European Regulators' Experience with Article 22 exemptions of Directive 2003/55/EC

2008 Update of ERGEG's internal survey

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1. Introduction & context

In the coming decades, considerable investment in new gas infrastructure in Europe will be needed in order to meet rising demand and to diversify supply sources. In the context of regulated gas networks, however, some investors argue that a restrictive regulatory framework might hinder sufficient investment. Existing legislation seeks to resolve potential conflicts between the need to invest and the regulatory regime by means of the provision in Article 22 of Directive 2003/55/EC (hereafter Art. 22), which foresees exemptions from regulation where investments would otherwise not be made. A series of criteria must be met to be eligible for an exemption, which would allow for the beneficiary to refrain from offering third party access (TPA) at regulated tariffs. Also, partial exemptions (with respect to the relevant provisions and/or capacity) are possible to reduce the potentially adverse effects of restricted TPA on competition. A review of the application of Art. 22 has shown that exemptions are being granted on an increasing number of infrastructure investments. Currently, there is not a common approach taken among regulators when determining exemption eligibility.

In September 2007, ERGEG published its Analysis Report on European Regulators' Experience with Art. 22 exemptions of Directive 2003/55/EC[1]. A number of projects that had not been included in the report (which was based on responses to questionnaires as of March 2007) are expected to apply for an Art. 22 exemption or have already done so. Therefore, ERGEG included a deliverable for an update of the 2007 report in the 2008 work programme.

The main goal of this (periodic) report is to provide information on new infrastructure projects and proceedings and to monitor the harmonisation of Art. 22 applications/proceedings.

ERGEG intends to provide periodic updates on the European regulators' experience with Art. 22 exemption proceedings, which will take new projects into account, including the cross-national pipeline projects, Nabucco and Poseidon, as well as LNG and storage projects.

[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.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_ERGEG_PAPERS/Gas/2007/E07-TNI-01-04_Art.%2022-AnalysisReport_12-Sep-2007.pdf

Since publication of the first Analysis Report, ERGEG has publicly consulted upon Guidelines on Art. 22 Exemptions; the responses to the consultation were published in an Evaluation of Comments paper[2] and have also been used as input to the ongoing European Commission work on revising its Draft Explanatory Note[3] towards new guidelines[4] on that subject.

This paper summarizes the results on additional and updated information on Art. 22 experience, mainly derived from regulatory authorities, but also from internet research and bilateral communications. The focus of this work was to obtain the necessary data to update the relevant project tables of the 2007 report.

2. Results of the Questionnaire

ERGEG asked a number of specific regulators, primarily those who have had ongoing Art. 22 proceedings in the past year or have been (or were expected to be) involved in such cases in 2008, to respond to the original (redistributed) questionnaire on Art. 22 experience and established/applied criteria for assessing Art. 22 applications.

The results have shed further light on some prominent proceedings, but are quite limited with respect to additional data on the criteria applied.

2.1. Responses received

Most regulators that were requested to respond to the questionnaire on Art. 22 proceedings in 2008 have provided responses. Three additional countries were contacted and included in the survey, while others were left out, as no changes to the data were expected in those countries.

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

[3] 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.

[4] COMMISSION DRAFT STAFF WORKING DOCUMENT: 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.

Some countries considered to have an ongoing or recently decided exemption case have been contacted on a bilateral basis in addition to the common request for responses to the questionnaire. Two countries (Hungary and Bulgaria) were only involved on a bilateral basis early on and did not provide a response to the questionnaire, so were not included in the analysis.

Details can be derived from the following tables, allowing for comparisons to the relevant responses from the 2007 report.

Please note that for a better readability and oversight, all new additions and changes compared to the 2007 report have been marked by a black font; grey font has been used to mark the original data from the 2007 report in all of the following tables.

Answers to the questionnaire "European Regulators Experience with Art. 22 exemptions of Directive 2003/55/EC"

