

**EREGEG Position paper on TPA to Storage**  
**Version 2004-10-06**

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

The European Regulatory Group for Electricity and Gas (EREGEG) set up a “Focus Group” in charge of developing in 2004 guidelines for access to storages and preparing a position paper on this issue.

The “Focus Group” issued a first set of guidelines for access to storages which was presented at the Madrid Forum of 8-9 July 2004 together with a first position paper.

This Madrid Forum invited the regulators to present a new document on GGPSSO at the next Madrid Forum. This second position paper which accompanies the revised paper on guidelines for access to storages makes a presentation of the EREGEG position while taking into account the provisional outcomes of the ongoing discussions between the different shareholders.

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

Article 19(1) of Directive 2003/55/EC (the Gas Directive) gives the right of access to storage, although leaving to Member States the decision as to whether a negotiated and/or regulated access regime should be implemented.

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

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

The document on “Recommendation for the Implementation of TPA to Storage and Linepack”, approved by the CEER General Assembly on 5<sup>th</sup> of December 2003, addressed the issue of the choice between nTPA and rTPA and concluded that, nTPA should prevail only in fully competitive environments. In the absence of a verifiable level of competition, rTPA should be adopted and the national regulatory authorities would be in charge of granting fair access conditions. However, since the results of both regimes (nTPA or rTPA) *should be equal, in order to comply with the principle of non-discrimination and competition embedded in the Directive* (Interpreting Note), a minimum set of core conditions is desirable on a European basis. This minimum set should apply irrespective of the choice for either rTPA or nTPA.

Competition does not in itself rule out the importance of guidelines for good TPA practice for Storage System Operators (GGPSSO) also because nTPA may be adopted in countries where competition in the flexibility market is not fully functioning and the applicability of the GGPSSO should not be subordinated to an assessment of the level of competitiveness of the flexibility market. Moreover, the Gas Directive imposes TPA and it helps to provide guidelines on the types of outcomes in terms of effective access to storage that would be expected even in truly competitive markets.

However, if SSOs consider that their storage facility is subject to sufficient competitive pressures, then it should be incumbent upon them, on a case by case basis, to demonstrate that arrangements at their storage facilities are sufficiently competitive and meet the guidelines in terms of the desired outcomes.

Both in cases of rTPA and nTPA, national regulatory authorities should ensure that the SSOs do not discriminate between storage users, i.e. that there is no differential treatment of affiliated company and effective competition: in its draft discussion paper on “Negotiated and regulated TPA for storage” presented at the 8-9 July 2004 Madrid Forum, the Commission stated that “Where storage still represents an essential facility, the obligatory requirement of effective, non-discriminatory access will not be achieved without clear regulatory oversight. In non competitive storage markets therefore, in the event that a Member state chooses negotiated TPA, national regulatory authorities will have to make careful use of their mandatory powers under Article 25 of “ensuring non discriminatory, effective competition, and the efficient functioning of the market, monitoring in particular the access conditions to storage”.

## **2) Public Service Obligations (PSOs) obligations**

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

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

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

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

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

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

### **3) Non discrimination and confidentiality of information**

Since storage facilities can be either integrated with the production or supply branch, or operated by legally unbundled Storage System Operator (SSO), or operated by a combined Transport Service Operator (TSO) and SSO, confidentiality shall be guaranteed. This confidentiality provision is essential to ensure non discrimination between storage users in favour of the competitive activities of the integrated company. Actually, the SSO is committed to confidentiality provisions of Directive 2003/55/EC, Article 10. This concern can be addressed by ensuring that information available to the SSO concerning its storage and processing business remains confidential.

In particular:

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

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

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

The Gas Directive makes two exceptions to TPA to storages<sup>1</sup>.

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

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

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

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

Each storage facility has its own technical (operational) constraints with associated costs. TPA to storages should not undermine the well functioning of these facilities. Under these technical constraints, storage operators have to offer to the users the largest range of storage services.

This includes offering bundled and unbundled services on the primary market, in an appropriate range if necessary due to the abovementioned constraints.

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

Congestion management procedures are necessary due to the fact that in some places, gas storage capacity may be scarce. The SSO shall actively endeavour to discourage capacity

---

<sup>1</sup> Another specific exception in the 2<sup>nd</sup> IGM Directive relates to the application of article 22 for new investments which includes investments in new storage facilities or to significant increases of capacity in existing infrastructures. Under this article and providing that the required conditions are met, these new infrastructures may be exempted from some provisions of the directive, mainly TPA.

hoarding. If in spite of secondary market mechanisms, capacity contracted under existing storage contracts remains unused and significant and prolonged contractual congestion occurs, the national regulatory authorities may require the SSO to introduce additional mechanisms to free up this capacity.

## **6) Transparency requirements**

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

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

Information relating specifically to a storage user's account must be kept confidential. Where a SSO considers that it is not entitled to make public all the data required, it shall provide a clear evidence to the relevant national authorities and seek its authorization to limit publication. The SSO shall submit for approval to the national regulatory authorities any request not to publish specific data (e.g. for reasons of costs or to avoid any potential market abuse). The relevant national authorities shall grant or refuse the authorization on a case by case basis and publish the substantiated reasons. This assessment should be renewed on a regular basis.

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

Where regulated, tariffs should reflect efficiently incurred costs of access to storages and include a fair return on investments. Tariffs should also avoid cross subsidies between storage users and promote efficient use of storage.

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

Negotiations should also happen in a time frame compatible with commercial needs.

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

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

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

### **8) Storage penalties**

Storage penalties are a possible tool to ensure that storage users and the SSOs respect their contractual obligations. These storage penalties may apply to:

- SSOs for compensation to be paid to the storage users in the event that the SSO fails to fulfil contractual obligations, as set out in the storage code/contract; and/or to
- storage users to provide effective incentive to ensure that they nominate and use storage capacity consistently with the capacity rights they have procured either on the primary or secondary market.

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

### **9) Implementation**

Storage users have to comply with the provisions of the Gas Directive which came into force on 1<sup>st</sup> July 2004. In addition, various SSOs are already offering number of services to storage users.

In these conditions it seems reasonable that SSOs comply with the provisions of the GGSSO by 1<sup>st</sup> April 2005; if SSOs have problems in implementing measures envisaged under §3 ("necessary TPA services") and § 6 ("transparency requirements") of the proposed guidelines, in particular with regard to IT systems, they shall provide an explanation to the relevant national authority setting out the problems in implementing by this deadline and present a concrete action plan for the implementation taking into account, if applicable, the size of the company.