Public Consultation on ERGEG's Guidelines on Article 22 (exemptions)

Evaluation of Comments

Ref: E07-GFG-31-07a

29 October 2008

European Regulators' Group for Electricity and Gas
Contact: Council of European Energy Regulators ASBL
28 rue le Titien, 1000 Bruxelles
Arrondissement judiciaire de Bruxelles
RPM 0861.035.445

1 Introduction / Background

The purpose of this paper is to summarize the views ERGEG received in response to its recent Draft Guidelines[1] on Article 22 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003, concerning the common rules for the internal market in natural gas allowing for exemptions from regulation for major new infrastructure.

Article 22 aims to promote effective competition and security of supply (SoS) by creating incentives for efficient investments in new infrastructure projects, while at the same time recognising the need for non-discriminatory access to relevant infrastructure.

In a presentation at the Madrid Joint Working Group on 17 July 2007, the European Commission identified the following shortcomings of the current Article 22:

- Vague definition of the exemption criteria, which gives room for substantial political discretion leading to uncertainty and unpredictability for investors
- Uncertainty on legal decisions for regulators, due to the need for interpretation
- Negative impact of varying practices in the interpretation and application of the Art 22 criteria on competition and SoS.

ERGEG carried out a survey on the regulatory practices to apply Article 22 in 2007. The report stated that there are varying practises in the application and interpretation of Art. 22 (e.g., concerning the definition of market power, definition of affected markets, duration of exemptions, application of open season procedures) as well as widespread application of Art. 22, making exemptions the rule rather than the exception, as all requests were eventually granted (although some had certain limiting conditions imposed).

ERGEG fully agrees with and supports the European Commission in that the criteria of Art. 22 need to be clarified in order to provide deciding authorities with a clear framework for assessing exemption requests. A clear framework will also be beneficial to investors by increasing the transparency of exemption procedures and thus will positively affect the investment climate.

ERGEG agreed upon the Draft Guidelines which constitute a harmonized and transparent framework for competent authorities when deciding on exemption procedures. These Guidelines are designed within the legal framework set by the existing Art. 22 and should be used by deciding authorities to guide their decisions when considering Article 22 applications. As shown in the analysis report on the European Regulators Experience with Article 22 exemptions of Directive 2003/55/EC [Ref: E07-TNI-01-04][2], a significant number of infrastructure projects have either received exemptions or are in the process of requesting exemptions. This shows the need for a harmonized or at least a consistent and improved approach for implementing Article 22.

---

[1] Draft Guidelines on Article 22 - An ERGEG Public Consultation Paper - of 5 March 2008; Ref: E07-GFG-31-07

[2] cf. ERGEG's Report on Article 22 Exemptions, Ref: E07-TNI-01-04, 13 September 2007
http://www.ergeg.org/portal/page/portal/ERGEG_HOME/ERGEG_DOCS/ERGEG_DOCUMENTS_NEW/GAS_FOCUS_GROUP/E07-TNI-01-04_Art.%2022-AnalysisReport_finalLAST.pdf

ERGEG invited all interested parties to comment on the issues raised in its consultation paper and specifically sought responses on specific questions which are analysed and evaluated in this paper. The majority of the questions sought views on the degree of prescriptiveness and appropriateness of some criteria of the guidelines.

The ERGEG consultation began on 21st March 2008 and ended on 2nd May 2008. 28 responses were received, 4 of which were confidential. Table 1 shows the list of non-confidential respondents and their origin. All non-confidential responses have been published on the ERGEG website. It is important to highlight that some submissions were incomplete and did not include responses to all the questions posed in the consultation paper.

ERGEG would like to thank all the organisations for their valuable contribution. ERGEG is pleased with the level of stakeholder engagement and grateful for the number of responses that have been submitted regarding this consultation. The regulators within ERGEG consider that this indicates the interest in and the importance of these guidelines.

After analysis of the comments received, ERGEG will use the findings as an input into the process of developing common guidelines with the European Commission. In parallel, the Commission has scheduled a stakeholder consultation on their Staff Draft Working Document on Art. 22[3].

