



Treatment of New Infrastructure

**European Regulators' Experience with
Art. 22 exemptions of Directive 2003/55/EC
Interim results of EREG survey**

**Ref: E07-TNI-01-04
12 September 2007**

Table of Contents

1. INTRODUCTION	3
2. REFERENCES	3
2.1. Commission's note on Art. 22	3
2.2. Draft NGIIR.....	4
3. RESULTS OF QUESTIONNAIRE.....	4
3.1. Responses received	5
3.2. Art. 22 projects overview (technical details)	6
3.3. Details on Art. 22 proceedings	8
3.4. Conditions on Open Season procedures	12
3.5. Applicable Criteria for Art. 22 treatment	12
3.6. Conclusions	15
3.6.1. Varying practice	15
3.6.2. Widespread application.....	16
3.6.3. Way forward.....	16

1. Introduction

During the next 20 years, considerable investment in new gas infrastructure in Europe will be needed in order to meet rising demand. Security of supply can only be maintained at the current level if new investments are made. In the context of regulated gas networks, however, investment may be inhibited due to a restrictive regulatory framework. Existing legislation tries to resolve potential conflicts between the need to invest and the regulatory regime by means of the provision in Art. 22 EC/2003/55 (hereafter Art. 22), which foresees exemptions from regulation where investments would otherwise not be made.

Experience with the application of this provision¹ has shown that exemptions have been granted on an increasing number of infrastructures.

Although the provision promotes investment on the one hand, it reduces TPA on the other. For the time being, there is no common approach among regulators. To date, guidance is provided by the Commission's note on Art. 22², where the Commission sets out its main ideas. The more recent draft SEE guidelines (NGIIR)³ picks up that issue, although it is currently still under discussion and for further development.

ERGEG has been asked to submit to the Commission its view on Art. 22 EC/2003/55 and a possible change of the legal framework with respect to investment issues. This paper summarizes the results of ERGEG's questionnaire on Art. 22 experience and on established and/or already applied criteria for dealing with Art. 22 applications. A separate paper with regard to the 3rd legislative package will provide the Commission with ERGEG's views on this important question, along with corresponding advice from ERGEG on the NGIIR.

2. References

2.1. Commission's note on Art. 22

DG Energy and Transport published a note in which the Commission states its views on exemptions from certain provisions of the third party access regime. According to this note, an exemption may be granted for all or part of the capacity, as stated in Art. 22 para. 3 and there are different types of exemptions foreseen in the EU legislation, including:

- **Full exemption** from TPA, which means that investors may retain full use of the new infrastructure's capacity and may decide not to allow TPA for the duration of the exemption. In this case, there is no obligation to publish tariffs and no possibility of ex-post intervention.

¹ Status quo: March 2007. Cases filed or decided at a later stage are not covered in this text, except if explicitly mentioned.

² See: European Commission, Notes for the implementation of the Gas directive 2003/55/EC, 30.1.2004, http://europa.eu.int/comm/energy/gas/legislation/notes_for_implementation_en.htm.

³ DRAFT Guidelines for New Gas Infrastructure Investment Regulation (NGIIR) in the Energy Community of South East Europe

- **Partial exemption** from TPA, where the investors may allow TPA not based on published tariffs but where a so-called “open-season”, an auction or individual negotiation, may be offered to potential users.⁴ In this case, regulators [or competent authorities] should approve the method for offering the capacity.

The Commission’s note also states that the possibility for such exemptions is clearly an exception to the general rule of third party access, which is the basis of the new competitive market for electricity and gas, and that exemptions will therefore only be granted exceptionally and on a case-by-case basis.

The note also sets out the Commission’s view that the applicant for the exemption bears the **burden of proof** that the necessary conditions are met and the criteria is fulfilled.

Furthermore, the note points out that exemption from the Directive and Regulation does not entail an exemption from competition law.

2.2. Draft NGIIR

The Energy Community’s draft NGIIR⁵ address a number of issues related to new investments. In addition to TPA rules (NGIIR Annex 1), it deals with Art. 22 (NGIIR Annex 2) as well as with institutional issues. With respect to the subject-matter of Art. 22, the NGIIR focuses on questions of the relevant market, unbundling requirements, and the importance of open season procedures.

3. Results of Questionnaire

ERGEG asked regulators to respond to a questionnaire. The results have shed further light on the two areas addressed in the questionnaire:

- Practice and experience with Art. 22.
- Investment in general (default regime)⁶.

