5 May 2008
Ref. 08GIE152

GIE Response to ERGEG Draft Guidelines on Article 22

Investment in gas infrastructure is central to the effective current and future functioning of the gas market in Europe. Article 22 remains a vital tool to ensure investment that could enhance competition and security of supply takes place.

GIE welcomes the opportunity to respond to ERGEG's consultation on draft guidelines on Article 22. Clarification of the process for which applications for exemptions will be considered, within the scope of Article 22 of the Gas Directive, is useful - and in particular the goal of reaching consistency across deciding authorities and transparency in the decision making process. However it is vital to recognise that exemptions should be judged on a case-by-case basis and some flexibility in the approach remains appropriate to account for individual project specifications.

GTE, GSE & GLE prepared specific comments and responses to the ERGEG consultation document. These are attached to this document.

Content:

Rue Ducale 83
B – 1000 Brussels

Tel +32 2 209 05 00
Fax +32 2 209 05 01

gie@gie.eu.com
www.gie.eu.com

Gas Infrastructure Europe (GIE) represents the interest of the infrastructure industry in the natural gas business such as Transmission System Operators, Storage System Operators and LNG Terminal Operators. GIE has currently 60 members in 27 European countries and is based on three columns: Gas Transmission Europe (GTE), Gas Storage Europe (GSE) and Gas LNG Europe (GLE).

05 May 2008
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GTE Response to ERGEG Draft Guidelines on Article 22

Introduction

Investment in gas infrastructure is central to the effective current and future functioning of the gas market in Europe. Article 22 remains a vital tool to ensure investment that could enhance competition and security of supply takes place.

GTE welcomes the opportunity to respond to ERGEG's consultation on draft guidelines on Article 22. Clarification of the process for which applications for exemptions will be considered, within the scope of Article 22 of the Gas Directive, is useful - and in particular the goal of reaching consistency across deciding authorities and transparency in the decision making process. However it is vital to recognise that exemptions should be judged on a case-by-case basis and some flexibility in the approach remains appropriate to account for individual project specifications.

By way of general introduction GTE would like to highlight the concern that the interpretation of the Article 22 process is often confused in relation to the nature of the investment being considered. Major investments tend to fall into four categories: LNG Terminals, Gas Storage Projects, Transmission Projects and Interconnector Projects. The fact that in many parts of Europe the last two of these are often viewed as one and the same, leads to further confusion in interpreting Article 22. Within Member States transmission is regarded as a regulated monopoly activity generally with an accompanying regulatory regime which should encourage investment and hence avoid the need for a regime like Article 22. In many Member States many people feel interconnector projects should also be subject to monopoly regulation by NRAs. However, as the EC's 3rd Package recognises, a mature regulatory regime within each Member State which encourages investment does not always exist yet, and in particular there is no EU or Regional regime which encourages or facilitates investment in inter-Member State infrastructure such as interconnectors. GTE looks forward to the 3rd Package introducing developments towards ensuring such a robust and stable investment climate is in place through extension of NRAs responsibilities and the introduction of ACER.

Comments on ERGEG Consultation on Draft Guidelines for Article 22

GTE has a number of specific comments in response to the consultation questions asked, however would like to stress a key concern identified during analysis of the proposed guidelines which relates to the review of exemption decisions. It is fundamental to investor decision making that there is a stable and predictable regulatory framework, and this applies equally to the granting and application of exemptions. Therefore the only appropriate form of review concerns the pre-set conditions specified when an exemption is granted. Amendment or revocation of an exemption should only be possible in case the applicant breaks applicable law or does not comply with the conditions set in advance by the authorities. Review clauses beyond this are therefore not appropriate as any uncertainty in the criteria for review will undermine investment decisions taken, and exemptions which impose further clauses for review will likely result in hindering future decisions from being made.

GTE agrees that it is important to thoroughly assess applications for Article 22 exemptions, however, whilst it is important to assess related information, it is also important to ensure that there is a balance in terms of the information requirement and the associated costs for the project initiator, given that such projects, if unsuccessful, will not go ahead and therefore any upfront costs may represent a significant risk.

