

**Draft Guidelines on Article 22
A contribution from IFIEC Europe**

Introduction

Directive 2003/55/EG concerning common rules for the internal market in natural gas and more particularly Article 22 thereof aim at promoting effective competition and security of supply by creating incentives for efficient investments in new infrastructure projects, while at the same time recognising the need for non discriminatory access to relevant infrastructures.

The past years have shown a significant amount of infrastructure projects having either received exemptions or being in the process of requesting exemptions. ERGEG states that this shows the need for a harmonised or at least consistent and improved approach for implementing Article 22.

IFIEC Europe would like to make its contribution by addressing some recommendations regarding the issues addressed in the ERGEG public consultation paper.

Questions for stakeholders

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?*

Infrastructures that are currently in the scope of Article 22 are interconnectors, LNG terminals and storage facilities. Those infrastructures are essential to the downstream market. In other words, they should not be considered as upstream or production investments but rather as key infrastructures to allow gas suppliers to make offers to end consumers. Those infrastructures must be regulated to guarantee free, fair and non-discriminatory access to the corresponding capacities. Therefore, exemptions should be restricted to a very strict minimum and should be strongly monitored by the relevant regulation authorities.

If investments that are key either to security of supply or to develop the market are not made by the operators, the relevant regulation authority must be empowered to impose

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these investments. The investor would then be paid back by the users through regulated tariffs including a fair return rate (that takes into account the low level of risk associated). This approach would support the development of the market through investments in infrastructures and fair access to the corresponding capacities.

In that perspective, IFIEC Europe is not comfortable with the proposed general principles and guidelines that may give room for too many exemptions and barriers to market development.

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

The scope should not be limited to interconnectors only. Storage facilities, LNG-terminals and interconnectors remain the focus.

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

IFIEC Europe considers that upstream markets and infrastructures on the one hand and mid- and downstream markets and infrastructures on the other hand, should clearly be treated differently. Upstream investments are very costly and risky. Only states and major oil companies are capable and willing to invest in this part of the market. On the other hand, EU Regulation aims at developing an internal mid- and downstream market. In this market, IFIEC supports an effective unbundling of all gas infrastructures (pipelines, storage and LNG facilities), effective non-discriminatory access at reasonable cost based on a properly regulated and predictable framework.

If the infrastructure is regulated, the investor is paid back through regulated tariffs. The risk is then very limited and there is no need to launch any Open Season because of that limited risk for the investor. In IFIEC's experience, Open Seasons in general are far from satisfactory. They tend to be slow and to require firm commitments on a long term basis by the would-be subscribers. Open seasons hence only limit the – already limited – risks for infrastructure owners. Open seasons are not the proper tool for determining market demands, nor planning required capacities. On the other hand there is no commitment from the operator on future allocations and tariffs. There seems to be a lack of balance between operator and user and meanwhile investments are not realised. Empowered regulation should improve this situation dramatically.

4. *Should open seasons also be used to allocate equity?*

In the process described above, it is not necessary to allocate equity.

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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?*

For an end-user, the ability to enjoy the open market possibilities, not only depends on the price of the molecules, but also on the available transport capacity, the available flexibility (line pack and storage) and the number of alternative suppliers (pipelines, LNG terminals). Therefore, the withdrawal of any availability of transport capacity, storage facilities or LNG terminals from rTPA (rTPA creating the proper market structure for the required market outcome) in principle is an act of limiting the freedom of choice of the end-user and hence, limiting the development of competitive prices. A key point is the assessment of market structure, chapter 3.2.1.2 under b) in the ERGEG consultation document. IFIEC underlines the necessity of the assessment of the overall impact on competition, both in primary and secondary markets. Prior to that, it is crucial to clearly define what the relevant market is : national , regional, or European.

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

In IFIEC Europe's view, the number of granted exemptions should be strongly limited. IFIEC Europe has consistently held the view that TPA exemptions should be the exception rather than the norm. 'The devil is in the details' of filling in the principles and criteria and the room national authorities have in interpreting and applying the rules. Example from page 7/23: "The deciding authority should verify the risk assessment provided by the applicant using appropriate measures". Clarifications should be brought on what could be considered as "appropriate measures".

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

Again, clarifications are necessary. Example from page 7/23: "Where 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 may be justified". IFIEC questions whether new entrants, without having assets in a particular market, would actually be able to invest in new infrastructures in that market. Transport capacity, storage capacity and LNG capacity should be available to them directly on the market rather than having to own the underlying assets.

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

See answers to 6 and 7. In addition, on page 14/23 of the ERGEG consultation document, it is stated that "another issue NRA should look at is whether the risk is such that it would be beneficial to let investors bear it, instead of imposing it on users in the

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form of a regulated tariff system for the proposed infrastructure”. In that case, IFIEC wonders who will eventually pay for the risks. In IFIEC Europe’s experience, the end consumer always bears that risk in the end, either through the tariffs, or through high gas prices because of capacity hoarding. From a consumer’s perspective, it is preferred to pay acceptable risks through regulated and predictable tariffs.

An additional factor is time : an exemption is often granted for 20 years. The risks will change during this period of time, as will the number of market players, and their market shares. IFIEC Europe considers that applications should be reassessed during the exemption period in case of significant changes in market conditions. The criteria mentioned on pages 18 and 19/23 are a major step in the right direction.

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 described criteria are a step in the right direction. However, it is difficult to assess whether they are exhaustive.

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

To a large extent, since the aim is to create an internal market. Boundaries, separating national markets with dominant players, should be torn down. This requires trans-national action (NRA).

A very good example of what is not functioning today is given by the Open Season to increase transit capacities between Belgium, France and the Netherlands. The process has been launched one year ago, and is now completely blocked. However, these investments are key to develop the market in this area. The relevant regulation authorities should impose the TSOs to invest without any additional delay. If we are not able to solve this problem quickly, it will be difficult to convince the large industrial consumers that a European gas market is achievable.

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 solutions (partial/full exemption) appropriate in safeguarding the goal of Directive 2003/55/EG in making all existing infrastructure available on a non-discriminatory basis to all market participants and safeguarding the principle of proportionality?*

An exemption should be an exemption rather than the rule. If an exemption is granted, a partial exemption might work efficiently in creating a partial rTPA-access instead of no access at all. A partially exempted project will at least have a certain contribution to market development.

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

If the incumbent is a dominating party, the policy should be restrictive. The exempted infrastructure should not extend the position of the dominating party, nor by the primary market, neither by the secondary market. Again, it is crucial to define what the relevant market is.

The time-scope is also of utmost importance : during the exempted period of time (almost by default 20 years), a dominating market player might loose its dominance. Another incumbent or even a new entrant might become dominant after a number of years.

13. *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?*

IFIEC Europe considers that exemptions should be reviewed, for example because dominant positions can change or because provisions to release capacities are not effective or efficient.

Where TPA exemption is granted, tough regulation is required to ensure that UIOLI provisions are consistently imposed. There are many current examples in Europe where this is clearly not happening, including the UK market which is regarded as the most liberal market in the EU. Recent actions taken by Ofgem regarding the Isle of Grain LNG terminal exemption give an appropriate illustration.

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