



**EREG Public Consultation on the draft
Guidelines for Good Practice on Open
Season Procedures (GGPOS)
- Evaluation of the Comments Received**

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1 Foreword

An ERGEG public consultation process on the “Draft Guidelines for Good Practice on Open Season Procedures (GGPOS) – An ERGEG Public Consultation Paper (C06-GWG-29-05)” was held from 7 December 2006 until the 19 January 2007. ERGEG received 15 non-confidential from the following stakeholders:

- Romanian National Natural Gas Regulatory Authority (ANRGN);
- BG International Limited;
- Centrica;
- EFET;
- EGL;
- Eni S.p.A.;
- Eurogas,
- Eurelectric;
- Geode;
- GIE;
- NAM;
- National Grid Transco;
- RWE Energy AG;
- RWE Transgas Net; and
- Shell Energy Europe B.V. (comments on behalf of Shell International Exploration and Production B.V. and Shell Energy Europe B.V.).

ERGEG also received 2 confidential responses. Responses were analysed by topic areas. This ensures confidentiality in those cases where respondents did not want their names to be published whilst taking their views on board.

Due to logistical problems, ERGEG was not able to integrate EGL’s submission into the present summary. However, EGL’s main arguments are presented at the end of this document. EGL’s full response, as well as the other non-confidential responses, is available on ERGEG’s website at www.erggeg.org.

The present document includes ERGEG’s view on the different points raised by stakeholders. ERGEG’s view takes into account the discussion that took place during ERGEG’s Open Season Workshop on 19 March 2007. The minutes of this workshop are also available via the ERGEG website at www.erggeg.org.

2 Background

2.1 Level of support for ERGEG's draft guidelines on open seasons

Almost all respondents welcome ERGEG's initiative. ERGEG's draft guidelines are seen as a useful opportunity to clarify what role open seasons should play in the internal natural gas market, and how open seasons should be structured. Several respondents mentioned that previous EU open seasons had yielded poor results, due to factors including poor design, lack of clarity regarding the role of the regulator, insufficient coordination and unreliable timetables. These respondents were of the view that ERGEG's draft guidelines can contribute to improving future open seasons.

3 Role of open season procedures

3.1 The importance of providing sufficient capacity to the market on a transparent and non-discriminatory basis

Respondents generally agree that competition requires the provision of sufficient infrastructure on a transparent and non-discriminatory basis. One respondent explicitly stated that the internal market needs more capacity to function correctly.

3.2 Optimising the use of existing infrastructure

Two respondents said that, as a first step, better use should be made of existing infrastructure. One way to do this, respondents suggested, would be to provide better information on the actual use of reserved capacities. Such information would allow users to make greater use of interruptible capacity.

ERGEG view

ERGEG agrees that before building additional capacity, efforts should be made to fully utilise existing capacity, which can, among other things, be fostered via greater transparency and effective UIOLI measures. However, this principle is already reflected in the draft guidelines and ERGEG does not feel that they should go into it in more detail. Existing capacity use and transparency are being treated through separate fora, including ERGEG's work on Transparency and some of the Gas Regional Initiative's Regional Energy Markets (REMs).

3.3 The TSO's obligation to meet the long-term demand of system users

Most respondents agree that TSOs are obligated to meet the long-term demand of system users, and insist that there should be no a priori limits on investment.

One respondent, however, insisted that the 2nd Gas Directive (2003/EC/55) only forces TSOs to meet minimum investment requirements. In order not to "encroach on proprietary rights", this respondent feels that these minimum requirements set at levels strictly necessary to meet the Public Service Obligations (PSOs) mentioned in article 3.2 of the Directive (such as security, regularity and quality). The respondent also said that EU legislation does not contain any kind of obligation regarding interconnections between Member States. Finally, the respondent seemed

to indicate that a TSO's refusal to invest might, in certain circumstances, be justifiable under antitrust law.

ERGEG view

ERGEG believes this is a crucial point that requires immediate clarification. Article 1.4 of the 2nd Gas Directive defines TSOs as "natural or legal persons... responsible for... ensuring the long-term ability of [their] system to meet reasonable demands for the transportation of gas". If a TSO is faced with demands it does not wish to satisfy because it deems them unreasonable due to technical or economic constraints, it should explain to the regulator what these constraints are.

This also applies to interconnections. As stated in the European Energy Regulators' response to the Energy Green Paper¹, "a cross border market that safeguards supply into all Member States" and "works in the interests of European rather than only national consumers" "requires an integrated European Grid, which in turn requires private investment in interconnection capacity and capability". Network operators should be the parties in charge of developing the integrated grid," based on approved standards". While network operators "should be able to make a fair rate of return" on the investments needed to meet these standards, "there must also be a legal obligation on network operators to pursue" these investments.

3.4 Enforcing the TSO's obligation to meet reasonable long-term demand

Several respondents insisted on the fact that a mechanism must be in place to ensure that TSOs comply with their obligation to meet reasonable demand. This type of mechanism is needed because there are too many instances where TSOs refuse to consider any investment despite repeated access refusals. Generally, respondents felt that the process described in the draft guidelines was a good one. However, some respondents believed that it needed to be strengthened. They suggested that the regulator assess whether long-term congestion exists as soon as a single access refusal occurs. If long-term congestion has been identified, the regulator recommends that the TSO initiate an open season. If this does not happen, the regulator then forces the TSO to conduct an open season.

ERGEG view

According to the 2nd Directive, TSOs must meet reasonable long-term demand. Therefore, if long-term congestion has been identified and the TSOs do not invest, respondents are right to point out that some enforcement action should be taken. ERGEG also believes that the regulator would be the right person to take appropriate action.

¹ See CEER's Response to the Energy Green Paper (C06-SEM-18-03), 11 July 2006, p. 4, http://www.ceer-eu.org/portal/page/portal/CEER_HOME/CEER_PUBLICATIONS/CEER_DOCUMENTS/2006/CEER-ResponseToGP_2006-07-11.pdf

3.5 Use of outside investors as a fallback when the system operator is unable or unwilling to invest

If a TSO is unable or unwilling to invest, several respondents would support the possibility of investments by outside parties as a fallback solution. But these same respondents note that a number of Member States do not allow investments by outside parties. In one Member State, outside investors are unable to invest in the transmission network due to legal provisions restricting system development and the sale of primary capacities to the TSO. One respondent noted that if investments were made by outside investors the outside investors would need to cooperate closely with the TSO (i.e. forward the details of the project to the TSO, which would then forward them to its NRA).