GTE would also like to stress the requirement for clarity and certainty in timings associated with the processing of article 22 exemptions. Due to the capital intensive nature and long-lead times associated with projects for which exemptions may be considered, a timely approach is required in order to provide transparency and allow adequate risk assessment by applicants. It would be useful for such timings to be included in any process guidelines adopted.

Answers to questions to stakeholders

Q1. 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?

The described principles and guidelines may offer guidance for competent authorities when deciding on exemption procedures. However, GTE has a number of general and specific comments included in this response which GTE offers for consideration.

Q2. Do you consider the present scope of eligible infrastructure to be too narrow?

The aim of the guidelines is to provide detail for the process through which applications will be considered, rather than redefining the scope of the eligible infrastructure. As a consequence, GTE does not consider this question within the scope of the current consultation.

Q3. 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?

Open Season is a useful tool for assessing market demand as well as subsequent capacity allocation; however it is not the only tool available or appropriate. GTE thinks that whatever the tool used by the applicant, it should be objective, transparent and non-discriminatory and should be open to all (existing and potential) market players. It is important that there is clarification on the information required for application; however the means by which such information is gathered should remain a matter for the applicant concerned provided it complies with the above mentioned criteria.

Q4. Should open seasons also be used to allocate equity?

The way equity is to be allocated should be decided by the initiators of the project. Allowing partners to participate will introduce additional conditions, either financial, technical or contractual, that might influence the access regime or the tariff structure envisaged by the initiators and prevent them from investing. An

open season could of course be a mechanism to attract project partners and the initiators should be free to use the mechanism they prefer.

Q5. 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?

Please see GLE response.

Q6. Are the described criteria for assessing the effects of an investment in infrastructure on enhancement of competition in gas supply appropriate?

GTE agrees that the assessment must involve an analysis of the effect of an exemption on the competitive structure of the market; however GTE has some concerns with the described criteria for undertaking such an assessment:

3.2.1.2 (a) – It is understandable that an applicant should provide information concerning its market position, however additional information on other concerned parties may be beyond the ability of the applicant to provide, and would likely represent speculation on behalf of the applicant. Therefore, the inclusion of this in the specified criteria is not appropriate.

3.2.1.2 (c) – It is unclear if the information detailed is to be provided by the applicant, or the competent authority - in fact it would not be appropriate for the applicant to provide much of the information (Existing and (other) potential competitors; comparing and ranking the proposed project with other existing and planned projects; Predominant cost structure in the relevant market; Possible alternatives; Expected behaviour and reaction of companies already active in the market). Irrespective of the information source, it must be assured that the competent authority provides thorough justification for what information has been used and how it has been interpreted in any assessment made.

Finally it is unclear if the defined criteria for assessment of competition enhancement are comprehensive, and there must remain a degree of flexibility in the application requirements depending on individual project and applicant circumstances considered on a case-by-case basis.

Q7. Are the described criteria for assessing the effects of an investment in infrastructure on enhancement of security of supply appropriate?

These criteria could be appropriate but there seems to be no need to be prescriptive. There can be many reasons why a specific infrastructure investment could positively contribute to security of supply.

Furthermore, GTE does not understand why the NRA would assess the granting of an exemption for the same project to another party. The market is liberalised, which means the initiative for projects is with market parties and it is not the task of the NRA to determine which party 'wins' the project.

Q8. Are the described criteria for the risk assessment appropriate?

GTE agrees that it is important to assess the level of risk associated with an application, and it is vital that the regulators provide a stable and predictable regulatory framework. In particular it is vital for project initiators, as well as for (potential) lenders, that the duration of an exemption is fully understood up front, any change to the exemption duration can seriously impact the financial viability of a project. It is unclear if the defined criteria for risk assessment are comprehensive, and there must remain a degree of flexibility in the application requirements depending on individual project specifications considered on a case-by-case basis.

Q9. 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?

