



# Article 22 Exemptions on New Gas Infrastructure

## Commission Draft Document

Nina Grall  
DG TREN • Directorat C-2

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# Content Overview

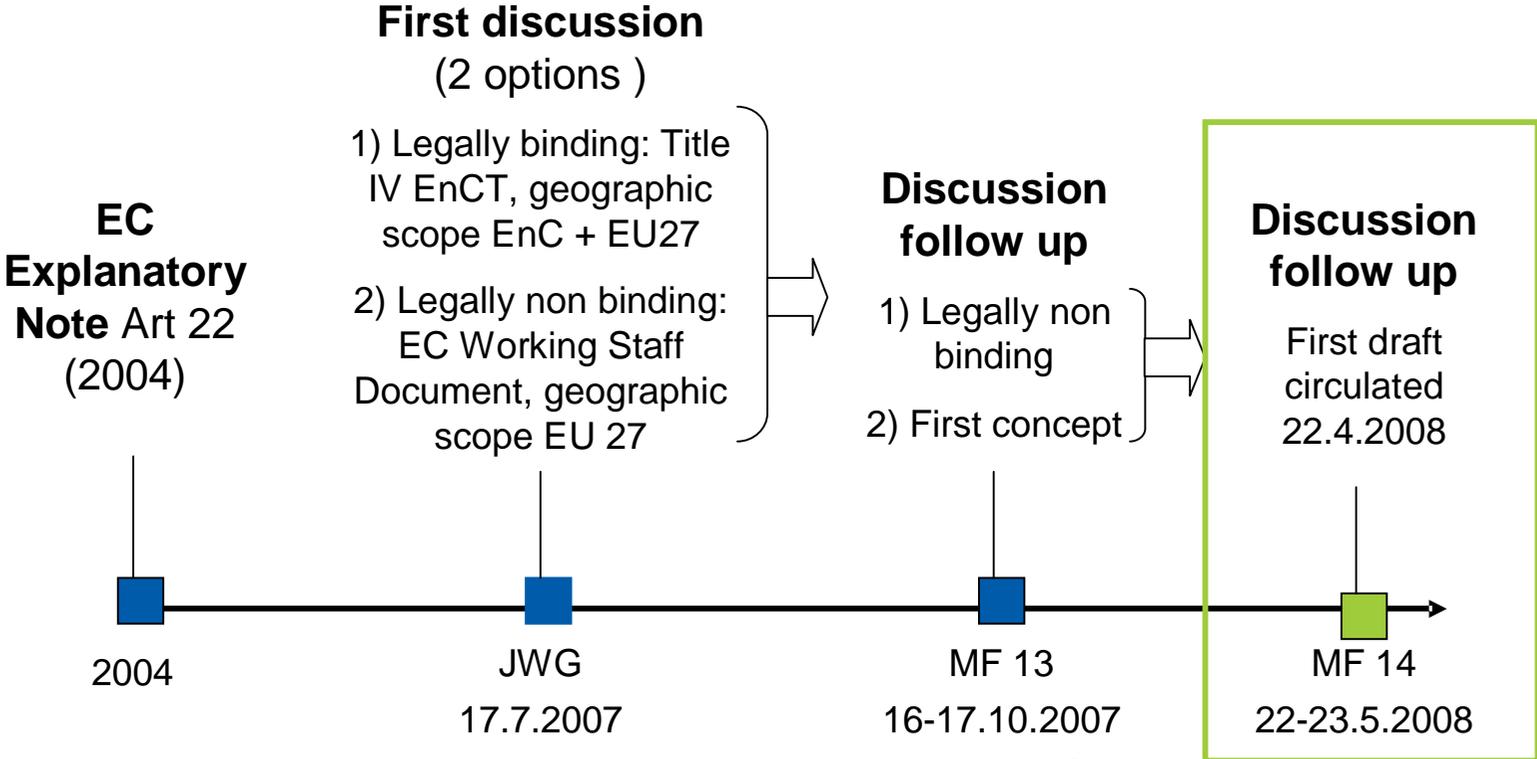
- Background
  - » Where do we start from
- Scope
- Content
- Way forward

# Background • where do we start from?

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Experience practical Art 22 cases (EC, NRAs, industry)

Stakeholders brainstormings August 2007

ERGEG report Art 22 practice (07/2007)

Directorate-General  
for Energy  
and Transport



## EC Draft: Scope

- Scope
  - » information on the Commission's assessment of NRA decisions exemption & guidance in the light of the practical exemption experience gained since EC Note 2004
  - » ex ante harmonised understanding on the Art 22 criteria and information/data to be provided
  - » transparency and guidance to regulatory authorities and market participants
  - » facilitate the procedures for assessing exemptions
  - » harmonised approach accross sectors (Electricity, gas (storage, pipeline, LNG) & unless specificities would justify differences
- Not the objective
  - » restrict or change the criteria for awarding exemptions
  - » give an exhaustive interpretation of the assessment criteria (“checklist”) & case by case character!
  - » without prejudice to Community competition rules

## EC Draft: Structure

1. General exemption framework
2. Analysis of criteria
  - a. When is this criterion met?
  - b. Which information has to be provided by the project sponsor?
    - » In order to proof that the criterion has been met
  - c. Conditions to be imposed
    - » In case the project does not sufficiently meet a criterion

Ä per criterion

Ä approach EC Explanatory Note 2004 unchanged!

