/> Economic barriers: cost structures of possible new storages were substantially higher than those of existing ones; or the lumpiness of new storage capacity would make their development uneconomic

Table 1: Overview of proposed criteria for determining third party access regime in the Interpretative Note of the European Commission<sup>15</sup>

Although the interpretative note is non-binding, four NRAs reported that the interpretative note was taken into account when defining the criteria to determine the access regime. However, most NRAs have not answered this question, either because the Ministry has chosen the criteria (and it is not clear to what extent the interpretative note was used) or because no criteria will be defined and published. However, one NRA indicated that the approach chosen by the Ministry is consistent with the interpretative note used, to the extent that the criteria of the assessment of the flexibility market has been used instead of looking at the storage market alone.

When comparing the indicative principles in the interpretative note and the criteria used in the different countries, it can be seen that the criteria also deal with the competition from other flexibility tools and the market conditions in the storage markets. Member States seem,

<sup>15</sup> Commission Staff Working Paper, Interpretative Note on Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas, Third-Party Access to Storage Facilities, January 2010, p. 12/13, [http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/implementation\\_notes/2010\\_01\\_21\\_third-party\\_access\\_to\\_storage\\_facilities.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_third-party_access_to_storage_facilities.pdf)

however, to have a more integrated view of the access conditions and also take into account the role of storage for security of supply and for the development of competition in the supply markets.

### 3.5 Process for determining the access regime

#### The access regime is mostly determined in national law

Ten NRAs reported that the third party access regime has already been chosen (during the legislative process when the 3<sup>rd</sup> Package was transposed into national law) and that the applicable third party access regime is currently prescribed in the national law itself. In two countries (at the time of drafting the report), the third party access regime had not yet been decided upon by the Member State. When looking at the actual applicable access regime, five countries reported that an nTPA is now the applicable third party access regime, while in four countries rTPA has been chosen. In one country, there is a “hybrid system” (meaning that both an nTPA and rTPA apply<sup>16</sup>), while in two remaining countries no third party access regime has been chosen yet.

With regard to the process for determining the third party access regime, one NRA has performed an analysis of the storage and flexibility market before the access regime was chosen by the Member State, while in two other countries the Member State itself invited market participants (through a consultation or on the basis of ministerial and parliamentary procedure) to provide their view on the applicable access regime. In one country, the NRA has a role to evaluate and inform the initial Ministry proposal. In most countries, however – based upon the received responses – it seems that the third party access regime was chosen by the Member State without a formal open consultation of stakeholders.

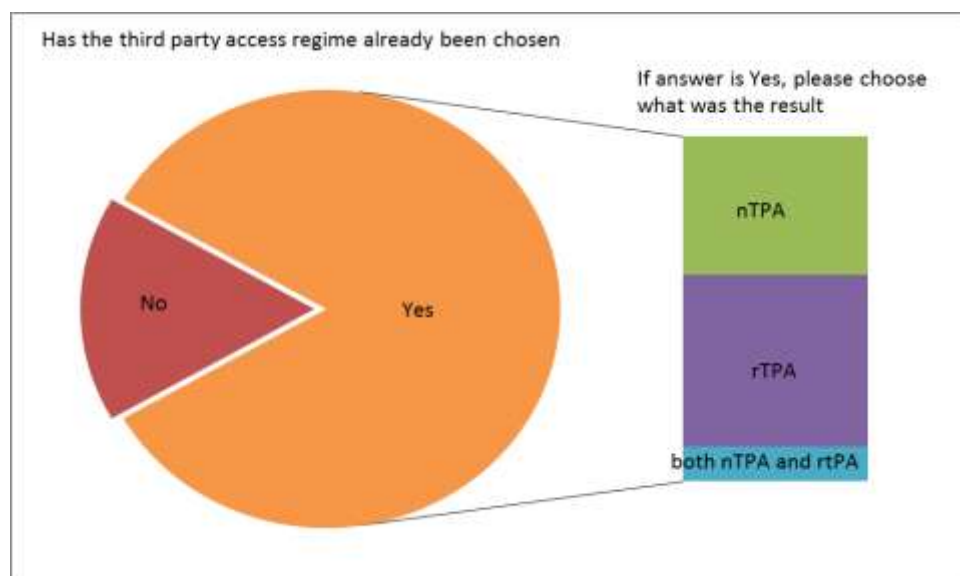


Figure 3: Overview of third party access regimes applied (12 responses received)

<sup>16</sup> To avoid any doubt, it is mentioned that a Member State can decide – according to Article 33 of the Gas Directive – that both access regimes can be in place.