⁴ These are some of the options available to competent authorities under Art. 22 as stated in the note, so the list is not exhaustive.

⁵ Here, reference is made only to the existing document “New Gas Infrastructure Investment Regulation (NGIIR) in the Energy Community”, ECS Version 1, 27.10.2006.

⁶ ERGEG internal document: Recommendations on regulatory treatment of cross-border domestic and non-domestic investment (default regime) (E07-TNI-01-01).

3.1. Responses received

Regulators have responded to the questionnaire on new infrastructure where they are competent for Art. 22 proceedings. Where ministries are the competent authority, regulators could only provide partial information. Therefore, in the case of NL, table 3.3 does not feature the requested detail information.

Answers to the Questionnaire "New Infrastructure" (Art. 22, Open Seasons, Default Regime....)		
Member state (NRA)	Answer Received	Preliminary quality & content analysis of responses on Part 1 (w/o Default Regime)
UK (Ofgem)	Yes	3 (+1 current) LNG & 1 Interconnector Art.22 projects, 3 exemptions (LNG) from Ofgem for 20-25yrs., 1 partial exemption (BBL); 4 times application of OSP; --> substantial answers & details also on criteria (quest. 1+2 of catalogue)
Italy (AEEG)	Yes	3 LNG & 1 Interconnector Art.22 projects, 2 exemptions (LNG) granted by ministry for 20yrs. & 80% of capacity; no OSP; --> substantial answers & details (quest. 1)
Netherlands (Dte)	Yes	2 exemptions (BBL + Gate LNG), 2 current projects (Eemshaven LNG, Liogas LNG) --> incomplete answers of questionnaire, but additional material (decision of ministry on Gate LNG)
Austria (E-Control)	Yes	little experience w/ Art.22 & OSP (1 current project: Nabucco-Pipeline) --> but substantial answers & info also on criteria (quest. 2 of catalogue)
Hungary (HEO)	Yes	little experience w/ Art.22 & OSP (1 current project: Nabucco-Pipeline) --> but substantial answers & info also on criteria (quest. 1+2 of catalogue)
Germany (BNetzA)	Yes	little experience w/ Art.22 & OSP (1 current project: extension of NEGP (onshore) (NEL, OPAL, KAPAL)), some statements on criteria for treatment Art.22
Slovenia (AGEN)	Yes	no experience w/ Art.22- & OSP, but some ideas on criteria for treatment of Art.22
Czech Rep (ERO)	Yes	no experience w/ Art.22- & OSP, but some ideas on criteria for treatment of Art.22
Slovak Rep (RONI)	Yes	no experience w/ Art.22- & OSP, some statements on criteria for treatment Art.22
Denmark (Dera)	Yes	no experience w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Finland (EMV)	Yes	no experience w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment, but literally implemented into national law
France (CRE)	Yes	no experience w/ Art.22, no statements on criteria for Art. 22 treatment
Sweden (STEM)	Yes	no experience w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Lithuania (NCC)	Yes	no experience w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Spain (CNE)	Yes	no data on Art.22- & OSP , no statements on criteria for Art. 22 treatment --> responsibility of Ministry
Belgium (CREG)	Yes	no experience w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Cyprus (CERA)	Yes	no experience w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment, no implementation of Art. 22 into national law yet
Latvia (PUC)	Yes	no experience w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Luxembourg (ILR)	Yes	no experience w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Poland (URE)	Yes	no experience w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Portugal (ERSE)	Yes	no experience w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment, ministry decides
Ireland (CER)	Yes	no experience w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Estonia (EMI)	No	
Greece (RAE)	No	
Malta (MRA)	No	
Answers received	22/25	

