

**DRAFT GUIDELINES ON ARTICLE 22:
EUROGAS VIEWS ON ERGEG'S PUBLIC CONSULTATION PAPER**

Eurogas welcomes the opportunity to respond to ERGEG's consultation on proposed Guidelines on Article 22. There is widespread consensus among all parties that significant investment is needed in new infrastructure of all types to enhance Europe's security of supply in coming years. There are challenges in delivering this objective in which context it is important to have a dialogue on the framework to incentivise the needed investment. One of the possible tools is the Article 22 exemption process, which recognizes the legitimacy of exemption from general third party access provisions for certain projects. It is particularly important that such an exemption be possible for new infrastructures with high investments at stake, so that they can benefit from tariff or reservation systems that support the long-term viability of such a project but a balanced approach is needed to using this Article. Complex issues can be involved, particularly in weighing up the project's contribution to the objectives of the internal market and its significance for the relevant market, for which reasons Eurogas continues to insist on the need for case by case assessment for each project. In this respect, we have called for the development of Guidelines on the application of Article 22, and therefore we support ERGEG's initiative.

Below are our answers to the questions directed at stakeholders:

1. Do you consider the described general principles and guidelines appropriate to achieve a consistent and transparent framework for competent authorities when deciding on exemption procedures?

The general principles and Guidelines proposed by ERGEG seem appropriate. The goal should be to define a coherent framework for the application of exemption procedures in order to help achieve a more transparent and consistent EU-wide approach, based on general principles when decisions are taken. Whatever form an exemption might take, e.g. for the access to the entire facility, a part of that facility or exemption from a regulated tariff, the objective must be to facilitate investments to develop the competitive market.

The responsibility lies with the competent authorities to determine the benefit of a proposed projects, taking into account the situation in the relevant market. Further detail in the Guidelines on the definition and application of the provisions set out in Article 22 would be welcome.

Clearly defined terms and rules are essential for the consistent interpretation of guidelines. For example, it would be helpful if the Guidelines could provide a more precise definition of "interconnector" to make it clear which part of a pipeline project qualifies, for example whether it also includes backup infrastructure. In addition, ERGEG should provide a precise definition of "hoarding" and indicate what type of behaviour constitutes anti-competitive hoarding.

2. Do you consider the present scope of eligible infrastructure to be too narrow?

There are different views among companies on this question. The issue of whether the scope should also encompass new technologies is complex, but there is consensus that innovative development has to be facilitated especially in the fast evolving LNG sector. If new technologies are considered to be part of the regulated regime, then exemption must be possible.

Eurogas notes the issue raised about duplicable/non-duplicable infrastructure, but we think that the possibility of enlargement of the facility would be a better criterion. Non-duplicable infrastructure should be constructed with a view to eventual enlargement, if

technically possible. If enlargement is not possible or the infrastructure cannot be easily duplicated, then partial exemption would be most appropriate.

3. Do you consider open season (or comparable) procedures an important tool in assessing market demand for capacity with respect to determining the size of the project applying for exemption, as well as in the subsequent capacity allocation? Should open season (or comparable) procedures be mandatory?

Open season (or comparable) procedures are important in assessing demand for capacity. It should not necessarily be the only means of determining the capacity of a project – other aspects have to be taken into account. As the question, however implies, there could be more than one procedure to establish market demand and the Guidelines should not rule out that possibility as long as the assessment process is non-discriminatory and transparent, and covers all possible users.

ERGEG therefore may wish to consider a process whereby project sponsors can satisfy the exemption criteria without conducting an open season. A preliminary market analysis of the market could be carried out by the regulatory authority to decide if the normal requirement for an open season could be waived.

Open seasons (or comparable market procedures) ensuring transparent consultation on users' needs should be accompanied by well functioning capacity allocation process but this is a different stage in the process. The capacity allocation process should ensure a required level of new investment on a scale to meet on an economic basis the needs of users for non exempted capacity (underpinned largely by firm commitments).

The outcome of the capacity allocation process should be non-discriminatory, and reflect as far as possible the demand for capacity from players in the relevant market and the contractual volumes they are to deliver to their consumers.

4. Should open seasons also be used to allocate equity?

We would not support the use of open seasons to allocate equity. When companies decide to enter into a co-ownership in a facility, one part of the decision is based on the quality of the other co-owners and their ability to take risks all together. The decision should remain under the responsibility of the companies sharing participating interest in a facility. It is their responsibility to decide with which parties they want to share risk over several years.