### Reasons for choosing either rTPA or nTPA

As already mentioned, in only a few countries was the criteria to be used for determining the access regime already known during the drafting of this report. At the same time, in ten out of the twelve countries the access regime has already been chosen (although the criteria that need to be in place to do so did not exist). To get a better insight into the actual reasons for choosing an nTPA and/ or rTPA regime, NRAs were asked to provide the reasoning thereof. Only a few NRAs have done so. It is expected that most NRAs did not provide input because the Member State has independently chosen the access regime.

The NRAs that provided information gave the following reasoning:

- ❑ The nTPA access regime was chosen because of the pluralistic structure, the favourable geological conditions in the country and the possibility for further consolidations of markets areas.
- ❑ The role of storage in guaranteeing security of supply was (the most important) reason for choosing rTPA. In choosing auctions for a part of the storage capacity with nTPA, an assessment of the existence of capacity congestion was undertaken in 2008.
- ❑ One reason for choosing nTPA was that only by deciding on nTPA (instead of also rTPA) would a unified legal regime be in place for all storage facilities. Further reasons were that nTPA best contributes to a sound investment climate for storage facilities in a liberalised gas market as it gives investors in storage capacity confidence in expected revenues over a longer period. In the view of the Ministry, rTPA is no longer feasible because the market is liberalised and many storage sites are now (being) built nationally and in neighbouring countries. As a result, flexibility is much more accessible now than in the past (also via the hub).

All reasons given for the choice of the access regime (separated between nTPA and rTPA) are listed in Annex IV.

### **3.6 Monitoring the correct use of the criteria**

#### The Monitoring task is mostly not specifically arranged in national law

Ten NRAs reported that they have been tasked with monitoring the correct application of the criteria that determine whether a storage facility should be subject to rTPA or nTPA. In some cases, this task has a clear basis in national law (e.g. one NRA is obliged to monitor the correct use of the criteria every three years), while another NRA has reported monitoring only the correct use of the criteria on the basis of suggestions from other participants in the gas market. In most other cases, however, this task seems to be fulfilled by conducting a (yearly)

review on the developments of the gas market and whether the applicable access regime is (therefore) still the right one<sup>17</sup>. Finally, one NRA has indicated that there is no intention – at least at this point in time – to change the access regime and therefore the correct use of the criteria will not be monitored. In summary, the monitoring varies in terms of execution due to varying interpretations of the criteria's purpose.