3.2. Art. 22 projects overview (technical details)

Country	Project No.	Nature of Project	Type of Project	Project Name, Location / Route	Sponsors / operators (Name, share in %)	Market share of operator(s), sponsors & users → Market dominator?	Definition of considered market [EU, national, commodity, transportation...]	Capacity [m ³ /a] ²	Investment Volume [EUR]	Expected Payback period (please indicate if not available for NRA or confidential)	(planned) start of operation
Netherlands	1	New Infrastructure	LNG	Eemshaven LNG terminal	Essent and Conoco Phillips	No response	No response	12 bcm/a	No response	No response	2012
	2	New Infrastructure Increase / Modification of Infrastructure	LNG	LionGas terminal	4Gas	No response	No response	16 bcm/a	No response	No response	2010
	3	New Infrastructure	LNG	Gate	Vopak LNG Holding and Gasunie LNG Holding BV	No response	No response	16 bcm/a	No response	No response	2010
	4	New Infrastructure	Interconnector	BBL	Gasunie, Ruhrgas Fluxys	No response	No response	15 bcm/a	No response	No response	2006
Italy	1	New Infrastructure	LNG	Adriatic LNG terminal - offshore Rovigo (RO)	Edison Spa (45%); ExxonMobil (45%); Qatar Petroleum (10%)	Lower than 20% for Edison; lower than 10% for ExxonMobil and Qatar Petroleum	National: gas supply and wholesale	8 bcm/a	835 millions	Na	2008
	2	New Infrastructure	LNG	Terminale LNG di Brindisi - Brindisi (BR)	BG (100%),	Lower than 10%	National: gas supply and wholesale	8 bcm/a	400 millions	Na	2009
	3	New Infrastructure	LNG	OLT - Offshore Livorno	OLT Energy Toscana Srl (17%); Irde Mercato Spa (23%); Endesa Europa (38%); others	Na	No response	3.8 bcm/a	360 millions	Na	Na
	4	New Infrastructure	Interconnector	Poseidon pipeline project, (as part of Turkey-Greece-Italy Interconnection Project) located in the Adriatic see between Stavrolimenas (Greece) and Otranto (Italy)	Edison Spa and Depa SA will be the owners of the Poseidon Transmission Co. (50% each one)	Lower than 20% for Edison; na for Depa;	National: gas supply and wholesale	8 bcm/a	350 millions	Na	2012

Country	Project No.	Nature of Project	Type of Project	Project Name, Location / Route	Sponsors / operators (Name, share in %)	Market share of operator(s), sponsors & users → Market dominator?	Definition of considered market (EU, national, commodity, transportation...)	Capacity [m ³ /y] ¹⁾	Investment Volume [EUR]	Expected Payback period (please indicate if not available for NRA or confidential)	(planned) start of operation
Austria	1	New Infrastructure	Interconnector	Nabucco Gas-pipeline, Turkey-Bulgaria-Romania-Hungary-Austria	Investors: Bogas (TR), Bulgargaz (BG), Transgaz (RO), MOL (H), OMV Gas International Ltd. (A) Each company holds 20% of the shares of a joint venture, Nabucco Gas Pipeline International Ltd (NIC) who is the project operator. NIC will be the holder of the capacity. Technical operation and maintenance of the pipeline rests with 5 national companies "Nabucco National Companies"	OMV Gas International Ltd. (OGI) acts as a holding company for OMV gas activities. OMV Gas Ltd. (OGG) is a 100% subsidiary of OGI. OGG has a dominant position in the underground storage market (approx. 75%) and operates various transmission pipelines. OGI was the sole importer of natural gas to Austria until fall 2006. Import contracts for Russian gas have recently been passed to the gas companies on the downstream market. Contracts for norwegian gas will follow in 2007. EconGas is a 50% subsidiary of OGI and dominant on the markets for balancing energy, supply to local distributors and supply to large (mainly industrial) costumers (annual demand over 500.000 CMY). No shares available.	Storage: regional (Eastern part of Austria) Balancing energy: regional (see above) Supply of local distributors: regional Supply of large customers: regional	8 bcm/a (stage 1) 15,7 bcm/a (stage 2) 25,5 bcm/a (stage 3) 31 bcm/a (stage 4)	3 - 4.6 billion EUR	Confidential	2011 (stage 1) 2013 (stage 2) 2017 (stage 3) 2020 (stage 4)
Hungary	1	New Infrastructure	Transit	Nabucco	MOL Natural Gas Transmission Plc. 20%	100%	EU, national, transportation	25.5 bcm/a	4.5 B	(confidential) yrs.	2011
United Kingdom	1	New Infrastructure	LNG	South Hook LNG, Milford Haven	South Hook LNG Terminal Company Ltd owned by: Qatar Petroleum (70%), Exxon Mobil (30%)	Capacity owner: Exxon Mobil, 5,4%	Great Britain markets considered: - upstream - wholesale - downstream	10.5bcm/y (Q1 2008) rising to 21bcm/y (2009/10)	1067m	Confidential	Q1 2008
	2	New Infrastructure	LNG	Milford Haven Dragon	Dragon LNG Ltd, owned by: BG (50%), Petronas (30%), Petroplus (20%)	Capacity owners: BG, 3,2%, Centrica, 10,7%	Great Britain markets considered: - upstream - wholesale - downstream	6bcm/y (phase 1) rising to 12bcm/y (phase 2)	No response	Confidential	Late 2007/ Early 2008
	3	Increase / Modification of existing Infrastructure	LNG	Grain 1&2	National Grid Grain LNG, wholly owned subsidiary of National Grid PLC	Grain 1: Capacity owners: BP, 5,1%, Sonatrach, 1,0% Grain 2: Capacity owners: Centrica, 10,7%, Gaz de France, 0,4%, Sonatrach, 1,0%	Great Britain markets considered: - upstream - wholesale - downstream	4.4bcm/y, rising by 8.6bcm/y from winter 2008/9	485m	Confidential	15. Jul 05
	4	Increase / Modification of existing Infrastructure	LNG	Grain 3	National Grid Grain LNG, wholly owned subsidiary of National Grid PLC	No response	Great Britain markets considered: - LNG - LNG+storage - All wholesale	7bcm/y	No response	No response	2010
	5	New Infrastructure	Interconnector	BBL	BBL Company, owned by: Gasunie BBL B.V. 60% E.ON Ruhrgas BBL B.V. 20% Fluxys BBL B.V. 20%	Capacity owner: Centrica, 10,7%	Great Britain markets considered: - upstream - downstream	15bcm/y	500m	Confidential	01.12.2006