Member state (NRA)	Answer Received 2008	Answer Received 2007	quality & content analysis of responses
UK (Ofgem)	Yes	Yes	4 LNG & 1 Interconnector Art.22 projects, 4 exemptions (LNG) from Ofgem for 19-25yrs., 1 partial exemption (BBL); 4 times application of OSP; --> **substantial answers & details also on criteria** (quest. 1+2 of catalogue)
Italy (AEEG)	Yes	Yes	3 LNG & 1 Interconnector Art.22 projects, 3 exemptions (2 LNG + Poseidon) granted by Ministry for 20yrs. & 80% of capacity; no OSP; --> **substantial answers & details** (quest. 1); decision by Ministry after consultation of the Regulator
Netherlands (EK)	Yes	Yes	3 exemptions (BBL + Gate LNG+Liongas LNG), 1 current project (Eemshaven LNG; new project, same location; former project did not continue, granted exemption was withdrawn by minister); decision by Ministry on the basis of an advice by the Regulator
Austria (E-Control)	Yes	Yes	1 Interconnector (Nabucco) exempted for 25yrs./50% of capacity, OSP applied, **substantial answers & details**
Hungary (HEO)	No**	Yes	little experience w/ Art.22 & OSP (1 current project: Nabucco-Pipeline) --> but **substantial answers & info also on criteria** (quest. 1+2 of catalogue)
Germany (BNetzA)	Yes	Yes	little experience w/ Art.22 & OSP (1 current project: onshore extension of Nord Stream (NEL, OPAL)), some statements on criteria for treatment Art.22
Slovenia (AGEN)	No	Yes	**no experience** w/ Art.22- & OSP, but some ideas on criteria for treatment of Art.22
Czech Rep (ERO)	Yes	Yes	**no experience** w/ Art.22- & OSP, but some ideas on criteria for treatment of Art.22
Slovak Rep (RONI)	No*	Yes	**no experience** w/ Art.22- & OSP, some statements on criteria for treatment Art.22
Romania (ANRE)	Yes	-	1 Interconnector Project, **substantial answers & info** (quest. 1+2)
Poland (URE)	Yes	Yes	1 current project (LNG Swinoujscie), criteria for treatment of Art. 22 still under discussion
Denmark (Dera)	No	Yes	**no experience** w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Finland (EMV)	No*	Yes	**no experience** w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment, but literally implemented into national law
France (CRE)	No	Yes	**no experience** w/ Art.22, no statements on criteria for Art. 22 treatment
Sweden (STEM)	No	Yes	**no experience** w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Lithuana (NCC)	No*	Yes	**no experience** w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Spain (CNE)	Yes	Yes	**no experience** w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment --> **responsibility of Ministry**
Belgium (CREG)	No	Yes	**no experience** w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Cyprus (CERA)	No*	Yes	**no experience** w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment, **no implementation** of Art. 22 into national law yet
Latvia (PUC)	No*	Yes	**no experience** w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Luxembourg (ILR)	Yes	Yes	**no experience** w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment; Implementation of Art. 22 through Art. 28 of the national law "Loi du 1er août 2007 relative à l'organisation du marché du gaz naturel"
Portugal (ERSE)	Yes	Yes	**no experience** w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment, ministry decides
Ireland (CER)	No*	Yes	**no experience** w/ Art.22- & OSP, no statements on criteria for Art. 22 treatment
Bulgaria (SEWRC)	No**	-	n/a
Estonia (EMI)	No*	No	n/a
Greece (RAE)	No	No	n/a
Malta (MRA)	No*	No	n/a
Turkey (EDPK)	No	-	n/a