[3] European Commission Draft Staff Working Document on Article 22 of Directive (EC) No 2003/55 and Article 7 Regulation (EC) No 1228/2003 – New Infrastructure Exemptions – (22.04.2008)

Table 1 – List of respondents (non-confidential)

Respondents		Country
BG Group	Energy company involved in the exploration, extractions, transmission, distribution and supply of natural gas.	UK
BNE	German Association of the New Energy Suppliers	Germany
BP Gas Marketing	Gas supplier	UK
Centrica	Owner of supply and gas storage companies	UK
CRE	French Regulatory Authority	France
EDF	Group present in all sectors of the electricity industry: generation, supply, trading, transmission, distribution	France
Edison	Energy company, with operations in the procurement, production and sale of electricity and natural gas	Italy
EFET	European federation of energy traders	EU
Eni Gas & Power	Gas producer and supplier	Italy
EnBW	Energy company involved in generation, transmission, distribution and supply of electricity; energy trading; distribution and supply of gas	Germany
ERG	Energy and petroleum group working in crude refining, petroleum product distribution and electricity production	Italy
EuroGas	The European Union of the Natural Gas Industry	EU
Exxon Mobil Gas & Power Marketing	World's largest non-government marketer of natural gas	UK
Gaz de Normandie	Project Company / future LNG Terminal Operator	France
Gaz de France	Energy company involved in production, transport, distribution and selling of gas & electricity	France
GEODE	The association of European independent distribution companies of gas and electricity.	EU
GIE (3 responses)	Gas Infrastructure Europe (GTE; GSE; GLE)	EU
IFIEC	International Federation of Industrial Energy Consumers	EU
National Grid	Electricity & gas transmission & distribution company	UK
PGNiG	PGNiG Group activities encompass field exploration, natural gas import, production and storage as well as trade and distribution of natural gas	Poland
POWEO	Trader of Electricity and gas	France
RWE Gas Storage	Storage System Operator	Germany
RWE Transgas	Transmission System Operator	CZ
Scottish & Southern Energy	Energy company involved in generation, transmission, distribution and supply of electricity; energy trading;	UK

	storage, distribution and supply of gas	
Shell Energy Europe BV	Pan-European gas marketing business of Royal Dutch Shell	Holland

2 Consideration of responses

All the respondents welcomed the opportunity to comment on the Art. 22 guidelines consultation document and contribute to the further development of the guidelines, appreciating ERGEG's effort to develop the guidelines.

The guidelines are valued as a step forward in the process to achieve a more consistent and transparent framework for competent authorities when assessing on exemption requests. Most of the respondents consider that exemptions must be available to all interested parties on a non-discriminatory basis, regardless of the type of infrastructure in question, because investments enhance the development of a common European gas market and increase security of supply in Member States of the European Union. However, further detail in the guidelines on the definition and application of the provisions set out in Article 22 would be welcomed by the respondents.

Additionally, the majority remarked that measures introduced by the guidelines must maintain the flexibility needed by National Regulatory Authorities to consider Article 22 exemption applications on a case-by-case basis.

2.1 Comments on the general principles, appropriateness and scope of the draft guidelines

Questions in the consultation document:

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

ERGEG's statement in the consultation document:

The guidelines aim for the establishment of general principles which can form the basis of more detailed guidelines. These should be used by deciding authorities to guide their decisions when considering Art. 22 applications.

The scope of the existing Art. 22 limits the exemption regime to interconnectors and LNG and storage facilities. This scope needs some clarification in that it should encompass (in line with the general framework and the definitions of the directive) new technologies (i.e. new LNG technologies) which serve the same purpose as the ones listed in Art. 22.

Stakeholders' responses to the consultation document:

The majority of responses (22 stakeholders) agreed that the guidelines are appropriate to offer some guidance for competent authorities when deciding on exemption procedures. The

supporters expect the establishment of a consistent framework as the guidelines contribute to a uniform application of the procedure under Article 22 of the Directive and that there should be greater transparency in the process. Five stakeholders felt that the guidelines contained insufficient detail for definitions (e.g. of "new technologies", “interconnector”) and the application of the provisions set out in Article 22.

Harmonization should focus on general principles; the guidelines should be capable of reflecting the particular market circumstances as the conditions in each Member State are not homogeneous. There is almost full agreement amongst respondents that the exemption procedure has to be considered on a case-by-case basis. Additionally, the differences between the different types of infrastructure should be highlighted.

In terms of the scope of the guidelines, 10 stakeholders consider the scope of eligible infrastructure as being too narrow. They are of the opinion that all types of infrastructure should be eligible for exemption. The respondents also tend to support the application of Art. 22 to new technologies serving the same purpose, but an implementation of this wider scope should be realised by changing Art. 22 rather than by developing guidelines.

13 Stakeholders state that the scope is not too narrow. Some suggest that Art. 22 should only be applicable to major infrastructure or major expansions. The proposal is a limitation to interconnectors, LNG and storage facilities.

