REPUBLIKA E SHQIPËRISË
ENTI RREGULLATOR I ENERGJISË
Bordi

VENDIM

Nr. 36 Datë 31. 03. 2016

PER MIRATIMIN E CERTIFIKIMIT PERFUNDIMTAR TË TAP AG SI OPERATOR I PAVARUR I TRANSMETIMIT TË GAZIT NATYROR

Bazuar në nenet 13, 37 dhe 38 të Ligjit nr.102/2016 "Për Sektorin e Gazit Natyror"; 11, të "*Rregullave për Certifikimin e Operatorit të Sistemit të Transmetimit për Gazin Natyror*" të miratuar me Vendimin nr. 100, Datë 05.08.2015 të Bordit te ERE-s, të ndryshuar; te pikes 4.5.2 te Opinionit te Perbashket Perfundimtar (Final Joint Opinion), miratuar me Vendimin nr.64, date 13.06.2013 te Bordit te ERE-s; Traktatit te Komunitetit te Energjise te ratifikuar me Ligjin nr.9501, date 03.04.2006; Rregullave per Organizimin, Funksionimin dhe Procedurave te ERE-s; Vendimit te Keshillit te Ministrave te Komunitetit te Energjise Nr.2011/02/MC-EnC; si dhe ne perputhje me nenin 10-te te Direktives 2009/73/EC dhe nenin 3 te Rregullores EC, Nr.715/2009 ashtu si jane adoptuar ne Vendimin e Keshillit te Ministrave te Komunitetit te Energjise Nr. 2011/02/MC-EnC dh; Vendimin e Bordit te ERE-s, nr.130 date 31.10.2015, "Per miratimin paraprak te certifikimit te TAP AG per aplikimin e bere nga ana e kompanise TAP AG, ne lidhje me certifikimin si Operator i Pavarur i Transmetimit te Gazit Natyror" dhe ne Opinionin 1/16 te Komunitetit te Energjise mbi Certifikimin e TAP AG te dates 03.02.2016, nr. Prot. 37/2 date 12.02.2016, Bordi i ERE-s në mbledhjen e tij të datës 31.03.2016, mbasi shqyrtoi relacionin e përgatitur nga grupi i

punës "Për miratimin perfundimtar të certifikimit të TAP AG, në lidhje me certifikimin si Operator i Pavarur i Transmetimit të gazit natyror dhe,

Duke mare ne konsiderate qe:

- Ne date 01 Korrik 2015, TAP AG ka paraqitur ne ERE kerkesen nr.12/11 prot. date 06.07.2015, per certifikimin si Operator i Pavarur i Transmetimit te Gazit Natyror ne perputhje me piken 4.5.2 te Opinionit të Përbashkët Përfundimtar (Final Joint Opinion), miratuar me Vendimin Nr. 64 date 13.06.2013 te Bordit te komisionereve te ERE-s, si dhe dokumentacionin perkates i cili eshte gjithashtu i aksesueshem edhe ne Data Room-in e krijuar per kete qellim.
- Kjo kerkese dhe dokumentacioni i paraqitur ne ERE, eshte vene gjithashtu ne dispozicion te Autoriteteve Rregullatore Grek dhe Italjan, perkatesisht RAE dhe AEEGSI, si pjese e gjithe dokumentacionit te nevojshme per proceduren e certifikimit nga tre Rregullatoret e vendeve ku kalon projekti TAP, perkatesisht Greqi, Shqiperi dhe Itali
- Paragrafi 4.5, pika 2 e Opinionit të Përbashkët Përfundimtar (Final Joint Opinion) kërkon që TAP AG të certifikohet si operator i pavarur i transmetimit për gazin natyror, para fillimit të ndërtimit të infrastrukturës dhe jo më vonë se data 1 Janar 2018.
- Në paragrafin 4.5 të Opinionit të Përbashkët Përfundimtar (Final Joint Opinion) vendoset perjashtimi i TAP AG nga rregullat mbi ndarjen e pronesise sipas nenit 9, pika 1 te Direktives 2009/73/EC per nje periudhe 25 vjet duke filluar nga vendosja ne perdorim e infrastruktures.
- Gjithashtu referuar nenit 37 pika 6, te ligjit nr.102/2015 "Per sektorin e gazit natyror", ERE ruan konfidecialitetin e informacionit tregtar gjate procedures se certifikimit te TAP AG.
- ERE ne bashkëpunim me Rregullatorin Grek (RAE) dhe te Italian (AEEGSI) pergatiten Draftin e Perbashket te Certifikimit Paraprak te TAP AG te cilin ERE e aprovoi me Vendimin nr.130 date 31.10 2015.
- Ne perputhje me paragrafin 4, neni 37 i ligjit nr.102/2015 "Per sektorin e gazit natyror", ne daten 02.12.2015 u dorezua ne Sekretariatin e Komunitetit te Energjise Vendimi nr.130 i Bordit te ERE-s i 31 Tetor 2015 se bashku me

Draftin e Perbashket te Certifikimit Paraprak te TAP AG te Rregullatoreve te Energjise.

- Ne 3 shkurt 2016 Sekretariati i Komunitetit te Energjisë ka dhënë Opinionin e tij Nr.1/16, rregjistruar ne ERE me nr. Prot.37/2 date 12.02.2016, ne lidhje me Certifikimin e TAP AG Bazuar ne nenin 9-te te Vendimit 2011/02/MC-EnC i Këshillit te Ministrave te Komunitetit te Energjisë. ERE ne vendimin përfundimtar te certifikimit duhet te marre shume ne konsiderate Opinionin e Sekretariatit te Komunitetit te Energjie.
- Gjithashtu Komisioni Europian ka dhënë Opinionin e tij te datës 28.01.2016, (rregjistruar ne ERE me nr. Prot. 37/7 date 15.02.2016), për AEEGSI dhe RAE, ne lidhje me Vendimin e Përbashkët Paraprak te Certifikimit te TAP AG.
- Ne piken 4.5 te Opinionit te Perbashket Perfundimtar (Final Joint Opinion) jane percaktuar kriteret perkatese per certifikimin para venies ne operim te gazsjellesit. Ne cilesine e autoritetit pergjegjes per rregullimin e sektorit te gazit natyror dhe ne perputhje me ligjin nr. 102/2015 "Per Sektorin e Gazit Natyror", si dhe me detyrimet sipas Traktatit te Komunitetit te Energjise i ratifikuar me ligjin nr.9501 date 03.04.2006, ERE ka miratuar me vendimin nr.100 date 05.08.2015, Rregullat per Certifikimin e Operatorit te Sistemit te Transmetimit për Gazin Natyror, te ndryshuar.
- Ne kerkesen e tij per Certifikim te mbeshtetur ne dokumentacion, TAP AG ka justifikuar perputhshmerine me disa kerkesa te kapitullit IV te Direktives 2009/73/EC dhe u angazhua per te permbushur brenda dates se fillimit te Operacioneve (COD) te te gjitha kërkesave te mbetura ne përputhje me udherrefyesin (Road Map).
- Ne lidhje me aktivitetet aktuale te TAP AG, te cilat kane te bejne me ndarjen e kapaciteteve te transmetimit dhe aktivitete te tjera te lidhura me to, Rregullatoret e Energjise sebashku kane marre te gjitha masat e nevojshme për parandalimin e diskriminimit ndaj palëve te treta nepermjet krijimit te nje kuadri regullator specifik, përfshirë këtu emërimin dhe aktivitetet e Oficerit te perputhshmerise (compliance officer).
- Pas dergimit te Opinionit te Sekretariatit te Komunitetit te Energjise dhe Opinionit te Komisionit Europian, te tre Rregullatoret e Energjise, ai Italian Grek dhe Shqiptar, bashkepunuan per te akomoduar verejtjet dhe sugjerimet e

bera nga Sekretariati i Komunitetit te Energjise dhe Komisioni Europian ne draftin final te perbashket te tre rregullatoreve per certifikimin e TAP AG.

- Bashkepunimi mes te tre Rregullatoreve ne lidhje me Certifikimin e TAP AG si Operator i Pavarur i Sistemit te Transmetimit te Gazit Natyror e ka bazen ne nenin 4.8.1 te Opinionit te Perbashket Perfundimtar (FJO) te aprovuar nga te tre Rregullatoret ne Qershor te vitit 2013 (Vendimi Nr. 64, datë 13.06.2013 i Bordit të ERE-s), nenin 42 te Direktives 2009/73/KE të Parlamentit Europian dhe të Këshillit, datë 13 korrik 2009, "Mbi rregullat e përbashkëta për tregun e brendshëm të gazit natyror, e cila shfuqizon direktivën 2003/55/KE", si dhe ne nenet 9, 15 pika 1/b, 16 pika 25 dhe 19 pika 7 te Ligjit Nr. 102/2015 "Per Sektorin e Gazit Natyror".

- Pas ketij bashkepunimi, ashtu si permendet me lart, te tre Rregullatoret rane dakort per draftin final te perbashket per certifikimin e TAP AG, regjistruar ne ERE me nr. Prot. 37/8 date 25.03.2016. Ne kete draft jane diskutuar dhe marre pergjithesisht parasysh komentet dhe sugjerimet e bera ne Opinionet Sekretariatit te Komunitetit te Energjise dhe Komisionit Europian.

- Duhet theksuar se te dy Opinionet, ai i Komisionit Europian dhe i Sekretariatit te Komunitetit te Energjise ngrene ceshtje dhe problematika te ngjashme te cilat kerkoheshin te sqaroheshin me tej prej Autoriteteve Rregullatore. Te gjitha keto verejtje dhe sugjerime te Komisionit dhe Sekretariatit jane trajtuar dhe sqaruar ne menyre te detajuar tek drafti i perbashket i te tre rregullatoreve per certifikim final te TAP AG bashkengjitur ketij vendimi.