Answers received	**11/28**	22/25	Status: Dec. 2008

* not contacted
** late request

2.2. Art. 22 projects - overview (technical details)

Country	Project No.	Nature of Project	Type of Project	Project Name, Location / Route	Sponsors / operators [Name, share in %]	Market share of operator(s), sponsors & users --> Market dominator?	Definition of considered market [EU, national, commodity, transportation...]	Capacity $[mN^3/y]$ ¹)	Investment Volume [EUR]	Expected Payback period (please indicate if not available for NRA or confidential)	(planned) start of operation
Netherlands	1	New Infrastructure	LNG	Eemshaven LNG terminal	Vopak LNG Holding (25 %) and Gasunie LNG Holding BV (25%) and Essent BV (50%)	Not available	National and NW European market wholesale	12 bcm/a	Not available	Confidential	2014
	2	New Infrastructure Increase / Modification of Infrastructure	LNG	LionGas terminal	4Gas (100%)	Not available	National and NW European market wholesale	16 bcm/a	Not available	Confidential	2010
	3	New Infrastructure	LNG	Gate	Vopak LNG Holding and Gasunie LNG Holding BV	Not available	National and NW European market wholesale	16 bcm/a	Not available	Confidential	2010
	4	New Infrastructure	Interconnector	BBL	Gasunie, Ruhrgas Fluxys	Not available	No response	15 bcm/a	Not available	Confidential	2006
Italy	1	New Infrastructure	LNG	Adriatic LNG terminal - offshore Rovigo (RO)	Edison Spa (45%); ExxonMobil (45%); Qatar Petroleum (10%)	Lower than 20% for Edison; lower than 10% for ExxonMobil and Qatar Petroleum	National: gas supply and wholesale	8 bcm/a	835 millions	Na	2008
	2	New Infrastructure	LNG	Terminale LNG di Brindisi - Brindisi (BR)	BG (100%),	Lower than 10%	National: gas supply and wholesale	8 bcm/a	400 millions	Na	2009
	3	New Infrastructure	LNG	OLT - Offshore Livorno	OLT Energy Toscana Srl (17%); Irde Mercato Spa (23%); Endesa Europa (38%); others	Na	No response	3.8 bcm/a	360 millions	Na	Na
	4	New Infrastructure	Interconnector	Poseidon pipeline project, (as part of Turkey-Greece-Italy Interconnection Project) located in the Adriatic see between Stavrolimenas (Greece) and Otranto (Italy)	Edison Spa and Depa SA will be the owners of the Poseidon Transmission Co. (50% each one)	Not markets dominators, Depa actually not present in the Italien market	EU	8 bcm/a		25 yrs.	2012
Hungary	1	New Infrastructure	Transit	Nabucco	MOL Natural Gas Transmission Plc. 20%	100%	EU, national, transportation	25.5 bcm/a	4.5 B	(confidental) yrs.	2011
Poland	1	New Infrastructure	LNG	Terminal LNG, Swinoujscie	Polskie LNG Sp. z o.o. 100%	100% owned by PGNiG S.A.	under discussion	2.5bcm/y, extension to 7.5bcm/y possible	Na	na	2013
Romania	1	New Infrastructure	Interconnector	Nabucco Gas Pipeline	SNTGN Transgaz S.A.	per MOU	EU-wide market	per stage up to 31bcm/y	3.0-4.6 bill.	25yrs.	2014

Country	Pro-ject No.	Nature of Project	Type of Project	Project Name, Location / Route	Sponsors / operators [Name, share in %]	Market share of operator(s), sponsors & users --> Market dominator?	Definition of considered market [EU, national, commodity, transportation…]	Capacity [mN^3/y] [1])	Investment Volume [EUR]	Expected Payback period (please indicate if not available for NRA or confidential)	(planned) start of operation
Austria	1	New Infra-structure	Inter-connector	Nabucco Gas-pipeline, Turkey-Bulgaria-Romania-Hungary-Austria	Investors: Botas (TR), Bul-gargaz (BG), Transgaz (RO), MOL (H), OMV Gas Inter-national Ltd. (A) Each com-pany holds 20% of the shares of a joint ven-ture, Nabucco Gas Pipe-line Inter-national Ltd (NIC) who is the project operator. NIC will be the holder of the capacity. Technical operation and main-tenance of the pipe-line rests with 5 national companies "Nabucco National Companies")	OMV Gas International Ltd. (OGI) acts as a holding company for OMV gas activities. OMV Gas Ltd. (OGG) is a 100% subsidiary of OGI. OGG has a dominant position in the underground storage market (approx. 75%) and operates various transmission pipelines. OGI was the sole importer of natural gas to Austria until fall 2006. Import contracts for Russian and Norwegian gas have recently been passed to the gas companies on the downstream market. Contracts for norwegian gas will follow in 2007. EconGas is a 50% subsidiary of OGI and dominant on the markets for balancing energy, supply to local distributors and supply to large customers. No shares available.	Wholesale market (production and import): wider than Austria; Storage: regional (Eastern part of Austria) Balancing energy: regional (see above) Supply of local distributors: regional Supply of large customers: regional	8 bcm/a (stage 1) 15,7 bcm/a (stage 2) 25,5 bcm/a (stage 3) 31 bcm/a (stage 4)	4.6 billion EUR (application 2007) 7.9 billion EUR (current estimation)	25 yrs.	2012 (stage 1) 2014 (stage 2) 2017 (stage 3) 2020 (stage 4)
United Kingdom	1	New Infra-structure	LNG	South Hook LNG, Milford Haven	South Hook LNG Terminal Company Ltd owned by: Qatar Petroleum (70%), Exxon Mobil (30%)	Capacity owner: Exxon Mobil, 5,4%	Great Britain markets considered: - upstream - wholesale - downstream	10.5bcm/y (Q1 2008) rising to 21bcm/y (2009/10)	1067m	Confidential	Q1 2008
	2	New Infra-structure	LNG	Milford Haven Dragon	Dragon LNG Ltd, owned by: BG (50%), Petronas (30%), Petroplus (20%)	Capacity owners: BG, 3,2%, Centrica, 10,7%	Great Britain markets considered: - upstream - wholesale - downstream	6bcm/y (phase 1) rising to 12bcm/y (phase 2)	No response	Confidential	Late 2007/ Early 2008
	3	Increase / Modification of existing Infrastructure	LNG	Grain 1&2	National Grid Grain LNG, wholly owned subsidiary of National Grid PLC	Grain 1: Capacity owners: BP, 5,1%, Sonatrach, 1,0% Grain 2: Capacity owners: Centrica, 10,7%, Gaz de France, 0,4%, Sonatrach, 1,0%	Great Britain markets considered: - upstream - wholesale - downstream	4.4bcm/y, rising by 8.6bcm/y from winter 2008/9	485m	Confidential	15. Jul 05
	4	Increase / Modification of existing Infrastructure	LNG	Grain 3	National Grid Grain LNG, wholly owned subsidiary of National Grid PLC	Mkt shares information not available for this exemption. Non confidential analysis based on HHI figures: HHI 1394 for relevant market in worst case scenario.	Great Britain markets considered: - LNG - LNG+other flexible sources - All wholesale	7bcm/y	450m	Confidential	2010
	5	New Infra-structure	Inter-connector	BBL	BBL Company, owned by: Gasunie BBL B.V. 60% E.ON Ruhrgas BBL B.V. 20% Fluxys BBL B.V. 20%	Capacity owner: Centrica, 10,7%	Great Britain markets considered: - upstream - downstream	15bcm/y	500m	Confidential	01.12.2006
Germany	1	New Infra-structure	Inter-connector	Nord Stream Onshore extensions: OPAL (Greifswald/ Baltic Sea coast to Brandov (CZ)) & NEL (Greifswald to Rheden (Germany))	Applicant/operator: 1.) OPAL NEL Transport GmbH (a 100% subsidiary of Wingas GmbH & Co. KG), pipe-in-pipe share: 80% of OPAL; 75% of NEL 2.) E.ON Ruhrgas Nord Stream Anbindungsleitung sgesellschaft mbH (a 100% subsidiary of E.ON Ruhrgas AG), pipe-in-pipe share: 20% of OPAL; 25% of NEL)	Confidential	Confidential	OPAL: max. 36,5bcm/y NEL: max. 21,8bcm/y	Confidential	Confidential	OPAL: 2011 NEL: 2012