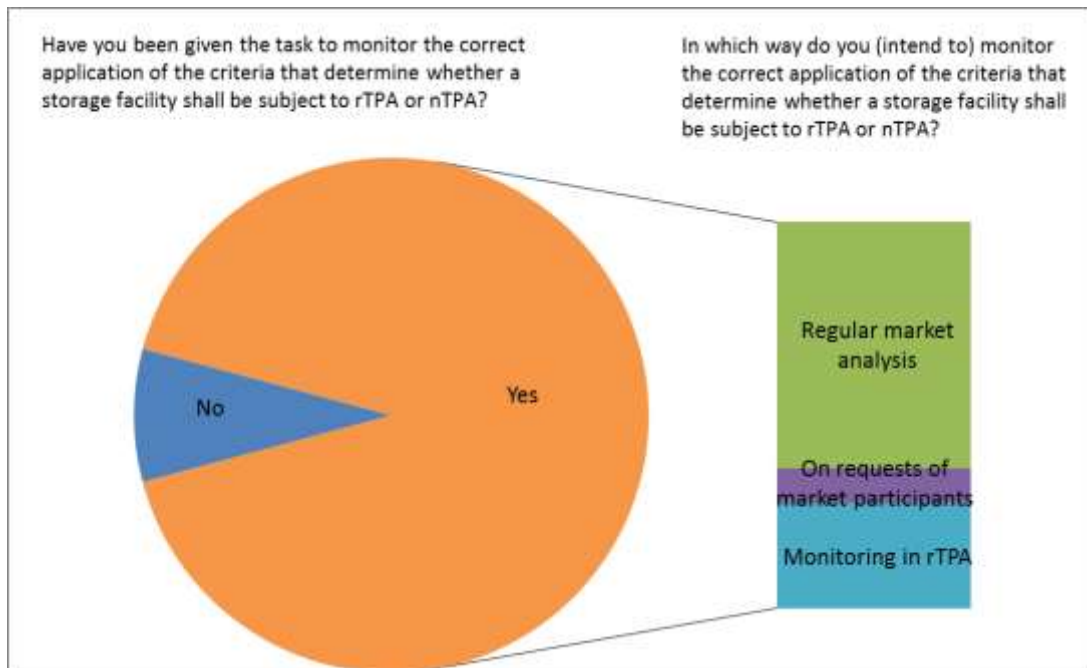


Figure 4: Overview of ways to monitor correct use of criteria (12 responses received)

<sup>17</sup> Two NRAs have reported that they monitor the correct use of the criteria by reviewing the grant of an exemption so as to determine whether it is met on an on-going basis. The criteria referred to are however the criteria that are used to determine whether TPA needs to be offered at all.



## 4 Conclusions

### ***The access regime has already been chosen in most countries, but not always based upon defined criteria***

Article 33 of the Gas Directive 2009/73/EC, among other things, aims to provide greater transparency in the reasoning as to why either an nTPA and/or rTPA access regime is applicable in a Member State. In several countries, criteria have been (or will be) defined and this is a good step towards a sound reasoning for choosing the applicable access regime. At the same time, it seems that in several countries the applicable access regime has already been chosen, even if the criteria that need to be taken into account are (or were at that moment in time) not yet defined and/or published. Although it seems that Member States have chosen an access regime based upon logical reasoning (either in the past<sup>18</sup> or in the legislative process when transposing the 3<sup>rd</sup> Package), the applicable access regime has not always been based on defined and published criteria. This makes it more difficult for an NRA to monitor the correct use of the criteria. As a result, monitoring will be executed differently across Member States due to the differing interpretations of the purpose of criteria (see below).

### ***The applicable access regime is usually described in national law***

The 3<sup>rd</sup> Package only states that criteria must be defined and published according to which the access regime may be determined; no further guidance is provided on how the defined criteria need to be published. There are also no specific rules as to how the applicable access regime, once chosen, needs to be published. Although publishing the applicable access regime in national law is permitted (as is now the case in several countries), this makes it more difficult to change the regime when an NRA – based upon its duty to monitor the correct use of the criteria – considers there is a strong case for revision.

### ***Use of the interpretative note***

The interpretative note of the European Commission provides some guidance on the criteria by presenting indicative principles that could be used to determine the access regime applicable for a storage facility. Although this document is not binding, in several countries it was taken into account when defining the criteria to determine the access regime. When comparing the criteria used in the different Member States there is an overlap between the criteria used for analysing the level of competition in the flexibility market and the criteria in the interpretative note.

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<sup>18</sup> Based upon the 2<sup>nd</sup> Package, Member States were already obliged to determine whether an nTPA and/or rTPA access regime should be applicable for storages.

Although, the criteria proposed in the interpretative note are not used literally, there seems to be a common understanding as to how to assess the level of competition. Member States, however, seem to have a more integrated view of the access conditions, taking into account the whole gas market, the role of storage for security of supply and the development of competition in the supply markets. In at least half of the responding Member States, the interpretative note was considered, but for various reasons not fully taken into account.