- Sekretariati i Komunitetit te Energjise ne Opinion e tij pervec sa evidentuar me lart, ka kerkuar nga ERE qe te kryeje nje procedure tjeter certifikimi sipas Nenit 10 te Direktives se Gazit dhe Nenit 3 të Rregullores së Gazit te pakten tre muaj para venies ne funksion te gazsjellësit TAP per përmbushjen nga TAP AG te te gjitha kërkesave te Kapitullit IV të Direktivës 2009/73/EC, përveç Nenit 22.

- Sipas shenimit 12 ne draftin final te perbashket per certifikimin e TAP AG, kërkesa e Sekretariatit do te trajtohet ne vendimin kombëtar te EREs mbi certifikimin e TAP AG.

- Ne kete menyre kërkohet qe TAP AG te paraqese evidence se eshte duke përmbushur detyrimet e tij ne perputhje me rregullat e ITO, Kapitullit IV të Direktivës 2009/73/EC, përveç Nenit 22 te pakten tre muaj para fillimit te operimit (COD) per infrastrukturen e TAP. Mospermbushja e ketyre detyrimeve nga ana e TAP do te shkaktoje rihapjen e procedures se certifikimit te TAP AG dhe gjithashtu vendosjen e penaliteteve. ERE do te njoftoje Sekretariatin e Komuitetit te Energjise per gjithe informacionin te dorëzuar nga TAP AG dhe te kerkoje opinionin e tij per përmbushjen.

- Ne cdo rast bazuar ne nenin 39 te Ligjit 102/2015 "Per Sektorin e Gazit Natyror" dhe ne perputhje me nenin 13 te "Rregullores per certifikimin e OST ne sektorin e Gazit Natyror", aprovuar me Vendimin e Bordit te EREs nr.100 te dates 05.08.2015, te ndryshuar, ERE fillon procedurat e vleresimit te certifikimit per te garantuar perputhjen nga TAP AG me kerkesat e Kapitullit IV te Direktives 2009/73/EC, pervec nenit 22.
- Kjo e zgjidh kerkesen e bere nga Sekretariatit i EnC ne Opinionini 1/16, per nje certifikim tjeter te mevonshem te TAP AG ne lidhje me përmbushjen nga ana e TAP e te gjitha detyrimeve sipa**s** Kapitullit IV të Direktivës 2009/73/EC, përveç Nenit 2**2.**

Për gjithë sa më sipër Bordi i ERE-s

Vendosi :

1. Miratimin Perfundimtar te Certifikimit të Shoqerise TAP AG si Operator i Pavarur i Transmetimit (ITO) të Gazit Natyror, ne përputhje me nenin 10 te Direktives 2009/73/CE dhe te paragrafit 4.5.2 te Final Joint Opinion. Certifikimi i TAP AG do te jete subjekt i kushteve te percaktuara ne "Vendimin Perfundimtar te Certifikimit te TAP AG te Rregullatoreve te Energjise" i cili eshte bashkëlidhur këtij vendimi (Aneksi A) si pjese integrale e tij.

2. Ky vendim se bashku me Aneksin A (versioni jo konfidencial) dhe raportin shpjegues te këtij vendimi do te publikohen ne faqen e internetit te ERE-s

3. Te percjelle këtë vendim ne Sekretariatin e Komunitetit te Energjise, Ministrine e Energjise dhe Industrise, ne Ministrine e Zhvillimit Ekonomik, Tregetise, Turizmit dhe Sipermarrjes, ne Autoritetin e Konkurences,ne RAE, ne AEEGSI dhe shoqërinë TAP AG.

Ky vendim hyn ne fuqi menjehere.

Ky vendim botohet ne fletoren zyrtare.

Kryetari i ERE-s

Petrit AHMETI

Energy Regulators' Final Decision on the certification of TAP AG

HAVING regard to Directive 2009/73/EC of the European Parliament and the Council of 13 July 2009
HAVING regard to the Final Joint Opinion of the Energy Regulators on TAP AG's exemption Application of June 2013
HAVING regard to the Energy Regulators' Preliminary Decision on the certification of TAP AG
HAVING regard to the Commission Opinion of 28 January 2016 on the Energy Regulators' Preliminary Decision on the certification of TAP AG
HAVING regard to the Energy Community Secretariat Opinion of 3 February 2016 on the Albanian Energy Regulator Preliminary Decision on the certification of TAP AG

1. Introduction

On 1 July 2015, the Italian, Greek and Albanian National Regulatory Authorities (namely, AEEGSI, RAE, ERE and collectively, "the Authorities") received a formal application by TAP AG for certification on the basis of Section 4.5.2 of the Final Joint Opinion on TAP AG's Exemption Application (hereinafter "FJO"). By means of the aforementioned decision, on June 2013, TAP AG was granted an exemption by the Authorities, pursuant to Article 36 of Directive 2009/73/EC ("Gas Directive"), from third party access, regulated tariffs and ownership unbundling rules for a period of 25 years.

Pursuant to Section 4.5 of the FJO, the exemption from the provisions on ownership unbundling as set out in Article 9.1 of the Gas Directive, was granted to TAP AG starting from the Commercial Operation Date, subject to a set of detailed conditions concerning: (i) TAP AG's functional unbundling to be implemented prior to allocating capacity as a result of the first booking phase, based on a Compliance Programme to be approved by the Authorities and (ii) TAP AG's obligation to apply for certification under Articles 10 or 11 of the Gas Directive, based on an independent transmission operator model, fulfilling certain requirements described in more detail in the following paragraphs.

A preliminary decision on the certification of TAP AG pursuant to Article 10(5) of the Gas Directive was adopted respectively by AEEGSI on 26 November, 2015, RAE on 30 October, 2015, and ERE on 31 October 2015. The decision was notified without delay to the European Commission pursuant to Article 10(6) of the Gas Directive and also to the Energy Community Secretariat. On January 28, 2016, the European Commission (hereinafter also "the Commission") delivered its opinion on the Authorities' preliminary decision on the certification of TAP AG pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of the Gas Directive. On 3 February the Energy Community Secretariat delivered its opinion on ERE's preliminary decision on the Certification of TAP AG pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of the Gas Directive, as incorporated

and adapted by Decision 2011/02/MC-EnC of Ministerial Council of the Energy Community of 6 October 2011.

With the present decision, the Authorities, having assessed, on the basis of the information provided by TAP AG[1], the compliance of the latter with the conditions set in Section 4.5.2 of the FJO adopt their final decision on the certification of TAP AG on the basis of *an ad hoc* independent transmission operator ("ITO") model pursuant to Article 3(2) of Regulation (EC) No 715/2009.

2. Background

The "Trans Adriatic Pipeline" ("TAP") is a major new project aimed to facilitate the transportation of gas produced from the gas fields of Azerbaijan to Greece, through Albania, to Italy and other European gas markets. TAP is being developed by TAP AG, a single purpose company, incorporated under the laws of Switzerland, with no other interest than the development, construction, ownership and operation, including the marketing and maintenance of TAP. Currently, TAP AG's shareholders are either vertically integrated energy undertakings, with interests in supply or production of electricity and gas, or certified gas transmission system operators.

TAP project is currently in its implementation phase as TAP AG is preparing for construction of the pipeline. According to the Authorities' Joint Opinion on TAP AG's request for a prolongation of the validity period of the exemption decision, adopted by the Authorities in April 2015, the construction of the pipeline is planned to start not later than 16 May 2016, whereas commercial operations are scheduled to begin not earlier than 1 January 2020 and not later than 31 December 2020.

Following the European Commission decision on TAP AG's exemption of 16 May 2013[2], the Authorities with three separate acts (AEEG Deliberation 249/2013/R/GAS of the 6th of June 2013, RAE Decision n. 269/2013 of 12th June 2013, ERE Decision n. 64/13 of 13 June 2013) adopted the FJO on TAP AG's request for exemptions from third party access, regulated tariffs and ownership unbundling for 25 years, pursuant to article 36 of Gas Directive, subject to a number of conditions listed in Part 4 of the document. In particular, Section 4.5 of the FJO granted TAP AG an exemption from the provisions on ownership unbundling as set out in Article 9.1 of the Gas Directive, for a period of 25 years, subject to the following conditions:

1. *TAP AG, prior to allocating capacity as a result of the first Booking Phase has to implement functional unbundling. To this end, TAP AG shall establish and submit to the Authorities for their approval, a Compliance Programme, which sets out measures taken to ensure that discriminatory conduct is excluded and that, no commercially sensitive information is communicated to its shareholders. The Compliance Programme should be submitted to the Authorities not later than 6 months after the adoption of the Commission*

[1] The information has been provided by TAP AG in its application for certification and in further communications following the Commission opinion of January 28, 2016.

[2] Commission decision C(2013) 2949 Final of 16 May 2013.