GTE agrees that it is important to assess the potential impact on competition/internal market/regulated system. In particular it is important that applications are analysed to ensure new projects do not put at risk cost recovery of existing infrastructure subject to rTPA. It is unclear if the defined criteria are comprehensive, and there must remain a degree of flexibility in the application requirements depending on individual project specifications considered on a case-by-case basis.

Q10. To what extent should consultations with neighbouring authorities be done?

Different projects will have different requirements and impacts on neighbouring countries, therefore the extent of required consultation with neighbouring authorities depends on the scope and impact of the

specific project. Obviously, for cross-border projects, coordination between the relevant deciding authorities is of key importance.

Q11. 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?

GTE welcomes that fact that Article 22 offers much flexibility regarding the deciding authority's ability to adjust the request for an exemption and the decision on what will be exempted. Partial or full exemption of TPA and tariffs, if required limited in time, is possible. Such decisions should be taken on a case-by-case basis taking into account all relevant circumstances. Providing guidelines in this area should not restrict this flexibility.

Q12. Do you believe that Art 22 exemptions should also benefit incumbents or their affiliates? If yes in what way and to what extent?

Providing that an application is able to meet all 5 criteria under which assessment is made, exemptions on principle should be available to all applicants.

Q13. 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?

Please refer to review comments in introduction.

05 May 2008
Ref: 08GTE152b

GSE Response to ERGEG Draft Guidelines on Article 22

Introduction

GSE appreciates the opportunity to contribute to the ERGEG consultation on Draft Guidelines on Article 22.

The proposed Guidelines aim to harmonize the approach within the EU for implementing Article 22 and to guide deciding authorities in making their decisions based on that article. Nevertheless, GSE would like to stress that it is important that deciding authorities continue to take account of national specificities.

GSE is not aware of any major concerns from its member companies regarding the clarity of the current guidelines related to Article 22, although improvements could be made with respect to the timeliness of the process, the transparency of NRA considerations and the possibility for appeal. The European Commission was made aware of this fact when GSE was invited to provide input to the (recently published) EC guidelines on art.22. Yet investment in storage is a priority area for GSE and Article 22 remains an important tool for facilitating investment.

Projects which are exempted under Article 22 have, by definition, a proven beneficial impact on both competition and security of supply. GSE's general position is that the guidelines should stay within the scope of the legislative text of Article 22 Gas Directive and not impose additional requirements.

GSE would like to highlight the following comments on the proposed Guidelines. The answers to the specific questions to stakeholders will be given in annex.

GSE would like to draw attention to the existence of negotiated TPA for storage as a regime left to the discretion of Member States according to Directive 2003/55/EC. GSE would like to express concern about ERGEG's position on nTPA as a form of exemption[1]; it appears that in the draft guidelines, probably just as a transposition of the applicable regime to transportation, Article 22 is seen as derogation to regulated TPA[2]. This position is clearly not in line with Directive 2003/55/EC. The

[1] Among the different kinds of exemptions, negotiated TPA is seen as a "partial exemption from tariff regulation" (p.16).
[2] P.5 of GGP Art. 22 : " there are circumstances where investment may not be undertaken if subject to all of the requirements associated with a regulated TPA regime". P.6 « it represents a deviation from rTPA ». P.7 "the risk

Guidelines should follow the Directive and eligibility for a TPA exemption should include storage facilities under a negotiated TPA regime.

Open season for storage

Open seasons (or comparable mechanisms) may be helpful tools in the assessment of market demand but GSE would like to stress that they are not always an appropriate evaluation tool for storage. For reasons mentioned below, open seasons for storage should not in itself be mandatory. Furthermore, making this process mandatory would go beyond the scope of the current legislation.

Firstly, storage project developments have long lead times (10-12 years for an aquifer, 5-8 years for a depleted field) and secondly, users' (especially traders') valuations of a storage project are commonly based on a comparison with the short/medium term prices (up to 3 years) given by the market.

