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Response to ERGEG's Public consultation on Draft Guidelines on Article 22

The development of new infrastructures is crucial for increasing competition, achieving security of supply and deepening market integration, all necessary for creating a Europe-wide market. The current legislative framework allows for investment that can be excluded, under Article 22, from some or all of the requirements of Third Party Access (TPA). Exemptions that are properly assessed and granted for genuine reasons will be beneficial and should be welcomed by competent authorities and in this respect, the widespread use of Article 22 should not in itself be seen as problematic. Indeed Article 22 has provided the Directive 2003/55/EC with a major tool that has facilitated significant and much needed investment in the European gas market. It is questionable whether such investment would have been brought forward as efficiently and effectively under a purely regulated approach. The objective of the guidelines shall not be to reduce the number of exemptions given per se but rather, as stated in the ERGEG document, to provide harmonized guidance on the best process to apply the criteria of Article 22.

Incorrect application of Article 22 can create problems (e.g. exemptions being given when the impact on competition is negative) and distort investment decisions. Guidelines that provide certainty and consistency in the application of Article 22 will help lower perceptions of risk and ensure investment decisions are not distorted and therefore should be welcomed. It is crucial however that the guidelines do not break the fundamental link between the underlying competition assessment and the form and nature of any exemption.

The focus of the guidelines should therefore be the '5 tests' of the application of the 5 criteria of Article 22, rather than prescribing general conditions or requirements that will dictate the form of any exemption in advance, as this will create barriers to investment. Each application should be assessed on a case-by-case basis and any conditions or requirements imposed should be the minimum necessary, particularly for new entrants, to mitigate competitive concerns.

1. **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 ?**

   Notwithstanding the comments below, the combination of general principles and more specific guidelines provide a good basis for developing a robust framework for Article 22 exemption decisions.

   Once the guidelines have been agreed, competent authorities should demonstrate how they have used them in coming to decision on exemptions.

   However, we would like to stress that principles and guidelines, whatever they may be, shall not replace the initial reference to the five conditions of exemption described in the article itself. Their assessment shall remain the core of the procedure when considering Article 22 applications.

   ERGEG (ACER) could have a role to report on the experience of the use of Article 22 in this respect.

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

No.

It is crucial that the scope of Article 22 is not extended to include national transport infrastructure as it should always be subject to regulated TPA to ensure non-discriminatory access.

We agree that Article 22 should be clarified to ensure that new technologies that serve the same purpose as those currently listed can potentially apply for an exemption. This will help to make Article 22 'future proof'.

3. 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 an exemption, as well as in the subsequent capacity allocation ? Should open season (or comparable) procedures be mandatory ?

Open Season or comparable procedures consisting in transparent market consultations or assessments can be a very useful tool to maximise the size of a project within its technical limits:

- *It can optimise the economics of the project if there is a true scale-effect on investment and thus facilitate the investment decision by investors,*
- *it can provide access to additional new entrants,*
- *it can maximise the publicity of the project and thus facilitate the commercialisation of the project capacity.*

However, running an Open Season should not be a mandatory condition to get a TPA exemption, for the following reasons :

- *As each project is specific, the need for an Open Season should be analysed on a case by case basis and if it is needed, then it should be tailored for the project.*

- *Open Seasons have a cost in terms of increased organisational complexity.*

- *It might happen that Open Seasons result in adverse effects on competition and on project completion.*

- *If there is no more capacity available in a project meeting the five criteria of Article 22 and if technical constraints prevent from adding capacity, the initial subscribers would be compelled to reduce their own capacity to allow a compulsory Open Season to be held.*

In addition, it is of first importance that such open seasons or market consultations, when suitable for a project applying for an exemption, should not necessary follow all ERGEG's GGPOS : projects applying for an exemption are often large and high-risk investments that require to optimise and fine-tune their capacity commercialisation to secure their business plan. These projects therefore need the flexibility to adapt their commercial offers to the diversity of subscribers and to the needs and evolutions of the market.

4. Should open seasons be used to allocate equity ?

TPA Exemptions are powerful tools to promote investments required by the market, i.e. these are tools to help investors to secure their business plan and thus to facilitate their investment decisions. Any dilution of investors equity in the applying project would be counterproductive and would hinder the investment decision by investors which is aimed at through the exemption application. In addition, equity allocation would have no impact on any of the 5

criteria required by the existing Article 22, and notably on the enhancement of competition in gas supply and on the enhancement of security of supply.

5. **Some stakeholders think that Article 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 ?**

   The impact of a particular infrastructure on competition and security of supply will depend on the nature of the investment and the respective market conditions and structure. If the competition assessment is undertaken properly it should identify whether an LNG project is particularly beneficial to competition and security of supply. The application of Article 22 should be 'technology neutral' otherwise there is a risk that investment decisions will be distorted.

   However the competition assessment must take account of the relevant issues and further guidance may be necessary to ensure that different types of infrastructure are assessed in the right way.