One supplier proposes to leave the question of scope to the individual regulatory authorities, on a case-by-case basis.

In general, the opinion that the guidelines should stay within the scope of the legislative text of Article 22 and not impose additional requirements remains undisputed among the respondents.

ERGEG’s comment on stakeholders’ feedback:

ERGEG is encouraged by the responses, since many of them support a common approach to exemption procedures as well as a common application of the exemption criteria of Art. 22. ERGEG appreciates that respondents have identified the areas where additional clarification is required, and will focus on these aspects, adhering to the case-by-case principle.

ERGEG does not fully agree with some respondents who consider the scope of eligible infrastructure as being too narrow. Art. 22 should remain the exception to the rule, whereas investments in most types of infrastructure should be made under the regulated framework. With respect to the guidelines’ proposal to include “new technologies” serving the same purpose, ERGEG considers the main message of the consultation as being supportive of that suggestion.

2.2 Open Seasons and their relation to exemption applications

Questions in the consultation document:

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

ERGEG's statement in the consultation document:

Open season procedures are an important tool in assessing the market need with respect to determining the size of the project as well as in the subsequent capacity allocation.
Nevertheless open seasons should not be mandatory. In case a project owner proved that an open season would undermine the feasibility of the project the NRA may not require the project sponsor to conduct an open season.

The final decision to grant an exemption has to take into account the results of the Open season procedure.

Stakeholders' responses to the consultation document:

Nearly all the responses state that open season procedures are an important and useful tool to assess market demand and allocate capacity. It could be seen as an initial market test to consult with interested parties.

Regardless of the positive effects, 15 stakeholders expressed the opinion that open seasons should not be mandatory. Since each project and the specific criteria for its realisation is unique, a general obligation to conduct open season procedures would not do justice to the intentions of exemption procedures provided by law. The need for open season should be assessed on a case-by-case basis, balancing costs and potential benefits.

The respondents underline that open season is only one possible method. Assessing market demand is crucial for a project, but not the exclusive criteria, as estimated future demand and contractual supply situations in addition to project cost and time frame also play important roles in exemption applications.

Among the stakeholders there are differing views concerning the scope of open season procedures. One stakeholder advises to restrict open season application to "not easily duplicable infrastructures" (e.g., interconnectors, storage facilities). Others mention that storage facilities may not be suited to open seasons as their size is not dependant on the number of applicants for services but on the geologic conditions of the site.

One stakeholder considers that open season procedures are rarely carried out in a transparent and non-discriminatory manner, and therefore questions the correctness of the results. Hence, ERGEG should first investigate the extent to which market players apply open season procedures in line with the Guidelines for Good Practice on Open Season Procedures.

One stakeholder classifies open seasons as needless because the procedure tends to be slow and requires long-term commitments. Additionally, the respondent argued that there seems to be an imbalance in the risk sharing between operator and user, because the operator is not obliged to commit on future allocations and tariffs. Open seasons, hence, only limit the risks for infrastructure owners. If the infrastructure is regulated, the investor is paid back through regulated tariff and the result is already a limited risk.

In this context another respondent refers to recent negative experiences with open season procedures. The association raises concerns with the asymmetric contract obligations and the possibility that any mistakes in the construction of the steps in the procedure might result in poor decisions.

There appears to be strong agreement among the respondents that open seasons should not be used to allocate equity (25 stakeholders). They argue that in a competitive market the developers of a project should be free to determine who will participate and what equity shares each of the participants should have. It seems difficult to bring forward commercial projects, if open seasons are used to allocate equity. Therefore, any dilution of investors' equity in the applying project would be counterproductive.

Only one supplier suggests that open seasons might be used to allocate equity, particularly if the procedure was used to determine the size of project.

ERGEG's comment on stakeholders' feedback:

For the reasons already outlined, ERGEG shares the view of the majority of stakeholders not to make open seasons mandatory for all exemption cases. ERGEG considers open season procedures to be an important tool for assessing market demand and subsequent capacity allocation, but recognises that such procedures may not be appropriate in some cases and should thus be carried out on a case-by-case basis. Furthermore, open season procedures should not be mandatory for allocating equity. However, ERGEG is of the view that an assessment of market demand is an obligatory precondition to be met in any case by the project sponsor, and should be included as part of the application requirements for an exemption.

2.3 Application of Art. 22 to LNG terminals

Questions in the consultation document:

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?*

ERGEG's statement in the consultation document:

In the application of Art. 22, one could consider different treatment for duplicable and non-duplicable infrastructure, in that the latter would require stricter treatment. Where infrastructure can reasonably be duplicated by third parties, preconditions for exemptions could be less strict.