This implies that open seasons may, under those circumstances, not provide the right investment signals over the time horizon required for the investment decision. As a result, open seasons may in some cases not provide the required stimulus for investments if the current market conditions are not favourable.

Other means like, for example, traditional demand forecasts or an appropriate range of contract durations can – in those circumstances – possibly be more adequate for determining total demand in a certain market area.

In the specific case of storage, it should be obvious that the use of an open season could not lead to a consistent development or expansion plan of a facility: the size of a project, although based on market demand, will in general also (and sometimes exclusively) depend on or be limited by the technical and physical characteristics of infrastructure (e.g. reservoir size) and on the risk in terms of the amount of money to be invested that a company is willing to accept.

Exemption applicants

The guidelines emphasize the very high improbability for an incumbent to get an exemption[3].

GSE believes that Article 22 exemptions should in principle be available to every storage operator, whether incumbents (or their affiliates) or newcomers, provided that the five criteria under Article 22 are

addressed under Art.22 […] can be assumed to be relevant where the […] investor would not be able to invest in the necessary new infrastructure under a regulated TPA regime." P.8 "deviations from the requirements of rTPA should [only] facilitate the investment that would otherwise not be brought forward."

[3] P.7 of GGP Art. 22 : "art.22, which requires that new infrastructure enhance competition […] makes it very difficult for dominant players or their affiliates to receive TPA exemptions". ERGEG adds that "market shares of 50% or more may in themselves be evidence of a dominant market position", according to Community case law (p.11). "A dominant player willing to get an exemption must prove that its market position will decrease as a result of the exemption and must show how the investment will contribute to enhance the position of smaller players" (p.12). ERGEG "reminds the competent authorities that there is a greater likehood that competition will be enhanced when an exemption is given to a new entrant" (p.12).

met and that exemptions are granted within a framework that ensures competition. Furthermore, GSE considers that a distinction should be made between suppliers and infrastructure system operators.

Exemption duration

According to the Draft Guidelines on Article 22, the duration of the exemption should not be longer than the expected pay-back period of the project as assessed by the NRA.

This is not in line with Directive 2003/55/EC, which states that on a case-by-case basis consideration may be given to the need to impose conditions regarding duration of the exemption; when deciding on such condition the authority shall take account of, in particular, the duration of contracts, (…) the time horizon of the project and national circumstances.

Furthermore, GSE underlines the need for a cooperation process between the investor and the NRA, where the investor shall propose the expected pay-back period underlined by the economic evaluation and any other relevant considerations.

Exemption review

Concerning the possibility of reviewing granted exemptions, it is essential in GSE's view that the criteria are specified in advance. Any uncertainty or discretional approach on the criteria will undermine investments.

Amendment or revocation of an exemption should only be possible in case the applicant breaks applicable law or does not comply with the conditions set in advance by the authorities. The mere suggestion that an exemption, once granted, could be changed or revoked on other grounds than stated above may severely impact on the investment climate.

Capacity and congestion management

GSE agrees that transparent and non-discriminatory rules of capacity allocation management and congestion management are necessary to ensure that capacity is efficiently used.

Still, GSE is of the opinion that while it is the responsibility of the regulatory authorities to set the general regulatory framework for abovementioned methods, the operator has the prerogative to choose the capacity allocation and congestion management methods that are best suited to the facility.

GSE is currently working on a paper on capacity allocation and congestion management procedures, which should provide an overview of the currently applied mechanisms while offering some practical guidance to all GSE and non-GSE storage system operators.

Annex

Answers to questions to stakeholders

Q1. 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?

The described principles and guidelines may offer guidance for competent authorities when deciding on exemption procedures. However, we have a number of general and specific comments (listed above), which we offer for consideration.

Q2. Do you consider the present scope of eligible infrastructure to be too narrow?

In principle, all major infrastructures should be eligible and we do not see why any kind of infrastructure should be out of scope. This confirms the current practice, where other infrastructure than interconnectors, LNG and storage facilities have successfully applied for exemptions under Article 22.

Q3. 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?

Please refer to the GSE general comments on open seasons.