   It should not be assumed for example that different infrastructure types will have the same impact on the various criteria. Further guidance should be given on the need to assess the different impact that alternative infrastructure types may have on the development of competition and security of supply. It is also necessary to consider carefully the relevant market for the infrastructure type in assessing the exemption. The underlying risk characteristics associated with different infrastructure types may also vary. However, this is not to say that all projects of a particular infrastructure type will have the same impact or risk characteristics as this will differ depending on the individual project and the relevant market for the proposed investment and as such there should be no 'generic' different treatment applied for a particular infrastructure type.

6. **Are the described criteria for assessing the effects of the investment in infrastructure on enhancement of competition in gas supply appropriate ?**

   The list of criteria seems exhaustive and appropriate except for the following item : "existing and (other) potential competitors ; comparing and ranking the proposed project with other existing and planned project". It is impossible for an applicant to provide information about his competitors in the market and about other projects. This information is not available to him.

   Among "legal and other barriers to market entry", congestions shall be particularly taken into account.

   We fully support the point of view that "competent authorities should remember that there is a greater likelihood that competition will be enhanced when an exemption is given to a new entrant". This is the reason why the assessment of enhancement of competition in granting an exemption to a new entrant should be simplified. In this case, the range of market analysis requested should be considerably reduced. It might even be restricted to a single question : the one of the maximum percentage of capacity that might be allocated to an incumbent in the project.

7. **Are the described criteria for assessing the effects of the investment in infrastructure on enhancement of security of supply appropriate ?**

   The described criteria are appropriate although we would like to add diversification of suppliers, as this will enhance security of supply.

8. **Are the described criteria for the risk assessment appropriate ?**

   It is difficult to see how regulators will be able to develop a hypothetical regulated benchmark to compare against the prospective exempted infrastructure to understand whether the level of risk is such that the project would not go ahead without an exemption. We think that it is not

possible to compare the financing of such projects under a system of regulated TPA with the financing under TPA exemption. Indeed, information concerning the regulated gas network, tariffs and demand is not known over the lifetime of the proposed project.

The project sponsor should be able to demonstrate to the regulator the underlying level of risk associated with its plans in providing the data needed - to the extent that they are strictly related to the project – including through sensitivity analysis of its business plan. All information resulting from the market analysis has to be kept highly confidential. Due to the large number of scenarios, it might though be impossible for the applicant to provide all corresponding figures.

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

The applicant would not have all of the necessary information available to him when he applies for the exemption to be able to demonstrate what the impact may be on the connected infrastructure – although he could provide initial estimates/views. It should be the responsibility of the regulatory authority, when consulting on the exemption application, to seek the views of all market participants – including owners of connected infrastructure – to understand what impact the exemption may have.

10. **To what extent should consultations with neighbouring authorities be done ?**

Coordination between authorities dealing with the relevant market is crucial to ensure a smooth and transparent assessment process for an exemption. Especially, in the case of an interconnector, consultation and decisions should be made jointly by the competent authorities in the directly connected markets.

For other infrastructure, it is important to look at the 'relevant market'. If the investment in one country has the potential for a significant impact elsewhere than the relevant competent authorities should be consulted along with market participants. These views should be taken into account by the 'host competent authority' in deciding on the exemption application. However, this should not make the exemption procedure a lot more complex.

11. **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 conditions (partial/full) 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 ?**

The guidelines should not describe in detail the form of partial exemption that could be used as this should be determined by the underlying competition assessment on a case-by-case basis – and the options identified are not exhaustive. Indeed a 'full exemption with conditions' is effectively a form of partial exemption. It would be better if the guidelines identified that there is a range of possible options (or 'tool kit') available to a regulator to mitigate competitive concerns including the use of partial exemptions and/or specific conditions or requirements. Different combinations of full/partial exemptions and conditions/requirements will have different risk/return profiles and each should be specific to the individual project subject to some overall guidance. Anything stronger risks breaking the link with the underlying competition assessment.

In any case, all conditions that increase risk will result in pushing up the required rate of return – this includes unreasonable limits on own use and on the duration of the exemption.

Conditions that help maximise capacity utilisation can be beneficial as long as they are not over regulated – e.g. congestion management/anti-hoarding but these should be developed by the infrastructure operator and subject to regulatory approval.

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

Incumbents, along with other investors and in a non-discriminatory manner, should be allowed to apply for an exemption. Whoever the investor may be, his project should be granted an exemption, on condition that it satisfies all the five criteria of Article 22.

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

Regulatory certainty is crucial for investment decisions. Any mandated requirement to review an exemption after a defined period of time will seriously undermine investment. That said, a competent authority should always have the option of reviewing an exemption but only if market conditions and structure have changed in a way which means that its continuance is now detrimental to competition and security of supply. Rates of return in excess of those anticipated under the initial project plans are not sufficient evidence to constitute a review of the exemption.

If the review of exemption becomes the rule, this situation will increase the uncertainty and therefore the risk for investors (that will require a higher rate of return)and the process of such a review will have to be defined in a transparent and ex ante manner, especially regarding the criteria on which such a review could happen.