

COMMENT ON ARTICLE 26 OF PROPOSED NEW PROCUREMENT DIRECTIVE

(FORMER ARTICLE 13)

INTRODUCTION

1. In the several position papers over the last years, Eurogas has called attention to the inappropriateness of the provision in the Utilities Directive on intra-group trading (EC/93/38 Art. 13; now revised as Art. 26). Eurogas has repeatedly called for a more practical and flexible approach in the case of intra-group trading; which would recognise the dynamics of procurement in an evolving business environment.
2. Eurogas therefore is disappointed that the issues raised by Article 13 have not been addressed by the Commission in this direction. The new proposal in other respects seeks to recognise the significant changes now taking place in the gas sector and Eurogas will comment on those separately. The approach, however, in new Article 26 remains rigid and impractical. In this short paper, Eurogas emphasises its concerns about Article 26, and illustrates the problem with some typical examples.

LACK OF CLARITY OF ART. 13/26

3. The text of the Article has from the outset given rise to problems of interpretation. It is not clear whether the 80% rule applies to the same type of services covered by the relevant contract or all services provided by the affiliate. This had led to different applications of the Directive in national legislation, and the new text does not clarify this point.

IMPLICATIONS OF ART. 13/26 IN AN EVOLVING GAS SECTOR

4. A more fundamental concern about Art. 13/26, however, is that it is an anachronism in the changes which are taking place in Europe's gas markets. It can be understood that in the early 90s, the Commission's purpose in seeking to limit intra-group trading and curtail what it saw as anti-competitive practices of its abuse, was against the background of vertically integrated, monopolistic, utilities. A decade later, however, this picture has changed, Companies have reorganised themselves, in order to be able to respond in a flexible manner to individual business and commercial needs generally; also in some cases, to meet national decisions to unbundle gas transport facilities from other activities of the gas business.
5. The provision that if more than 20% of the service turnover of the company or subsidiary concerned is provided outside the Group, then it would be illegal for it to provide intra-group services without competitively tendering for them, is impractical with regard to current business dynamics.
6. It is common practice in today's business world that all types of enterprise transfer some of their activities to independent subsidiaries, which will carry out services for their parent companies as well as for other companies.

7. The rigid provisions of Art. 13/26, however, cause unjustified disadvantages for all those entities operating in a sector covered by the Utilities Directive. Their ability to determine the company's structure is restricted, and they cannot establish a subsidiary for specific services without establishing the obligation to make a call for tender when these services are needed.
8. In Italy, for example, Snamprogetti is a separate engineering company within the ENI group, but in view of its top-level know-how and expertise in the oil and gas sector its services are increasingly sought after. A major contract in any one year can distort the apparent relationship with SNAM or indeed any other ENI group company, with the effect of depriving SNAM of a corporate asset.
9. Another example comes from The Netherlands. Within Gasunie, the unit "Transport, Services and Consultancy" a task force is operating in the area of gas pipeline repair and special expertise and experience in (hot)tapping and welding on pressurised gas pipelines. Highly qualified staff are trained to do their job in all conditions. To maintain this highly qualified standard on-the-job-training is essential. Therefore this task force is also used for "normal" construction activities, if no special tasks are in hand. It is obvious that the best training for these men is this pipeline repair and (hot)tapping work. It has been decided to approach pipeline-owners all over the world to promote this task force and its activities, which enable operators to repair or extend their pipeline-grid without the need to stop the product-flow. Because of the Directive's requirements, Gasunie will be running a risk, if the unit is established as an affiliate company, that it would have to tender for the services offered, which will lead to uncertainties in relation to the responsibilities Gasunie manages in its business at large. Gasunie is concerned that this might also be in conflict with art 10 of the "Gas Wet" which emphasises the duty of Gasunie to develop and maintain the grid in a way that safety, efficiency and reliability are secured (this article is the Dutch implementation of art. 7.1 of directive 98/30/EC).
10. The impact which the Gas Directive will have on companies' organisational structures also needs to be considered, as it can be expected that there will be unbundling of operational and commercial activities to various degrees. The UK already provides us with insight into the difficulties which can arise in this respect.
11. Transco, the UK transmission and distribution business, is part of BG. Transco provides gas shipping services to gas trading shippers. This is the vast majority of its business. It therefore always exceeds the 20% rule of work done outside the Group and, therefore, cannot provide any services to other parts of the group without tendering.
12. BG Technology is the research and technology business unit of the group. As a consequence of market liberalisation, it has contracts with gas trading companies, eg British Gas Trading (Centrica), which means that its external business is close to 20% of its activity. This is a direct result of market liberalisation. The result is that at some times of the year it would exceed the 20% and at other times it would not. It would therefore be difficult to know whether its services have to be tendered for by the captured utility.
13. It seems to BG that the arrangements for these activities are better dealt with under the powers of the relevant member state regulatory body, eg Ofgem, rather than under 93/38. At present, BG is covered by both and there are often confusing overlaps in responsibilities.
14. A last general argument against Art. 13/26 is that it does not appreciate that for reasons of efficiency companies will outsource more and more for particular activities. This will not change fundamental relationships with intra-group companies, but in a particular year can already affect the 20% criterion.

15. The provisions of Art. 13/26 are quite arbitrary and do not take account of legitimate company structures in a changing business and commercial environment. Eurogas would like to see it replaced with a provision which would exempt from the scope of the Directive as many of the contracts awarded to associated companies as possible. As the provision stands it will discourage restructuring which is justified in the interests of commercial flexibility and efficiency, or to comply with regulatory requirements. It may also act as a disincentive to mergers undertaken to improve and enlarge the services to customers.

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