Decision. The Compliance Officer should be appointed not later than 1 month from the approval of the Compliance Programme by the Authorities. This Compliance Programme shall lay down at least the following:

i. *Measures to prevent discriminatory conduct in relation to the participants in the first Booking Phase of the market test, who are not shareholders in TAP AG;*

ii. *The duties and the rights of the employees of TAP AG in the fulfilment of the purposes of the Compliance Programme;*

iii. *The person or body responsible for monitoring the Compliance Programme and submitting to the Authorities an Annual Compliance Report, setting out the measures taken;*

iv. *The principles of the tariff methodology and the congestion management rules that were to be applied to the marketing of capacity by TAP AG.*

2. *TAP AG should be required to be fully certified before the start of the construction of the pipeline, and not later than 1 January 2018. To this end, TAP AG will apply for certification in accordance with Article 10 or 11 of the Gas Directive, as the case may be, with the view to safeguard the degree of independence of the top and executive management of TAP AG from its shareholders. Therefore, TAP AG will need to be certified in each Member State, which territory it crosses. Regulatory Authorities of Greece and Italy will need to assess in their certification decisions the compliance of TAP AG with the unbundling rules prescribed in the Exemption Decision. To this end, the certification application will be based on an independent transmission operator model. TAP should comply with all conditions set out in Chapter IV of the Gas Directive apart from Article 22 of the Gas Directive. These conditions should include, among others as specified in Chapter IV of the Gas Directive, the following provisions:*

   i. *The top and executive management of TAP AG will not participate in any company structures of the shareholders of TAP AG responsible for the day- to-day production and supply of gas;*

   ii. *Evidence that the professional interests of persons responsible for the management of TAP AG are taken into account in a manner that ensures that they are capable of acting independently;*

   iii. *All the financial supervision rights allowed under legal and functional unbundling shall be charged to a Supervisory Body. The Supervisory Body shall be in charge of taking decisions that may have a significant impact on the value of the assets of the shareholders within TAP AG. This includes the decisions regarding the approval of the annual and longer-term financial plans, the level of indebtedness of TAP AG and the amount of dividends distributed to shareholders. However, the Supervisory Body cannot interfere with the day-to-day activities of TAP AG and the operation of TAP pipeline;*

   iv. *Evidence that TAP AG has the necessary resources, including human, technical, physical and financial to have executive decision-making rights;*

v. *Evidence that TAP AG will have a Compliance Programme in place, which is adequately monitored by a compliance officer employed by TAP AG.*

3. *TAP AG is not compelled to comply with Article 22 of the Gas Directive, since the scope of the provisions of Article 22 of the Gas Directive are sufficiently addressed by the in-depth assessment of the Authorities and by the conditions and time limits which are imposed by the FJO.*

In accordance with article Article 36, paragraph 6, of the Gas Directive, in April 2012, prior to granting the exemption decision, the Authorities issued the guidelines for the management and allocation of capacity of TAP AG (the so called "Market Test") according to which the process is to be conducted in two phases, namely, a non-binding Expression of Interest Phase and a subsequent binding Booking Phase. The Expression of Interest Phase took place from 15 June 2012 until 15 August 2012 on the basis of the guidelines approved by the Authorities. Furthermore, in November 2013, the Authorities approved the TAP Tariff Code.

On 11 February 2014, the Authorities approved the Compliance Programme submitted by TAP AG pursuant to Section 4.5 of the FJO, which sets out the measures taken by TAP AG, prior to the allocation of capacity as a result of the first Booking Phase, aimed at preventing, during the construction phase, any discriminatory conduct and any disclosure of commercially sensitive information to TAP AG's shareholders.

Following the approval of the Compliance Programme, in March 2014, the Authorities issued guidelines for the management and allocation of capacity of the binding Booking Phase of the Market Test that started on 17 March 2014 and was concluded in November 2014.

On 1 July 2015, TAP AG submitted a formal application for certification, pursuant to Section 4.5.2 of the FJO. The application has been submitted by TAP AG on the basis of provisions on the independent transmission operator model set out in Chapter IV of the Gas Directive with the exclusion of Article 22 of the Gas Directive.

3. The unbundling provisions of the Gas Directive

According to the Gas Directive, each undertaking which owns a transportation system is required to act as a Transmission System Operator ("TSO") that is responsible, among other things, for granting and managing third-party access on a non-discriminatory basis to system users, collecting access charges, congestion charges and payments under the inter-TSO compensation mechanism, and maintaining and developing the network system. As regards investments, the owner of the transportation system is responsible for ensuring the long-term ability of the system to meet reasonable demand through investment planning. Articles 13 and 17(2) of the Gas Directive describe in detail the tasks and the activities that TSOs must carry out.

The Gas Directive provides for different models with different degrees of structural separation of the network operation from production and supply activities, each of them aims at removing any conflict of interest between producers, suppliers and transmission system operators. These models should remove the incentive of vertically integrated undertakings to discriminate against competitors as regards access to the network, access to commercially relevant information and investments

on the network. The three models should create incentives for the necessary investments and guarantee the access of the new market entrants under a transparent and efficient regulatory regime.

In particular, under the ITO model provided for by Chapter IV of the Gas directive, the TSO may remain part of a vertically integrated undertaking; however, detailed rules are provided for by the Gas directive in order to ensure effective unbundling of the ITO from the vertically integrated undertaking. Among these, the following are of particular relevance:

1. *Autonomy of the ITO*

- Article 17(1) - the ITO must be equipped with all financial, technical, physical and human resources necessary to fulfill its obligations and to carry out the activity of gas transmission;
- Article 17(1)(c) - the ITO should be autonomous and not dependent on other parts of the vertically integrated undertaking; in this respect, leasing of personnel, and contracting of services to the ITO by other parts of the vertically integrated undertaking are categorically prohibited;
- Article 17(1)(d) - appropriate financial resources for investment projects are made available to the ITO;
- Article 17(4) - the ITO must not create confusion, in its corporate identity, communication, branding and premises, in respect of the separate identity of other parts of the vertically integrated undertaking;

2. *Independence of the ITO*

- Article 18(1)(a) - the ITO must have effective decision-making rights, independent from any part of the vertically integrated undertaking and the vertically integrated undertaking is not allowed to determine, directly or indirectly, the competitive behavior of the ITO in relation to day-to-day activities and management of the network. The overall management structure and corporate statutes of the ITO should provide for a decision-making structure and rules ensuring effective independence of the ITO;
- Article 18(1)(b) - the ITO must have the power to raise money on the capital market in particular through borrowing and capital increase;
- Article 18(6) - all commercial and financial relations between the transmission system operator and other parts of the vertically integrated undertaking must comply with market conditions and must be revealed to the regulatory authority upon request;
- Article 18(7) - all commercial and financial agreements between the vertically integrated undertaking and the ITO are approved by the regulatory authority.

3. *Independence of the staff and management of the ITO*

- Article 19 - the management of the ITO must be independent from the interest of production and supply;

4. Supervisory Board

- Article 20 - a Supervisory Body must be set up to be in charge of taking the decisions that may have a significant impact on the value of the assets of the shareholders within the ITO, such as decisions regarding the approval of the annual and longer-term financial plans, the level of indebtedness of the ITO and the amount of dividends distributed to shareholders. The Supervisory Body cannot interfere with the day-to-day activities of the ITO and the management of the network;

5. Compliance Programme

- Article 21 - ITO is under the obligation to establish and implement a compliance programme setting out the measures taken in order to ensure that discriminatory conduct is excluded. The compliance programme must be approved by the regulatory authority. A compliance officer is to be appointed by the Supervisory Body, subject to the approval by the regulatory authority and shall be in charge of ensuring observance of the compliance programme and that the ITO is independent and does not pursue any discriminatory conduct.

A TSO can only be approved and designated as a TSO following a certification procedure laid down in Article 10 of the Gas Directive in combination with the provisions of Article 3 of Regulation (EC) No 715/2009. Article 11 of the Gas Directive sets out the procedure in case the certification is requested by a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries.

4. TAP AG's arguments

4.1 TAP AG's application for certification

In its application for certification of 1 July 2015, TAP AG presented a set of arguments explaining the reasons why it is not currently in a position to fulfill all the conditions laid down in Chapter IV of the Gas Directive concerning the ITO model. These arguments refer to the following:

a) TAP AG is not currently operating as a TSO

TAP AG claims that due to the distinguishing features of the project concerned (first and foremost the fact that the pipeline is still to be constructed), it cannot be certified under the same conditions as an existing transmission system operator ("TSO") belonging to a vertically integrated undertaking. More specifically, TAP AG argues the following:

- First, TAP is a stand-alone project that will lead to the construction of a major new gas transportation asset that will allow gas to be shipped from new gas sources to the European market and it is not being developed as part of any existing transmission system. Moreover, as recognized by the European Commission services in a letter dated 10 April, 2013, no shareholder currently

exercises control within the meaning of the Council Regulation (EC) No 139/2004 ("Merger Regulation") over TAP AG. It results from the above that TAP AG does not belong to a vertically integrated undertaking;

- Second, since the project is currently in view of construction, TAP AG will not engage in TSO's activities, as laid down in article 13 and 17 of the Gas Directive, prior to the date on which the pipeline will be completed and able to receive, transport and re-deliver natural gas (referred to as Commercial Operation Date hereinafter or "COD"). As a consequence, according to TAP AG the application of many of the provisions of Chapter IV of the Gas Directive which are specifically designed to ensure the effective unbundling of existing TSOs from the other parts of a vertically integrated undertaking, proves difficult throughout the construction phase as well as unnecessary.

In addition, TAP AG argues that the premature implementation of the provisions on unbundling could also threaten the purpose of the exemption granted to TAP in the FJO, namely to facilitate new investment in a major cross-border pipeline project independently of existing TSOs, since the strict application of the ITO requirements at this early stage might endanger the completion of the transmission network and the bankability of the whole project (see in particular *sub* e).

b) TAP is subject to an extensive and strict tailor made regulatory regime preventing third parties' foreclosure from the pipeline during its construction and operation

TAP AG argues that its tailor made regulatory regime is able to prevent any third parties' foreclosure from the pipeline since shareholders cannot withhold investment in expansion capacity. Indeed, while TAP AG is exempted from Article 22 of the Gas Directive in respect of any other future investments, the FJO contains an obligation on TAP AG to accommodate economically viable expansions based on binding capacity requests received during regularly conducted Market Tests[3]. The details of the economic viability test for investment in expansion capacity are specified in Article 3.3.1 of the TAP Tariff Code. If TAP AG considers that the expansion of capacity is not economically viable, TAP AG must demonstrate this to the Authorities. If so requested by the Authorities, TAP AG will provide an opinion by an independent third party.

Furthermore, according to TAP AG shareholders' agreement, which governs TAP AG and the implementation of the TAP project, shareholders are obliged to provide financing for an economically viable expansion of the capacity. A decision to build expansion capacity (as well as the approval of the necessary budget) requires the consent of TAP AG's Board of Directors. If the Board does not take a decision in favour of expanding the pipeline's capacity, the Board will be directing in essence

[3] Section 4.1.8 of the FJO stipulates that TAP AG is under the obligation to build additional capacity above the Initial Capacity in order to accommodate binding capacity requests that result in an economically viable expansion of the capacity.

TAP AG not to comply with the FJO, [redacted]. Once the Board has taken a positive decision to build expansion capacity, all shareholders are obliged to finance it severally, pro rata to their respective shareholding in TAP [redacted].