Q4. Should open seasons also be used to allocate equity?

The way equity is to be allocated should be decided by the initiators of the project. Allowing partners to participate will introduce additional conditions, either financially, technical or contractual, that might influence the access regime or the tariff structure envisaged by the initiators. An open season could be a mechanism to attract project partners and the initiators should be free to use a mechanism they prefer.

Q5. 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?

Please see GLE response.

Q6. Are the described criteria for assessing the effects of an investment in infrastructure on enhancement of competition in gas supply appropriate?

GSE agrees with ERGEG's position with regard to defining the relevant market in order to assess enhancement of competition. However, GSE would like to emphasize the fact that an incumbent can be a new entrant in a different market.

Furthermore, GSE does not see why (par. 3.2.1.2 under c) 'Predominant cost structure in the relevant market' should be a criterion for the assessment by the NRA. The project initiators will base their initiative on an economic analysis of the relevant market and may not be aware of the cost structure in the market as information on costs is generally confidential.

Q7. Are the described criteria for assessing the effects of an investment in infrastructure on enhancement of security of supply appropriate?

These criteria could be appropriate but there seems to be no need to be prescriptive. There can be many reasons why a specific infrastructure investment could positively contribute to security of supply.

Furthermore, GSE does not understand why the NRA would assess the granting of an exemption for the same project to another party. The market is liberalised, which means the initiative for projects is with market parties. It is not the task of the NRA to determine which party 'wins' the project.

Q8. Are the described criteria for the risk assessment appropriate?

These criteria create confusion insofar they seem to be only related to rTPA. They are therefore not adapted to the specific case of storage because the regimes are different. Regulated TPA is not the only possible regime for storage.

Q9. 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 assessment could be supported by an analysis by the TSO that connects the new infrastructure with the gas network and that addresses if sufficient capacity can be allocated to the new infrastructure in a timely manner.

Q10. To what extent should consultations with neighbouring authorities be done?

For storage projects, such consultations should be limited to assessing the effect of the project on the neighbouring markets and only in cases where such effect can reasonably be expected.

Q11. 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?

Article 22 offers much flexibility to the project initiator respectively the deciding authority to adjust the request for an exemption and the decision on what will be exempted. Partial or full exemption of TPA and tariffs, if required limited in time, is possible. Such decisions should be taken on a case-by-case basis taking into account all relevant circumstances. Providing guidelines in this area should not restrict this flexibility.

As already stated in GSE's general comments, the Guidelines seem to consider only rTPA as an admissible regulatory regime and treat negotiated TPA as a partial exemption. This is in contradiction with the Directive, where for gas storage, Member States can choose between regulated or negotiated access.

Q12. Do you believe that Art 22 exemptions should also benefit incumbents or their affiliates? If yes in what way and to what extent?

Yes. Please refer to the GSE general comments.

Q13. 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?

Please refer to the GSE general comments.

5 May 2008
Ref:08GLE152c

GLE Response to ERGEG Draft Guidelines on Article 22

Introduction

1. In March 2008, ERGEG issued the Draft Guidelines on Article 22 and successively launched a public consultation involving all the stakeholders. ERGEG aims with this document at creating a "harmonised and transparent framework for competent authorities when deciding on exemption procedures".

2. GLE would like to stress its views about Article 22, in particular:

   (i) Investments in new LNG infrastructures (new facilities or expansion of existing ones) are crucial for supporting effectively the functioning of the gas market in Europe.

   (ii) Article 22 exemptions are one of the tools to facilitate investments in major infrastructures such as LNG Terminals. Application of Article 22 of the Second Gas Directive may foster investment climate but when exemptions are granted, these should not be detrimental to the effective functioning of the internal gas market and take into account the interests of existing LNG Terminals both subject to rTPA and exempt;

   (iii) the existing procedural note from the Commission (30.01.2004) provides sufficient guidance to determine exemption from certain provisions of third party access regime;

   (iv) exemption procedures shall prevent the introduction of market distortions, taking into account the investment system rules applied in each country;

   (v) Article 22 should be addressed to allow access and tariff exemption provided that transparency and non-discriminatory approach is complied with.

