



13<sup>th</sup> European Regulatory Forum – 16 – 17 Oct 2007 (Madrid)



## **New Investments – Article 22 Directive (EC) 2003/55**

Clarification of Exemption Criteria



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1. **Background**
2. **Scope – Work approach**
3. **Starting point of discussion**
4. **Criteria**
5. **Way forward**





# Background

1. **Background**
2. Scope
3. Criteria
4. Way forward

## ⌘ **General principles**

- q exception to the rule/special regulatory treatment – case by case – burden of proof with applicant – partial/full)

## ⌘ **Discussion** – 2 options (JWG 17.7.2007)

1 – Legally binding: Title IV EnCT, geographic scope EnC + EU27

2 – Legally non binding: EC Working Staff Document, geographic scope EU 27

## Ä **Result: legally non binding**

## ⌘ **3rd package**

- q Agency
- q Capacity allocation – market demand test
- q Congestion management – UIOLI, 2ndary market
- q Conditions on duration and non-discriminatory access
- q Regulatory authority reflect capacity allocation results in criteria assessment

## Ä **EC mandate for Art 22 guidelines**





## Where do we start from

1. **Background**
  2. Scope
  3. Criteria
  4. Way forward
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1. **Published first EC Explanatory Note on the application of Article 22**

- q [http://ec.europa.eu/energy/gas/legislation/notes\\_for\\_implementation\\_en.htm](http://ec.europa.eu/energy/gas/legislation/notes_for_implementation_en.htm)

2. **Experience gained since first note**

3. **Input stakeholders brainstormings August 2007**

4. **ERGEG report on current regulatory Art 22 practice**

- q Report presented to JWG 17.7.2007





## Scope

1. Background
2. **Scope**
3. Criteria
4. Way forward

- ⌘ **Clarification on the Art 22 criteria**
- ⌘ **Create an ex ante harmonised understanding on the Art 22 criteria and information/data to be provided for an exemption**
- ⌘ **No exhaustive list but exemplary illustration – « checklist »**
  - q Case to case character of exemptions
  - q Not narrow down the scope of Art 22 and its criteria
- ⌘ **Smoothen the process**
- ⌘ **Harmonised approach accross sectors**
  - q Electricity, gas (storage, pipeline, LNG)
  - q Unless specificities would justify differences
- ⌘ **Legally non binding**





## Approach

1. Background
2. Scope
3. **Criteria**
4. Way forward

1. **When is this criterion met?**
2. **Which information has to be provided by the project sponsor?**
  - q In order to proof that the criterion has been met
3. **Conditions to be imposed**
  - q In case the project does not sufficiently meet a criterion

Ä **Per criterion**





# (1) Enhancement of Security of Supply

1. Background
2. Scope
3. **Criteria**
4. Way forward

- ☉ **Criterion:** *“The investment must enhance security of supply”*
- ☉ **Assessment criteria – when is the criterion met?**
  - q Diversification of sources or route
  - q Contribution to the security of supply standards – Art 4 (1) Directive (EC) 2004/67
- n **Which information has to be provided** (at least)
  - q Supply and demand situation/forecast of the markets supplied
  - q Project's ability to provide entry/exit to/from these markets
  - q Justification of the total capacity offered (test market demand)
- n **Conditions**
  - q Assess the effective market demand (eg open season) – adjustment of capacity offer





## (2) Enhancement of Competition

1. Background
2. Scope
3. **Criteria**
4. Way forward

- ⊕ **Criterion:** *“The investment must enhance competition”*
- ⊕ **Assessment criteria – when is the criterion met?**
  - q Not reinforce the position of a dominant market player
  - q Definition of the relevant market
- n **Which information has to be provided (at least)**
  - q Primary capacity allocation (who contracts capacity, market interest)
  - q Anti hoarding mechanism
  - q Ownership structure
  - q Duplicability – likelihood of a second similar piece of infrastructure
- ⊕ **Conditions**
  - q Test of market interest
  - q Short-term capacities – at least for a part of the capacity
  - q Anti-hoarding and congestion management
  - q Ownership structure – eg by-laws, voting rights, management links, financial/ contractual relationships
  - q Timely limited exemption's validity
  - q Downstream access to gas/electricity (gas release)
  - q Conditions on capacity allocation – limitation of maximum capacity shares





## (3) Level of Risk

1. Background
2. Scope
3. **Criteria**
4. Way forward

- ☉ **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 the criterion met?**
- ☉ **Which information has to be provided (at least)**
  - q Information on contracts (supply, transport, up-/downstream)
  - q Financial parameters – eg expected revenues, RoR
  - q Risk compared to comparable projects in the sector
  - q Effect on the financial structure in case developed within regulated system
  - q Is the competent authority not able/willing to include the project in the regulated asset base? (why?) – possibility of a special regulatory treatment
  - q Evidence of compliance by (supply or other) contracts
- ☉ **Conditions**
  - q Analysis of exemption duration - eg level of risk, duration of underlying transportation contracts
  - q Amount of capacity exempted





## (4) Ownership Structure

### (5) Charges

1. Background
2. Scope
3. **Criteria**
4. Way forward

#### ☉ **Criterion**

- ☐ *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*

Ä **In general no need for further clarification**





## (6) Competition, effective market

1. Background
2. Scope
3. **Criteria**
4. Way forward

### ⌘ **Criterion**

- q 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 the criterion met?**

- q Exemption should not technically or economically endanger regulated system
- q Exemption itself should not have a negative impact on competition in
  - q The markets involved
  - q The EU market – consultation of regulators

### ⌘ **Which information has to be provided (at least)**

- q See criterion « enhancement of competition » + **EU dimension**

### ⌘ **Conditions**

- Ä See criterion « enhancement of competition » + **EU dimension**





- ⌘ **Limit the validity of any exemption decision in time**
- ⌘ **Regulatory cooperation**
  - q Projects crossing the border of one or more Member States benefit from harmonised regulatory approach with respect to their exemption application
  - q consultation would ideally result in harmonised regulatory exemption decisions for the whole project (regulatory one stop shop)
- n **Competent authority**
  - q Notify application to the Commission as soon as received
  - q Inform Commission about negative decision



## Way Forward

1. Background
  2. Scope
  3. Criteria
  4. **Way forward**
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1. Proper consultation of stakeholders
2. Paper based on the principles presented today will be sent to all stakeholders
3. Next discussion at the next Madrid Forum

