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ERGEG public consultation on
"Draft Guidelines on Article 22"

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Dear Mrs. Geitona,

we appreciate the opportunity to offer our opinion on "Draft Guidelines on Article 22."

EnBW would like to emphasize the critical role for an adequate and clear framework for facilitating and incentivizing efficient investment both for the development of competition and for helping to ensure security of supply. Article 22 provides the European gas market with an essential tool to facilitate the much needed investments. It is questionable, whether such investments would have been brought forward as efficiently and effectively under a regulated regime. It should not be the goal of the guidelines to reduce the granting of exemptions per se, as it can be assumed that exemptions that have been adequately assessed and granted on the basis of the Art. 22 criteria can be beneficial for gas markets. Therefore the guidelines should not focus on a general restriction of widespread application of Art. 22 because regardless of the amount of exemptions granted in the European Union, it can be assumed that these decisions are necessary for the relevant projects for the enhancement of competition and security of supply. Instead the guidelines should rather substantiate Art. 22 by creating a common understanding of the exemption criteria and the true purpose of the exception rule.

Considering the fact that Article 22 and its requirements leave much room for interpretation, EnBW believes that guidelines on Article 22 can certainly provide more consistency in the application of the aforementioned regulation and are therefore capable of increasing legal and regulatory certainty. The guidelines that substantiate Art. 22 could therefore create the foundation for a better environment for investments in new infrastructure which are necessary to meet the increasing demand in natural gas and further diversify the energy supply in Europe.

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EnBW further offers the following comments in response to the issues raised in the consultation paper "Draft Guidelines on Art. 22":

Do you consider the described general principles and guidelines appropriate to achieve a consistent and transparent framework for competent authorities when deciding on exemption procedures?

Regardless of the following comments EnBW believes that the guidelines are generally appropriate to achieve a common approach to exemption prerequisites as well as a common application of the exemption criteria of Art. 22. By the very nature of a European Directive the exceptional rule in Art. 22 left much room for further design. Therefore any further substantiation of the issues mentioned in Art. 22 and the exemption procedure itself are helpful to achieve a consistent framework in which exemptions can be granted Europe-wide on a common legal basis.

To increase the transparency of the decision making process on exemptions the responsible regulatory authority should demonstrate how the guidelines for Art. 22 have applied.

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

EnBW believes that Art. 22 is regarding its scope of eligible infrastructures and its incentives on investors to tackle the problem of lack of willingness to invest due to regulation uncertainty in the transition.

Storage and LNG facilities, as well as interconnectors will play an increasingly critical role in the facilitation of a single European Gas Market. Especially regarding security of supply and energy diversification investments in new infrastructures should be incentivized by reducing regulatory risks burdened on gas investors. On the contrary, gas networks should not be allowed to apply for TPA exemption as these should always be subject to regulated TPA. Furthermore – keeping the requirements of Art. 22 in mind - it is quite unlikely that a granted TPA-exemption of a network could not be detrimental to competition.

Do you consider open season (or comparable) procedures an important tool in assessing market demand for capacity with respect to determining the size of the project applying for exemption, as well as in the subsequent capacity allocation? Should Open Season (or comparable) procedures be mandatory?

Provided that transparent market consultations or assessments are conducted, Open Season or comparable procedures can be a very important tool to adjust the size of a project in respect of its technical limits. Open Season procedures can give additional new entrants access to the project that they initially might not have had and also increase the publicity of the project and therefore facilitate commercialization of the project capacity.

Regardless of these positive effects of an Open Season, these procedures should not be mandatory for the applicant to receive a TPA exemption. Since each project

and the specific (base) criteria for its realization are unique, an over-all obligation for Open Season would not do justice to the intentions of exemption procedures provided by law. For example, mandatory open seasons would facilitate dominant market players to book capacity in projects initiated by new entrants which could result in negative effects on competition. Furthermore some infrastructures – such as storage facilities, which in most cases de facto lack the character of a natural monopoly – may not make it necessary to offer capacity of the asset concerned, as geological circumstances offer the market participants the option to initiate a storage project by themselves.

In case of interconnection related Open Seasons, it should be guaranteed that the involved TSOs coordinate the proceedings particularly timetables. Without coordination uncertainties prevent potential shippers to participate in such open seasons.

Should Open Seasons also be used to allocate equity?

The rationale of exemptions from third party access according to Art. 22 is to promote investments required by the market. In other words exemptions are to offer legal certainty to investors to secure their business plan and alleviate their investment decisions. Any dilution of investors equity in the applying project would be counterproductive and would distort if not hinder any investment decision which is aimed at on the basis of the exemption application. In addition it can be assumed that the allocation of equity would have no impact on any of the 5 criteria required by the existing Art. 22, and notably on the enhancement of competition in gas supply and on the enhancement of security of supply.

Open Season can therefore not be considered as an appropriate tool for determining the allocation of equity within an investment project.

Some stakeholders think that Art. 22 should be applied differently to LNG terminals as they may be generally better suitable for enhancing competition and security of supply than other types of eligible infrastructure. What is your point of view on this? If you agree, how should this be reflected in the guidelines?

EnBW believes that a differentiated approach for LNG facilities is not necessary. Yet it is certain that new LNG infrastructures will in most cases fulfill the five criteria of Art 22. According to estimates indigenous gas production in the EU is steadily going to decline. This will lead to an increasing dependency of imports in the next years. In order to fill the supply gap, further gas infrastructure is needed. Particularly LNG facilities will help to enhance diversification of sources of supply and simultaneously decrease dependency from only a small number of supplying countries.