ERGEG view

As one respondent pointed out, investment by third parties can require some additional coordination. In addition (like other SOs) to operating, maintaining and developing secure, reliable and efficient systems under economic conditions, TSOs, are legally required by the 2nd Gas Directive to meet reasonable long-term demand. But there may be instances where investment is provided by a third party. ERGEG recommends that Member States take the necessary legal steps to make investments by third parties possible, while ensuring that relevant parties put in place appropriate coordination measures.

3.6 Open seasons as a way to gauge market demand and allocate capacity on a transparent and non-discriminatory basis

Generally, respondents believe that open seasons are a useful way to gauge market demand and allocate capacity on a transparent and non-discriminatory basis.

However, a few respondents stated that other solutions can sometimes be more appropriate. These solutions and ERGEG's view are discussed in section 4, on the application of open seasons.

3.7 The difference between a “project sponsor” and “system operator”

Two respondents stated that the words “sponsor” and “system operator”, which are used interchangeably in the text, ought to be clarified, along with their different roles.

ERGEG view

The project sponsor is the investor or investors. The investor or investors may be the system operator, or different parties. This is already stated in the draft guidelines but is clarified further, when the terms are defined at the beginning of the guidelines and throughout the text. In addition the revised final guidelines mention the fact that if the sponsor is not an SO and intends on operating the new infrastructure, and signing contracts for infrastructure use, it will need to abide by the unbundling provisions of Directive 2003/55/EC.

3.8 Supervision of open seasons by regulators

Many respondents feel that it is crucial for the regulator to be actively involved in open seasons. Regulators should not just monitor open seasons, but should actively raise and help resolve potential concerns. Also, even though the preparatory phase is crucial, regulators must be active throughout the entire process. Some respondents note that, during past open seasons, it has been common for the regulator's position to remain unclear until the very end of the process. Although another respondent seemed to disagree, one respondent said that the regulator should, among other things, actively monitor the drafting of legally binding agreements. Respondents noted that if the investment project involves more than one jurisdiction, regulators of all relevant jurisdictions should be involved in actively supervising the open season.

A small minority of respondents feel that too much regulatory involvement in open seasons would generate delays and raise ambiguities about the draft guidelines themselves.

ERGEG view

ERGEG agrees that there needs to be appropriate regulatory involvement in open seasons. As stated in the answers, this has not always been the case in the past, often due to a lack of regulatory powers. This has led to open seasons which, as stated before, have suffered from problems such as poor design, insufficient coordination and unreliable timetables. ERGEG has always been in favour of market-driven investment processes. Therefore, its intention is not to over-regulate open seasons, but for regulators to be sufficiently involved so as to ensure the necessary conditions (including transparency, non-discrimination, predictability) are in place for proper investment decisions to be made.

When an open season involves more than one Member State, the regulators of the concerned Member States must cooperate with each other. This can happen when a new infrastructure is located in more than one Member State, or when a shipper's ability to use a new infrastructure in a given Member State depends on the availability of infrastructure other Member States. The issue of regulatory cooperation, including cooperation regarding open seasons, has been highlighted in the frame of the North West Regional Energy Market (REM) of the Gas Regional Initiative.

As the European Energy Regulators stated in their response to the Energy Green Paper, for regulators to be able to cooperate effectively, the first step is to raise the powers and independence of the regulators towards a minimum level of harmonisation to ensure that each can effectively undertake its role. The minimum powers that ERGEG believes regulators need to have are listed in annex B of its response to the Energy Green Paper². They include powers needed to:

- regulate monopoly activities;*
- oversee and enforce market rules;*
- oversee and enforce transparency and information management;*
- as well as information gathering powers;*
- and other powers necessary for general market oversight and efficient market functioning.*

² See also forthcoming ERGEG paper "Powers and Independence of National Regulators" (C07-SER-13-06-5-PD), 5 June 2007.

But this is not sufficient. Regulators also need powers and duties to co-operate in ways which extend beyond national boundaries, which is not the case today. In particular they need:

- *the ability to act jointly to oversee TSO investment in and operation of cross border transmission capacity, including system planning and emergency planning;*
- *regulators also need to be able to exchange information, pursue or request investigations of activities that occur in one territory that affect markets in another.*

These powers and duties to cooperate would help regulators ensure that TSOs construct open seasons involving compatible timetables, processes and products on both sides of concerned borders. This topic is discussed in more detail in section 6 on coordination between adjacent system operators.

4 Application

4.1 Types of infrastructure and environments open seasons should apply to

A majority of respondents feel that, in theory, open seasons could be applied to all types of new infrastructure. Two respondents suggested that open seasons were especially well suited for transmission projects. More specifically, one respondent suggested that open seasons were well suited for projects affecting transmission entry and exit points. Another respondent suggested open seasons might be useful for transmission investments resulting from the creation of new LNG terminals. Two respondents also noted that open seasons are especially useful when future demand is very uncertain.

4.2 Justification when an open season is not conducted

Several respondents added that where an open season is not conducted, this should be justified.

ERGEG view

ERGEG believes that well-designed open seasons based on the present guidelines are a transparent, non-discriminatory and efficient way to identify and allocate needed capacity. Alternative mechanisms should be as efficient and produce the same outcomes and effects, and be approved by the NRA or other relevant regulatory authorities.

4.3 Types of infrastructure and environments open seasons may not be applicable to

4.3.1 Small investments

Almost all respondents note that, in practice, open seasons may not be necessary for small investments, such as minor upgrades or de-bottlenecking projects set up in response to normal flow and demand changes. Several respondents caution, however, that a threshold should be set for defining what can be qualified as a small investment. Two respondents stressed that transparent, non-discriminatory mechanisms should nonetheless be in place for small investments. These mechanisms could take the form of processes similar to open seasons but with less stringent deadlines and information provisions.