3.3. Details on Art. 22 proceedings

Country	Project No. corresponding to 1.3	Status?	Art. 22 Exemption Granted? (combined answers possible)	Overall duration of proceeding from application until final decision by national authority	Description of specific approval procedure (including specific project agreements between regulator & sponsors, regulatory co-ordination, consultations, problems...)	Capacity allocation mechanism (CAM) used?	Percentage of long term (> 1 year) vs. short term (< 1 year) capacity contracts ?	Application of an open season procedure? (If not, proceed with question 1.6)	Where applicable: terms and conditions of exemption	Most important/problematic criteria for granting/denying an exemption & additional remarks
Italy	Rovigo LNG	Decided	Yes, for 25 years Partially for 80 % of new capacity	2,5 months	The request was sent to the Ministry that asked the AEEG for the opinion. The operator asked for a 25 years exemption for 80% of the new capacity. The exemption was granted on the basis of the commitments and information provided in the request, notably exempted capacity allocated to Edison under a 25 year SPA with RASGAS (30% ExxonMobil - 70% Qatar Petroleum)	1) Agreement between the sponsors for the exempted capacity; 2) priority access rights set out by the Ministry (decree 28/04/2006) & access rules set out by the AEEG (resolution no. 168/2006) for the non exempted capacity	100% for the exempted capacity; non exempted capacity has not been offered and allocated up to now	No	No response	According to the law the exemption must be granted for at least 80% of the new capacity and for at least 20 years. The main issue was to assess if the financial risk associated with the investment justified the 25 year exemption requested
	Brindisi LNG	Decided	Yes, for 20 years Partially for 80 % of new capacity	2,5 months	The request was sent to the Ministry that asked for the opinion of AEEG. The operator asked for a 20 years exemption for 80% of the new capacity. The exemption was granted on the basis of the commitments and information given in the request, notably exempted capacity allocated 50% to BG and 50% to Enel on the basis of a SPA with BG. After the decision Enel sold its share to BG, that, after confirmation of the exemption by the Ministry, holds now 100% of the project and the whole exempted capacity	1) Agreement between the sponsors for the exempted capacity; 2) priority access rights set out by the Ministry (decree 28/04/2006) & access rules set out by the AEEG (resolution no. 168/2006) for the non exempted capacity	100% of the exempted capacity; non exempted capacity has not been offered and allocated up to now	No	No response	According to the law the exemption must be granted for at least 80% of the new capacity and for at least 20 years. The sponsors requested the minimum exemption level
	Livorno LNG	Pending	No response	No response	The Ministry has not yet requested the advice of the NRA	No response	No response	No response	No response	No response
	Poseidon IC	Pending	No response	No response	The Ministry asked AEEG for the advice. According to art. 22, paragraph 3, e) of the Directive any decision shall be taken after consultation with the the relevant authorities of Greece.	No response	No response	No response	No response	No response