Stakeholders' responses to the consultation document:

Several responses point out that there is no need for Art. 22 to be applied differently to LNG terminals.

Indeed, LNG terminals have different characteristics to storage facilities and interconnectors, but it is difficult to reflect this fact in ex-ante guidelines without running the risk of discriminating against certain other types of infrastructure in the application of Art 22, potentially distorting investment signals. If, in a particular case, an LNG facility will significantly enhance competition and security of supply, this can be reflected comprehensively in a case-by-case decision on the grounds of Art. 22. It is necessary to ensure that the market is not artificially distorted in favour of a particular type of facility.

Five stakeholders (in particular associations) favour different treatment for LNG terminals and LNG technology. It must be considered that the principles concerning interconnections predominantly apply to entities within the EU Member States. By contrast, LNG exporters are usually based outside the EU. When combined, such applications could be ineffective and raise doubts as to their interpretation. Taking into account the current structure of the global market, the gas delivered to the EU will definitely originate from outside of the EU, i.e., from non-regulated markets with different expectations of the European counterparty. Therefore, the guidelines and regulations should not undermine the competitive position of European terminals in the global market. Finally, LNG terminals are entry points to the internal European market. As such, granting exemptions to them is less harmful to third party access than to other facilities that are located at the heart of the interconnected European transmission network.

ERGEG's comment on stakeholders' feedback:

Since Art. 22 applications generally require a case-by-case analysis and subsequent evaluation, potential additional positive effects of LNG terminals will be taken into account in the exemption process. Likewise, implications arising from the fact that LNG is generally considered to be a global market can be adequately addressed within the case-by-case approach. ERGEG is not convinced by the responses of some stakeholders to reflect any ex-ante preference of LNG terminals in the guidelines, even though granting exemptions to LNG terminals might be less harmful to internal competition than others. This has already been laid down in ERGEG's statement in the consultation document (see above).

2.4 Appropriateness of assessment criteria

Questions in the consultation document:

6. *Are the described criteria for assessing the effects of an investment in infrastructure on enhancement of competition in gas supply appropriate?*
7. *Are the described criteria for assessing the effects of an investment in infrastructure on enhancement of security of supply appropriate?*
8. *Are the described criteria for the risk assessment appropriate?*

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?*

ERGEG's statement in the consultation document:

6.) The criterion of the enhancement of competition in gas supply shall oblige the relevant authorities to assess a project's potential impact on competition and the position of the applicant in the relevant markets. The guidelines determine that a dominant player who wants to benefit from an exemption must prove that his market position will decrease as a result of the exemption and must show how the investment is intended to enhance the position of smaller players.

7.) When determining whether a project enhances security of supply11, possible criteria can be:

- Total amount of new capacity
- Diversification of national / European supply sources (competent authorities should take into account the benefits in terms of supply diversification brought about by new infrastructure which is able to take in gas from diverse geographic sources)
- Needed capacity expansions to meet future demand

8.) Deciding authorities shall investigate the financing of such projects under a system of regulated TPA and shall compare the findings to the information on the proposed infrastructure, relying on information concerning the regulated gas network, tariffs and demand in the destination countries – which the regulator will obtain from the project sponsor or applicant and verify against other sources.
Deciding authorities shall make this determination based on the results of the market analysis and on the following (minimum) information to be provided by the applicant:

- throughput estimates
- estimated construction and operating costs of the project
- expected depreciation period
- expected rate of return
- expected revenues
- explanation as to why these expectations cannot be met under a regulated TPA regime.

Another issue NRA should look at is whether the risk is such that it would be beneficial to let investors bear it, instead of imposing it on users in the form of a regulated tariff system for the proposed infrastructure.

9.) The applicant will provide the relevant information on the project design and anticipated flows to the destination market, and consult with the respective TSOs. The project will be deemed compatible with the "efficient functioning of the regulated system to which the infrastructure is connected" if the regulatory authorities determine that:

- the project will not cause constraints on the regulated system requiring investments having a significant adverse effect on the welfare of system users including endconsumers;
- in particular the project economics are not unduly influenced by peculiarities (e.g. simplifications, socialisation of certain costs) in the tariff system of the regulated infrastructure, making an inefficient bypass commercially attractive.

Competent authorities should also assess the impact that a particular TPA exemption may have on TPA more generally throughout the system, based on how reliant the system is on a particular piece of infrastructure.