ERGEG view

ERGEG realises that, for small investments, open seasons may lead to higher costs than benefits. Furthermore, ERGEG cannot ignore the overwhelming support from respondents for excluding small investments from open season requirements. ERGEG concludes that it would be justifiable not to conduct an open season for a small investment. ERGEG believes that an exact threshold cannot be set. But the regulator should look at the benefits the project will bring and decide if it warrants an open season.

In particular the regulator should assess how much marketable capacity the investment will create. It is possible for small investments to create large amounts of marketable capacity, in which case an open season may be warranted. ERGEG agrees that transparent, non-discriminatory mechanisms should be in place for small investments as well, but these mechanisms will not be treated in the open season guidelines.

4.3.2 Distribution networks

Several respondents pointed out that, in practice, open seasons may not be applicable to distribution networks. In a mature distribution network, investment typically arises through a more general investment obligation against a regulated rate of return. One respondent reinforces this point by noting that, in Great Britain, distribution investments are made in response to direct customer needs (connection requests, higher aggregate demand) rather than on the basis of shipper requests. The respondent added that British distributors are subject to an obligation to connect if economic (a clear economic test exists) and that distribution capacity is impossible to hoard.

ERGEG view

ERGEG agrees with these respondents and notes that every regulator should ensure that distribution capacity is impossible to hoard. For distribution projects solely used for distribution purposes, ERGEG believes it would be entirely justifiable not to carry out an open season.

4.3.3 Article 22 exemptions vs. non-exempt projects

Many respondents feel that the guidelines should apply to Article 22 exempt projects infrastructure, or did not say anything specific about excluding Article 22 exempt projects from the guidelines. But an even greater number of respondents did question whether the guidelines might be applicable or fully applicable. Some respondents said that the guidelines should not apply automatically to these types of projects. Some respondents said that not all provisions of the guidelines should apply. And some said that the guidelines should not apply to the non-exempt part of exempt infrastructure.

One respondent stated that if an open season is conducted for the non-exempt portion of an exempt facility, bidders should understand that they are bidding for capacity in excess of the sponsor's requirements.

One respondent suggested that open seasons should apply exclusively to exempt projects. First because this is the purpose they are used for in the United States (in the United States, open seasons were introduced due to the industry' departure from common to contract carriage model). Second because exempt projects tend to be conducted by vertically integrated undertakings with little incentive to maximise capacity. Finally because exempt projects are not subject to regulation and therefore require a higher degree of scrutiny.

ERGEG view

ERGEG believes that new non Article 22-exempt infrastructure should be subject to an open season or other systems as efficient as open seasons and producing the same outcomes.

The applicability of open seasons to Article 22-exempt infrastructure, or to potentially exemptable infrastructure, will be treated in ERGEG's guidelines on Article 22 exemptions. This being said, it is important to note that partially exempt infrastructure will include a regulated part which should in principle fall under the scope of the open season guidelines. Nevertheless, any process applied to an exempt infrastructure must fit into the exemption request process, must take into account the case by case nature of this process, and must be compatible with the terms of any exemption that is granted. Consequently, there may be instances where:

- conducting an open season on the regulated part of the infrastructure will be inappropriate – for example, this may be the case:
 - because a facility has already been granted an exemption that sets the size of its exempt and non exempt portions during a given timeframe, and as a result an open season contravening the terms of the exemption cannot be conducted;
 - or because the sponsor has chosen not to conduct an open season prior to requesting an exemption, and has nonetheless been granted the exemption.
- or instances where the open season guidelines will need to be adapted as to fit inside the exemption request process and remain consistent with the terms of the exemption.

In all cases, however, regulated capacity should be tailored and allocated in a transparent and non-discriminatory way as provided in the guidelines. ERGEG will continue to work on any recommendations it may have for competent authorities on derogations from the open season guidelines for the regulated part of an exempt infrastructure, and will present them in its Article 22 guidelines.

While ERGEG's Article 22 guidelines are being developed, if an open season is applied to a project that intends on applying for, or has been granted, an Article 22 exemption, the present guidelines could be used to define how the open season ought to be structured.

4.3.4 Other market-based mechanisms coupled with non-discriminatory allocation methods

A number of respondents feel that open seasons are not necessary when market-based mechanisms already provide sound investment signals and are coupled with and non-discriminatory allocation methods.

However, one respondent stressed that these market mechanisms must be agreed with regulators. Another respondent stressed that they had to produce sound investment signals. A third respondent pointed out that sufficiently transparent, non-discriminatory and well-functioning market signals do not yet exist.

One respondent suggested that well-designed market mechanisms, together with current and forecast demand, expected sources of supply and existing use of capacity, could serve as inputs for the system operator's own market analysis, and that this analysis should be the leading factor behind any investment, with open seasons only playing a residual role. The terms that the respondent used to describe this process, suggested that he was referring to the analysis National Grid Gas conducts based in part on the results of its long term entry capacity auctions. The respondent felt that such market analysis might be able to capture "hidden" demand by shippers unable to make early commitments, which an open season would not be able to capture.

ERGEG view

Market-based mechanisms coupled with non-discriminatory allocation methods can lead to the same outcomes as an open season, but only under very specific conditions. As is the case in Great Britain with regard to transmission, system operators need to have robust forecasting systems, the market has to be well developed, and well-designed market-mechanisms approved by the NRA or other relevant regulatory authorities have to be in place. This being said, and as one of the respondents noted, these mechanisms, even if effective, do not rule out the use of open seasons.

4.3.5 Unbundling

Although one respondent said that unbundling did not matter, several respondents said that open season guidelines may not be necessary when an investment is made by a properly unbundled undertaking. One of them, however, insisted that what constitutes "proper unbundling" should be clearly defined.

ERGEG view

A fully ownership unbundled company will have appropriate incentives to identify and allocate needed capacity in a transparent, non-discriminatory and efficient way and will therefore use an open season or other market mechanisms that lead to equivalent outcomes when considering whether to build a new infrastructure. Any other market mechanism that may be used should be approved by the NRA or other relevant regulatory authorities.

