



EREGG

Guidelines on Article 22 (exemptions)

An EREGG conclusion paper

Ref: E07-GFG-31-07b
9 April 2009

1. Review: ERGEG's work on Art. 22 exemption procedures in 2007 and 2008

Article 22 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas provides for exemptions from regulation for major new infrastructure.

ERGEG carried out two surveys on regulators' experience with Article 22 exemptions in 2007¹ and 2008². The 2008 report stated that a significant amount of exempted infrastructure will develop in the coming years. The main message of the 2007 report remains valid: The existent diverging practice (that may lead to "forum shopping") and the widespread application of exemptions (all requests have been granted) can pose a barrier to achieving a single, European gas market. However, some recent decisions have resulted in partial exemptions (with respect to the share of capacity exempted) or include additional measures, such as open season procedures, capacity caps for dominant players, limited validity concerning start of operation .

ERGEG's public consultation on its Draft Guidelines on Art. 22 exemptions³ was launched in spring 2008. The responses to the consultation have been published and summarised in an Evaluation of Comments report⁴ in October 2008. This document incorporates the conclusions to the ERGEG public consultation.

2. Conclusions of the public consultation on ERGEG's draft Art. 22 guidelines

The main conclusions comprise additional aspects and some specific clarifications on ERGEG's draft Art. 22 guidelines, for example:

- On "identical" new technology as eligible infrastructure.

¹ Treatment of New Infrastructure: European Regulators' Experience with Art. 22 exemptions of Directive 2003/55/EC - Interim results of ERGEG survey (Ref: E07-TNI-01-04; 12 September 2007) http://www.energyregulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPERS/Gas/2007/E07-TNI-01-04_Art.%2022-AnalysisReport_12-Sep-2007.pdf

² Ref: E08-GIF-02-03 European Regulators Experience with Art. 22 Exemptions of Directive 2003/55/EC 2008 Update.

³ Draft Guidelines on Article 22 - An ERGEG Public Consultation Paper - of 5 March 2008; Ref: E07-GFG-31-07: http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/CLOSED%20PUBLIC%20CONSULTATIONS/GAS/Article%2022/CD/E07-GFG-31-07%20Article%2022%20Guidelines%20DP2.pdf

⁴ http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_CONSULT/CLOSED%20PUBLIC%20CONSULTATIONS/GAS/Article%2022/CD

- Open Seasons should not be mandatory. An assessment of market demand is an obligatory precondition to be provided in any case by the project sponsor together with the application to grant an exemption.
- No ex-ante preference should be given to LNG terminals, since potential positive effects will be assessed on the basis of a “case-by-case decision” principle.
- Diversification of suppliers” should be added to the list as another means to strengthen Security of Supply. Enhancement of Security of Supply should be justified in detail.
- Coordination and cooperation between connected system operators should be the rule, even when dealing with exemptions.
- NRAs consultations are necessary when infrastructure has cross-border relevance.
- Partial exemptions remain preferable to full exemptions.
- Exemptions for projects of incumbents are not excluded a priori due to reasons of non discrimination and the case-by-case principle, but will naturally remain an exception.
- Possibility of an exemption review: there is a need to establish ex-ante transparent, non-discriminatory, stable and consistent rules on the circumstances under which an exemption could be reviewed.

3. Link to EC’s work on Art. 22 exemption regime

ERGEG’s consultation results had already been published and communicated (together with ERGEG’s draft guidelines) to the European Commission in 2008. They have subsequently been used as an input to the European Commission’s ongoing work on revising its *Draft Explanatory Note*⁵ towards new guidelines on this area. The Commission’s efforts included a parallel stakeholders’ consultation on the *Commission’s Staff Draft Working Document on Art. 22*⁶.

⁵ 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.

⁶ European Commission Draft Staff Working Document on Article 22 of Directive (EC) No 2003/55 and Article 7 Regulation (EC) No 1228/2003 – New Infrastructure Exemptions – (22.04.2008)

4. Way forward

ERGEG has finalised its supportive work for the European Commission on developing a single new guidance document for the application of Art. 22 exemption procedures.

The guidelines are expected to be published by the European Commission in 2009 and will provide a basis for regulators to develop a more consistent approach when dealing with exemption procedures.

Nonetheless, ERGEG is going to regularly update the above mentioned *Art. 22 Regulators' Experience Reports* in order to provide information on new infrastructure projects considered to be exempted and also to monitor the harmonisation of Art. 22 applications, proceedings and assessment criteria applied.

Early effects of the envisaged harmonised approach might become visible after ERGEG's 2009 monitoring of the exemption procedures applied in the Member States.

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