Stakeholders' responses to the consultation document:

Competition enhancement

The majority of respondents answering this question see an important role in the criterion of competition enhancement. They agree that defining the market and assessing the impact of the proposed development on the affected markets is essential.

However, numerous concerns have been raised with regard to the distinctiveness of the criteria.

In general, several respondents indicate that a major barrier to the project initiator lies within the provision of relevant information, which is why it should be the responsibility of the regulatory authority to obtain certain data, e.g., "Expected behaviour and reaction of companies already active in the market", "Predominant cost structure in the relevant market'. The project initiator may not be aware of the cost structure in the market as information on costs is generally confidential. Additionally, it is important to ensure that the level of information on company structure is proportionate and relevant to the particular project and its associated market.

Some stakeholders worry that it may become difficult to demonstrate that a new market entrant will produce a demonstrable increase in competition in an already competitive market. It is pointed out that a "Ranking" (3.2.1.2.c) implies a central decision-making process that goes beyond an objective application of the Article 22 tests and implies abandonment of the case-by-case requirement.

In consequence, the examination has to consider the need of balancing project sponsors' interests and the aim of enhancing competition.

ERGEG's comment on stakeholders' feedback:

As the provision of relevant information seems to be a major concern for some stakeholders, ERGEG wants to clarify especially the objected part 3.2.1.2 c): The items listed there should be assessed by the relevant authority, but they are "based also on information provided by the applicant", meaning that information for example on "Expected behaviour..." and "Predominant cost structure..." need not necessarily be submitted by the applicant, but other sources can be used by the authority for a just assessment.

Apart from that, the criteria already set out in the guidelines generally appear to be accepted by the majority of respondents and ERGEG considers them to be appropriate.

Enhancement of security of supply

The criteria for assessing the effects of an infrastructure investment on the enhancement of security of supply have been regarded as appropriate. But some associations negate the need of prescriptiveness. Others consider that security of supply should not attempt to be exhaustive as there are numerous ways in which security of supply can be enhanced.

The assessment needs to take into account the structure of the relevant market and the positive effects should be well-proven (not vague referrals).

The majority of stakeholders are in favour of further clarification as some areas are vague and bear the risk of subjectiveness. Two respondents propose that the "diversification of suppliers" should be added to the criteria as this will enhance security of supply.

ERGEG comment on stakeholders' feedback:

The requirements for security of supply enhancement set out in the guidelines are not meant to be exhaustive, but rather "possible criteria" to allow applicants to be more specific rather than giving vague referrals. ERGEG agrees with the proposal to add "diversification of suppliers" as an extra criterion to be looked at.
With the exception of the above comment, the criteria set out in the guidelines generally appear to be accepted by the majority of respondents, and ERGEG considers them to be appropriate.

Risk assessment

Some responses value the criteria for risk assessment as a good approach. However, some stakeholders prefer to distinguish between different types of infrastructure, as the level of scrutiny may well be appropriate for interconnectors but would be disproportionate for small gas storage projects.

Others consider the criteria of risk assessment insufficiently precise and request clarification. One stakeholder refers to the impact of the time factor as risks will change during the time period.

In general, there must remain a degree of flexibility in the application requirements, depending on individual project specifications considered on a case-by-case basis.

Two stakeholders point out that these criteria create confusion, insofar they seem to be only related to rTPA. In this context they propose that there should be clarification about whether the exemptions may be granted under Article 22 to infrastructure with both nTPA and rTPA (e.g. storage).

ERGEG comment on stakeholders' feedback:

With respect to the level of scrutiny of different infrastructure exemption cases, ERGEG does not agree with the aforesaid disproportion. For reasons of non-discrimination, each project must be examined with the same level of thoroughness. The minimum information required to evaluate this criterion will also be necessary, and ascertainable for applicants, including "small gas storage projects".
Further clarification as requested by some other stakeholders may be desirable, however, the responses did not contain a sufficient level of concrete proposals to achieve this.

In general, the case-by-case principle is indeed also valid for the risk assessment. The last proposal regarding clarification on exemption granting in an rTPA and nTPA regime is justified and will therefore be taken into account by ERGEG.

"Effective functioning…"

The criteria for assessing whether the exemption is not detrimental to competition, to the effective functioning of the internal gas market, or the efficient functioning of the regulated system to which the infrastructure is connected have been regarded in different ways. Some of the stakeholders consider the criteria as useful, but not sufficiently useful to ensure the effective functioning of the internal gas market. One stakeholder states that these are the "most important criteria".