4.3.6 National planning

Two respondents said that open seasons were not necessary in jurisdictions where well-conducted national planning already takes place.

ERGEG view

If national planning is used instead of an open season, the national planning should be conducted in such a way that needed capacity is identified and allocated in a transparent, non-discriminatory and efficient way just as in an open season. In particular, users should be consulted and the regulator should be able to give its opinion about the project being considered.

4.3.7 LNG and storage facilities

Two respondents pointed out that storage and LNG operators are not subject to the same development obligation as TSOs under the 2nd Gas Directive, and that as a result, the open season draft guidelines should not necessarily apply to them.

Some respondents felt that the draft guidelines should also apply to these operators. They also noted that creating storage and LNG capacity involves different technical challenges than developing transmission capacity, and calls for different open season processes.

ERGEG view

Respondents are right to point out that the 2nd Directive establishes different obligations for storage and LNG operators than for TSOs. ERGEG reminds these respondents that its guidelines are not binding and do not legally oblige storage and LNG storage operators to meet reasonable long-term demand or conduct open seasons. However, ERGEG feels that they should perform these tasks, particularly when operating under a regulated regime. ERGEG realises that open seasons for these types of facilities must be adapted with regard to the technical information that appears in the open season notice, and the final guidelines indeed provide indications on how the notice should be adapted for LNG and storage projects. There may be more technical constraints for LNG and storage projects, and they should be taken into account.

4.3.8 Existing infrastructure

One respondent noted that open seasons should not apply to existing infrastructure, so as to not jeopardise existing transportation contracts - something which DG TREN has explained was not the goal of open seasons. Another respondent, however, felt that open seasons should apply to major infrastructure extensions.

ERGEG view

ERGEG does not understand how an open season applying to the new portion of an existing infrastructure might jeopardise existing transportation contracts. In its draft guidelines, ERGEG stated that open seasons should apply “to new infrastructure understood in analogy to Directive 2003/55/EC (Art 2 para 3, Art 22 para 1 and 2)”. This includes, as stated in the Directive, “significant increases of capacity in existing infrastructures and to modifications of such infrastructures which enable the development of new sources of gas supply”. ERGEG sees no reason to change this position.

4.3.9 Projects that have already filed an application for a license or authorisation

One respondent suggested that ERGEG’s open season draft guidelines should not apply to projects that have already filed an application for a license or authorisation.

ERGEG View

It would not be fair to subject to the guidelines projects that are at an advanced stage and had no prior knowledge of the guidelines. Projects that are at an advanced stage may include projects that have already been granted, or have filed for, an authorisation or license. The final decision as to whether a project is at an advanced stage and should be excluded from the scope of the guidelines is left to the NRA.

4.3.10 Investments inside a network

One respondent noted that whether an investment is made inside a network rather than at an entry or exit points is irrelevant in terms of deciding whether an open season should take place. The fundamental question is whether new capacities are created and are therefore marketable as a result of the investment.

ERGEG view

ERGEG agrees. If the investment creates a definable, marketable product, it should be subject to an open season.

4.3.11 Situations where infrastructure is provided on a competitive basis

Some of the respondents that suggested open seasons should not apply to LNG and storage projects invoked the fact that such infrastructure is provided on a competitive basis. One respondent said that competitive provision of infrastructure should not be taken into account when deciding whether an open season is necessary.

ERGEG view

ERGEG agrees with the last respondent. Competitive provision of infrastructure should not be a factor when deciding whether an open season is necessary, as there is anyway a need to consult the market and allocate capacity in a non-discriminatory way.

4.3.12 Situations where “open subscription periods” are conducted

One respondent mentioned that open seasons might be replaceable by “open subscription periods”, which he felt might not involve the same economic and bureaucratic burdens as open seasons.

ERGEG view

To our knowledge, an open subscription period is a timeframe during which bids for capacity are accepted. Generally, all bids, whatever their timing, are treated as having been received simultaneously. This mechanism eliminates “race to the courthouse” problems typically associated with first-come-first-served capacity allocation methods, and are seen as a positive by ERGEG. However, ERGEG notes that there is much more to an open season than to an open subscription period. In an open season as set out by ERGEG, the sponsor consults users, prepares a proposal which the regulator can comment on, and publishes this proposal. Users make non-binding bids and can provide the sponsor feedback on how to better accommodate their needs. If the sponsor feels he can come up with a proposal that will better accommodate user needs, he can organise another open season, which will lead to another round of bidding. The sponsor then proposes a final allocation, and interested users can enter into binding agreements with the sponsor. Open subscription periods only comprise a bidding phase, which unlike in an open season, is immediately binding. They only relate to existing infrastructure and do not contain a capacity allocation phase.

4.3.13 Other situations

One respondent said that open seasons are a useful way to gauge market demand, but should not necessarily be used to make investment decisions or to allocate capacity.

ERGEG view

This respondent did not propose any alternate mechanisms.

4.4 Non-binding nature of the draft guidelines

Two respondents insisted on the fact that the draft guidelines cannot be binding, as EU legislation contains no obligation to conduct open seasons nor to invest at levels demonstrated by open seasons if there are technical, economical or financial constraints.

EREG view

EREG reiterates the fact that the EREG guidelines on Open Season Procedures are not legally binding.

5 Guidance on Open Season Procedures

5.1 General structure of open seasons

5.1.1 Number of non-binding bidding rounds

One respondent noted that open seasons will in practice require more than one round of market evaluation if tariffs depend on subscription levels. There has been at least one open season in the past where the tariff moved substantially relative to the initially announced tariff and bidders had only two options: maintain the original bid, or drop out.

EREG view

Multiple bidding rounds are one way to approach the question of tariffs, and should be possible under the open season draft guidelines. Another approach, already mentioned in the draft guidelines, is to explicitly give bidders all possible tariffs for all possible subscription levels, in which case only one bidding round would be needed.

However, and this is in fact a material change to the draft guidelines, neither of these approaches should be obligatory, because other approaches exist. Indeed, a scenario where the tariff does not vary according to total subscriptions could also be possible, particularly for transmission investments. The choice should be left to the regulator.