3. This GLE document is intended to provide input into ERGEG's work on developing the draft Guidelines according to the above views. The document is based on ERGEG's questions to

stakeholders included as part of Guidelines consultation. Additional comments have been included where there is otherwise no suitable question raised by ERGEG that allows GLE concerns to be expressed.

4. For the sake of clarity, neither GLE nor individual GLE stakeholders are deemed to agree or disagree with those Guidelines which are not commented upon here.

Comments relating to the General Principles on Article 22 Exemptions

5. GLE welcomes the ERGEG initiative for the harmonisation of the criteria for granting an exemption, improving the approach and evaluation consistency between NRAs. The significant amount of infrastructure projects which either received exemptions or is in the process of requesting them demonstrates the success of Article 22 in attracting investments.

   Therefore the need for a harmonisation and a more consistent approach in the EU Countries should not prevent exemption from being considered on a case-by-case basis.

6. GLE considers that a sound and stable investment climate is crucial for capital-intensive LNG regasification infrastructure development. A fair rate of return which reflects the level of the risk attached to the LNG investment should be ensured.

7. GLE's general position is that the Draft Guidelines should stay within the scope of the legislative text of Article 22 of the Gas Directive and should not impose or imply additional requirements.

8. GLE agrees that it is important to thoroughly assess applications for Article 22 exemptions, however, whilst it is important to assess related information, it is also important to ensure that there is a balance in terms of the information requirement and the associated costs for the project initiator, given that such projects, if unsuccessful, will not go ahead and therefore any upfront costs may represent a significant risk.

9. The Draft Guidelines appear to emphasize a high improbability for an incumbent to receive an exemption. GLE considers that the Guidelines should not impede any operator from applying Art. 22 exemptions, whether they are incumbents (or their affiliates) or new comers, provided that the five criteria under Article 22 are met and that exemptions are granted within a framework that ensures competition.

10. In GLE's view regulatory guidance notes on the criteria that may be used in the review of an exemption application should be carefully specified and be available to project developers in advance. Uncertainty on the criteria and any lack of visibility will undermine confidence of investors. A review of an exemption that has been granted should only be possible where the behaviour of the facility owner/operator is proven to result in negative effects on competition or does not comply with one or more of the conditions included as part of the Exemption order. Even a mere suggestion that an exemption, once granted, could be changed or revoked on other grounds than those stated above will severely undermine investment confidence.

Questions for stakeholders

Q1. 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?

11. As stated in the previous paragraph, the significant amount of infrastructure projects either received exemptions or are in the process of requesting them demonstrates the success of Article 22 in attracting investments. However, the need for a harmonisation and a more consistent approach in the EU Countries can not be detrimental to the efficacy of this tool or to the operation of facilities under it.

12. The guidance has to be defined broadly enough so that the National Regulatory Authorities can apply these without risk of conflict in their national market circumstances. This is particularly important for those Member States where rTPA has hitherto been the preferred direction of the NRAs.

13. The Draft Guidelines should be limited to that of interpretive guidance to competent Authorities based on the 5 tests included in Article 22, and should not arbitrarily reduce the possibility for granting an exemption. Anyway the Guidelines should also underline that NRAs can of course continue to be allowed the option to determine whether appropriate long term and stable incentives can be made available for the operation of a new facility under an rTPA regime taking into account the consequences for consumers in the relevant markets.

14. The described principles and guidelines may offer guidance for competent authorities when deciding on exemption procedures. However, GLE has a number of general and specific comments which should be taken into consideration

Q2. Do you consider the present scope of eligible infrastructure to be too narrow?

15. GLE believes that the Draft Guidelines on Article 22 should not go beyond that envisaged or allowed by the Directive and the scope should be limited to that mentioned in the Directive.

    Actually the aim of the guidelines is to provide detail for the process through which applications will be considered, rather than redefining the scope of the eligible infrastructure. Consequently, GLE does not consider this matter consistent with the scope of the current consultation.