2.3. Details on Art. 22 proceedings

Country	Project No. corresponding to 1.3	Status?	Art. 22 Exemption Granted? (combined answers possible)	Overall duration of pro-ceeding from application until final decision by national authority	Description of specific approval procedure (including specific project agreements between regulator & sponsors, regulatory coordination, consultations, problems,...)	Capacity allocation mechanism (CAM) used?	Percentage of long term (> 1 year) vs. short term (< 1 year) capacity contracts ?	Application of an open season procedure? (If not, proceed with question 1.6)	Where applicable: terms and conditions of exemption	Most important/proble-matic criteria for grant-ing/denying an exemption & additional remarks
Austria	Nabucco IC	Decided	Yes, exemption from Art. 18, 20, 25 II-IV for 25 yrs and 50% of total capacity	6 months	National procedure is a "normal" administrative procedure according to the Austrian Gas Act that has to be closed within 6 months from receival of the application. The national exemption decision was taken after consultation with regulatory authorities of other Member States concerned. Specific problems of the project arise on European level: Project affects 5 states, one being no EU-MS. Coordination between 5 NRA and EC is required. Project requires changes of Romanian and Hungarian national energy law. Application has to be translated into national languages.	Open season is intended, but after the exemption decisions have been taken. The procedural steps of the OS are determined in the application documents. Applicant intends to make a separate OS for sharehold-ers and affiliates (priority capacity allocation up to 50% of the capacity)	NIC will offer minimum 10% short term capac-ity	Yes/Yes/Yes; the fact that an Os is intended under predetermined conditions influenced the decision, but results of OS were not available yet, when the decision had to be taken.	No response	Risk assessment: NRA must rely on risk analysis delivered by applicant – NRA can not verify the risk analysis respectively do not know where is the limit for the investor to spend money into a project without an exemption. Exemption from TPA (50%): enhancement of competition on national markets is questionable. Duration of exemption that, exceeds payback period: which duration of exemption is justified, what are the criteria? Enhancement of competition: assessment is restricted to competition on national level (NRA cannot judge impact on competition in other MS) – a European view can be achieved by cooperation within the NRA concerned only
Romania	Nabucco IC	Decided	Yes, for 25 yrs. and 50% of total capacity	No response	MOU	Open Season	No response	Yes, partial for 90% of capacity Requested by NRA? Yes Did OS influence the decision? Yes	per decision no. 1228/2008	European Union acquis communautaire
Poland	Terminal LNG Swinoujs-cie	Pending	No response	No response	Request is for 20 years for 100 % capacity. National procedure is a "standard" administrative procedure.	No response	No response	No	No response	No response
Hungary	Nabucco IC	Pending	25 yrs. for Art. 18, 25 (2)-(4)	3 months	Problems: 1.Applicant should be a licensee due to the provisions of the Gas Act 2. The project is of EU interest. Who will decide? (And: If the NRA/Minister says NO, EU will not even be aware of the project formally, due to the procedure set in Art. 22.)	Open Season	90% (> 1 year) vs. 10%	Yes for 100% requested Yes influenced decision: Yes	No response	No response