### ***Most NRAs have been designated the task of monitoring***

The monitoring of the correct application of the criteria should be, according to Article 41 (1(s)) of the Gas Directive, performed by the NRA. Through the transposition of the 3<sup>rd</sup> Package into national law, most NRAs (participating in the survey) have indeed been issued this monitoring duty. Although in a few cases this task has a clear basis in national law (e.g. one NRA is obliged to monitor the correct use of the criteria every three years), in most cases this task seems to be fulfilled by conducting a (yearly) review on the developments that have taken place within the gas market. Finally, it has to be mentioned that the different execution of monitoring is a result of the different interpretations of the purpose of the criteria.

## Annex I – CEER

The Council of European Energy Regulators (CEER) is the voice of Europe's national regulators of electricity and gas at EU and international level. Through CEER, a not-for-profit association, the national regulators cooperate and exchange best practice. A key objective of CEER is to facilitate the creation of a single, competitive, efficient and sustainable EU internal energy market that works in the public interest.

CEER works closely with (and supports) the Agency for the Cooperation of Energy Regulators (ACER). ACER, which has its seat in Ljubljana, is an EU Agency with its own staff and resources. CEER, based in Brussels, deals with many complementary (and not overlapping) issues to ACER's work such as international issues, smart grids, sustainability and customer issues.

The work of CEER is structured according to a number of working groups and task forces, composed of staff members of the national energy regulatory authorities, and supported by the CEER Secretariat.

This report was prepared by the Gas Storage Task Force of CEER's Gas Working Group.

## Annex II – List of Abbreviations

Term	Definition
ACER	Agency for the Cooperation of Energy Regulators
CEER	Council of European Energy Regulators
NRA	National Regulatory Authority
nTPA	Negotiated Access Regime
rTPA	Regulated Access Regime

## Annex III – Criteria used in assessment of access regime

CATEGORIES	CRITERIA
Storage as part of flexibility market	<input type="checkbox"/> Availability of capacity to supply gas from various sources; role of storage to meet forecast peak and winter demand and the demand for flexibility
	<input type="checkbox"/> Competition of storage facilities with other sources of flexibility
	<input type="checkbox"/> Changes in the market organisation with implementation of the 3 <sup>rd</sup> Package (merging of balancing zones, changes in balancing systems)
Competition Indicators	<input type="checkbox"/> Development of number of independent providers of storage services and number of storage clients/degree of dispersion of storage clients
	<input type="checkbox"/> Price comparisons
	<input type="checkbox"/> Range of products on offer and their use
	<input type="checkbox"/> Market concentration (supply and demand side)
	<input type="checkbox"/> Amount of capacity booked long-term/short term
	<input type="checkbox"/> Potential for new storage projects (geological conditions)
	<input type="checkbox"/> Impact of exemption on effective market signals and economic use of storage capacity
Role of storage in the gas market	<input type="checkbox"/> Impact of access regime on incentives on investments in storage
	<input type="checkbox"/> Access should be consistent with the business model of storage
Storage role in guaranteeing security of supply	<input type="checkbox"/> General development of competition (market based organisation of the balancing system is expected to have an additional positive effect on the storage market with a further increase of competition)
	<input type="checkbox"/> Strategic reserves kept in underground storage
	<input type="checkbox"/> Withdrawal capacity in winter peak demand
	<input type="checkbox"/> Impact on effective market signals and economic use of storage capacity

## Annex IV – Reason for choosing nTPA or rTPA

Reasons for nTPA
↻ Pluralistic structure of suppliers of storage capacity
↻ Favourable geological conditions for storage development
↻ Possibility for further consolidations of markets areas
↻ Active competition between facilities
Impact of access regime on incentives on investments in storage
↻ By only choosing nTPA (instead also rTPA) a unified legal regime will be in place for all storages
↻ nTPA does best contribute to a sound investment climate for storages in a liberalised gas market
↻ Storages are built for many years and investors need to have enough confidence in expected revenues over a longer period. If this is not the case, investors will not invest
↻ rTPA is no longer feasible because the market is liberalised and many storages are now (being) built on the national and surrounding countries. More flexibility is therefore much more accessible now than in the past (also via the hub)
Reasons for rTPA
↻ Storage role in guaranteeing security of supply
↻ Congestion in storage facility