In order to be in the position to use the potential of alternative sources, new LNG projects should principally be exempted from regulated TPA. As such projects are capital intensive and pay-back periods are accordingly long, project companies need to have planning security. Long-term contracts grant consistent payment flows. A number of regasification facilities would probably not be actualized under a regulated TPA regime. In order to avoid a negative impact on competition non

discriminatory and transparent practice of Open Season procedures should consequently be applied from the start of a project. This offers new market participants the possibility to receive capacity rights.

Are the described criteria for assessing whether the exemption is not detrimental to competition or the effective unbundling of the internal gas market or the efficient functioning of the regulated system to which the infrastructure is connected, appropriate?

In most cases the applicant will not possess the necessary information to be able to demonstrate the impact of the new infrastructure – let alone the exemption itself. Generally the applicant will only be able to supply the regulatory authority with estimates or views. Upon applying for an exemption it should be the responsibility of the regulatory authority to seek views of all market participants to understand what the impact of the exemption may be.

EnBW would further like to highlight that regulatory authorities should strongly differentiate between dominant market players and newcomers applying for TPA exemption when assessing the positive effects the investment will have on competition in the gas market as well as when assessing the impact of the exemption itself on competition. It can assumed as a matter of principle that any exemption granted for projects of new market entrants – that would only invest provided that TPA exemption is granted – cannot be detrimental to competition.

This issue is only addressed briefly in the guidelines that the legal requirements of Art. 22 make it very unlikely that the exemption of a dominant market player is not considered detrimental to competition. This assertion is plausible as exemptions and in particular wide ranging TPA exemptions would have a negative impact on competition by further cementing the already dominant position of the dominant market player. And although the criteria for Art. 22 should be applied equally to new-players and incumbents, the guidelines should stress the importance of applying exemptions on newcomers to offer new market players regulatory certainty for a noteworthy period of time to incentivize the entry of new market players in the gas market.

Especially if the only effective means of market entry is by establishing new infrastructure, e.g. due to lack of available capacity on existing infrastructure, the granting of an exemption should generally be considered as justified.

To what extent should consultations with neighbouring authorities be done?

Under consideration of the relevant gas market and in the light of the fact that gas infrastructure projects will increasingly have a cross-border effect a coordination between authorities is inevitable to ensure a smooth and transparent assessment for an exemption from TPA. The necessity of regulatory coordination is most evident in investments in interconnectors. As has been considered by the EC Draft of the Third Energy Package regarding cross-border projects, consultation and decisions should be made jointly by the competent authorities in the directly connected markets when assessing the effects of the project on the relevant gas market.

In case the investment in a European Member State has the potential for a significant impact in a different European Member State, the competent regulatory authority of the effected country should be consulted along with market participants to assess the possible enhancement of competition. These views should be taken into account by the competent authority deciding on the exemption application in the country the infrastructure is being constructed.

Parts 3.3.1.1 and 3.3.1.2 of the proposed guidelines deal respectively with partial and full exemptions. Do you consider the described decisions (partial/full exemption) appropriate in safeguarding the goal of Directive 2003/55/EC in making all existing infrastructure available on a non-discriminatory basis to all market participants and safeguarding the principle of proportionality?

Since exemption decisions should be made on a case-by-case basis and the different possible options of designing partial exemptions is practically inexhaustible, the guidelines avoid going focusing on details of partial exemptions. Any guidelines would probably only limit the regulatory authority in a case-by-case assessment in the exemption application procedure.

To increase the transparency of the exemption application procedures the regulatory authority should include any interested effected market participants in form of consultation procedures. EnBW has noticed such an approach in UK where Ofgem has informed market participants in advance of their planned exemption decision and given other market participants the possibility to offer their opinion in a public consultation.

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

Although incumbents also possess the right to apply for an exemption according to Art. 22 we concur with the statement of the guidelines that requirements of Art. 22 "make it very difficult for dominant market players or their affiliates to receive TPA exemptions and in particular wide-ranging TPA exemptions as there is a significant risk that the granting of an exemption in such circumstances would have a negative impact on competition by fortifying an already dominant position in the relevant markets". Yet exemptions for new infrastructures of incumbents and their affiliates should not be excluded per se, as exemptions with imposed conditions – so called "partial exemptions" – should also be taken into consideration for incentivizing new investments. For "partial exemptions" could offer smaller market participants or new entrants the possibility to purchase capacities in the new infrastructures that they possibly could not have received under normal circumstances.

Do you agree that under certain circumstances, deciding authorities should be entitled to review the exemption? How can it be assured that this does not undermine the investment?

EnBW stresses the fact any review of the exemption would distort the decision the exemption is originally founded on and there decrease regulatory certainty. The latter is essential for any investment decision. A mandated requirement to review an exemption after a defined period of time will seriously undermine investment. The possibility of reviewing an exemption should rather be restricted for cases in which a breach of Art. 22 criteria is suspected by the regulatory authority, hence making a reconsideration of the requirements of the Art. 22 criteria, upon which the exemption decision was founded, inevitable.

To ensure transparency and planning reliability any review of the exemption should not be taken into account without first consulting the project owner.

EnBW hopes that these comments prove to be useful in the further development of the ERGEG paper concerning Draft Guidelines on Art. 22.

Sincerely,

Philipp-Nikolas Otto