Country	Project No. correspo nding to 1.3	Status?	Art. 22 Exemption Granted? (combined answers possible)	Overall duration of pro-ceeding from application until final decision by national authority	Description of specific approval procedure (including specific project agreements between regulator & sponsors, regulatory coordination, consultations, problems,…)	Capacity allocation mechanism (CAM) used?	Percentage of long term (> 1 year) vs. short term (< 1 year) capacity contracts ?	Application of an open season procedure? (If not, proceed with question 1.6)	Where applicable: terms and conditions of exemption	Most important/proble-matic criteria for grant-ing/denying an exemption & additional remarks
United Kingdom	South Hook LNG	Decided	Yes, for 25 yrs.	2.3 months	• Draft exemption application • Consultation • Draft Ofgem response • General European Commission support for Draft Ofgem response • Formal exemption application • Consultation • Formal Ofgem exemption order	Auctions for Long Term reservations of capacity, UIOLI	Only LT Long Term: ≥ 10 years	No Requested by NRA? Yes Did O.S. influence the decision? Yes	Effective UIOLI arrangements must be put in place	Although the OS was requested the parties did not undertake one. After taking into account all the information, on balance the exemption was granted. Further documentation including decision letters and consultations are available on the Ofgem website: www.ofgem.gov.uk
	Dragon LNG	Decided	Yes, for 25 yrs.	3.1months	• Draft exemption application • Consultation • Draft Ofgem response • General European Commission support for Draft Ofgem response • Formal exemption application • Consultation • Formal Ofgem exemption order • EC approves decision	Auctions for Long Term reservations of capacity, UIOLI	N/A	Yes Requested by NRA? Yes Did O.S. influence the decision? Yes	Effective UIOLI arrangements must be put in place	Further documentation including decision letters and consultations are available on the Ofgem website: www.ofgem.gov.uk
	Grain 1&2 LNG	Decided	Yes, for 20 yrs.	3.6 months	• Formal exemption application • Consultation • Formal Ofgem exemption order	LT reservations, UIOLI, Open seasons	All LT	Yes Requested by NRA? No Did O.S. influence the decision? Yes	Effective UIOLI arrangements must be put in place	Further documentation including decision letters and consultations are available on the Ofgem website: www.ofgem.gov.uk
	Grain 3 LNG extension	Decided	Yes, for 19 years	5 months	• Formal exemption application • Public consultation • Consultation with EC throughout process • Formal Ofgem exemption order • EC approval of exemption without amendments	LT reservations, UIOLI, Open seasons	All LT	Yes Requested by NRA? No Did O.S. influence the decision? Yes	Effective UIOLI arrangements must be put in place	Some bidders for primary capacity led Ofgem to have some concerns over the benefit to competition. Concerns were only lifted when Ofgem was made aware, in confidence, of the identity of the bidders and their maximum bid over the project's capacity.
	BBL IC	Decided	Partially for Forward flows (UK-NL) for 10 and 15 years (length of the two contracts)	4 months	• Draft exemption application • Consultation • Draft Ofgem response • General European Commission support for Draft Ofgem response • Formal exemption application • Consultation • Formal Ofgem exemption order • Amendment on advice of European Commission	Open Season, UIOLI	Two blocks of Long-Term contracts: - One starting December 2006 until December 2016 for 2/3 of capacity - One starting December 2007 until 2022 for 1/3 of capacity The remaining capacity in the first year of the project is sold on a first come first served basis	Yes Requested by NRA? No Did O.S. influence the decision? No	Only NL-UK flows exempt Effective UIOLI arrangements must be put in place	Further documentation including decision letters and consultations are available on the Ofgem website: www.ofgem.gov.uk