We believe that ownership structures are not the responsibility of sector regulators unless addressed within the scope of their responsibilities in agreement with competition authorities.

5. Some stakeholders think that Art. 22 should be applied differently to LNG terminals as they may be generally better suitable for enhancing competition and security of supply than other types of eligible infrastructure. What is your point of view on this? If you agree, how should this be reflected in the guidelines?

In the view of Eurogas, LNG terminals like other investments should also be subject to a case by case assessment, under the implementation of Article 22. Ultimately LNG terminals have to be subject to the same main criteria as other projects for which exemption is sought. The Guidance notes may find it useful to refer to broad considerations that will apply to LNG terminals, and care has to be taken not to weaken shippers' ability to use LNG terminals to compete for gas in the growing global market. There may also be technical aspects to be highlighted in the Guidelines. LNG plants have specific technical constraints linked to the character of input (LNG carriers)

and the whole LNG process, with consequences for the required level of flexibility and the possible number of users.

6. Are the described criteria for assessing the effects of an investment in infrastructure on enhancement of competition in gas supply appropriate?

Criteria described in the draft seem appropriate, but need clearer definition. Some areas are vague and therefore risk being applied in a subjective manner. A clearer definition will also help give the project sponsors and other stakeholders a clearer understanding of the steps that need to be taken.

7. Are the described criteria for assessing the effects of an investment in infrastructure on enhancement of security of supply appropriate?

They are appropriate but as the wording implies, the list is not exhaustive as there are numerous ways in which security of supply can be improved.

8. Are the described criteria for the risk assessment appropriate?

The criteria seem to apply only to RTPA, and we think it is necessary to clarify that the exemptions may be granted under Article 22 to infrastructure with both NTPA and RTPA. Also it is not clear how anti-hoarding mechanisms would be applied to exempted capacity in case of a partial exemption, and how it would be established that capacity hoarding is taking place or not. The following statement might be added "For LNG facilities, the commercial risks linked with the splitting of the capacity have to be assessed".

9. Are the described criteria for assessing whether the exemption is not detrimental to competition or the effective functioning of the internal gas market or the efficient functioning of the regulated system to which the infrastructure is connected, appropriate?

In relation to the possible criteria set out in 3.2.2, "needed capacity expansions to meet future demand" is perhaps the most important, as that will enlarge capacity and potentially contribute to diversification, and security of supply, important objectives of EU policy.

10. To what extent should consultations with neighbouring authorities be done?

It would be useful to have more detail on what "consultations" would consist of, and to what extent they would potentially affect the decision-making process of an application for an exemption. In general, however, increased co-operation especially among NRAs is supported. Decision making could be streamlined if authorities carry out joint assessments.

Consultations with neighbouring countries are appropriate in the case of an interconnector, to set up common or at least compatible rules for the facility on each side of the border, ensuring also that it should enhance competition in national and regional markets and at European level.

The consultation process should include stakeholders in the neighbouring states that may benefit from the planned investment.

11. Parts 3.3.1.1 and 3.3.1.2 of the proposed guidelines deal respectively with partial and full exemptions. Do you consider the described decisions (partial/full exemption) appropriate in safeguarding the goal of Directive 2003/55/EC in making all existing infrastructure available on a non-

discriminatory basis to all market participants and safeguarding the principle of proportionality?

The reasons for granting a partial exemption are clearly detailed. The explanation, however, on full exemptions is weak by comparison. More needs to be said about the application of the five tests and the principle of proportionality; some more thought needs to be given to the sort of situations in which the benefits of full exemption would outweigh its negative effects.

12. Do you believe that Art 22 exemptions should also benefit incumbents or their affiliates? If yes in what way and to what extent?

Providing that the criteria to obtain the exemption are met, there is no reason to dismiss the possibility of incumbents benefiting from Article 22 exemptions. There is a wide enough range of exemption possibilities for the regulator to determine the most favourable approach for the competitive market overall.

13. Do you agree that under certain circumstances, deciding authorities should be entitled to review the exemption? How can it be assured that this does not undermine the investment?

Investors need to be confident in a stable regulatory framework, especially that the agreed framework will not change during the pay back time. Nonetheless, the exemption could clearly define some conditions, under which with the agreement of the sponsor, aspects of exemptions could be reviewed, taking into account whether compliance with the criteria is within the responsibility of the sponsor.