The suitability of TAP AG tailor-made regulatory regime to prevent any potential foreclosure of the pipeline during its construction and operation has also been recognized by the European Commission in its decision of 16 May 2013 on TAP AG's exemption (at paragraph 219). This regulatory regime has been substantially developed since the adoption of the FJO in 2013, and now includes the TAP Tariff Code, TAP AG Regulatory Compliance Programme and the Market test guidelines, approved by the Authorities. The TAP Network Code will also be submitted for regulatory approval on the same basis.

Through the Regulatory Compliance Programme, which was initially approved by the Authorities in February 2014 and will also need to be updated following the certification, TAP AG introduced measures to prevent discriminatory conduct and communication of commercially sensitive information to its shareholders, prior to the First Booking Phase of the Market test, launched in March 2014 and completed in November 2014. A Regulatory Compliance Officer was also appointed by TAP AG and endorsed by the Authorities to implement and monitor compliance with the Regulatory Compliance Programme. Subsequently, the First Booking Phase of the Market test was conducted by TAP AG in accordance with a detailed set of guidelines, approved by the Authorities, aimed at ensuring that this process was conducted independently from its shareholders, in accordance with the FJO's requirements.

Based on the above, TAP AG therefore concludes that during the construction and operation phase, there will be no possibility to discriminate against third parties.

c) Outsourcing of services

TAP AG foresees significant cost benefits in outsourcing some of the technical operation and maintenance activities throughout the operations phase to adjacent, certified TSOs. In addition, according to TAP AG, service agreements between the former and those shareholders that are certified TSOs in their respective jurisdictions should be allowed at all times and on an *ad hoc* basis, provided that these agreements are at arm's length and remain limited in scope so as not to affect the autonomy of TAP AG.

TAP AG claims that it shall at all times have the overall control and management of the operations of the pipeline. Following certification and to provide assurance to the Authorities that these types of service agreements would not compromise TAP's

autonomy to perform its TSO activities once operations commence, TAP AG commits to submit these contracts to the Authorities for their scrutiny.

d) Provision of services by shareholders during the construction phase

According to the information provided by TAP AG, a Project Management Contractor (i.e. a third party company), without any shareholding in TAP AG, will be in charge of the construction of the onshore part of project. More specifically, the Project Management Contractor will be responsible for the management and follow-up of engineering, procurement and construction contracts during construction, commissioning and start-up. On the other side, TAP AG will manage the offshore pipeline construction directly, without the need for an offshore Project Management Contractor.

Notwithstanding the above, the applicant considers of key importance for the continuity of the project that required knowledge, competence and experience of its shareholders are retained within TAP AG's organisation throughout the construction phase. The continued provision of services by shareholders is required to ensure the technical realisation of the pipeline. These technical services have no bearing on TAP AG's limited commercial operations in the construction phase that in any event are already ring-fenced from its shareholders' interests by means of the specific regulatory regime described above.

During the construction phase, TAP AG therefore intends to continue to receive engineering and supervision services from its shareholders for the purpose of technical realisation of the pipeline. In this regard, in case TAP AG were to require specific services from shareholders beyond this stage of the project so as to ensure safe commencement of operations, TAP AG would inform the Authorities of the extraordinary circumstances that would justify the extension of any specific services beyond COD. Otherwise, by COD, seconded personnel from shareholders should return to their mother companies in accordance with the independence requirements of the Gas Directive.

e) Financial independence of TAP AG

TAP AG claims that it cannot fully comply, at this stage, with all the ITO requirements on financial autonomy provided for by the Gas Directive, given the nature of the financial arrangements in place for the project. In support of this argument, the following arguments have been provided by TAP AG, so as to show that despite its shareholders' control over the financing of the pipeline the independence of the ITO from production and supply interests of the said shareholders will not be put in jeopardy.

First, with respect to the financial arrangements for the construction of the pipeline, TAP AG explains that the project will be financed through a combination of equity and project finance debt and that the currently envisaged financing structure is expected to be finalised by the end of 2016, following the closing of the major contracts for goods and services. A key feature of project financed transactions is that the assets and cash flows of the project are not owned by the shareholders of the

project, but rather by the project company itself – these cannot however be fully at the disposal of the project company. Financing of the project is secured by the project's tangible and intangible production assets and the cash flows that these are forecasted to generate over a given time horizon. Thus, the credit base for such a financing is the capability of the project to generate revenue sufficient to cover all operating and maintenance costs, working capital, as well as the scheduled debt service on the third-party debt and a return on equity that is sufficient to attract the shareholders' investment in the project's assets. It follows that, in a project financing, the security of cash flows is of critical importance as it is the main, or even the only backing for the extended credit. Thus, lenders typically have a significant level of control over events that may hamper the cash flows of the project where possible.

Given the financial structure of the project concerned, TAP AG must rely on its shareholders to ensure financing for the construction of the pipeline and the latter must be directly involved in the financial arrangements since lenders require that TAP AG shareholders assume full financial responsibility for completion risks. It goes without saying that shareholders have an obvious interest to arrange a financing structure that mitigates these risks in the best manner.

These risks are to a large extent mitigated through the exemption from certain provisions regarding third party access and regulated tariffs, however, a number of additional risks including economic, political, environmental and social risks cannot be sufficiently addressed by regulatory measures and must still be assumed by shareholders. As explained in TAP's exemption application and supplementary documentation, these additional risks will persist throughout the lifetime of the project. As evidenced by their resolution to construct, taken in December 2013, TAP AG's shareholders are prepared to accept these risks. However, full application of the financial autonomy requirements of the ITO model would endanger shareholders' ability to achieve their foreseen equity return and therefore undermine the mitigation of major risks related to sunk costs (as also recognized by the Commission decision on TAP AG's exemption of 16 May 2013)[4]. It follows from the foregoing that TAP AG shareholders must be in a position to mitigate risks by optimizing the financial arrangements necessary to realise the investment. A high level of certainty for shareholders and lenders in setting up the optimal financing structure for the project is crucial for such a very significant investment.

Second, the financial arrangements under discussion among TAP AG, its shareholders and potential lenders are based on standard commercial practice and subject to scrutiny by national taxation authorities. The financial arrangements for the TAP project are therefore fully aligned with market conditions. If these arrangements were to be subject to additional regulatory scrutiny (and potential retrospective adjustments) this could cause considerable uncertainty and might even deter external investments.

[4] See paragraph 165 of the Commission decision.

Moreover, regulatory scrutiny of commercial and financial arrangements for the realisation of the project concerned following TAP AG's certification could be viewed by lenders as creating a risk for retrospective regulatory re-assessment and/or adjustment of the financing structure negotiated between them and TAP AG's shareholders in order to start construction. Potential retrospective regulatory assessment and/or a re-opening of such arrangements should be prevented, since it could hamper reaching successful financial close in a crucial phase of the development of the project.

Finally, the shareholders' resolution to construct of December 2013 is based on a Target Internal Rate of Return. If shareholders were not able to fully control the conditions for financing, they could not put in place structures allowing the optimisation of shareholders' return post financing that, as recognized by the European Commission[5], is an essential requirement for the realization of the investment. In this respect, TAP AG reiterates that the interest of investors in a project lies in the expected returns from such investment and is linked to the expected revenues versus the set of risks inherent to the project. TAP AG considers, therefore, that the full application of the unbundling rules at this early stage of the project should not lead to increased costs or lower project retuns given that these are the very big risks that the exemption from certain provisions of the Gas Directive aims at mitigating.

On the basis of the above arguments, the applicant believes that TAP AG's shareholders must retain sole discretion to determine the financing structure of the investment of the project without the limitation laid down by the unbundling rules.

According to the applicant, TAP AG's shareholders control over the financing of the TAP project does not contradict the objective pursued by the financial independence requirements of the ITO laid down in Article 18 of the Gas Directive – that the removal of conflicts of interest between producers, suppliers and TSOs to create incentives for investments and guarantee access of new market entrants[6]. This is the case as no shareholder is in a position to influence the organisation of the financing of the project in such a way that it could cause TAP AG to favour any of its activities on the production or supply market to the detriment of other users of the pipeline. There can be no danger for conflicts of interest given that:

(i) the financial arrangements do not confer any direct or indirect rights to any shareholder concerning the operation of the pipeline;
(ii) TAP's tailor-made regulatory regime and governance arrangements ensure that no shareholder can prevent investment in expansion capacity as explained *sub* b);
(iii) the various options available to TAP AG and its shareholders to secure financing are market conform, as also required for taxation purposes.

[5] See paragraph 207 of the Commission decision.

[6] See Recital 9 of the Gas Directive.

With specific reference to point (iii), TAP AG points out that the financial arrangements under discussion among TAP AG, its shareholders and potential lenders are based on standard commercial practice and subject to scrutiny by national taxation authorities that stipulate that any financial agreements between TAP AG and its shareholders should be at arm's length. The financial arrangements for the TAP project are therefore fully aligned with market conditions. It follows that shareholder loans will be on market terms in compliance with the requirements of Article 18(6) of the Gas Directive.

f) Independence of the staff and the management of TAP AG

From the information provided by TAP AG, it results that the company day-to-day management is currently delegated to a managing Director, supported by the Leadership Team (hereinafter "LT"). In particular, TAP AG's management is responsible for personnel matters, remuneration, cost control and within pre-established thresholds for TAP AG's procurement strategy. In addition, TAP AG's management represents the company and acts as point of contact towards third parties and public authorities. TAP AG's shareholders currently only exercise decisions on strategic procurement matters above a given threshold, the setting of general limits for TAP AG's debt and monitoring of the performance of TAP AG in accordance with the financial plan. Shareholders do not have any further influence over commercial or operational activities once these have been approved in the financial plan.

Notwithstanding the above, TAP AG equally maintains that during the construction phase, it will not be able to fully comply with the managerial independence requirements laid down in article 19 of the Gas Directive as the applicant must rely on its shareholders' skilled management and personnel, in order to complete the project on schedule and within budget so that TAP AG can employ TSO's activities at COD.

