

## Second Position paper on TPA to Storage

30 November 2004

The final conclusions of the Madrid Forum of September 2003 stressed “the need to ensure non-discriminatory and transparent access conditions to storage facilities in line with the provisions of the 2<sup>nd</sup> Internal Gas Market Directive. Therefore “the Forum called on the Commission, CEER, GTE and Eurogas to develop initiatives aimed at proper involvement of all relevant storage operators on the EU internal market for natural gas in the future work.”

The European Regulatory Group for Electricity and Gas (ERGEG) set up a “Focus Group” in 2004 to take charge “inter alia” of developing guidelines for access to storage facilities and preparing a position paper on this issue.

The “Focus Group” issued a first set of draft guidelines for access to storage facilities for presentation at the Madrid Forum of 8-9 July 2004 together with a first draft of the position paper.

This second position paper, which accompanies the revised GGPSSO sets out ERGEG’s agreed position on these issues, taking into account the discussions that have been held with various interested parties and the formal consultation process which closed on 12 November 2004.<sup>1</sup>

### 1) The choice between negotiated and regulated access to storages

Article 19(1) of Directive 2003/55/EC (the Gas Directive) gives the right of access to storage, although it is left to Member States to decide whether a negotiated (nTPA) and/or regulated (rTPA) third party access regime should be implemented.

While in an rTPA regime the right of access to storage is executed on the basis of published tariffs and/or other terms and obligations, which means that tariffs and/or terms and obligations are determined *ex ante* by the regulator, under a nTPA regime the storage system operator (SSO) has initial flexibility in designing the price and non-price terms of access, subject to full compatibility with the provisions and requirements of the Gas Directive.

In addition, in a nTPA regime, and on the basis of complaints submitted by any party with respect to access to storage facilities, the national regulatory authorities (as defined in article 25 of the Gas Directive) could exercise effective *ex post* revision with a view to ensuring non-discriminatory and transparent access conditions to storage facilities. In the event that access conditions would not comply with the requirements of non-discrimination, transparency and competition, the national regulatory authorities should become actively involved in shaping appropriate access conditions to storage facilities.

The document, “Recommendation for the Implementation of TPA to Storage and Linepack”, which was approved by the CEER General Assembly on 5<sup>th</sup> of December 2003, addressed the issue of choice between nTPA and rTPA. It concluded that nTPA should prevail only in fully competitive environments. In the absence of a verifiable level of competition between

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<sup>1</sup> Responses to the public consultation on the GGPSSO are available on the ERGEG website at: [www.ergereg.org](http://www.ergereg.org)

storage facilities and with the other flexibility services, rTPA should be adopted and the national regulatory authorities would be in charge of granting fair access conditions. However, since the results of both regimes (nTPA or rTPA) *should be equal, in order to comply with the principle of non-discrimination and competition embedded in the Directive (Interpreting Note), a minimum set of core conditions is desirable on a European basis.* This minimum set should apply irrespective of the choice for either rTPA or nTPA.

Competition does not in itself rule out the importance and relevance of guidelines for good practice – as they will help to continue to facilitate the development of effective competition. In addition, because nTPA may be adopted in countries where competition in the flexibility market is not fully functioning, the applicability of the GGPSSO should not be subordinated to an assessment of the level of competitiveness of the flexibility market. Moreover, the Gas Directive imposes TPA and it helps to provide guidelines on the types of outcomes in terms of effective access to storage that would be expected even in truly competitive markets.

Both in cases of rTPA and nTPA, national regulatory authorities should ensure that the SSOs do not discriminate between storage users, and in particular that there is no differential treatment of affiliated company. In a case of a SSO being part of a vertically integrated company, the SSO has to draw up a document setting out all terms and conditions with the affiliate company to be made available to the national regulatory authority in charge of ensuring non discriminatory access.

In its draft discussion paper on “Negotiated and regulated TPA for storage” presented at the 8-9 July 2004 Madrid Forum, the Commission stated that “Where storage still represents an essential facility, the obligatory requirement of effective, non-discriminatory access will not be achieved without clear regulatory oversight. In non competitive storage markets therefore, in the event that a Member state chooses negotiated TPA, national regulatory authorities will have to make careful use of their mandatory powers under Article 25 of “ensuring non discriminatory, effective competition, and the efficient functioning of the market, monitoring in particular the access conditions to storage”.

## 2) Public Service Obligations (PSOs) obligations

As for the choice between rTPA and nTPA, rules related to public service obligations are typically under the Member state competence, who can delegate part of his power to the regulator. Therefore subsidiarity related to PSOs is important.