One Supplier considers it necessary to include a consultation process; insofar the regulatory authority should involve other market participants when considering the impact on the market.

Four stakeholders judge the criteria not precise enough and remark that they would not have all necessary information on connected infrastructure.

One stakeholder considered that this criterion may not be appropriate in the special case of an incumbent TSO (who is part of a vertically integrated undertaking and operates the existing network under a regulated regime) that may use this criterion to frustrate an exemption project of new entrants that want to connect to the existing network.

ERGEG comment on stakeholders' feedback:

In some cases, a consultation process on market impact might indeed be helpful, for example, if information submitted by the applicant or accessible to competent authorities is incomplete or outdated. ERGEG believes that this would lie within the realm of the deciding authority to launch such a process based on a case-by-case evaluation. Also, an open market consultation was proposed in the consultation document (Guideline 3.3.3).

With respect to the last statement, applicants should always strive to collect the requested information on connected infrastructure; coordination and cooperation between system operators is a fundamental basis for players in an interconnected system.

2.5 Extent of consultations with neighbouring authorities

Questions in the consultation document:

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

ERGEG's statement in the consultation document:

The deciding authorities shall apply the following procedural rules:

a) Upon receiving an Art. 22 application, the deciding authority shall notify other concerned authorities without undue delay.

b) The deciding authority shall share all the relevant documentation with other concerned authorities, including at least a summary, in English, of the necessary information to be provided by the applicant, and give the other concerned authorities at least four weeks time to respond in writing, unless a shorter deadline is prescribed by law.
c) The deciding authority shall inform other concerned authorities of the intended decision.
d) Other concerned authorities shall safeguard all confidentiality requirements determined by the deciding authority.

Stakeholders' responses to the consultation document:

In general, the responses state that a better understanding of neighbouring regulatory situations by relevant national authorities would be preferable. There seems to be agreement that there should be different consultation processes for interconnectors and LNG/Storage facilities. In case of interconnectors, the consultation should involve authorities likely to be affected by the proposed project. For LNG and storage facilities, the majority considers that only the national authorities are relevant.

One TSO is in favour of a system which always allows authorities in neighbouring countries to submit their comments, not only *"where requested by the deciding authorities"* as stated in the guidelines. Others do not favour an "automatic" consultation, but only if there is a demonstrable need.

Several respondents' consider that the guidelines must specify the details on what "consultation" would consist of, and to what extent they would potentially affect the decision-making process of an application for an exemption.

ERGEG's comment on stakeholders' feedback:

ERGEG believes that a certain minimum level of regulatory coordination is essential for projects with cross-border relevance. Even though such relevance is likely to be more significant for interconnectors, storage and LNG projects (located close to a border, for example) might be of importance for several states as well. Again, a case-by-case consideration seems unavoidable. Therefore, and also due to the fact that concrete proposals were not submitted in response to the public consultation on the guidelines, the (minimum) and more general procedural rules on regulatory consultations listed above should serve as a basis in that matter.

Regarding the proposal of one TSO for a process that always allows neighbouring authorities to submit comments, ERGEG tends to not agree with that statement, since there might be legal / procedural conflicts, when taking / or NOT taking "non-requested" requirements into account when deciding on exemptions. Also the term "neighbouring countries" would be inappropriate, since more heavily affected countries might not necessarily be bordering countries, just as other "neighbours" might not have a stake in the project.

2.6 Appropriateness of partial exemptions

Questions in the consultation document:

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?*

ERGEG's statement in the consultation document:

The guidelines distinguish two types of exemptions: partial and full exemption.

Exempting only part of an infrastructure or only a part of the rTPA rules are tools that can be used to mitigate the impact of an exemption on regulated TPA, safeguarding the goal of directive 2003/55/EC of making all existing infrastructure available on a non-discriminatory basis to all market participants and safeguard the principle of proportionality.

Full exemptions encompass the entire capacity on the infrastructure. They may be granted when, in addition to passing the five tests, the principle of proportionality is upheld because the overall benefits of a full exemption outweigh the costs of such an exemption on the default TPA regime.

Stakeholders' responses to the consultation document:

In principle, the overwhelming majority (21 responses) considers the possibility to choose between full and partial exemption as beneficial. The general availability of partial and full exemptions is judged as a good approach, as it provides sufficient flexibility.

However, several concerns are raised when defining the details. One stakeholder highlights the difference between exempting part of the infrastructure (which might be difficult to manage) and exemptions from certain TPA rules (which might be a way to facilitate applicants to recover the investment made).