Country	Project No. corresponding to 1.3	Status?	Art. 22 Exemption Granted? (combined answers possible)	Overall duration of proceeding from application until final decision by national authority	Description of specific approval procedure (including specific project agreements between regulator & sponsors, regulatory coordination, consultations, problems,...)	Capacity allocation mechanism (CAM) used?	Percentage of long term (> 1 year) vs. short term (< 1 year) capacity contracts ?	Application of an open season procedure? (If not, proceed with question 1.6)	Where applicable: terms and conditions of exemption	Most important/problematic criteria for granting/denying an exemption & additional remarks
Italy	Rovigo LNG	Decided	Yes, for 25 years Partially for 80 % of new capacity	2,5 months	The request was sent to the Ministry that asked the AEEG for the opinion. The operator asked for a 25 years exemption for 80% of the new capacity. The exemption was granted on the basis of the commitments and information provided in the request, notably exempted capacity allocated to Edison under a 25 year SPA with RASGAS (30% ExxonMobil - 70% Qatar Petroleum)	1) Agreement between the sponsors for the exempted capacity; 2) priority access rights set out by the Ministry (decree 28/04/2006) & access rules set out by the AEEG (resolution no. 168/2006) for the non exempted capacity	100% for the exempted capacity; non exempted capacity has not been offered and allocated up to now	No	No response	According to the law the exemption must be granted for at least 80% of the new capacity and for at least 20 years. The main issue was to assess if the financial risk associated with the investment justified the 25 year exemption requested
	Brindisi LNG	Decided	Yes, for 20 years Partially for 80 % of new capacity	2,5 months	The request was sent to the Ministry that asked for the opinion of AEEG. The operator asked for a 20 years exemption for 80% of the new capacity. The exemption was granted on the basis of the commitments and information given in the request, exempted capacity allocated 50% to BG and 50% to Enel on the basis of a SPA with BG. After the decision Enel sold its share to BG, that, after confirmation of the exemption by the Ministry, holds now 100% of the project and the whole exempted capacity	1) Agreement between the sponsors for the exempted capacity; 2) priority access rights set out by the Ministry (decree 28/04/2006) & access rules set out by the AEEG (resolution no. 168/2006) for the non exempted capacity	100% of the exempted capacity; non exempted capacity has not been offered and allocated up to now	No	No response	According to the law the exemption must be granted for at least 80% of the new capacity and for at least 20 years. The sponsors requested the minimum exemption level
	Livorno LNG	Pending	No response	No response	The Ministry has not yet requested the advice of the NRA	No response	No response	No response	No response	No response
	Poseidon IC	Decided	Yes, for 25 yrs.	12 months	The operators asked for a 25 years exemption for 100 % of the new capacity. The exemption was granted on the basis of the and information provided in the request, notably exempted capacity allocated to Poseidon Co (50% Edison, 50% Depa)	1) Agreement between the sponsors for the exempted capacity; 2) priority access rights set out by the Ministry (Decree 31/01/2007 and Decree 21/06/2007) with obligation for Poseidon to activate an OS procedure for an additional 1,0 bcm/y to TPA; 3) AEEG and RAE resolutions for OS procedure regulation	100% of the exempted capacity; 100 non exempted capacity (offered for different durations: 10, 15, 20 and 25 years)	Yes/Yes/Yes	OS starting process within 1 year since Decree 21/06/08; currently published the "OS Procedure Regulation"	According to the law the exemption must be granted for at least 80% of the new capacity and for at least 20 years. The main issue was to access if the financial risk associated with the investment justified the 100%/25 year exemption requested