PSOs can be achieved through obligations in terms of outcomes imposed on shippers or other actors (for instance, shippers may be obliged to ensure supply to customers in case of particular events e.g. coldest winter in 20 years) or through obligations of means (e.g. mandatory volumes of storages); in general obligations of results better fit to open and competitive gas markets. In addition, for security of supply purposes, the Commission takes the view *that where gas could economically and reasonably be replaced by an alternative fuel, PSOs should not constitute any grounds for the restriction of competition* (Interpreting Note – Security of Supply Provision for Gas). Hence GGPSSO should be developed in harmony with these ex-ante choices.

Common rules in relation to PSOs have been identified. Obligations related to *PSOs shall be clearly defined, transparent, non discriminatory, verifiable [...]* (Directive 2003/55/EC, article 3(2)) and consistent with the scope of this Directive: they should not be used as an instrument to close the access to storage and hamper market development. The implementation of PSOs must affect the development of trade and competition only in the

least possible manner, whether these PSOs are incumbent upon the storage users or the SSOs themselves.

Equally, when SSOs are required to grant priority treatment to storage users to whom PSOs have been imposed, this priority treatment must be restricted to what is indispensably necessary to guarantee proper implementation of the PSO.

Therefore, whichever party responsible for PSOs is, it shall demonstrate upon request to the national regulatory authority that their requested capacity reservation in storages for PSO purposes is no more than what is required to satisfy the relevant PSO.

Companies with PSO imposed should enjoy the same treatment. This means that storage capacity reserved for the proper implementation of PSOs must be made equally available, on TPA basis, to all companies carrying out PSOs in accordance with the PSOs they are actually responsible for. Any possible newcomer burdened with PSOs must get the same right and treatment with respect to access to storage: *in determining the storage needs for fulfilling PSOs, there must be no discrimination against newcomers* (Interpreting Note).

### 3) Non discrimination and confidentiality of information

Storage facilities can be either integrated with the production or supply branch, or operated by legally unbundled Storage System Operator (SSO), or operated by a combined Transport Service Operator (TSO) and SSO.. Confidentiality requirement is important in any case and in particular in the case of an integrated company as the Gas Directive does not require the legal unbundling of the supply branch and the SSO of an integrated company. Actually, the SSO is committed to confidentiality provisions of Directive 2003/55/CE Article 10. This concern can be addressed by ensuring that information available to the SSO concerning its storage and processing business remains confidential.

In particular:

- commercially sensitive information from storage users' account remains confidential. Any information available to the SSO concerning its storage and processing business shall not be passed to other possible parts of the company in advance of being provided to all market participants; staff working for the affiliate business if any (e.g. supply) should have no access to information which could be commercially advantageous, such as details on actual or potential storage users, and is not made available to all market parties. The arrangements to implement this requirement should include a code of conduct for staff/compliance programme, supervised by a Compliance Officer;
- in case of an integrated company operating supply and/or production and storage business or when there are no separate database systems, specific confidentiality duties must be clearly defined; the relevant national regulatory authorities shall at least require sufficient evidence from companies concerned so as to prove an effective establishment of Chinese walls between the SSO and the supply and/or production branch of the vertically integrated companies. The arrangements to implement this requirement should include a code of conduct for staff/compliance programme, supervised by a Compliance Officer, which should embody the principles behind the Chinese walls concept. Cost effective solutions should be implemented to ensure that the SSO and the supply business are not located in the same place. The SSO and the supply business should be located in separate buildings, provided such a measure is proportionate given the size of the activity concerned.

The legal separation of storage business from the competitive activities of the supply business on a voluntary basis would also help meeting the confidentiality requirements.

#### **4) General rules for access to storages**

The Gas Directive makes two exceptions to TPA to storage facilities<sup>2</sup>.

The first exception relates to the storage used by TSOs for their needs. Article 2(9) of the Gas Directive allows the TSOs to reserve storage facilities or a portion of them, for carrying out their functions. The second exception is the exclusion of storage capacity needed for production purposes. In addition, at least some small storages facilities in Europe are excluded from TPA on the grounds that their exclusion has no consequences on the functioning of the gas market and does not lead to competition distortions between suppliers.

In any case, to ensure non discrimination and effective competition, exclusion of storage capacity from TPA shall not be the decision of the SSO and/or the beneficiary of the storage capacity exempted from TPA and shall be approved by relevant national regulatory authorities, with the publication of substantiated reasons.

There should be no restriction for access to storages based on customer category: the legal background is the combined disposals of Article 19(1) and the definition of customers as *wholesale and final customers of natural gas and natural gas undertakings which purchase natural gas*. Therefore there shall be TPA to storage in order to supply household customers, but also storage capacity for more advanced services has to be allocated through TPA, as e.g. traders are customers as well.

