bp

David Slack

Regulatory Affairs
UK Gas and Power

BP Gas Marketing ltd
20 Canada Square
Canary Wharf
London
E14 5NJ
United Kingdom

2 May '08

ERGEG
Council of European Energy
Regulators
28 Rue le Titien
1000 Brussels
Belgium

Direct: +44 (0)20 7948 5066
Mobile: +44 (0)7771 945984
Fax: +44(0)2079487844
Main: +44 (0)20 7948 5000
David.slack@bp.com

Draft Guidelines on Article 22 – An ERGEG Public Consultation Paper 5 March 08

Dear Sirs

Thank you for the opportunity to respond to this consultation.

We believe that the demand for and the number of exemptions granted demonstrates how successful they have been in bringing forward investment in infrastructure that otherwise would not have happened under a regulated regime, and that this additional infrastructure will have a beneficial impact on competition and security of supply.

BP welcomes this initiative to provide greater consistency on Article 22 treatment provided that such measures maintain the flexibility needed by National Regulatory Authorities (NRAs) to consider Article 22 exemption applications on a case by case basis.

BP also welcomes the statement in Section 4 of the consultation that the intent is to 'guide' the decisions of NRAs. BP supports NRAs being able to consider Article 22 exemption applications within the defined framework set by Article 22 with appropriate discretion to reflect the circumstances of individual cases, subject to appropriate appeals procedures being in place.

With respect to specific questions raised in the consultation we provide the following comments listed for clarity with the questions themselves.

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?

BP welcomes the fact that ERGEG is seeking to ensure that there is clarity and consistency relating to how Article 22 is applied by regulatory authorities. That said it is important to remember that exemption applications are considered on a case by case basis taking into account particular features of a specific application. For the avoidance of doubt we do not advocate the right for an individual NRA to make decisions that are fundamentally different from its neighbours decisions, rather we advocate flexibility to be able to take into account specific requirements relating to an application's individual characteristics.

In section 2.7 the consultation refers to consistency of decisions and notes that *'it is crucial that the form/ nature/ conditions of any exemption are proportionate to the individual project/market – which will be determined by the underlying competition assessment'* It follows that it would be inappropriate to harmonise solutions themselves, but rather harmonisation efforts should primarily focus on the consistency with which specific tests are applied to ensure that under similar circumstances there is consistency in any conditions applied by NRAs in response.

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

Should it facilitate additional investment in other types of infrastructure that would not otherwise have taken place under existing regimes, then with appropriate safeguards, there should be benefits to competition and security of supply in extending the scope of eligible infrastructure. Having said this we believe that it should only be applicable to major infrastructure or major expansions. For example major pipelines that are not interconnectors could be included within the scope.

Where required system reinforcement has not been conducted by a TSO, this would allow a supplier or end-consumer to construct pipeline capacity for their own use, without becoming a regulated infrastructure provider. This opportunity for by-pass may in itself improve System Operators' willingness to construct the desired capacity. The DG Comp Sector Inquiry identified behaviour by TSOs over construction of new capacity preferentially to meet the requirements of their supply affiliate as one of the problems to be addressed. Allowing by-pass could help to reduce the impact of these problems encountered new entrants.

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?

To make open seasons mandatory would reduce the flexibility of NRAs.

Furthermore circumstances may well prevail in relation to a specific application that impact the practicability of using open seasons. For example GGPOS (Guidelines for Good Practice for Open Seasons) indicates in Paragraph 11's footnote that "ERGEG recognises that LNG and storage projects may be subject to greater technical constraints than transmission projects and these constraints should be taken into account when designing the open season".

In section 2.9 the consultation refers to the submission of open season results together with an application for exemption. The EC Third Package also refers. We are however concerned that the requirement for an open season before an exemption application could prove problematic in some circumstances, and that in some cases it would be more practicable to for example require in an exemption application a commitment from the project developer to undertake an open season which then takes place subsequently after the exemption has been granted.

Open seasons should be available as an option to be requested if appropriate by NRA's who should assess the merits and practicalities on a case by case basis. It would be unhelpful if the imposition of impracticable open season requirements were to prevent a project from proceeding which might otherwise have benefited competition and security of supply

Section 2.9 recognises that the NRA may determine an open season is not necessary, but refers specifically to interconnectors. We believe that there should be scope for NRAs to also consider whether open seasons are necessary on a case by case basis for other types of infrastructure too.

