



## **GEODE Position Paper on ERGEG Public Consultation Paper of 5 March 2008**

### **Draft Guidelines on Article 22**

The European Regulatory Group for Electricity and Gas (ERGEG) has presented a Public Consultation Paper on the Draft Guidelines on Article 22 of Gas Directive 2003/55/EC. GEODE welcomes the opportunity to contribute to the consultation. In the following, GEODE would like to present its view on the questions raised by ERGEG in the consultation.

#### ERGEG Consultation Questions

*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?*

GEODE is convinced that the described general principles and guidelines will be an important tool for the proper and coherent application of Art. 22. In accordance with the provision of the Gas Directive and implementation note of the European Commission on Art. 22, the ERGEG guidelines need to emphasize that granting an exemption is clearly an exception to the general rule of third party access (TPA). Otherwise, the creation of a competitive and well-functioning internal market for gas will suffer severe setbacks. In its current form, the guidelines reflect that exemptions are to be granted exceptionally and on a case-by-case basis only. Apart from that, GEODE considers that some of the guidelines need further clarification in order for them to be a good guide for national regulatory authorities.

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

The types of infrastructure listed under Art. 22 (interconnectors, LNG and storage facilities) include all infrastructures where granting an application might be considered appropriate. Other types of infrastructure, e.g. transmission infrastructure within a Member State, must remain excluded due to the fact that granting an exemption may hamper the development of a competitive market. As far as the regulatory treatment of “new technologies” is concerned, GEODE shares ERGEG’s view: Under the condition of identity with the three types of infra-

structure explicitly mentioned in Art. 22, new technologies may also be subject to an exemption. In this context, GEODE suggests amending guideline 3.1 with the provision that the undertaking applying for an exemption shall prove the identity of the new technology with the above mentioned types of infrastructure with respect to size, purpose and economic relevance.

*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 subsequent capacity allocation? Should open season (or comparable) procedure be mandatory?*

GEODE believes that open season procedures are an important tool in assessing market demand for capacity. Given the fact that open season procedures are rarely carried out in a transparent and non-discriminatory way, the procedure does not mirror market demand correctly. ERGEG should therefore first of all investigate to what extent market players apply open season procedures in line with the Guidelines for Good Practice on Open Season. A necessary step to ensure full compliance might be to recommend binding legislation on the basis of the current open season guidelines.

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

While open seasons have to be considered as an important tool to assess market demand for capacity, equity allocation can be carried out without such procedures. GEODE believes that the decision of financing a new infrastructure should be left to the market player initiating the project.

*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?*

In general the application of Art. 22 should be identical for LNG facilities and the other types of infrastructure mentioned in the provision. GEODE is well aware of the importance of LNG facilities for Europe's gas supply, especially with regard to the growing dependence on gas imports from Russia. Nevertheless, the importance of LNG facilities does not justify different treatment. If in a particular case an LNG facility will significantly enhance competition and security of supply, this can be reflected comprehensively in a case-by-case decision on the grounds of Art. 22. Besides, the criteria of Art. 22 as well as the ERGEG guidelines provide an adequate scope for regulatory evaluation of the effects of a particular infrastructure on competition and security of supply.

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

The proposed guidelines are appropriate criteria for assessing the effects of a new infrastructure on enhancement of competition. As guideline 3.2.1.3 states, the enhancement of competition shall be substantial enough to justify an exemption. Additionally, GEODE would like to point out that granting dominant market players an exemption might at least in the long run strengthen their market position due to competitive advantages in other fields. Consequently, particular attention shall be paid to projects carried out by dominant market players. GEODE therefore welcomes the provision saying that there is a greater likelihood that competition will be enhanced when an exemption is given to a new entrant. From our experience, new entrants are also willing to open up parts of their infrastructure so that other market participants can benefit from the project. In those cases, a new infrastructure has a twofold positive effect on competition: Firstly the (dominant) market position of established undertakings will decrease as a result of the exemption. Secondly, market players other than the new entrant will be able to compete more effectively.

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

As regards the criteria for assessing the effects of a new infrastructure on enhancement of security of supply, the guidelines provide an appropriate guidance for regulatory decisions. GEODE, however, wants to point out that the goals of achieving greater competition and security of supply need to be well-balanced. Vague referrals to security of supply shall not be a gateway to an exemption. Instead, the positive effects of the project shall be proven adequately. As guideline 3.2.2 suggests, non-duplicable infrastructures shall be given particular attention.

*Are the described criteria for risk assessment appropriate?*

The described criteria are appropriate and should be adopted in the final version of the guidelines on Art. 22.

*Are the described criteria for assessing whether an 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 appropriate and should be adopted in the final version of the guidelines on Art. 22.

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

Consultations with neighbouring authorities are particularly important for the creation of well-functioning regional/transnational markets. A lack of cooperation bears the danger that a new infrastructure enhances the isolation of a national gas market. GEODE considers it necessary that the national regulatory authorities consult each other if the proposed infrastructure has a cross-border effect. This includes projects situated only in one Member state which could have supranational impact. Furthermore, the European Commission and/or the soon-to-be established Agency for the Cooperation of Energy Regulators (ACER) shall be notified and accompany the consultation process.

*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?*

GEODE believes that an exemption should remain the exception, and in those cases an exemption is to be granted, a partial exemption should be the rule. This means that national regulatory authorities should in general grant only partial exemptions if a new infrastructure qualifies for an exemption. By doing so, the hidden negative effects on competition can be kept to a minimum. In that respect, it is important to illustrate the wide range of possible exemptions in the guidelines (see guideline 3.3.1.1). GEODE gives preference to partial exemptions which would give the applicant the right to retain only parts of the available capacity. In addition to that, GEODE welcomes the guidelines on the conditions on the duration of an exemption set out under 3.3.1.3. A full exemption shall only be granted if the new infrastructure is the only means to enhance competition and security of supply.

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

Granting an exemption to incumbents shall remain the exception. However, the necessity to grant an exemption also to incumbents or their affiliates shall not be ruled out completely, particularly in those cases where competition remains underdeveloped and other means to foster competition are not available. The relevant national regulatory authority should then give preference to a partial exemption.

*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?*

GEODE in general believes that the possibility to review the exemption decision undermines the willingness to invest in high-risk projects. However, given the fact that the underlying conditions and circumstances of a project might (unexpectedly and significantly) change, the

national regulatory authorities should be entitled to review and revoke the exemption. When taking a decision on revocation, the authority shall pay attention to the protection of confidence. This means that the exemption can only be modified, but not completely revoked.

### Final Remarks

GEODE is glad to respond to the issues raised in the consultation and is looking forward to escorting ERGEG's initiatives in the future. We share the position of ERGEG that a coherent framework for the application of Art. 22 is necessary. The guidelines include very important steps to ensure coherence and facilitate competition in the gas market. An adoption should therefore be envisaged as soon as possible.

Barcelona, 28.04.2008