#### **5) Functioning of storages: technical constraints, storage services, secondary markets and congestion management**

Each storage facility has its own technical (operational) constraints with associated costs. TPA to storages should not undermine the well functioning of these facilities. Under these technical constraints and pursuing the efficient use of the facilities, storage operators have to offer to the users in the primary market the largest range of storage services which should comprise bundled and unbundled services, short and long term services as well as interruptible services. The use of available capacity should be maximised and should include the offer of unused capacity on an interruptible basis

In addition SSOs should facilitate secondary markets. This is all the more important when the technical and operational constraints of storages are put forward: the development of secondary markets allowing to re-trade storages services will add flexibility to the market. Nevertheless, every effort should be made to ensure that storage services available on the primary market are as flexible as possible.

These services and the facilitation of secondary markets should be developed with proper consultation with storage users to take into account market demand.

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<sup>2</sup> Another specific exception in the 2<sup>nd</sup> IGM Directive relates to the application of article 22 for new investments which includes investments in new storage facilities or to significant increases of capacity in existing infrastructures. Under this article and providing that the required conditions are met, these new infrastructures may be exempted from some provisions of the directive, mainly TPA.

Congestion management procedures are necessary due to the fact that in some places, gas storage capacity may be scarce. The SSO shall actively endeavour to discourage capacity hoarding. If in spite of secondary market mechanisms, capacity contracted under existing storage contracts remains unused and significant and prolonged contractual congestion occurs, the national regulatory authorities may require the SSO to introduce additional mechanisms to free up this capacity.

## **6) Transparency requirements**

As stated above, information necessary to storage users should be provided on a non discriminatory basis. Transparency requirements are an essential feature to ensure effective and non discriminatory access to storages. Also, the quality of information such as information system on the internet are essential for the efficient use of storage capacity both in case of regulated and negotiated access. Necessary information includes commercial and operational information as well as planned maintenance periods.

With regard to nTPA, the directive requires “storage system operators and natural gas undertakings to publish their main commercial conditions for the use of storage”. This includes the publication of the prices of the standard services to ensure that all storage users are equally treated.

Information relating specifically to a storage user’s account must be kept confidential. Where a SSO considers that it is not entitled to make public all the data required, it shall provide a clear evidence to the national regulatory authorities and seek its authorization to limit publication. The national regulatory authorities shall grant or refuse the authorization on a case by case basis and publish the substantiated reasons. This assessment should be renewed on a regular basis.

The SSO should submit for approval to the national regulatory authorities any request not to publish specific data which it considers harming its commercial interests. The national regulatory authorities shall grant or refuse the authorization on a case by case basis and publish the substantiated reasons.

## **7) Tariff structures and derivation**

Where regulated, tariffs should reflect efficiently incurred costs of access to storages and include a fair return on investments. Tariffs should also be non discriminatory and promote efficient use of storage.

Where negotiated, SSOs shall not adopt any charging principles and/or tariff structures that would restrict market liquidity of storage capacity, create undue barriers to market for new entrants or hamper system enhancements and integrity. Prices should be non discriminatory: they should be the same for any storage user for the same service contracted for at the same time. They should be only subject to adaptations/changes on the grounds of varying circumstances.

Negotiations should also happen in a time frame compatible with the storage users’ commercial needs.

Pursuant to Article 19 of the Gas Directive, in case of disputes, the national regulatory authority shall determine appropriate arrangements. The SSO shall maintain records to enable the regulator to determine costs of provision and prices already levied on other users of that facility for the similar services.

In both nTPA and rTPA regimes, tariffs need to promote adequate and efficient investments in storages which are becoming increasingly necessary due to the increased European gas consumption, the growing need for flexibility as well as possible national requirements related to PSO obligations, including security of supply requirements.

The national regulatory authorities should consider on a case-by-case basis the possibility of granting higher revenues to new investments made under the rTPA regime, in the case no exemption is granted on the grounds of article 22 of the Gas Directive. In any case, mechanisms to promote investments should at the same time continue to promote competition and non discriminating access arrangements.

### **8) Storage penalties**

Storage penalties may be established to ensure that the SSOs and the storage users respect their contractual obligations:

a) SSO may be exposed to storage penalties (such as compensation payment to the storage users) in the event that SSO fails to fulfil contractual obligations, as set out in the storage code/contract

b) storage users may be exposed to storage penalties (such as overrun and scheduling charges) as an incentive to ensure they nominate and use storage capacity consistently with the capacity rights they have procured either on the primary or secondary market.

When they exist or when they are established they shall not be discriminatory and shall not hamper the entry of new participant into the market.

### **9) Implementation**

The GGPSSOs are intended to contribute to the goal of creating the internal market but their implementation needs to be realistic. Storage users have to comply with these obligations in a step by step approach, between 1<sup>st</sup> April 2005 and 1<sup>st</sup> April 2006. Two aspects have been taken into account:

- the fact that access to storages is mandatory since 1<sup>st</sup> July 2004 and that storage operators should have already offered storage services;
- the fact that the implementation of some of the aspects of the GGPSSO may require some time, specifically when the development of IT systems is necessary. This should be taken into account in particular for small SSOs.