The use of senior management, seconded or employed by TAP AG's shareholders, is necessary due to their considerable project experience and recognised trust by external stakeholders, ensuring a level of project continuity that is essential for the development of the infrastructure concerned.

Moreover, according to the applicant, a mandatory replacement of experienced senior management at certification would threat the smooth progress of the project since TAP AG is currently unable to guarantee long term employment perspective to any new and directly employed management team members, whose skill set is not necessarily needed when commercial operations will start. This might therefore make difficult to replace the current LT members with equally skilled persons in order to complete the constructions works. Any delay in the recruitment of TAP AG's management would in turn risk delaying the project at its critical construction phase.

In the same vein, TAP AG also maintains that seconded management from its shareholders should not be subject to the cooling off periods of Article 19 of the Gas Directive since they have never left their mother companies in the first place. Similarly, TAP AG does not deem it feasible to subject directly employed management members that are in post during the construction phase to the aforementioned requirement for the following reasons.

First, in view of the current project's time schedule (start of construction Q2 2016), a number of the LT members cannot comply with the *ex ante* cooling off periods at the date of certification as they were previously employed by TAP AG's shareholders prior to taking employment with the applicant. Given the necessity for TAP AG to retain the current LT in order not to frustrate the construction process, *ex ante* cooling off periods should not be applied to the LT members.

Second, applying *ex post* cooling off periods to those members of TAP AG's management who are directly employed by the company might prevent a gradual transition towards a new management structure by COD. A strict implementation of the cooling off periods to TAP AG's personnel could be detrimental to the completion of the project.

In light of the above arguments, TAP AG argues that the application of the independent governance criteria of Chapter IV of the Gas Directive prior to COD will not only jeopardise project completion, but is also unnecessary during the construction phase, as TAP AG does not engage in TSO activities and the limited commercial activities carried out at this stage are sufficiently ring-fenced by any potential interference by shareholders due to its regulatory regime.

g) Establishment of the Supervisory Body

According to the Gas Directive, the Supervisory Body is normally in charge of taking the decisions that may have a significant impact on the value of the assets of the shareholders within the ITO; such assets are existing assets which generate tariff revenue. The powers typically entrusted to the Supervisory Body relate to these revenue streams and include decisions regarding the approval of the annual and longer-term financial plans, the level of indebtedness of the ITO and the amount of dividends distributed to shareholders. Therefore, it is evident from the terminology of Chapter IV of the Gas Directive that the functions of the Supervisory Body relate to the operations of existing infrastructure assets, and not to the construction of a new assets in the case at stake. This follows from Article 20(1) which requires that the Supervisory Body should not interfere with the daily management of the transmission network, this being the task of the ITO.

However, TAP AG cannot assume this task until the network is operational and generates revenue. In fact, as explained *sub* e), without operational revenue, the ITO cannot have any financial autonomy from its parent companies that are in charge of funding the project. As a consequence, TAP AG believes that the tasks assigned to the Supervisory Body in Article 20(1) of the Gas Directive are only relevant at COD, at the earliest, and once TAP AG generates tariff revenue.

Consistent with the above reasoning, the applicant also maintains that, in accordance with the terminology of article 20 of the Gas Directive, the Supervisory Body should have no role or function in relation to the supervision of investments on the TAP project as all the relevant decisions must solely be made by the shareholders in order to finance the construction of this new and indeed only asset within the ITO. It follows from this that, if this body were to be appointed at some point in time during the construction phase and were to be given the full powers listed in Article 20 of the

Gas Directive, this might require numerous key project decisions already taken by shareholders to be re-validated[7], subject to regulatory approval, with the risk of compromising the overall continuity of the project. This could also generate uncertainties for financial institutions, to the detriment of the existing financing arrangements.

Based on the above arguments, TAP AG therefore considers that following the construction of the pipeline and its entry into operation, the Supervisory Body can then take up the functions allocated to it in accordance with Article 20 of the Gas Directive, to the extent that this would not jeopardise the exemption. In particular, TAP AG proposes to commence the selection process of the independent members of the Supervisory Body at the earliest twelve (12) months prior to COD and to submit proposed nominations to the Authorities six (6) months prior to COD for them to raise any objections to the proposed appointments.

h) Compliance of TAP AG with articles 17 and 18 of the Gas Directive

Even if TAP AG is not currently operating as a TSO, TAP AG is still in the position, at this stage, to fulfill some of the requirements of ITO model, namely, Article 17 and 18 of the Gas Directive. In fact:

- TAP AG is expected to be the owner of all assets necessary for the activity of gas transmission, including the TAP Pipeline;
- the majority of TAP AG's personnel is employed on the basis of a TAP AG employment contract; for this personnel, salaries are governed by an independent TAP AG remuneration system, unrelated to the performance of any activities of the shareholders;
- TAP AG is a limited liability company legally unbundled from its shareholders;
- TAP AG has an independent corporate identity and branding policy;
- TAP AG does not share physical premises with its shareholders;
- TAP AG uses its own IT systems, equipment and security access systems;
- TAP AG has policies in place to ensure confidentiality of information as TAP AG has appointed a Regulatory Compliance Officer and has drawn up a Regulatory Compliance Programme, approved by the Authorities;
- TAP AG's accounts are issued separately from its shareholders in accordance with Swiss law.

At the same time, throughout the construction phase, TAP AG will continue to be legally and functionally unbundled, and, as per the FJO, will conduct market tests on

[7] As financial resources have to be approved by the Supervisory Body in compliance with article 20 of the Gas directives, the ITO must inform the regulatory authority of these financial resources, in accordance with Articles 18(6) and 18(8) Gas Directive. See Section 2.4.4 of the Commission interpretative note on the unbundling regime, Brussels, 22 January 2010.

a commercially autonomous basis so that the possibility of any discriminatory conduct vis a vis third parties within the meaning of article 18(5) of the Gas Directive is excluded.

i) New financial and corporate arrangements at COD and TAP AG's commitments

TAP AG considers that existing corporate governance arrangements, undertaken for the purpose of construction of the pipeline, may need to be revisited shortly before COD, when TAP AG will take up TSO's activities. In this respect, TAP AG will submit to the Authorities a new corporate arrangement, establishing a Supervisory Body, amending the company statutes where necessary and (re)appointing its senior management members in accordance with the independence requirements of the ITO model.

Furthermore, after construction is completed and operations have successfully started, a large number of risks cease to exist and the risk profile of the project improves, making a refinancing of TAP project at longer tenors and lower cost a potentially attractive option for TAP AG. It is important that TAP AG and its shareholders are able to undertake such a process when the opportunity arises. Therefore, TAP AG expects to raise money on the capital market on its own account in accordance with Article 18(1) (b) of the Gas Directive. However, as any refinancing will imply major modifications to arrangements entered into by TAP AG's shareholders to finance construction, the latter must retain full discretion to determine if and how this should happen.

Finally, TAP AG commits to ensuring the smooth transition to the full implementation of all the requirements provided for by the ITO model, in accordance with a Road Map aimed at guaranteeing that as soon as TAP AG takes up all the mandatory TSO's activities at COD, the requirements of the ITO model as set out in Chapter IV of the Gas Directive are fully reflected in its organisational and operational structure.

In this respect, TAP AG commits to:

- at the time of the issuance of the certification decision:
  - maintain current functional unbundling regime and update the current Regulatory Compliance Programme so that it remains valid until COD; the Regulatory Compliance Officer will provide annual reports to the Authorities to ensure sufficient regulatory oversight of the implementation of the milestones until COD;
- throughout construction phase and beyond (2016 onwards):
  - make available to the Authorities, before signing: technical, operation and maintenance agreements with adjacent TSOs; including relevant justification regarding their purpose and their compliance with the Gas Directive, for comments and tacit endorsement;
  - on request by the Authorities, make available construction-related service agreements with any shareholder;
- not later than twelve (12) months before planned COD (2019):

- submit to the Authorities: new corporate arrangements, including the set-up of a Supervisory Body and amendment of the company statutes where necessary, for comments and tacit endorsement;
- provide proof of resources necessary to fulfill obligations as a TSO (activity of gas transmission), i.e. financial, technical, physical and human resources, for comments and tacit endorsement and submit the TAP Network Code for approval;
- submit description of ICT systems necessary for commercial operations, for comments and tacit endorsement;
- update Regulatory Compliance Programme, for approval;
- submit existing service agreements with shareholders, together with evidence of compliance with the Gas directive, for approval;
- in case TAP AG were to require specific services from shareholders to ensure safe commencement of operations, TAP AG will inform the Authorities of extraordinary circumstances that justify the extension of those specific services beyond COD, for comments and tacit endorsement; should specific services be required to ensure safe commencement of operations in the following 12 months until COD, TAP AG will inform the Authorities promptly;

➢ not later than six (6) months before planned COD:
- notify the Authorities of the appointment of the Supervisory Body members in accordance with the independence requirements provided for by the Gas directive, for tacit approval;
- (re-)appoint senior management members by the Supervisory Body in accordance with the independence requirements provided for by the Gas directive, for tacit approval;
- (re-)appoint the Regulatory Compliance Officer by the Supervisory Body, for approval;

➢ not later than Planned COD (2020):
- assure that seconded personnel from shareholders return to their mother companies in accordance with the independence requirements of the Gas Directive;
- apply the cooling off periods to directly employed TAP AG's personnel.

With reference to the above, planned COD refers to the Commercial Operations Date as defined in the FJO (i.e. the date on which TAP pipeline will be completed and able to receive, transport and re-deliver natural gas) that will occur in the time period between 1 January 2020 and 31 December 2020.

5. The initial assessment of the European Commission Services

In a letter dated 28 June 2013, in response to a formal inquiry submitted by TAP AG, the Services of the European Commission provided a preliminary assessment on the applicability of the ITO model to TAP AG. The position of the Services of the European Commission can be summarized as follows.