What matters, as the respondent points out, is that the bidders be able to evaluate the tariff they will be asked to pay at the time of bidding. A process where the tariff or tariff methodology provided in the open season notice abruptly and unexpectedly changes after bidding would be unacceptable.

If the tariff changes or other information in the open season notice changes materially after bidding, this would warrant the organisation of another bidding round.

5.2 First Step: proposal to shippers

5.2.1 Consultations with users prior to the open season

One respondent suggested that even prior to consulting with users, the sponsor should have its own estimates of technical and economic constraints.

5.2.2 Contents of the open season notice

5.2.2.1 General comments

A large majority of respondents believes that the open season notice in the draft guidelines is good list, but most respondents also had comments about elements that were particularly important, elements that should be added to the notice or elements that should be cancelled from it.

One respondent felt that there was no reason for setting such prescriptive information requirements. According to that respondent, TSOs will spontaneously publish as much information as possible in order to sell as much capacity as possible.

ERGEG view

So far, TSOs have not always been as forthcoming with information as the response would imply. This is why guidelines are necessary.

5.2.2.2 Elements deemed of particular importance in the current notice

Generally, respondents felt that the following elements of the notice are of particular importance:

- information about capacities:
 - One respondent suggested that bidders be given available capacities, not technical ones.

ERGEG view

Technical and available capacities must both be given.

- capacity allocation method
 - This piece of information is crucial. The capacity allocation method should be provided from the outset of the open season and should not be allowed to change. There have been open seasons where this has not been the case.

ERGEG view

The capacity allocation method is already included in the current draft notice. But the fact that this method should not change over the course of the open season is a useful clarification.

- information about the tariff applied to users, or at least the underlying methodology
 - In a regulated regime, this information should be approved before the beginning of the open season by the regulator.
 - Although this is already implicit in the draft guidelines, it should be clear that tariffs have to be given for each level of buildable capacity and, inside each level of buildable capacity, for each level of total subscriptions.
 - One respondent suggested that bidders should be offered long-term capacity and a corresponding long-term tariff.

- Two respondents felt that tariffs and underlying methodologies were less important.
 - i. One respondent said that:
 - 1. in competitive environments such as the German transit industry, tariff methodologies are considered business secrets;
 - 2. in cost-based regimes, methodologies are already available to the regulator.
 - i. The second respondent said that tariff methodologies were only necessary in advance of binding agreements and did not need to be published in the open season notice.

ERGEG view

Users cannot bid representatively, even if bids are non-binding, if they do not know the tariff they will pay, or are not given an indicative tariff and underlying methodology. If only an indicative tariff and methodology are provided, they should incorporate all the information available to the project sponsor, so as to allow users to evaluate the final tariff as precisely as possible.

This information is so important that it deserves to be published in the notice even if it already appears elsewhere. The tariff or indicative tariff and underlying methodology should be approved by the regulator before the beginning of the open season.

Tariffs or indicative tariffs and underlying methodologies should be given for all possible capacity situations and for all subscription situations if the tariff depends on the level of subscription and if a single-round bidding approach has been chosen (as stated above, these choices regarding pricing should be left to the NRA).

For long-term capacity, ERGEG agrees that a long-term tariff or long-term indicative tariff and underlying methodology might give more visibility to bidders. However, tariffs may need to be periodically updated due to cost-reflectivity concerns. Cost-reflectivity concerns may be particularly relevant for transmission investments, due to the need to ensure coherent pricing between the new piece of infrastructure and the rest of the transmission system. In cases where a long-term tariff or indicative tariff and underlying methodology is not provided for long-term capacity, users should be given all the elements needed to evaluate possible tariff movements as precisely as possible.

- upstream and downstream capacities
 - One respondent felt that existing as well as potential capacities should be provided.
 - One respondent said that this information should be provided by relevant TSOs and not by the TSO conducting the open season.
 - One respondent felt that such information was only needed in advance of binding agreements and should not be provided in the open season notice.

ERGEG view

Existing upstream and downstream capacities are essential to make a representative bid (whether binding or non-binding), since they will most likely affect the value of capacities sold as part of the open season. Potential capacities, defined as capacities that the relevant SOs have announced they might build, as well as the factors that might trigger their development, must be published since certain bids may be contingent upon these capacities.

- in-service dates, adequate publicisation of the open season, setting a minimum duration for the open season.

5.2.2.3 Elements that should be added to the notice

Respondents said that the following information should be added to the list, where relevant:

- the maximum duration of the open season (a duration of 6 months was suggested);
- information on existing technical, booked and used capacities, so as to let bidders decide if buying interruptible capacity might be more advantageous than investing in new capacity;
- quality specifications on upstream and downstream networks;
- the methodology that will be used to decide how much capacity to build (in a regulated regime, this economic test should be approved by the regulator);
- the UIOLI arrangements that will be applied to new capacity (because they help bidders evaluate the firmness of the capacity they are bidding for);
- drafts of the legally binding agreements bidders will be asked to sign;
- the amount of the guarantee bidders will be asked when signing legally binding agreements;
- mechanisms to deal with cost-overruns;
- the procedures and timetable for regulatory approvals;
- possible coordination problems (delays due to discussions with neighbouring SOs, approvals in neighbouring countries) and responses;
- penalties applied to sponsor if capacity is not delivered on time (this is mentioned later in the draft guidelines but is important and should be moved to the notice);
- a translation of the open season notice in English.

ERGEG view

Most of the above elements would give bidders a better idea of the product they are bidding for and should be incorporated in the notice.

Before building new capacity, full use should be made of existing capacity. This principle is laid out in the guidelines, and the open season notice should be consistent with it. It therefore seems reasonable that the notice include information on existing technical, booked as well as used capacities.

As was stated earlier a shipper's demand for capacity on a given infrastructure may be contingent on his ability to use upstream and/or downstream infrastructure. This means that sufficient capacity must be available on this infrastructure, but also that gas quality specifications must be compatible. It therefore seems reasonable to include in the notice quality specifications on upstream and downstream systems, if relevant.

To bid representatively, shippers must have as much information as possible on the product that is being offered. The economic test that will be applied to decide whether an infrastructure is built or not belongs to this category of information. Indeed if shippers have access to the economic test, they will be better able to assess the probability that the infrastructure will eventually get built and therefore the amount of product that will be on offer.