16. Giving the above, and bearing in mind that the Directive 2003/55/EC establishes that only "major new gas infrastructures, i.e. interconnectors between Member States, LNG and storage infrastructures may be exempted", GLE considers that new technologies are neither mentioned in the Directive nor in the 3rd Package proposal. On this basis new projects should be analysed under the five tests mentioned in Article 22 regardless the type of technology used for the development of the infrastructure.

17. For the same reasons a non duplicable facility should be treated no differently to that of a non duplicable facility in the review process. Of course in certain circumstances it might be expected that the decision or conditions for exemption might be different for a non duplicable facility in a Member State than they might be for an equivalent duplicable facility in another Member State.

Q3. 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?

18. The Open Season (or comparable mechanism) is an effective market based method for assessing the market demand providing the mechanism both for identification of the level of market interest and for an efficient and non discriminatory initial allocation capacity. Anyway, when applied, this procedure should ensure that:

    - Project companies do not offer unattractive terms in order to deter third party participation;

    - Capacity allocation is done in a transparent and non-discriminatory way.

19. GLE generally believes that the Open Season relevance, during the procedure for the application of article 22, depends on different factors like the national regulation framework, the technical constraints, the business model, the need to increase the security of supply differentiating the gas sources and so on.

20. Therefore open seasons (or comparable mechanisms) may be a helpful tool in assessing market demand but should not be mandatory.

Q4. Should open seasons also be used to allocate equity?

21. The allocation of equity is out of the scope of the Draft Guidelines on Article 22. The subject who invests in a new infrastructure in defining investment programme shall be free to choose the partners considered more reliable and suitable for the project. The way equity is to be allocated should be decided by the initiators of the project that shall decide the ownership structure of the project, without any mandatory provisions.

Q5. 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?

22. In principle there are not sufficient reasons for a different application of Article 22 to LNG Terminals as regards other eligible infrastructure.

23. However GLE believes that, being understood that the five tests of the Directive and a homogeneous approach for the application of Article 22 are respected, is reasonable that any guidelines adopted should allow the specificities of the LNG sector to be taken into account in the determination of an exemption decision.

Q6. Are the described criteria for assessing the effects of an investment in infrastructure on enhancement of competition in gas supply appropriate?

24. GLE supports the approach described in 3.2.1 in the Draft Guidelines. .

25. GLE supports 3.2.1.2 a) namely that an applicant provides information on its market position. The applicant will only be required to provide information on the market position of others where such information is publicly available or is available through an appropriate market consultant.

26. GLE agrees that an assessment such as that proposed under 3.2.1.2 b) will be required but any such analysis should, in the case of an exporter should at least focus on the position of that exporter within the relevant market (production and supply of gas including LNG).

27. GLE broadly agrees with the items to be assessed under 3.2.1.2.c) but questions the requirement for ranking projects and does not see why 'Predominant cost structure in the relevant market' should be a criterion for the assessment by the NRA. The project initiators will base their initiative on an economic analysis of the relevant market and may not be aware of the cost structure in the market as information on costs is confidential.

Q7. Are the described criteria for assessing the effects of an investment in infrastructure on enhancement of security of supply appropriate?

28. The criteria could be appropriate but there seems to be no need to be prescriptive with the risk to create a barrier to the investment. There can be many reasons why a specific infrastructure investment could positively contribute to security of supply.

Q8. Are the described criteria for the risk assessment appropriate?

29. The NRA may evaluate whether appropriate incentives can be made available to a project sponsor under an rTPA regime. In particular as the NRA is expected to demonstrate that it is capable of offering a clear, stable and predictable regulatory framework including i) a fair rate of return for new investments, ii) clarity and transparency of the rules applied to new infrastructures iii) long term visibility on returns to companies that are investing iv) possibility to sign long term contracts with respect to the new capacity built according to market request (e.g. open season). An NRA cannot however prevent an application under Article 22 being made nor resist a review of such an application.