Although TAP AG did not exist on 3 September 2009, it has been exempted from ownership unbundling and required to comply with the ITO model provisions on the basis of the conditions set out in the FJO; as such, it is immaterial that TAP AG was not part of a VIU on 3 September 2009. Nevertheless, not all of the provisions of Chapter IV of the Gas Directive are to be applied literally to TAP AG. Instead, the ITO rules need to be read in the broader context and against the background of the exemption decision. In particular, in reference to the applicability of Article 17.1, that envisages that the TSO shall be equipped with all human, technical, physical and financial resources necessary for fulfilling its obligations and Article 17.1(c), that prohibits leasing of personnel and rendering of services from any other parts of the vertically integrated undertaking, such rules aim to ensure that the technical and commercial operation of the pipeline is carried out independently, not to ensure that the construction of the pipeline is carried out independently of the other parts of the vertically integrated undertaking.

The reason why the exemption decision requires the certification to take place before the start of the construction of the pipeline is that TAP AG will already, during the period between the start of construction and the start of technical operation of the pipeline, engage in certain commercial operations transactions (for example related to first and subsequent booking phases foreseen in the exemption decision); certification should thereby ensure that those commercial operations activities are carried out independently of the vertically integrated undertaking. As a consequence, the unbundling rules do not limit the ability of shareholders to provide engineering and supervision services for the purpose of the construction of the pipeline.

In case certain construction related services are continued to be provided by TAP AG shareholders after the start of the pipeline's technical operation, the Authorities should verify, during the certification procedure, that these activities do not interfere with the independent (technical and commercial) operations of the pipeline in compliance with the aim of the ITO model. In this regard, the Authorities may require, for example, the termination or phasing out of such activities within a given timeframe and/or explore the opportunity of imposing ring-fencing measures between TAP AG and the personnel seconded by its shareholders, in order to avoid any disclosure of relevant information between TAP AG and its parent companies, for instance on the commercial operation of the pipeline. This would need to be assessed on a case-by-case basis by the Authorities during the certification procedure.

6. The Authorities assessment in their preliminary decision

Having regard to the arguments presented by TAP AG in its application for certification and to the initial assessment of the European Commission Services, the Authorities adopted their preliminary decision on the certification of TAP AG on the basis of the following assessment.

6.1 The certification procedure

Section 4.5.2 of the FJO provides that TAP AG, in order to be fully certified before the start of the construction of the pipeline, and not later than 1 January 2018, shall

apply for certification in accordance with Article 10 or 11 of the Gas Directive, as the case may be. In this respect, it should be recalled that Article 10 of the Gas Directive lays down the certification procedure applicable to all unbundling models foreseen by Article 9 of the Gas Directive, among which the ITO model. Article 11 of the Gas Directive establishes the procedure for the certification of transmission system owners or TSOs which are controlled by a person or persons from a third country or third countries.

According to the information provided by TAP AG in its submission of July the 1st, 2015 and consistent with the European Commission Services' view (reported in the previous paragraph) no shareholder enjoys either sole or joint control over TAP AG within the meaning of the EU Merger Regulation[8]. As no person from a third party controls TAP AG, the Authorities consider that the former shall be certified, by the two Authorities of the EU Member States and one Authority of Energy Community Contracting Parties[9] which territory TAP crosses, according to the procedure laid out in Article 10 of the Gas Directive and Article 3 of Regulation (EC) No 715/2009.

6.2 The purpose of the application of the ITO model to TAP AG

As explained in Section 2.5 of the FJO, the Authorities granted to TAP AG an exemption from the provisions of Article 9 of the Gas Directive in order to allow the investors to pursue their investment decisions in the project concerned, as ownership unbundling rules, full third party access regime and tariff regulation might have undermined the commercial viability of the interconnector.

Nonetheless, as the infrastructure is not fully exempted according to Article 36 of the Gas Directive, TAP AG has been required to comply with the unbundling rules of an independent transmission operator model so as to ensure that the non-exempted capacity is marketed independently from any production or supply interests of the shareholders of the pipeline. To verify the compliance with such obligation, the FJO has equally prescribed on TAP AG to be fully certified before construction so as to address any potential conflict of interests that might arise already at this stage. As explained by the applicant, the commercial operations performed by TAP AG during the construction phase refer to the Market test foreseen by Article 36.6 of the Gas Directive (that is the procedures for the management and allocation of the capacity of TAP and, in particular, to the first and subsequent booking phases foreseen in the exemption decision). Certification should therefore ensure that these commercial operations activities are carried out by TAP AG independently from its shareholders.

[8] Regulation (EC) No. 139/2004.

[9] According to the Energy Community Treaty ratified by the Law No. 9501, dated 03.04.2006 and Ministerial Council decision D/2011/02/MC-EnC of the Energy Community, ERE shall also assess the certification application of TAP based on Article 10 of the Gas Directive and Article 3 of Regulation (EC) No. 715/2009.

On this basis, therefore, the Authorities have to verify whether this objective is met by TAP AG, which in that case may be certified pursuant to the FJO.

6.3 Autonomy and Independence of the ITO

Article 17 of the Gas Directive provides for specific rules as regards the assets, the personnel and the financial resources that are necessary for the fulfillment of the tasks and obligations of the ITO which directly concern the operation of the gas transmission system. The aim of such provision is in fact to avoid any interference of the other parts of the vertically integrated undertaking on the technical and commercial operations of the network system in favour of their supply/production interests. For these reasons, Article 17(1) (c) of the Gas Directive expressly prohibits the contracting of the services to the ITO by the other parts of the vertically integrated undertaking.

Against this background, the Authorities agree with TAP AG that, during the construction phase, most of the requirements of the ITO model cannot be complied with given that at the time of the certification TAP AG will not engage in TSO's activities to which the unbundling rules expressly apply.

In particular, during construction, TAG AG will perform almost none of the tasks or activities provided for by Article 13 and Article 17(2) of the Gas Directive for the ITO nor, in this respect, TAP AG, almost in any way, falls into the definition of the TSO provided by Article 2(4) of the Gas Directive[10]. The ITO activities and definition provided by the Gas Directive, indeed, all refer to an existing infrastructure and not, in any way, to the construction of a new (not previously existing) infrastructure.

Consequently, the Authorities share TAP AG's view that shareholders should be allowed to continue providing the engineering and supervisions services, which are strictly necessary for the completion of the pipeline and that the application of all the requirements of Article 17 of the Gas Directive are not needed until COD when TAP AG will start engaging in TSO's activities. In this respect, the Authorities consider that any obligation upon the applicant to put an end to the current service agreements with the shareholders during construction might risk undermining the objective of the exemption that is to allow the investment into a new interconnector. Moreover, from the information provided by the applicant, it seems that those technical services have no bearing on TAP AG's limited commercial operation in the construction phase (i.e.

[10] Pursuant to Article 2(4) of the Gas Directive a TSO is *"a natural or legal person who carries out the function of transmission and is responsible for operating, ensuring the maintenance of, and, if necessary, developing the transmission system in a given area and, where, applicable, its interconnections with other systems, and or, ensuring the long-term ability of the system to meet reasonable demands for the transport of gas"*.

market test for the booking of capacity) and as a consequence any risk of conflict of interest can be ruled out.

This conclusion is also consistent with the preliminary assessment of the European Commission Services on this matter, described in paragraph 5, where it has been clearly explained that unbundling rules do not aim at ensuring that the construction of a pipeline is carried out independently from the other parts of the vertically integrated undertaking. Therefore, in the case at stake, the shareholders' ability to offer services which are necessary to TAP AG for the project's realization during the construction phase should not be limited.

The same arguments as above hold true in relation to the application of the independence requirements of the ITO to TAP AG throughout the construction phase.

In this respect it should be recalled that according to Article 18 of the Gas Directive the ITO should have effective decision making rights, independent from any other part of the vertically integrated undertaking in relation to the day-to-day activities and management of the network, including investment decisions in the network development. The *ratio* underlying the recalled provision is to prevent the other parts of the vertically integrated undertaking to determine the competitive behavior of the ITO in a way as to favour its interests in supply and production.

Also in this case, the full application of the independence requirements of the ITO to TAP AG is not necessary at this stage given that shareholders could not influence TAP AG's commercial behavior to their advantage since the pipeline is not operational yet.

The above argument is equally valid in relation to the requirement on financial autonomy of the ITO, the purpose thereof is to address potential conflicts of interests in relation to strategic investment decisions in the gas network. In particular, without such prerequisite, the vertical integrated undertaking could withhold the necessary funding in order to obstruct the building of new connections to the grid with a view to hindering its actual and potential competitors in production and supply.

For the reasons explained in paragraph 4.1.e, TAP AG is currently unable to fully comply with the above requirement throughout the construction phase of the pipeline given that, until the network is operational and generates revenue, the former cannot have any financial autonomy from its shareholders who are in charge of securing financing for the construction of the interconnector.

On the basis of the arguments put forward by the applicant, the Authorities consider that any risk of conflict of interests between TAP AG and its shareholders during the construction phase can be ruled out for the following reasons:

- First, TAP AG's shareholders are committed to the financing of both Initial and Expansion capacity and are in a position to secure optimal financial arrangements for the project;
- Second, shareholders are not in a position to block expansion decisions due to the tailor made regulatory regime applicable to TAP AG (see section 4.1.b)

and TAP AG's shareholders agreement is fully in line with the requirements of such regulatory regime;

- Additionally, the financing arrangements currently under consideration may require shareholders to assume a number of responsibilities *vis a vis* lenders to ensure the completion of the project, but this will not enhance shareholders' involvement in TAP AG's operations and cannot enable the former to foreclose third parties from obtaining capacity in the TAP pipeline during the construction and operation phase, due to TAP's current regulatory regime.

It follows from the foregoing that the application of Articles 17(1) (d), 18(1) (b), 18(6) and 18(7) of the Gas Directive as a condition for certification prior COD would be superfluous, since shareholder involvement in TAP financing will not lead to conflicts of interests.

6.4. Independence of the staff and management of the ITO

Article 19 of the Gas Directive sets out rules on the independence of the management of the ITO which entail, *inter alia*, that the persons responsible for matters related to the operation, maintenance and development of the network do not have direct relationships with the other parts of the vertically integrated undertaking so as to avoid disclosure of commercially sensitive information on the ITO's activity. To this purpose, the TSO's management is also subject to an *ex-ante* and *ex- post* cooling off period.