Country	Project No. corresponding to 1.3	Status?	Art. 22 Exemption Granted? (combined answers possible)	Overall duration of proceeding from application until final decision by national authority	Description of specific approval procedure (including specific project agreements between regulator & sponsors, regulatory co-ordination, consultations, problems...)	Capacity allocation mechanism (CAM) used?	Percentage of long term (> 1 year) vs. short term (< 1 year) capacity contracts?	Application of an open season procedure? (If not, proceed with question 1.6)	Where applicable: terms and conditions of exemption	Most important/problematic criteria for granting/denying an exemption & additional remarks
Austria	Nabucco IC	Pending	No response	No empirical values available	<p>National procedure is a "normal" administrative procedure that has to be closed within 6 months from receipt of the application.</p> <p>Specific problems of the project arise on European level: Project affects 5 states, one being no EU-MS. Coordination between 5 NRA and EC is required. Project requires changes of Romanian and Hungarian national energy law. Application has to be translated into national languages.</p>	Open season is intended. Applicant intends to make a separate OS for shareholders and affiliates (priority capacity allocation up to 50% of the capacity)	NIC will offer minimum 10% short term capacity	Yes Requested by NRA? Yes	No response	<p>Risk assessment: NRA must rely on risk analysis delivered by applicant – NRA can not verify the risk analysis respectively do not know where is the limit for the investor to spend money into a project without an exemption. Exemption from TPA (50%): enhancement of competition on national markets is questionable. Duration of exemption that exceeds payback period: which duration of exemption is justified, what are the criteria? Enhancement of competition: assessment is restricted to competition on national level (NRA cannot judge impact on competition in other MS) – a European view can be achieved by cooperation within the NRA concerned only</p>
Hungary	Nabucco IC	Pending	25 yrs. for Art. 18, 25 (2)-(4)	3 months	<p>Problems:</p> <p>1. Applicant should be a licensee due to the provisions of the Gas Act</p> <p>2. The project is of EU interest. Who will decide? (And: If the NRA/Minister says NO, EU will not even be aware of the project formally, due to the procedure set in Art. 22.)</p>	Open Season	90% (> 1 year) vs. 10%	Yes for 100% requested Yes influenced decision: Yes	No response	No response

Country	Project No. corresponding to 1.3	Status?	Art. 22 Exemption Granted? (combined answers possible)	Overall duration of proceeding from application until final decision by national authority	Description of specific approval procedure (including specific project agreements between regulator & sponsors, regulatory co-ordination, consultations, problems...)	Capacity allocation mechanism (CAM) used?	Percentage of long term (> 1 year) vs. short term (< 1 year) capacity contracts?	Application of an open season procedure? (If not, proceed with question 1.6)	Where applicable: terms and conditions of exemption	Most important/problematic criteria for granting/denying an exemption & additional remarks
United Kingdom	South Hook LNG	Decided	Yes, for 25 yrs.	2.3 months	<ul style="list-style-type: none"> Draft exemption application Consultation Draft Ofgem response General European Commission support for Draft Ofgem response Formal exemption application Consultation Formal Ofgem exemption order 	Auctions for Long Term reservations of capacity, UIOLI	Only LT Long Term: ≥ 10 years	No Requested by NRA? Yes Did O.S. influence the decision? Yes	Effective UIOLI arrangements must be put in place	Although the OS was requested the parties did not undertake one. After taking into account all the information, on balance the exemption was granted. Further documentation including decision letters and consultations are available on the Ofgem website: www.ofgem.gov.uk
	Dragon LNG	Decided	Yes, for 25 yrs.	3.1 months	<ul style="list-style-type: none"> Draft exemption application Consultation Draft Ofgem response General European Commission support for Draft Ofgem response Formal exemption application Consultation Formal Ofgem exemption order EC approves decision 	Auctions for Long Term reservations of capacity, UIOLI	N/A	Yes Requested by NRA? Yes Did O.S. influence the decision? Yes	Effective UIOLI arrangements must be put in place	Further documentation including decision letters and consultations are available on the Ofgem website: www.ofgem.gov.uk
	Grain 1&2 LNG	Decided	Yes, for 20 yrs.	3.6 months	<ul style="list-style-type: none"> Formal exemption application Consultation Formal Ofgem exemption order 	LT reservations, UIOLI, Open seasons	All LI	Yes Requested by NRA? No Did O.S. influence the decision? Yes	Effective UIOLI arrangements must be put in place	Further documentation including decision letters and consultations are available on the Ofgem website: www.ofgem.gov.uk
	Grain 3 LNG extension	Pending	No response	Formal application received Nov 2006 final decision should come out in early March 07 (check Ofgem website for latest details)	<ul style="list-style-type: none"> Formal exemption application Public consultation Consultation with EC throughout process Formal Ofgem exemption order EC may decide to revoke or uphold Ofgem's decision 	LT reservations, UIOLI, Open seasons	Information not yet available (see Ofgem website for latest)	Yes Requested by NRA? No Did O.S. influence the decision? Yes	Effective UIOLI arrangements must be put in place	Some bidders for primary capacity led Ofgem to have some concerns over the benefit to competition. Concerns were only lifted when Ofgem was made aware, in confidence, of the identity of the bidders and their maximum bid over the project's capacity.
	BBL IC	Decided	Partially for Forward flows (UK-NL) for 10 and 15 years (length of the two contracts)	4 months	<ul style="list-style-type: none"> Draft exemption application Consultation Draft Ofgem response General European Commission support for Draft Ofgem response Formal exemption application Consultation Formal Ofgem exemption order Amendment on advice of European Commission 	Open Season, UIOLI	Two blocks of Long-Term contracts: - One starting December 2006 until December 2016 for 2/3 of capacity - One starting December 2007 until 2022 for 1/3 of capacity The remaining capacity in the first year of the project is sold on a first come first served basis	Yes Requested by NRA? No Did O.S. influence the decision? No	Only NL-UK flows exempt Effective UIOLI arrangements must be put in place	Further documentation including decision letters and consultations are available on the Ofgem website: www.ofgem.gov.uk