# EC Draft: general exemption framework

## EXEMPTION possible 8

### SPECIFIC CIRCUMSTANCES

- ü risk attached to the investment is such that the investment would not take place unless an exemption would be granted
- ü exemption to general rule!

GENERAL FRAMEWORK: general principle Directive 2003/55/EC = rTPA to gas systems

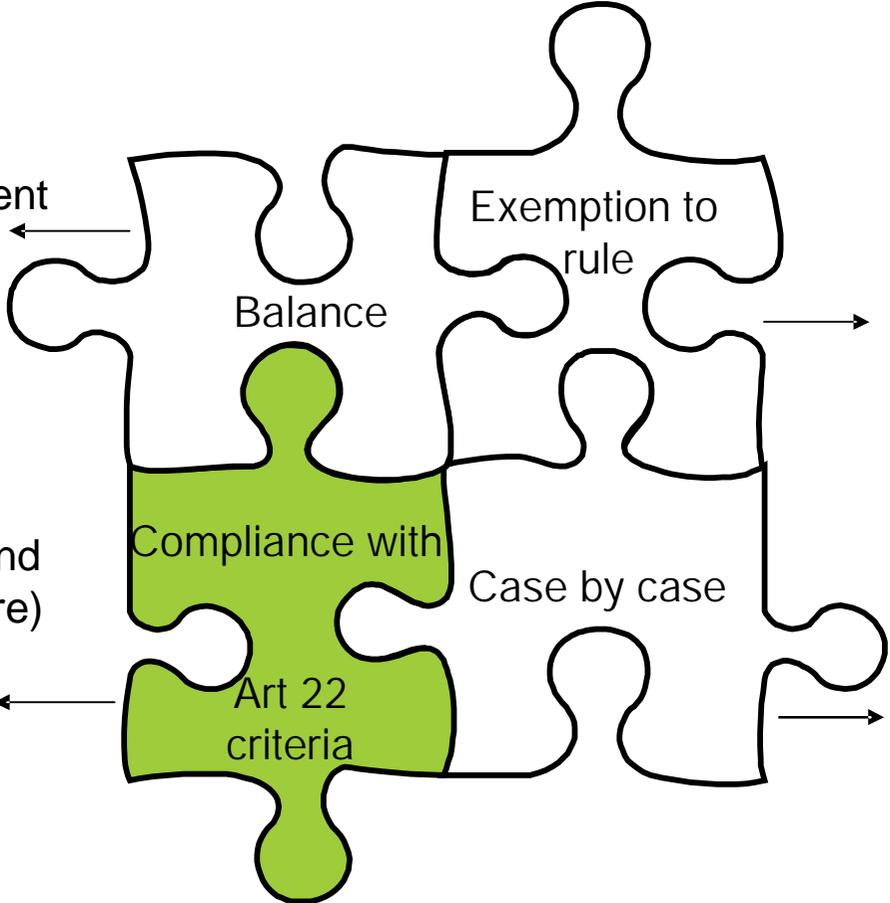
- ü Role of sufficient infrastructure for competition/liquidity
- ü Role of TSOs: meet reasonable demand
- ü Role of regulators: investment friendly regulatory framework • incentives, stability, predictability, compensate costs

# Article 22 • building blocks

q promoting infrastructure investment vs. impact on competition (TPA), security of supply, functioning of internal market

q risk of competitive distortion (regulated and exempted infrastructure)

q No trade-off!



q alternatives?  
 - to be realised within regulated system? (incentives)  
 -partial exemptions?

q particular project and market(s) characteristics

q review EC 8 wider EU interest



# [1] Enhancement of Security of Supply - 1

- Criterion " The investment must enhance security of supply"
- Assessment criteria – when is this criterion met?
  - » Diversification of sources or route
  - » Contribution to the security of supply standards • Art 4 (1) Directive (EC) 2004/67
  - » more flexibility for bringing additional gas to a market in case of emergency & LNG terminals; anti-hoarding mechanism; short-term contracts
  - » Size (all things equal)
- Information to be provided (at least)
  - » Supply and demand situation/forecast of the (national, regional) markets to be supplied
  - » Market(s) supply % expected to be covered by the project
  - » Project's ability to provide entry/exit to/from these markets
  - » Justification of the project's dimension & e.g. open season

## [1] Enhancement of Security of Supply - 2

- Possible conditions
  - » Assess effective market demand (e.g. open season) & increase total capacity
  - » Link project to additional markets (pipeline) & add entry/exit points