UIOLI arrangements affect the firmness of capacity and therefore its value. Therefore the arrangements should be listed in the open season notice.

The legally binding agreements shippers will be required to sign at the end of the capacity allocation phase are crucial in determining what product is being offered, because they include all of the final conditions according to which the product will be marketed. In fact they are so important that drafts of the agreements should not only be provided to bidders at the outset of the open season, but should be approved by the NRA. One feature of the legally binding agreements that is especially important to bidders is the amount of the guarantees they will be asked to provide. For a small shipper, guarantees can represent a substantial barrier to entry and are thus of critical importance.

Tariffs are crucial in determining the kind of product being offered. Mechanisms to deal with capacity overruns will affect these tariffs and should therefore be listed in the notice.

When capacity will be available affects the value of that capacity. Shippers therefore need as much visibility as possible on the timing according to which capacity will be released. This includes information on procedures and timetables for regulatory approvals. If capacity is not delivered in time shippers need to know well they will be compensated, i.e. they need to know the penalties that the sponsor will have to pay.

Because shippers may be foreign, it is important, in terms of non-discrimination, for the notice to be also available in English.

5.2.2.4 Elements that should be dropped from the list

Respondents said that the following elements should be deleted from the list:

- The cost of the project: because users are not so much interested in the cost of the project as the tariff they will be paying;
- the general route of the project when the investment takes place in an entry/exit system;
- elements already mentioned in existing regulations and network codes (simple reference to these regulations could be made instead).

ERGEG view

ERGEG generally agrees with the above points. But in cases where only a tariff methodology is provided, cost will be a necessary component which, together with the methodology, will allow users to evaluate resulting tariffs.

5.2.2.5 Adaptation in case open season applies to other types of infrastructure than transmission

Two respondents said that for projects other than transmission, the open season notice should be adapted. One respondent felt that the same notice could be used as such for all types of infrastructure.

ERGEG view

As was stated earlier, the final guidelines will provide indications on how the notice should be adapted for LNG and storage projects.

5.2.3 Feedback from bidders

A number of respondents suggested that shippers should not be required to divulge their source of gas or supplier. Such information is commercially sensitive or unknown at the time of bidding, as well as unnecessary. Communicating this information to a TSO that is not properly unbundled would be particularly dangerous. What may be needed for engineering or quality conversion reasons is for shippers to communicate what upstream/downstream systems they intend on using - but this should be done only if strictly necessary.

EREG view

EREG agrees. There seems to be consensus around this issue, which was initially raised by some EREG members during the drafting of the draft guidelines.

One respondent felt that it was important, as provided in the draft guidelines, that shippers be able to give the sponsor some feedback to the sponsor about their needs in terms of in-service dates, contract durations, types of service offered, intake and offtake points and available capacities. One respondent stated that shippers should also be able to comment about contingent upstream and downstream capacities needed to make a binding offer.

EREG view

EREG agrees. This type of information would allow the system operator better respond to market needs and sell more capacity, thereby maximising profits.

Several respondents insisted that there should not be any a priori limits on the size of a facility unless there are solid technical reasons to justify a limit. One respondent suggested that there might be more technical constraints for storage than transmission projects.

EREG view

As stated previously, any technical constraints should be well justified. The bidding process will typically expose any economic constraints. There may be additional technical constraints for storage projects than for transmission projects, and they should be taken into account when designing the open season, but they should also be justified.

5.2.4 The economic test

A number of respondents commented on what should be done if demand for capacity turns out to be lower than capacity on offer and capacity on offer cannot be reduced by a proportional amount.

One respondent suggested organising another bidding round incorporating a higher tariff.

Other respondents suggest that a decision will have to be made as to whether to go ahead with the project or not.

Respondents note that there may be good reasons to go ahead with the project: for example, the demand that does exist needs to be served to ensure security of supply. Market analysis may also show that additional demand by players unable to make early commitments will develop in the future.

Respondents note that the decision to invest must be subject to an economic test available to bidders in the open season notice, and approved by the regulator if the project occurs in a regulated framework. In a regulated framework, the test will balance necessary investment levels, the need to provide investors a guaranteed revenue stream and effects on tariff levels. Once the economic test is agreed to by all relevant parties, it should not be breached.

ERGEG view

ERGEG agrees that there needs to be an economic test to decide whether an investment must go ahead or not. The economic test should be approved by the regulator.. Once an economic test has been defined, it should not be breached. The economic test will need to be published in the open season notice.

The economic test should address situations where demand turns out to be insufficient both at the end of the first, non-binding round and at the end of the second, binding round of bidding.

5.2.5 How to compensate risk

If it is decided that the project will go ahead, one respondent suggested that the sponsor could be compensated for risk by granting it exclusive rights over the excess capacity. Another respondent suggested bringing in outside investors willing to take on more risk than the original sponsor.

ERGEG view

Under Article 22 of the Directive, compensating investors for risk via a TPA exemption is possible. However such decisions are made on a case-by-case basis by Member States and ERGEG's open season guidelines do not aim at defining what process Member States should follow to come to these decisions. This question is being addressed separately by ERGEG in its workstream on the treatment of new infrastructure. The second question raised by the respondents has already been addressed.

5.2.6 Second open season due to overbidding

One respondent also considered the case where demand would be higher than supply. The respondent does not feel that another open season would need to be conducted even if the project were to be amended. In the case of a partially Article 22 exempt facility, the respondent also feels that the exempt part of the facility's capacity should be reserved to the holder of the exemption.

ERGEG view

If demand is higher than supply and there are no technical constraints, the investor should offer additional capacity according to the bid. If the bid leads to a different project; another open season may be necessary.

For the non-exempt portion of Article 22-exempt facilities, if an open season takes place we have already stated that the procedure may need to be adapted: one necessary adaptations may be that bidders should only be able to bid for capacity over and above the capacity reserved by the exemption holder.

5.3 Second Step: Capacity Allocation following Open Season

5.3.1 Letters of intent signed as part of the non-binding phase

One respondent noted that in certain contexts such as Great Britain, where there is a well-understood set of auction rules and network access conditions, non-binding letters of intent may not be necessary.