Other stakeholders state that any partial exemption could be detrimental to project financing and increase business complexity.

One participant stated that care must be taken that partial exemptions are not used as a means to enable dominant incumbents to benefit from exemptions. Similarly, partial exemptions should not be used as a means to continue to regulate infrastructure when it should be granted full exemption.

The majority of respondents would like to give priority to partial exemptions, arguing that in this way negative effects could be minimised. Full exemption should only be granted if it is the only means to enhancing competition and security of supply.

In general, regarding the conditions on defining partial and full exemption, a case-by-case evaluation is regarded as the most convenient procedure.

Views on the responsibility of definition differ. Some responses point out that the guidelines must provide a range of possibilities, including partial exemption, conditions and requirements.

The opposite view advises that no detailed definitions of different typologies and partial exemption should be defined by the guidelines, but rather should be evaluated and assessed by the competent authority.

ERGEG's comment on stakeholders' feedback:

For the main principles laid down in the guidelines, ERGEG finds acceptance for its draft by the majority of respondents. The reasons for ERGEG's preference for partial exemptions are already stated in the guidelines - the listed rules and possibilities on partial exemptions do not conflict or question the principles of proportionality and case-by-case decision.

In ERGEG's view, difficulties to manage partially-exempted infrastructure or increased business complexity are not sufficiently grave to generally oppose partial exemptions, especially with regard to the inevitable trade-off against negative effects on TPA and markets when deciding on exemptions.

2.7 Relation of exemptions and incumbents

Questions in the consultation document:

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

ERGEG's statement in the consultation document:

Art. 22 require that the new infrastructure enhance competition and that the exemption is not detrimental to competition. These criteria make it very difficult for dominant market players or their affiliates to receive TPA exemptions as there is a significant risk that the granting of an exemption in such circumstances would have a negative impact on competition by fortifying an already dominant position in the relevant markets unless there are substantial compensating benefits.

Stakeholders' responses to the consultation document:

The majority of the respondents (23) believe that Art 22 exemptions should also benefit incumbents or their affiliates as exemptions are individually assessed on a non-discriminatory basis. Most stakeholders indicate that the right to apply for an exemption should be available for all applicants according to Art. 22.

Another alternative proposed is to allow an exception only if there are no other means to foster competition. One supplier mentioned that exemptions should not be granted to incumbents, except in cases where the incumbent is fully independent from the TSO and the needed infrastructure would not be built otherwise.

Regarding the extent of exemptions for incumbents, several respondents draw the attention to the importance of deciding case by case. Granting an exemption to incumbents should remain the exception and the relevant national regulatory authority should then give preference to a partial exemption. The regulators should impose the necessary conditions and requirements to limit the anti-competitive impacts and competition law should be enforced to prevent any anti-competitive behaviour.

ERGEG's comment on stakeholders' feedback:

ERGEG generally agrees with the principles of non-discrimination and case-by-case decisions. Consequently, incumbents are not excluded from benefiting from exemptions beforehand. But as the guidelines state, in many cases the proper application of existing criteria make it very difficult for dominant players to actually receive a (full) exemption. When applying the above mentioned principles, full exemptions will likely be an exception; partial exemptions remain preferable, if a dominant player qualifies at all.

2.8 Review of exemptions

Questions in the consultation document:

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?*

ERGEG's statement in the consultation document:

Compliance with the criteria and/or specific conditions imposed for granting an exemption should be monitored by the NRA. If these criteria are not satisfied anymore or if the conditions imposed are infringed upon, the NRA should be able to review the exemption. In order not to discourage investment, there should be clear and stable rules laying out the circumstances under which the exemption could be reviewed.

Stakeholders' responses to the consultation document:

The majority of respondents answering this question would allow a review of an exemption (22 stakeholders) on the condition that transparent, stable and predetermined rules are guaranteed.

There are two different approaches on a review procedure to ensure not to undermine investment. First, in some responses a review of exemption is regarded as necessary insofar as conditions imposed in the exemption are not met or rather a breach of Art. 22 criteria is suspected by the regulatory authority. These stakeholders consider it important to determine clearly defined principles and exclude revisions in cases where external factors independent of the applicant's activities change.

Others believe that the need for a review will emerge from the market. If market conditions and structures have changed in a way that an exemption's continuance is now detrimental to competition and security of supply, it should be possible to review an exemption.

As a review creates uncertainty among investors and undermines willingness to invest, a review should only be allowed under exceptional circumstances and redemption must be the last resort. Where possible, exempted projects should be given the opportunity to rectify any problems, rather than automatically lose their exemption.