Country	Project No. correspo nding to 1.3	Status?	Art. 22 Exemption Granted? (combined answers possible)	Overall duration of pro-ceeding from application until final decision by national authority	Description of specific approval procedure (including specific project agreements between regulator & sponsors, regulatory coordination, consultations, problems,...)	Capacity allocation mechanism (CAM) used?	Percentage of long term (> 1 year) vs. short term (< 1 year) capacity contracts ?	Application of an open season procedure? (If not, proceed with question 1.6)	Where applicable: terms and conditions of exemption	Most important/proble-matic criteria for grant-ing/denying an exemption & additional remarks
Netherlands	Eems-haven	Pending	No response	No response	No response	No response	No response	EK demanded to apply the GGPOS (of May 2007) to the open season procedure	No response	No response
	Gate	Decided	Yes, for 20 yrs.	9 months	Exemption request on March 27th 2006. Additional information request on June 14th 2006 and August 10th 2006. Advice NMa to Ministry on August 2006. Decision Ministry on November 13th 2006.	FCFS	No response	Yes Requested by NRA? No Did O.S. influence the decision? No	- efficient transparent and non-discriminatoir UIOLI system - additional capacity to be offered to the market tiht OS - changes to be reported to Ministry - new customers need to be reported to the Ministry - no more then 50% of the primary capacity to a dominant party	No response
	BBL	Decided	Yes, for 20 yrs.	5 months	Exemption request on December 2004. Advice NMa on March 2005. Decision in April 2005	FCFS	No response	Yes Requested by NRA? No Did O.S. influence the decision? No	No response	No response
	LionGas	Decided	Yes, for 20 yrs.	8 months	Exemption request on December 2006. Additional information request on January 2007 and April 2007. Advice NMa in June 2007. Decision Ministry in July 2007.	FCFS	No response	Yes Requested by NRA? No Did O.S. influence the decision? Yes	- exemption for 20 years - efficient transparent and non-discriminatoir UIOLI system - additional capacity to be offered to the market with OS - changes to be reported to Ministry - new customers need to be reported to the Ministry	No response
Germany	OPAL/NEL	Pending	proceedings still ongoing	proceedings still ongoing	1. application / proceeding: - the application of one sponsor was rejected for formal reasons concerning the applicant - the application of the other applicant was withdrawn 2. application / proceeding: - two revised applications - proceedings still pending	FCFS (plus e.g. UIOLI)	100% LT	Yes Requested by NRA? Yes Did O.S. influence the decision? Proceedings still ongoing	proceedings still ongoing	proceedings still ongoing

2.4. Summary of projects and proceedings (status as of November 2008)

Country (authority)	Decieded Proceedings (exemptions granted)		Open Season	Pending Proceedings	
	LNG	IC	applied	LNG	Interconnector (IC)
United Kingdom (Ofgem)	4 (South Hook, Dragon, extension of Grain 1&2, 3)	1 (BBL)	3 yes 1 no		
Italy (AEEG + Ministry)	2 (Rovigo, Brindisi)	1 (Poseidon)	2 no, 1 yes	1 (Livorno)	
Netherlands (Ministry + ad-vise of Ener-giekamer)	2 (Gate, LionGas)	1 (BBL)	3 yes	1 (Eemshaven)	
Austria (E-Control)		1 (Nabucco)	1 yes		
Hungary (HEO)					1 (Nabucco-Pipeline) ?
Poland (URE)			1 no	1 (Swinoujscie)	
Romania (ANRE)		1 (Nabucco)	1 yes		
Germany (BNetzA)			1 yes 1 no		2 (for separate shareholders of NEL and OPAL)
∑	8	5	10	3	2

Status: November 2008
New additions & changes are marked by a black font
Results of the original report (2007) are marked by a grey font

There have been eleven (in 2007: 10) Art. 22 LNG projects in total. Eight (2007: 6) exemptions have been granted, three (4) are pending. In addition, there are seven (6) proceedings for four (4) interconnector projects, five (2) decided and two (4) projects (OPAL/NEL with 2 applicants in Germany and Nabucco in Hungary) pending. Most exemptions have been granted for 19-25 years; only two have been limited to ten and fifteen years. The total capacity varies from 2.5 to 21.0 bcm/a (at a final stage) for LNG projects, and from 8.0 to 36.5 bcm/a for interconnector projects. Some exemptions are limited to 50% of the total capacity (Nabucco pipeline, Austria) or 80% of new capacity (Rovigo LNG, Italy). Open seasons are often used to identify market demand and to allocate new capacity. Other capacity allocation mechanisms include auctions for long-term reservations. The congestion management procedure applied is UIOLI, although this may encompass different mechanisms in practice. Most contracts are long-term contracts. Where short-term contracts are possible, their share is about 10% of total available capacity. In ten (2007: 6) projects, an open season procedure was applied, in six (3) cases, this occurred without a request by the NRA. Occasionally, as for example in Italy with respect to all infrastructure under Art.22, the application of UIOLI arrangements has been requested. The size of the market share of capacity owners varies quite extensively in comparison to the 2007 report. In the 2007 report, the market share of the exempted infrastructure was, for the most part, below 20%. It now seems that market participants with higher shares are benefitting from exemptions.