Summary of projects and proceedings (status as of March 2007)

Country	Decided Proceedings (exemptions granted)		Open Season applied	Pending Proceedings	
	LNG	IC		LNG	IC
UK (Ofgem)	3 (South Hook, Dragon, extension of Grain 1&2)	1 (BBL)	3 yes 1 no	1 (extension of Grain 3)	
Italy (AEEG)	2 (Rovigo, Brindisi)		no	1 (Livorno)	1 (Poseidon)
Netherlands (Dte)	1 (Gate)	1 (BBL)	1 yes 1 n/a	2 (Eemshaven, Liongas)	
Austria (E-Control)					1 (Nabucco-Pipeline)
Hungary (HEO)					1 (Nabucco-Pipeline)
Germany (BNetzA)					1 (NEGP's 3 onshore extensions: NEL, OPAL, KAPAL)*
?	6	2		4	3 (+1)

* update, not mentioned in the questionnaire

There are ten LNG projects in total. Six exemptions have been granted, four are pending. In addition, there are six proceedings for four interconnector projects, two decided and four pending.⁷ Most exemptions are granted for 20-25 years; only two are limited to ten and fifteen years. Capacity varies from 3,8 bcm/a to 31 bcm/a. Some exemptions are limited to 80% of new capacity (Italy). Open seasons are often used to identify market demand and allocate new capacity. Other capacity allocation mechanisms include auctions for long term reservations. The congestion management procedures applied is UIOLI. Most contracts are long term contracts. Where short term contracts are possible their share is about 10%. In six projects, an open season procedure was applied, in three cases without a request by the NRA. Occasionally, as for example in Italy with respect to all infrastructure under Art.22, the application of UIOLI arrangements has been requested. In most cases, the market share of capacity owners is lower than 20%.

Also, from the results of the survey and from explicit RAE comments one can derive that dealing with the risk assessment of a project is a crucial and difficult issue that needs to be further analysed. Furthermore, the approach should be made consistent among the regulators (to avoid unequal treatment of investors).

⁷ The decision on the Poseidon Pipeline was finalised in May 2007. The numbers already include the new German project.

3.4. Conditions on Open Season procedures

Only two respondents answered questions on conditions for applying open season procedures.

For the Austrian part of the Nabucco-Project, the conditions on open season procedures are still open, but UIOLI mechanisms (which are to be specified within the transportation contracts) were mentioned as envisaged CMP for unused capacity.

For most projects in the UK, Ofgem delivered detailed information on the subject.

3.5. Applicable Criteria for Art. 22 treatment

This section summarises the responses to the criteria currently set out by Art. 22.

Criterion: How do NRAs interpret “major” and “new” infrastructure?

On temporal application, there are different interpretations: Some respondents define new infrastructures as those that have not been completed by the entry into force of the Directive, others refer to the date of application of a national law or a functional approach.

With regard to the types of infrastructures that fall under the scope of Art. 22, few NRAs identify gas storage or at least interconnectors as “major” per se. Ofgem cited a threshold of costs that exceed EUR 210 million.⁸ According to another opinion, the classification of infrastructure as “major” depends on the amount of capital to be invested in the specific infrastructure in relation to the invested amount of capital in existing infrastructure of the same or similar kind. RAE also links the definition of “major” to the corresponding size of the market resulting in a case-by-case decision.