No stakeholder has pointed out a general interdiction of review, but the need for a clear definition and a restrictive scope is highlighted. The regulatory authorities should set out the circumstances in advance (ex-ante in the exemption approval) and consult the project owner. A sole ex-post-review by the regulatory authorities would be arbitrary.

One stakeholder objects to a complete revocation of an exemption, but considers modifications to the exemption decision possible (protection of confidence).

ERGEG's comment on stakeholders' feedback:

ERGEG is encouraged by the general support of introducing the possibility to review an exemption decision. Generally, a review should balance the welfare of the market with the protection of the stability of exemption beneficiaries.

As the guidelines state and responses show, there is now a need to establish ex-ante transparent, non-discriminating, stable, and consistent rules on the circumstances under which an exemption could be reviewed. ERGEG sees a need to further the work on this matter, taking aspects such as the proposal "conditions imposed in the exemption are not met or a breach of Art. 22 criteria is suspected", on board.

For evaluation of the proposed exclusion of revisions "in cases where external factors independent of the applicant's activities change", a further definition of "external factors" appears to be necessary.

2.9 Additional points raised in the responses

Stakeholders' additional comments on the consultation document:

One TSO considers it important to emphasize that it is a difficult task to harmonise the application of exemption criteria if a harmonisation of rTPA criteria is not carried out beforehand.

With reference to the importance of case-by-case decisions, one respondent points out that the authorities must ensure that the guidelines do not lean towards the imposition of an inefficient, one-size-fits-all model. The guidelines should be appropriate to specific market conditions.
One association proposes that the EU regulatory regime should provide greater clarity as to what investments the regulated TSOs should be making to build new or enhanced interconnection capacity between their regulated pipeline infrastructures. The guidelines could then point out that only projects outside the responsibility of TSOs should be considered for TPA exemptions, as this is the intention of the Gas Directive.

Also, TSOs holding exemptions should still be bound by the requirements for information provision about aggregate infrastructure use and the offer of unused capacity to the market (as proposed to be addressed in the 3rd package).

Finally, one stakeholder favours to commit the decisions about exemption matters to an EU institutional body, such as the Agency of European Regulators as proposed in the third energy package.

ERGEG's comment on stakeholders' feedback:

As already recognised in the course of this document, ERGEG fully agrees with the importance of case-by-case decisions.

With respect to future responsibilities and competencies, ERGEG wants to clarify, that within the proposed third energy package, only exemption decisions of cross-border relevance will be handled within ACER.

3 Summary of results

ERGEG is encouraged by the number of responses received to this consultation. ERGEG considers the responses to be supportive of the overall guidelines and the general case-by-case principle to be upheld when dealing with exemptions.

As a result of the public consultation, ERGEG will take the following (additional) issues into account in the course of the ongoing discussion:

- Scope / eligible infrastructure: “Identical” new technology serving the same purpose should be included.
- Open Seasons should not be mandatory and should not be used for allocating equity. An assessment of market demand is an obligatory precondition to be provided in any case by the project sponsor together with the application to grant an exemption.
- No ex-ante preference should be given to LNG terminals, since potential positive effects will be covered by the case-by-case decision principle.
- Competition enhancement: Since the provision of certain information could be problematic for the applicants, other information sources available to deciding authorities should be taken into consideration, e.g. on connected infrastructure.
- Security of supply (SoS): “Diversification of suppliers” should be added to the list as another means to fortify SoS. Enhancement of SoS should be justified in detail, rather than just vaguely referred to.
- Risk assessment: Scrutiny regarding this criterion should not be dependent on project dimensions (e.g., with regard to the extent of (financial) data to provided). A clarification on exemption granting in an rTPA and nTPA regime (storage) seems necessary.
- Effective functioning…: Coordination and cooperation between connected system operators should be standard, even when dealing with exemptions (data exchange).
- Consultations with neighbouring authorities should take place when dealing with infrastructure of cross-border relevance (could also include – on a case-by-case decision - LNG and storage).
- Partial exemptions remain preferable to full exemptions.
- Exemptions for incumbents are not excluded beforehand due to reasons of non-discrimination and the case-by-case principle, but will naturally remain an exception.
- Possibility of an exemption review: As the guidelines state and responses show, there is a need to establish ex-ante transparent, non-discriminatory, stable and consistent rules on the circumstances under which an exemption could be reviewed. Aspects, such as the proposal “conditions imposed in the exemption are not met or a breach of Art. 22 criteria is suspected”, could be taken into account.