30. An exemption may be granted when in the view of the deciding authority the relevant tests of Article 22 are met.

31. GLE questions the significance of throughput estimates in the risk analysis. At the point of allocating primary capacity throughput is, or is largely, irrelevant to a merchant infrastructure owner when seeking most favourable financing. The level and duration of capacity contracts are on the other hand extremely important. For an integrated project involving “own use” production, the initial export market risk will also be an important element in the assessment of financing terms.

Q9. 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?

32. The criteria mentioned in the Draft Guidelines on Article 22 are broadly appropriate but some matters should be more carefully considered: for instance the requirements for investment in the system to which the infrastructure is connected and the impacts on the existing terminals.

33. About the requirements for investment, the assessment could be supported by a timely analysis by the TSO that connects the new infrastructure with the gas network and which makes clear the timing and mechanism by which sufficient transmission capacity can be allocated to the new infrastructure.

34. As regards the potential detrimental impacts of the exemption over the existing LNG terminals subject to rTPA, it should be analysed whether the new LNG terminal could put at risk cost recovery of existing LNG terminals subject to rTPA.

Q10. To what extent should consultations with neighbouring authorities be done?

35. GLE notes that Art. 22 paragraph 3 (e) does not apply to LNG. In case that a LNG terminal requesting for an exemption could affect interconnected markets, it should be left to the NRA decision whether consultations with neighbouring authorities should be done.

Q11. 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?

36. The Draft Guidelines on Article 22 offers a sufficient flexibility and GLE agrees that there should be no limitation on the range of possible exemptions that could be applied for and granted.

37. GLE would again point out that the solutions to be adopted should be taken on case-by-case taking into account all relevant circumstances.

Q12. Do you believe that Art 22 exemptions should also benefit incumbents or their affiliates? If yes in what way and to what extent?

38. If the Article 22 tests are considered passed by the rigorous application of the procedures under question, then it should not matter whether an incumbent or its affiliates derives some benefit.

Q13. 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?

39. Concerning the possibility of reviewing exemptions, as already stated at point 10 of the present document, it is essential in GLE's view that the criteria are well ex-ante specified. Otherwise, the uncertainty on the criteria and the lack of visibility will undermine investments. A review of an exemption should only be possible in case the applicant breaks that law or does not comply with the conditions set in advance by the authorities.

    Any other retrospective adjustment of the exemption, for terms and conditions granted, would be detrimental to owner and user confidence in the regulatory regime.

40. Any automatic right to review an exemption based on conditions that are outside the control of the owner/operator creates uncertainty and potentially jeopardises investment. For instance Section 3.3.1.3 b (duration) proposes that an exemption that is dependent on "market

predictions" can be reviewed after it is granted if conditions change. If there were to be scope for a regulator to review an exemption based on changes in market predictions (especially if revocation remained an option and even if only of last resort) it would have the effect of inhibiting to a greater or lesser degree based on the project under review, the availability or cost of finance.

Other remarks

41. According to the text of Art. 22, paragraph. 3 (b) (ii) is applicable only to interconnectors. The suggestion that this should also apply to LNG [and storage facilities] (paragraph 3.3.1.3) goes beyond the current legislation.

    Under "Duration of the exemption", bullet (b) a clause for revision *may* be attached to the exemption, not *shall* be. The Directive requires that the duration of contracts may be taken into consideration when determining the duration of an exemption and this should be included in the guidelines.

    Under "Mechanisms for management and allocation of capacity", bullet (c) the NRA should not be able to change the (design of the implementation of) conditions prior to the start of commercial operation of the infrastructure.

    Concerning anti-hoarding provisions, insofar as the operator can only manage "the unused capacity when the holders of capacity did not nominate its use" (cf. § 3.3.1.3), the operator cannot be responsible for "long term use-it-or-lose-it", but only for "short term use-it-or-lose-it" provisions. The NRAs are the ad hoc (most) relevant entities to appreciate hoarding of capacities via long term contracts and impose sanctions on it.