ERGEG view

ERGEG agrees.

5.3.2 Capacity allocation method

Two respondents commented on the risks of using pro-rata capacity allocation methods. Without proper safeguards, this type of mechanism can lead to uneconomical lot sizes. Bidders may also choose to over-bid in order to get the amount of capacity they want after quantities have been pro-rated.

One respondent asked that the regulator verify the transparent and non-discriminatory nature of the capacity allocation mechanism that will be applied.

ERGEG view

ERGEG agrees that pro-rata allocations can produce unsatisfactory outcomes. In light of this risk, of the second respondent's comment and of previous comments regarding the role of the regulator, ERGEG believes that the regulator should be actively involved in designing the allocation method. The regulator should ensure that the method chosen will produce a satisfactory outcome in terms of promoting competition and verify its transparent and non-discriminatory nature.

5.3.3 Short-term capacity

A number of respondents commented on the requirement to make space for short-term capacity. Although many respondents understand why setting aside some capacity for short-term needs would be helpful, two respondents point out that longer-term capacity is important in terms of mitigating risk, and that imposing a level of short term capacity may reduce the incentive for non-dominant players to invest. Two respondents also pointed out that short-term capacity drives up tariffs. One of these respondents added that short-term capacity may therefore be incompatible with the 2nd Directive Art 8.1.a's requirement to provide access under "effective" conditions. The other respondent suggested, if the cost of putting aside capacity for short-term needs were deemed to be too high, putting in place a well functioning secondary market instead. One respondent said that a clear regulatory framework is needed on the issue of short-term capacity. Another respondent suggested that EU regulatory frameworks dealing

with this issue should be harmonised, to avoid discrepancies on two sides of a same border. One respondent said that rules regarding short-term capacity should be published as part of the open season notice.

EREG view

Short-term capacity may raise tariffs, but its benefits in terms of increased competition may outweigh these costs. Short-term capacity is important to competition in part because new entrants often are not in a position to commit themselves for long periods. Short-term capacity requests should therefore be taken into account. This does not mean that all such requests should always be satisfied, but short-term capacity requests should be considered. Regulation 1775/2005/EC establishes that transmission users have to be offered some short-term capacity and ERGEG believes this should also apply to storage and to LNG,. If there are no requests for short-term capacity and an NRA or Member State feels, based on market signals, that there is a justified need for short-term capacity, a robust assessment should be made of how much capacity should be provided. Also, a mechanism must be developed to ensure that any costs or risks customers are exposed to are minimised, and incentives must be developed to ensure that the capacity is utilised. All of these processes should be handled in a transparent way. Efficient UIOLI mechanisms coupled with a well-functioning secondary market do not offer the same benefits as short-term capacity. Cross-border contract duration discrepancies are a real issue which is being addressed by ERGEG via other fora.

5.3.4 Tariff prior to the binding agreement

A number of respondents commented that by this stage the tariff methodology (as well as the tariff, if possible) should be clear (in fact it should ideally be absolutely clear from the outset of the open season).

EREG view

ERGEG agrees that the tariff or indicative and underlying methodology should be clear. If only an indicative tariff and underlying methodology can be given, they should incorporate all available information, so as to allow users to evaluate the final tariffs as precisely as possible. Where a long-term tariff or tariff methodology is not provided for long-term capacity, users should be given all available elements to evaluate possible tariff movements as precisely as possible.

5.3.5 Other comments regarding the binding agreements

Respondents also said that:

- the sponsor should state clearly how much capacity it will build;
- the guarantee required by the sponsor should not exceed 1 to 2 yearly tariffs;
- in the case of an TPA exemption, the agreement should be conditional on the results of the ensuing exemption request;
- regulators have a role in ensuring, via adequate incentives and penalties, the timely delivery of capacity.

ERGEG view

ERGEG agrees with points 1 and 4. Regarding the second point, ERGEG agrees that guarantees should be reasonable and should not discriminate against new entrants. Regarding the third point, we have already stated that for the non-exempt portion of Article 22-exempt facilities, if an open season takes place, the procedure may need to be adapted: one necessary adaptations may be that the agreement should be conditional on the results of the ensuing exemption request.

One respondent suggested that regulators should not go into commercial terms that lie outside of the open season. However, as was pointed out earlier, another respondent feels that the regulator has a crucial role to play in ensuring that commercial terms are transparent and non discriminatory.

ERGEG view

ERGEG believes that the legal agreements could potentially be used to introduce discrimination and need to be supervised like the rest of the open season procedure.

5.4 Results of the open season and transparency

5.4.1 Commercially sensitive information

A number of respondents suggested that the names of the winning bidders and in particular their percentage of the total capacity assigned as a result of the open season constitute commercially sensitive information which could reveal the bidders' strategies and harm competition. In addition this type of information should be of use in a well-regulated TPA system with good UIOLI rules and a well-functioning secondary market. One respondent also notes that the publication of such information is not required by law. However, many of the respondents admit that the information may need to be accessed by the regulator.

One respondent also considers tariffs and contract durations commercially sensitive.

One respondent notes that in the case of an exempt facility only the information relative to the non-exempt part of the facility should be published.

One respondent is satisfied with the publication requirements on winning shippers.

ERGEG view

There seems to be consensus around the issue of names and capacity of winning bidders, which was raised by some ERGEG members during the drafting of the draft guidelines. ERGEG agrees that this information should not be published. However, it may need to be accessed by the regulator.

With regard to tariffs and contract durations, the rule is the same as for the investment decision: the information has to be published. If the sponsor does not wish to have it published because it feels the information commercially sensitive, it has to obtain the approval of the regulator.

5.4.2 Uniformity of binding agreements

One respondent noted that it is crucial for the regulator to have access, as provided by the draft guidelines, to the terms of agreement between the shippers and project sponsor, and verify non-discrimination. Typically confidentiality agreements signed at the beginning of an open season prevent bidders from verifying non-discrimination by themselves.

EREG view

EREG agrees. It also notes that if there is confidentiality it should be applied in a non discriminatory way, and that any requirements in confidentiality agreements should not produce discriminatory outcomes.