Criterion: How to measure “enhancing competition”?

All respondents define the relevant market, analyze the competitive conditions of this market (specifically, NRAs look at the investor’s market share⁹) and the possible impact of the investment on competition. RAE, for example, suggests competition tests (including, for example, the testing of effects on resulting market share of an Art. 22 applicant in the destination market on upstream” or “shipper-to-shipper” competition) to reveal the impact on competition.

Criterion: How to measure “enhancing security of supply”?

All NRAs refer to the diversification of gas supply sources. RAE also points out that diversification of sources could mean “diversification of routes” and also “diversification of suppliers”.

⁸ EC’s explanatory note also mentions a financial threshold for “major” projects: a capital cost of more than €10 per connected customer. Also, the costs of projects already granted an exemption can be used as an indicator. (cf. table 3.2)

⁹ Note that exemptions are usually not granted to anyone with more than a 20% market share (c.f. 3.3 summary)

Criteria to measure the level of risk attached to the investment & at what point is the level of risk assumed to be too high?

Many respondents demanded a risk evaluation from the applicant. The only relevant risks with respect to Art. 22 applications are economic risks (for example risks of investment with sunk costs or large investments in combination with low market demand).

In addition, the length of the payback period and the uncertainty surrounding the national market developments over such a period must be examined. The risk is considered too high, if during the payback period there is an important risk of the facility not being used according to plan or rather if the applicant encounters problems finding lenders to ensure the project's financing. Furthermore, the profitability of the infrastructure is compared with the profitability considered by the NRA in the definition of the tariff for non-exempted infrastructures.

In RAE's estimation, the risk criterion can be set in relation to the question "Who should bear the risk of the destination market": the rate payers or the Art. 22 applicants?

Verification that the infrastructure is owned by a natural or legal person who is separate at least in terms of its legal form from the system operators in whose system that infrastructure will be built:

The applicant has to provide documentation according to the legal structure concerned.

Verification that charges are levied on users of that infrastructure:

The NRAs look at documents, tariff sheets, contracts showing terms with the users or publications. In particular, where infrastructure is partially exempted, there should not be any cross subsidy between the users of the exempted part and the users of the non-exempted part.

Examination that a possible exemption is not detrimental to competition or to the effective functioning of the internal gas market:

Those respondents, who do not think that an infrastructure investment that enhances national gas-to-gas-competition (which is required to obtain an exemption) automatically enhances the competition of the internal gas market, look at the general impact of the investment on the market and on the particular positions of the project partners. Essential **outcomes are HHI¹⁰ and market shares** expected over the **duration of the exemption**. NRAs have to examine whether there is room for free TPA, full transparency for allocation or (non-)usage of capacity, and whether non-discriminatory rules are applied. Furthermore, they have to ensure that interconnector and import terminal operators are bound by relevant technical, safety and contractual rules and responsibilities.

Examination that a possible exemption is not detrimental to competition or to the efficient functioning of the regulated system to which the infrastructure is connected:

¹⁰ Herfindahl-Hirschmann-Index

The NRAs examine whether Art. 81 EC or Art. 82 EC are infringed upon and ask for a binding declaration by the investor and the operators of infrastructure to which the considered infrastructure is connected and examine whether the infrastructure is in line with national and/or European **technical standards**. What is more, NRAs examine if the new infrastructure creates congestion on existing regulated infrastructure and if the project company will provide the relevant information on the project design and anticipated flows to the TSO in the destination market. NRAs consult with the TSO to determine if the project will not cause constraints on the regulated system requiring investments which could have a significant adverse effect on the regulated tariffs for the existing system and if the project economics are not unduly influenced by distortions in the tariff system on the regulated infrastructure (**inefficient bypass**).

As CRE states in its survey response (partly in line with AEEG comments), a major part of infrastructure will almost always create potential congestions in adjacent systems and the need for collateral investment in capacity and capacity allocations. The question of financing the removal of congestion needs to be addressed.

Extra criteria:

Questions relating to capacity allocations are of high importance. Firstly, **open season** procedures are mentioned. Moreover, as seen in Italy, sponsors could (upon a request by the relevant authorities) be obliged to increase the infrastructure's capacity reserved for TPA. The operator has to grant TPA for the unused capacity if users of the exempted capacity fail to use the whole capacity and the Ministry and the NRA are informed. The transfer of the exempted capacity among users, except in the case of spot transfer, must be authorized by the Ministry and fulfil the criteria of Art. 22. Also, where an exemption is granted for transmission infrastructure, possible backhaul flows should not be automatically included in the exemption.