Against this background, the Authorities hold that also in this case TAP AG should be allowed to make use of limited skilled management and personnel provided by shareholders throughout the construction phase until COD so as to avoid any delay in the project realization. In fact, the Compliance Programme approved by the Authorities contains measures that are able to prevent any disclosure of sensitive information on the limited commercial activities carried out by TAP AG (i.e. market test for capacity allocation) to its shareholders.

Moreover, the Authorities also agree with TAP AG that the strict application of rules on the cooling-off periods to managerial staff employed by TAP AG during the construction phase is not necessary until COD given that, prior to that point in time, none of the functions performed by its senior management can interfere with the objectives of the unbundling rules, since TAP AG's management is not involved in TSO's activities at that stage.

The above conclusion appears consistent with the guidance provided by the European Commission in its staff working document concerning the criteria for the assessment of the presence of conflicts of interests where a strict and literal interpretation of other aspects of the unbundling rules was found to be disproportionate to the aim of those rules, by stating that: "*It would not be in line with this objective if certification of a TSO were to be refused in cases where it can be clearly demonstrated that there is no incentive for a shareholder in a TSO to influence the TSO's decision making in order*

to favour his generation, production and/or supply interest to the detriment of other network users"[11].

6.5 Supervisory Body

A key requirement as regards the ITO model is the setting-up of a Supervisory Body in charge of taking the decisions that may have a significant impact on the value of the assets of the shareholders within the ITO. The Supervisory Body cannot interfere with the day-to-day activities of the ITO and the management of the network.

Also in this respect the Authorities take the view that since TAP AG is currently not performing the activities of transmission, the setting up of the Supervisory Body is superfluous and unnecessary to ensure managerial autonomy of TAP AG from its shareholders in relation to the commercial activities in which the applicant will engage during pipeline construction. Moreover, as it can be established from the information and supporting documentation submitted by TAP AG in the certification application, a number of safeguards of TAP AG's commercial autonomy during the construction phase are already in place prior to COD.

7. The Commission opinion

In its opinion of January 28, 2016 on the Authorities' preliminary decision on the certification of TAP AG, the Commission shared the Authorities' view that TAP AG should be certified on the basis of a tailor-made *ad hoc* ITO model; in this regard, the Commission recalls that the obligation of TAP AG to apply an ad hoc ITO model does not stem from the Gas Directive but from the Exemption Decision and, therefore, the application of the provisions contained in Chapter IV of the Gas Directive should be considered in the light of the Exemption Decision and the objectives pursued by such exemption. In particular, the Commission acknowledges that the regulatory framework in which TAP operates contains elements that go beyond those usually applied to an ITO whereas the factual circumstances (described in the previous paragraphs) that ITO rules seek to address do not apply in full to the present case. The Commission also recalls that the compliance with an *ad hoc* ITO model imposed by the Exemption Decision aims to ensure that the technical and commercial operation of the pipeline is carried out independently not that the initial construction of the pipeline is carried out independently from the other parts of the VIU; therefore, compliance with the respective provisions of Chapter IV of the Gas Directive should be assessed with this objective. The Commission also agrees with the Authorities that Article 11 of the Gas Directive is not applicable to the present case given the fact that none of the shareholders, solely or jointly, have control over TAP AG and that the introduction of a Supervisory Body is not required to protect against risks of undue shareholder influence on the full scope of commercial operations carried out by TAP AG.

[11] Commission staff working document ownership unbundling the Commission's practice in assessing the presence of a conflict of interest including in case of financial investors. Brussels, 8.5.2013, SWD (2013) 177 final, p. 2.

Nonetheless, in its opinion, the Commission has invited the Authorities to assess in greater detail in their final decision on the certification of TAP AG whether the regulatory safeguards currently in place ensure that the pipeline technical and commercial operations are carried out independently from its shareholders. For this reason, the Authorities have been invited to address the following issues.

First, the Commission has called on the Authorities to monitor closely the development of the ownership structure of TAP AG and take all necessary steps in case a risk of market foreclosure evolves due to new owners or current owners moving into the Greek and the Italian markets.

Second, the Commission has noted that regardless as to whether TAP AG is currently providing gas transportation services during the construction phase, some conflicts of interest may well arise at this stage too since the applicant is already engaged in few commercial operations (e.g first capacity allocation by means of the first booking phase, subsequent Market Test, etc.). As a consequence, the Authorities have been invited to assess more in depth whether the grounds for a deferred implementation of the respective ITO requirements put forward by TAP AG are justified in light of the specific circumstances under which the project concerned is being developed and whether the additional regulatory safeguards currently in place shield sufficiently against risks of undue shareholder influence on the full scope of commercial operations carried out by TAP AG at the respective points in time. If this is not the case, the Commission has urged that Authorities to impose in their final decision additional conditions or safeguards to avoid the aforementioned risks of discrimination and undue influence.

The Commission has also noticed that although shareholders should be allowed to provide engineering and supervision services for the purpose of the construction of the pipeline, however, the Authorities should assess further whether there are sufficient measures in place to prevent confidential commercial information of TAP AG from being disclosed to its shareholders, and where necessary, to impose further measures to this end. For the same reason, the Commission has also urged the Authorities to verify that potential construction related services provided by TAP AG' shareholders after the start of the pipeline's technical operation (if need be) do not interfere with the independent (technical and commercial) operation of the pipeline in compliance with the aim of the ITO model.

With respect to provision of services by TAP AG's shareholders that are certified TSOs, for some technical operations and maintenance activities during the operation phase, the Commission has invited the Authorities to assess the compatibility of such agreements with the unbundling requirements; in this regard, the Commission is of the opinion that the provision of services to TAP AG by those shareholders certified as ownership unbundled TSOs could be possible under certain conditions, in particular provided that they are rendered under market conditions and that they do not undermine the confidentiality of commercial sensitive information available to TAP AG.

By the same token, the Commission has requested the Authorities to assess the compatibility with the unbundling requirements of TAP AG's outsourcing of some

activities to adjacent TSOs; in this context, the Commission has also recalled that the procurement of services by the TSO should occur in a market-based and transparent manner and that the TSO should retain control and ultimately bear full responsibility for the tasks set out in Article 13 and 17(2) of the Gas Directive.

Further, the Commission has called on the Authorities to assess already in their final decisions whether the conditions under which TAP AG's shareholders intend to participate in the financing of the project can be considered as compliant with the requirements of Article 18(6) of the Gas Directive, whilst ensuring proper subsequent monitoring of their ultimate compliance herewith. Finally, the Commission has invited the Authorities to make sure in the final certification decision that the independence rules under Articles 19(3), 19(4), 19(5) and 19(7) of the Gas Directive fully apply once TAP AG's staff and management are involved in commercial decisions on the use of the pipeline.

7.1 The Energy Community Secretariat Opinion

In its Opinion of 3 February 2016 the Energy Community Secretariat unconditionally supports certification of TAP AG in line with ERE's Preliminary Decision subject to similar requests made by the Commission. Such requests are elaborated below in the final assessment of the Authorities, section 8. However, the Secretariat requests ERE to assess the full compliance by TAP AG of the requirements of Chapter IV of Directive 2009/73/EC, except for Article 22, and conduct a certification procedure at the latest three months before COD.[12]

8. The final assessment of the Authorities

Having regard to the Commission's opinion and Secretariat Opinion and on the basis of the additional information provided by TAP AG[13], the Authorities hereby undertake their final assessment on TAP AG application for certification as an ITO in accordance with Section 4.5 of the FJO.

8.1 Choice of the ITO model

As reported in the previous paragraph, in its opinion, the Commission calls on the Authorities to monitor closely the development of the ownership structure of TAP and should take all necessary steps in case a risk of market foreclosure evolves due to new owners or current owners moving into the Greek and the Italian markets.

In this regard, it should be recalled that according to the FJO[14] and the Authorities' preliminary certification decision, TAP AG is already under the obligation to notify

[12] This request by the Secretariat shall be explained in more detail in the ERE's National decision on TAP AG certification.

[13] Letter of TAP AG to the Authorities of March 4, 2016.

[14] See Section 4.7.11 of the Final Joint Opinion on TAP AG's exemption application of June 2013.

the Authorities of any change in its ownership structure that would result in a person or persons acquiring control of TAP AG within the meaning of the Merger Regulation, as well as in the existing Shareholders' agreement, so as to enable the Authorities to assess whether the grounds for the exemption and the certification are still met. Furthermore, according to the national legislation in place, TAP AG is required to inform the competent authorities (among which the Authorities and the Ministry) of any change in its shareholding structure, including any change that does not necessarily result in a change of control over TAP AG. In light of the above, should any such change occur, the Authorities shall reopen the certification procedure with a view to secure compliance with the unbundling rules, also by imposing additional obligations on TAP AG if necessary to prevent any risk of market foreclosure by its shareholders. In this respect, it should also be underlined that the FJO already contains measures intended to rule out any such risk as it imposes capacity caps for dominant players in the Italian, Greek and Albanian gas markets[15].

[redacted]

In light of the above, the Authorities believe that the regulatory framework currently in place allows them to monitor effectively any development of TAP AG's ownership structure and take all the necessary measures to timely counteract any potential risk of anti-competitive behavior from TAP AG's shareholders.

8.2 Necessary safeguards concerning commercial activities

In its opinion, the Commission invites the Authorities to assess whether the regulatory safeguards currently in place shield sufficiently against risks of undue shareholders' influence on the full scope of commercial operations carried out by TAP AG at the respective points in time and, if need be, to impose additional conditions or safeguards on TAP AG.

According to TAP AG's submissions, the commercial operations undertaken during the construction phase refer exclusively to the first allocation of transmission capacity and the management of all previously agreed shipping contracts as well as the execution of further Market tests. These allocation processes have been conducted in a fully regulated context, according to Guidelines approved by the Authorities, namely, the Initial Capacity Allocation Mechanism[16] in respect of the exempted capacity and the Booking Phase Guidelines and the Booking Phase Notice in respect of non exempted capacity, which have proved being effective in preventing any undue shareholders' influence over TAP AG's commercial activities as well as disclosure of commercially sensitive information.