Clarification on what constitutes an open season (expressions of interest, auctions for limited amounts of capacity) would be welcome, in particular clarifying whether the approach adopted by Spanish and Italian authorities on LNG terminals constitutes a valid interpretation of Article 22 procedures.

Should open seasons also be used to allocate equity?

It is for the market to bring forward commercial projects. It is difficult to envisage how, if open seasons were used to allocate equity, that this would not be detrimental to market innovation and distort the efficient functioning of the market.

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?

The consideration of different types of proposed facility against the prescribed criteria should be non-discriminatory so as to ensure that the market is not artificially distorted in favour of a particular type of facility.

However the differences between different types of facilities need to be taken into account by NRAs when considering Article 22 exemption applications.

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

We are not clear how the hypothetical test in Section 3.2.2. to assess the level of competition and impact on security of supply that would result from granting an exemption to an alternative project sponsor could actually be undertaken in practice by an NRA. How would an NRA be able to predict what another project sponsor might propose or understand fully their competitive position without a detailed submission from that party? We are not convinced that such a hypothetical test should have a place in a rigorous process to determine whether a real project should be granted exemption.

Are the described criteria for assessing the effects of an investment in infrastructure onenhancement of security of supply appropriate?

We are not clear how the hypothetical test in Section 3.2.2. to assess the level of competition and impact on security of supply that would result from granting an exemption to an alternative project sponsor could actually be undertaken in practice by an NRA. How would an NRA be able to predict what another project sponsor might propose or understand fully their competitive position without a detailed submission from that party? We are not convinced that such a hypothetical test should have a place in a rigorous process to determine whether a real project application should be granted exemption.

Are the described criteria for the risk assessment appropriate?

Independent investors are unlikely to have guaranteed revenue under regulated access – particularly for competitive storage, LNG and interconnectors - hence RTPA can increase risk on investors, rather than reduce it.

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?

The existing regime based on Article 22 exemptions appears to have successfully provided a basis for new independent investment judging by the number of applications. What is not apparent is evidence that demonstrates specific shortcomings in the criteria.

It can be argued that the exemptions regime has, as a result of the criteria, actually facilitated a significant amount of investment in infrastructure which would not otherwise have happened and that the number of exemptions has therefore actually been beneficial

To what extent should consultations with neighbouring authorities be done?

Consultations should only be undertaken with neighbouring authorities where there is a demonstrable need. Automatic consultation with neighbouring authorities would incur costs outweighing what are likely to be questionable benefits in some cases.

There will of course be a need for consultation, for example in the case of interconnectors between Member States or in circumstances where a potential project gives rise to potential concerns in other Member States that merit in broader consultation. The NRA under the jurisdiction of which the applicant project falls should decide on the level of consultation and there should be appropriate appeals mechanisms in place to ensure that an appropriate degree of consultation occurs.

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?

It would be helpful if ERGEG were to clarify the Spanish and Italian approaches to LNG as consistent with the Article 22 regime.

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

Section 2.3 refers to the role of dominant players vs. newcomers. The section seems to suggest the possibility of a different treatment for each party. It is our view that in a non-discriminatory market there should be equal treatment for all parties. It is actually the tests for exemption that may be more easily satisfied by new entrants than by incumbents, and in this way new entrants will be encouraged. That said, the tests should be the same and it is through the tests themselves that safeguards are provided to ensure that there is no detriment to competition.

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?

BP welcomes the recognition in section 2.10 of the need for clear and stable rules. Stability and predictability is important to provide investors with confidence to invest in new infrastructure. Further it is important that this

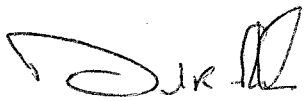
stability is maintained as far as practicable through the period of exemption, as subsequent material changes could erode project value which would not only impact the project in question but also impact investor confidence in relation to future potential projects.

The risk that a more onerous regime is subsequently applied may deter a number of applications from proceeding. With large scale, capital intensive investment decisions, regulatory transparency, consistency and continuity is key. New investors are most likely to be deterred if they believe that the regime may be changed unpredictably against their interest, or will require high tariffs to compensate for the increased risk.

In summary BP believes it is important that a balanced approach to exemptions prevails, and that it is vital that the regime does not become overly harmonised or prescriptive as this would erode the flexibility for NRAs to support investment in new infrastructure where it would not have taken place under a regulated or negotiated TPA regime. Under certain circumstances exemptions can facilitate additional investment which will increase the competitiveness and security of supply of the market.

We trust that our comments will be of assistance. Please do not hesitate to contact us should you wish to discuss them further

Yours sincerely



David Slack
Regulatory Affairs