In addition, the results of the survey and from bilateral comments show that the evaluation of the risk assessment of a project is a crucial and difficult issue that requires careful analysis. Even though each exemption request is to be assessed on a case-by-case basis, the approach should be made consistent among the regulators to avoid unequal treatment of investors.

2.5. Conditions on Open Season procedures (2008 additions)

Only four respondents provided additional information on the conditions for applying open season procedures.

In Italy, the duration of the interest submitting phase for the Poseidon Interconnector's ongoing open season (which was requested by AEEG & RAE for an additional capacity of 1 bcm/a) is four weeks. Capacity will be auctioned; the lots will be ranked on the basis of a binding offer premium.

For the Dutch open seasons on LNG terminals, data is not available, however, open seasons have been checked to ensure transparency and non-discrimination.

Regarding the Nabucco pipeline, a harmonized decision on the open season procedure was reached by the relevant authorities in the affected EU Member States. The open season will be carried out after the exemption decisions of the relevant national authorities. Nevertheless, the following details have been predetermined: There will be one open season for shareholders (10 weeks commitment phase, 2 weeks for assessment and allocation) and another one for Third Parties (information phase parallel to OS for shareholders, 6 weeks commitment phase, 2 weeks for assessment and allocation). A potential overbooking will lead to bringing forward the predetermined expansion stages (up to 31 bcm/a) to an earlier point in time. If shareholder commitments exceed the reserved capacity of 50% of the pipeline capacity, they will be reduced and allocated pro-rata. The ranking of valid subscriptions in the open season for Third Parties will be assessed by the contract value (determined by requested distance, flow-rate, contract period, and commencement date).

In addition to establishing a bulletin board for secondary capacity trading, implementing an interruptible UIOLI to avoid capacity hoarding and increase liquidity, 10% of the capacity must be offered on a short-term basis in each open season procedure for each expansion stage.

2.6. Applicable Criteria for Art. 22 treatment

Additional remarks on the criteria applied by deciding authorities that were not included in the original report are summarised in this paragraph, separated by the single criteria:

Criterion: How to measure "enhancing competition"?

Energiekamer stated, that an independent study on benefits to competition will be undertaken, complemented by specific reports on the parties who will book capacity and by an assessment of the contribution to diversification of gas supply (cf. security of supply criterion).

Criteria to measure the level of risk attached to the investment and at what point is the level of risk assumed to be too high?

Energiekamer adds cash flow and breakeven analyses to the risk evaluation, taking into account information on positive effects of an exemption on price ~, volume ~ and financing risks.

Verification that the infrastructure is owned by a natural or legal person who is separate at least in terms of its legal form from the system operators in whose system that infrastructure will be built:

As Energiekamer suggests, statutory data of the companies involved and agreements between the companies must be taken into account when verifying this criterion.

Verification that charges are levied on users of that infrastructure:

In addition to written commitments of the applicant (E-Control), an assessment of tariff calculation and indexing methodologies are taken into account by Energiekamer.

Additional criteria:

Regarding the Austrian exemption decision on the Nabucco pipeline, the following additional criteria were stipulated by E-Control (and the European Commission):

- a revision of the tariff methodology after 20 years, if tariffs are 10% higher than for comparable pipelines,
- the obligation of the applicant to report Open Season results (staged & final) to E-Control,
- a realisation of the project within a period where the underlying assumptions are still valid,
- the obligation on the management of Nabucco Gas Pipeline International GmbH to take decisions independently of shareholder interests,
- the inclusion of a 50% capacity cap for dominant shippers for the Nabucco exit in Austria,
- a modified condition with respect to the latest start of operation (end of 2016), and
- a clarification regarding the capacity expansion of Nabucco.

3. Conclusions

Responses to this survey report a total of eight exemptions granted to date. At least five other exemptions are pending with the respective regulators. If this practice continues, a significant amount of exempted infrastructure will develop in the coming years.

Reviewing the results of this recent analysis, it is evident that 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 etc., to provide some safeguards to support the development of a competitive market.

Progress has also been made regarding the development of guidelines for the application of Art. 22 by ERGEG and the Commission. A single guidance document will be published by the European Commission in 2009, providing a basis for regulators to develop a more consistent approach when dealing with exemption procedures. It is likely that the effects of such a harmonised approach will become visible in future monitoring tasks of the exemption procedures.