5.4.3 Open seasons on a rolling basis

One respondent suggested that open seasons be organised on a rolling basis, for example every 2 years. Although the respondent recognises that such a procedure would have costs, it feels it is a necessary procedure to take into account changing user needs.

EREG view

There should not be a set date for open seasons. It should be possible for open seasons to be initiated at any time, for instance at the suggestion of the regulator.

6 Coordination with adjacent system operators

A large majority of respondents agree that TSO coordination is absolutely crucial. One respondent indicates that this has been an area of critical weakness in the past, which needs to be strengthened. In particular, more clarity is needed on the role of TSOs and regulators, and on who ensures that proper coordination actually takes place.

Respondents feel that coordination should start early, and before the beginning of the open season.

The goal should be to have compatible/harmonised conditions on both sides of borders, including:

- quality and pressure specifications;
- designs;
- capacity deliveries and capacity allocation procedures (in particular, there could be parallel and symmetrical open seasons facilitating interdependent bids);
- tariffs and costs;
- contract terms.

In addition to producing better open season results, coordination could also produce synergies, which would drive costs lower.

Regulators should actively participate in the process rather than just supervise it. In particular, regulators can play a useful role by setting coordinated timetables for decisions and approvals. Regulators can also move in as the default coordinator when TSOs do not coordinate with each other. ERGEG could play a useful role in this process.

One respondent supported coordination but felt that open seasons in each Member State should be conducted solely by the TSO of that Member State. In particular, information regarding upstream and downstream networks should be provided by relevant TSOs, not by the TSO conducting the open season.

One respondent felt that no regulation of coordination was necessary. In its view, TSOs are market oriented entities that have every incentive to spontaneously coordinate. The only thing regulators have to do is to put in place national tariffs that encourage spontaneous coordination. This respondent felt that revenue cap tariffs do not provide adequate incentives.

ERGEG view

As was mentioned earlier, self-regulation has not always produced adequate results. Regulators therefore need to be proactive in helping the sponsor coordinate open seasons with adjacent SOs, particularly given the fact that SO coordination is described by respondents as such a crucial issue.

Coordination between the sponsor and adjacent SOs means that if an open season is organized for a transmission entry point, the open season should be organised jointly by the TSO in charge of the entry point and the TSO in charge of the corresponding exit point. If the open season is conducted for an LNG terminal or storage facility, the open season should be conducted jointly by the LNG operator or storage operator and the operator of the transmission system the terminal or storage facility will be connected to. Bidders should be offered in a coordinated and compatible way a combined product comprising entry/LNG/storage capacity and an equivalent amount of exit/entry/entry capacity and associated services with compatible characteristics. For coordination to take place, the duties and responsibilities of the sponsor and adjacent SOs must be precisely defined. In their answers, respondents mentioned some of the processes and characteristics which need to be compatible, coordinated and/or harmonised. The North-West Regional Energy Market (REM) of the ERGEG Gas Regional Initiative has identified others³. They include capacity booking procedures, congestion management procedures, nomination procedures, renomination procedures and matching procedures.

Coordination should start early on. Regulators should take appropriate steps, taking into account national legislation, to ensure that effective SO coordination takes place. If it has any concerns regarding the degree of coordination between the sponsor and adjacent SOs, the relevant regulatory authority should raise them before the start of the open season, just as it would raise any other concerns regarding the open season's other features.

In some cases, the project sponsor will have to coordinate itself with foreign SOs. For example, this will be the case when an open season is organised for a transmission entry points. In these cases, there will also be a need for coordination between national regulatory authorities: National regulatory authorities must ensure that their respective regulatory frameworks are clear enough and share a sufficient degree of similarity so that it is possible for the project sponsor and adjacent SOs to design open seasons involving compatible products and processes. They should also ensure that whatever differences between regulatory frameworks do exist are not a

³ http://www.ergereg.org/portal/page/portal/ERGEG_HOME/ERGEG_RI/Gas_Regional_Initiative/North-West.

barrier to investment. Also, concerned national regulatory authorities must jointly monitor the open season and resolve concerns regarding the arrangements put into place by the project sponsor. Many of the issues the sponsor and adjacent SOs will need to address will be tied to the allocation of costs and to remuneration. It is essential that national regulatory authorities provide timely and coordinated input on these matters to the sponsor and adjacent SOs.

The national regulatory authorities' ability to conduct these processes will depend on their powers and ability to cooperate, as explained in section 3.8 on the supervision of open seasons by regulators.

7 Appendix: EGL's submission

EGL is of the opinion that the GGPOS should not apply to new infrastructure projects which are eligible for exemption procedures under the Gas Directive. EGL's opinion is based on a number of observations:

- For projects that extend beyond EU borders, there is no guarantee of reciprocity in non-member countries and therefore no assurance that the outcome of an open season would be beneficial for the EU.
- Projects that extend beyond EU borders are undertaken with a view to gaining access to new sources of upstream supply and introducing considerable volumes of new gas supply to the EU. As a result, such projects should be seen as upstream production projects rather than as a typical transmission project that needs to be built and operated to ensure more downstream competition.
- When a project crosses a number of jurisdictions, it will be difficult to convince the national authorities of every jurisdiction to adopt open season procedures. This will be especially true when the jurisdictions do not belong to the EU. Coordination between different jurisdiction already is a problem, even in the EU, and introducing the additional obligation of conducting open seasons would further complicate coordination.
- EGL seems to suggest that an open season where all users are treated equally, provided equal information and allocated capacity on a non-discriminatory basis would not be adapted to investor-owned and operated projects where preferential treatment is given to users willing to share the investment risk in the proposed project.
- Although open seasons are an acceptable way to test the market, the sponsors of an investor-owned project will wish to tailor any open season procedure they might use in a way that suits the nature and scope of their project.
- EGL also seems to suggest that Article 22 exemptions are given on a case by case basis and that competent authorities will ultimately decide, on a case by case basis, whether an open season is needed and what kind of open season procedure may be acceptable.

EGL's full submission is available, together with the other non-confidential responses ERGEG received, on ERGEG's website at www.erggeg.org.