## [2] Enhancement of Competition - 1

- Criterion " The investment must enhance competition"
  - » Sui generis test but having regard to principles developed under Art 81/82 EC and EC Merger Regulation
  - » Balance likely negative/positive effects
- Assessment criteria – when is this criterion met/to be considered
  - » Balance positive effect of additional capacity on competition vs. negative impact of exemption (capacity reservation)
  - » Case of dominant undertakings vs. case of non-dominant undertakings
  - » Forward looking criterion & need to reflect likely market developments including assessment of probability of competition effects
  - » Proper definition of the relevant market consistent with those applied in competition cases at national and EU level

## [2] Enhancement of Competition - 2

- Information to be provided (at least)
  - » Ownership structure of the project
  - » Applicant's view on the relevant markets affected (up- and downstream)
  - » Market structure of these markets, market conditions, market shares of project developers, actual/potential customers, market position of competitors
  - » Capacity allocation mechanism
  - » Result of open season conducted or information on planned open season
  - » Project's effect on the relevant market(s)
  - » Anti hoarding mechanisms
  - » Any measures enhancing competition
  - » Any measures promoting secondary market trading
  - » NRA: assessment of information provided by applicant

## [2] Enhancement of Competition - 3

- Possible conditions
  - » Testing market demand & satisfy the capacity interest (to largest possible extent); final capacity allocation to take place after open subscription process
  - » Limitation of decision's validity (time)
  - » Congestion management, anti hoarding, transparency
  - » Reservation of capacity for short term contracts (ideally based on open season results) & recognise potential impact on risk!
  - » Requirements on ownership structure (by-laws; voting rights; management links; contractual relationships)
  - » Limitation to part of investment capacity

## [3] Level of Risk - 1

- Criterion " The level of risk attached to the investment is such that the investment would not take place unless an exemption is granted"
- Assessment criteria – when is this criterion met/to be considered
  - » Risk of non-use & availability of upstream supply and downstream demand & mitigated by testing market demand downstream and long-term contracts upstream?
  - » Risk of change in cost and/or revenues & due to non-use/change of market situation/regulatory changes
  - » Likelihood of project enjoying unchallenged position weakens the risk (all things equal)
  - » Case for exemption weaker in case of vertically integrated company

## [3] Level of Risk - 2

- Information to be provided (at least)
  - » why the investment would not take place without an exemption
  - » assessment of risk of non-use and risk of a change in revenues
  - » risk mitigating measures and relation to the business model chosen
  - » Project's costs and revenues  $\mathcal{E}$  including underlying assumptions and analysis of uncertainties/probabilities
  - » Key financial parameters
  - » financial risk compared to other projects in the sector
  - » accounting principles subscribed by law that influence financing structure
  - » Effect on the financial structure and parameters in case developed within the regulated system
  - » RNA: argumentation on why exemption but not special regulatory regime
  - » Public funds received an impact
  - » Evaluation by the RNA in an assessment independent from the project sponsor

## [3] Level of Risk - 3

- Possible conditions
  - » Limitation of exemption duration  $\mathcal{S}$  consider throughput/transportation/upstream and downstream supply contracts
  - » Exemption duration does not have to correspond to full amortisation period  $\mathcal{S}$  equal or less to pay back period
  - » Limitation to part of investment capacity

## [4] Ownership structure [5] Charge levy

- Criteria
  - » *The investment has to be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that interconnector will be built*
  - » *Charges for the use of the infrastructure] have to be levied on users of that infrastructure*
- No further clarification needed
- Aiming at sufficient ring-fencing non-regulated activities of TSOs

## [6] Internal Market

- Criterion: *The exemption has not to the detriment of competition or the effective functioning of the internal electricity (gas) market, or the efficient functioning of the regulated system to which the infrastructure is connected*
- Assessment criteria – when is this criterion met/to be considered
  - » focus is not on the pro-competitive effect of the investment, but on the possible negative effects of the exemption
- Information to be provided (at least)
  - » effect of exemption on competitive structure of the market
  - » effect of exemption on existing regulated infrastructure and other planned projects competing for the same source of supply or corridor
  - » effect of exemption on application of the relevant regulation
  - » possible barriers to free movement of gas

## Others

- Decision monitoring
  - » review decision in case of change of underlying assumption on market circumstances
  - » Limitation of decision's validity (time)
- Amendment or withdrawal
  - » applicants to notify any changes of the circumstances underlying the decision
  - » mergers, takeovers, change of ownership or control structure
  - » non-compliance with conditions imposed as prerequisite for granting the exemption
- Information RNA to EC

## Way forward

- Stakeholder comments by 6 June
- New version based on stakeholder comments



# Background Material

## Art 22 exemptions • 3rd package

- Agency
- Capacity allocation • market demand test
- Congestion management • UIOLI, 2ndary market
- Conditions on duration and non-discriminatory access
- Regulatory authority reflect capacity allocation results in criteria assessment
- EC mandate for Art 22 guidelines