The operator of an exempted infrastructure, for example in the UK, is expected to initially offer capacity to market, to have effective secondary trading and anti-hoarding mechanisms as well as to provide information that should be available to the regulator and/or published.

Improvements:

More detailed rules on treatment of applications comparable with the draft guidelines in the Energy Community (NGIIR) are desired. Some NRAs advocate closer cooperation (or even rules for collaboration on cross-border projects) between the NRAs concerned and the European Commission. The Commission's interpretive note is considered very useful.

As one possible alternative, CREG has indicated the following:

Sometimes, subtle changes can have an important impact on the investor's decision. Therefore, as a complement to the Art. 22 regime, Belgian legislation foresees derogations granted by art.15/bis §3 (B), subject to which a special regime may be granted while the regulator continues to regulate that regime.

According to the Belgian experience, operators (investors) do not always prefer non-NRA involvement. Working under the umbrella of the regulator may be comfortable for operators (investors). Indeed, art.15 bis §3 has been developed to meet market needs, esp. concerning predictability/certainty.

Art. 15 bis §3 may grant derogations regarding:

1. The duration of the regulated tariffs: fixed tariffs for more than 4 years
2. The return on investment

Long-term contracts may be possible, but anti-hoarding, UIOLI, secondary market, etc. (cf. CMP) apply and are supervised by the regulator.

From the Belgian point of view, the issue of multi-annual tariffs may be very important for the breakthroughs in investments. This approach is based on the philosophy that operators (investors) seem particularly interested in returns and predictability/certainty and not in the selection of who may use the infrastructure. Whereas the return on investment is one aspect, predictability/ certainty are at least equally important. This has been illustrated by the extension of the Zeebrugge terminal. Other current projects show that shippers may be reluctant to subscribe to long-term contracts, where they do not have the security of long-term tariffs. This approach ensures that non-discriminatory/transparent TPA is upheld as a basic right.

3.6. Conclusions

There have been a total of eight exemptions granted so far¹¹. Eight others are pending with the responsible regulators. If this practice continues, a significant amount of exempted infrastructure will develop over the next years. From the data received, it can already be noted that not only is there a widespread application of Art. 22, but also a varying practice in the interpretation and application of Art. 22.

3.6.1. Varying practice

Diverging practices in the application of Art. 22 could be identified in particular with respect to the following aspects (cf. tables):

- Definition of market power along with definition of affected markets
- Definition of criteria required by Art. 22
- Duration of exemption
- Type of exemption granted
- Conditions attached to exemption
- Share of exempted capacity
- Role of short-term contracts

These varying practices can lead to **diverging frameworks for competition** in Member States and therefore pose a **barrier to the single competitive European market for natural gas**. As a result, investors could be incentivised to invest where exemptions are most easily granted and conditions are most favourable, rather than where infrastructure is actually needed. Ensuring consistency in the regulators' approach would contribute to avoid "**forum shopping**" by investors and would also ensure equal treatment of investors.

¹¹ Includes only exemptions granted by regulators (UK and Italy). Where other authorities, e.g. ministries, are competent, data has not been submitted.

3.6.2. Widespread application

All applications treated by NRAs were eventually granted (most of the exemptions granted were subject to certain conditions attached). Only in one case did the European Commission exercise its right under Art. 22 para. 4 to request amendments to a decision granting an exemption (i.e. BBL interconnector). There is no case where the Commission asked to withdraw an exemption grant. Should this practice of granting exemptions for all major new infrastructure for which they are requested (as well as granting the exemptions more extensively) continues, this could lead to a difficult co-existence of exempted and non-exempted infrastructures and, therefore, could create a barrier to the creation of a single European market.

3.6.3. Way forward

Based on these findings, a more defined and EU-wide consistent approach for assessing exemption requests should be elaborated. Guidance on the conditions that should be put in place if an exemption is granted should also be developed. Therefore, and following the EC's request, an ad hoc task force has been established to develop guidelines for the treatment of Art. 22 or alternatively, to propose changes/amendments to Art. 22 itself. These guidelines (or the proposal for Art. 22 amendments) will build upon the draft NGIIR and the earlier work of the former workstream "TNI," which will result in a separate paper.