[15] See Section 4.7.2, 4.7.6 and 4.7.9 of the Final Joint Opinion on TAP AG's exemption application of June 2013.

[16] See Section 4.1.3 of the Final Joint Opinion on TAP AG's exemption application of June 2013.

Moreover, also for future capacity allocation, the FJO prescribes new Market tests to be performed in line with a tailor-made regulatory regime so as to prevent any potential foreclosure of the pipeline. In any case, TAP AG has claimed that it has no plans to perform the next Market Test earlier than required, i.e. starting from no later than COD, and this process will have to be conducted in accordance with Guidelines to be approved by the Authorities.

Furthermore, according to the Authorities, the approved Regulatory Compliance Programme sets out adequate safeguards up until full compliance with all the unbundling requirements against the risk of discrimination by TAP AG's shareholders and disclosure of commercially advantageous information. Those measures entail:

- the identification of the sensitive commercial information available to TAP AG which cannot be shared and/or communicated to its shareholders;
- the ring-fencing of sensitive commercial information that involves, *inter alia*, the separation of the server where such information is stored from TAP's corporate IT systems for daily use, and a restricted access to the hard copies containing that information;
- non-disclosure commitments upon TAP AG's Employees and Shareholders (including their representatives);
- sanctions for the violation of the measures laid down in the Regulatory Compliance Programme.

In addition to the above, TAP AG has confirmed that all its Employees, including consultants embedded in the integrated Project Management Team (iPMT) are subject to the rules set out in the RCP and receive relevant training in that regard.

Furthermore, a Regulatory Compliance Officer has been appointed by TAP AG and has been empowered with all the necessary powers to ensure compliance with all the measures set in the Regulatory Compliance Programme. In this respect, TAP AG has informed the Authorities that discussions related to commercially sensitive information can only take place if the Regulatory Compliance Officer is either attending the relevant meeting or has approved the sharing of commercial sensitive information. The Regulatory Compliance Officer is copied to all invitations for shareholders meetings with access to the agenda and the shared materials. In this respect TAP AG has also clarified that the Regulatory Compliance Officer always considers the extent to which information needs to be shared for the specific business purpose (i.e. sharing on a "need to know basis"). For example, shareholders were informed of the results of the First Booking Phase following its completion as it was in their legitimate interest to know whether the pipeline had to be expanded or not. However, only aggregated capacity bookings were communicated and not any specific names of a relevant shipper or the amount of capacity it had booked. Hence, this information was cleared from its commercial sensitivity.

The Regulatory Compliance Officer has submitted its annual reports for 2015 and 2016 to the Authorities and no violations of the Compliance Programme have been reported.

In light of the above, the Authorities hold that the current functional unbundling regime in place at TAP AG during the construction phase provides sufficient guarantees against the risks of undue influence by its shareholders as well as any discriminatory disclosure of commercially sensitive information. Moreover, as the current regulatory framework allows the Authorities to closely oversee TAP AG's behavior also by means of the periodic reporting undertaken by the Regulatory Compliance Officer, the former would be in a position to promptly intervene should a risk of discrimination and/or undue influence by TAP AG's shareholders arises at any point in time until COD.

8.3 Rendering of services to the ITO

In its opinion, the Commission invites the Authorities to assess whether there are sufficient measures in place to ensure that the current provision of construction related services by the shareholders will not jeopardize the confidentiality of commercially sensitive information accessible to TAP AG and to make sure that services possibly provided after the start of the pipeline's technical operation do not interfere with the independent (technical and commercial) operation of the pipeline in compliance with the aim of the ITO model.

In this regard, it should be underlined first that according to TAP AG's submissions, following the introduction of the Project Management Contractor in TAP's integrated Project Management Team, the agreements with the Technical Services Providers were terminated. Former resources of the Technical Services Providers have been retained in order to provide TAP AG with their competence and experience for the purpose of realizing the construction of the pipeline. However, with the exit of E.ON in 2014 and of Statoil in 2015, these experts are no longer affiliated with companies that are shareholders in TAP AG. Furthermore no senior management at TAP AG is seconded from shareholders and all TAP AG employees, including consultants embedded in the Project Management Team are subject to the rules set out in the Regulatory Compliance Programme and receive relevant training in that regard.

Finally, as reported by TAP AG, shareholder representatives do not function as full or part time TAP AG employees, but rather participate in "Management Committees". These Management Committees are advisory forums and have no decision making powers. They are set up for specific purposes and on an ad hoc basis to function as a channel for advice from shareholders experts to TAP's management. However, according to TAP AG no Management Committee is engaged with commercial operations.

Against this background, the Authorities consider that any potential concern of endangering the confidentiality of commercially sensitive information available to TAP AG due to the presence of service providers coming from the shareholders can be ruled out. In any event, it should be reiterated that the Regulatory Compliance Programme (described in paragraph 8.2) would shield adequately from any such risk as it provides for ring-fencing arrangements aimed at safeguarding TAP AG's commercially sensitive information against any undue interference from third parties affiliated to its shareholders.

In addition, it should be stressed that the commitment imposed on TAP AG to submit, no later than 12 months before COD any service agreements with its shareholders for the Authorities' prior approval, together with evidence of compliance with the ITO requirements will enable the Authorities to impose further measures to preserve TAP AG's independence, if need be. The same is true with respect to potential services provided after COD, as also in this case TAP AG would be under the obligation to promptly inform the Authorities.

8.4 Provision of services by shareholders and outsourcing of services to adjacent TSOs during the operation phase

In its opinion, the Commission call on the Authorities to assess the compatibility with the unbundling requirements of the provision of services to TAP AG by its shareholders which are certified TSOs and of the planned outsourcing of services to adjacent TSOs during the operation phase.

In this context it is noteworthy that, according to TAP AG's submissions, to date no agreements for services during the operations phase have been concluded with neither shareholders that are certified TSOs nor adjacent TSOs. Therefore, any possible assessment on the compatibility of such agreements with the ITO requirements is impossible and premature to make at this stage. In this respect, TAP AG anticipates that it does not intend to outsource technical operational services as these will remain under the competence and control of TAP AG. On the other hand, TAP AG considers the outsourcing of some in-country field maintenance services to adjacent TSOs since the latter are more familiar with local requirements and required language skills. In any case, TAP AG stresses that such agreements will be between commercial entities that have no incentive to deviate from market conditions.

[redacted]. Taking the diverse make-up of TAP AG's shareholders structure into account, the applicant believes that it would be hard to foresee a circumstance in which it could be in the interest of all Board members to agree on a contract with a particular shareholder that is not based on market terms. Moreover, according to TAP AG's submissions it is in its shareholders' interest to ensure market based terms in related party transactions to avoid any negative tax implications.

In any event, it should be recalled that the requirements set out in the Road Map requiring TAP AG to submit to the Authorities on the one hand any service agreement with certified TSOs that are also shareholders for approval, and on the other hand any agreement with adjacent certified TSOs together with sufficient justification regarding their purpose and their compliance with the provisions of the Gas Directive, provide the Authorities with adequate means to effectively ensure that these services are rendered under market conditions and that they do not undermine the confidentiality of commercially sensitive information available to TAP AG, whilst the latter retains in any case control and ultimately bear full responsibility for the performance of the tasks set out in Articles 13 and 17(2) Gas Directive.

8.5 Financial autonomy of the ITO

In its opinion the Commission invites the Authorities to assess already in their final decisions whether the conditions under which TAP AG's shareholders intend to participate in the financing of TAP can be considered as compliant with the requirements of Articles 18(6) of the Gas Directive, whilst ensuring proper subsequent monitoring of their ultimate compliance herewith.

In this regard, it should be stressed that as the Commission noticed in its opinion, it can be deducted from the information provided by TAP AG that the latter will in principle be able to raise funding independently of its shareholders and sufficient assurances exist that shareholders take the required, including financial, decisions to realise TAP AG's investments. [redacted]

In view of the above, it appears that any loans provided by shareholders within the context of TAP AG's project financing are likely to be compatible with the requirements for such financing as laid down in Article 18(6) Gas Directive as: (i) third party lenders and TAP shareholders will subscribe by the nature of the financing process to the same conditions; that, (ii) in view of third party participation, can be presumed to be based on market terms.

In any event, the conditions set out in the Road Map requiring TAP AG to provide all the necessary information on the definitive financial arrangements for the construction of the pipeline will enable the Authorities to assess whether the compliance with Article 17 and 18 of the Gas Directive is respected and to impose further safeguards of TAP AG’s financial independence, if necessary.

8.6 Independence of TAP AG’s staff and management

In its opinion, the Commission considers that although it would not be proportional to apply the requirements of Article 19 (3) and (7) of the Gas Directive to TAP AG management and staff that are solely engaged in the management or execution of construction-related activities, the Authorities should, however, make sure that sufficient measures are in place to prevent that such personnel have access to commercial sensitive information on TAP AG’s commercial operations and that the independence rules under Articles 19(3), 19(4), 19(5) and 19(7) Gas Directive fully apply once TAP AG's staff and management are involved in commercial decisions on the use of the pipeline.

In this regard, it should be noticed that according to TAP AG’s submissions there is already no seconded personnel from shareholders involved in commercial operations. Moreover, it results that TAP AG’s staff involved in the first allocation of transmission capacity, the management of all previously agreed shipping contracts and the execution of further Market Tests, fulfils the requirements of Art 19(3), 19(4),

19(5) of the Gas Directive, as they are not affiliated with any shareholder in TAP AG. As a consequence any concern of an indirect influence on TAP AG from its shareholders as well as of an information flow between stakeholders and the applicant can be ruled out.

As regards the *ex post* cooling off periods required by the Gas Directive for senior management, TAP AG has committed to apply it as of COD onwards in accordance with the Road Map.

Furthermore, for the whole period prior to the full implementation of the ITO model the Regulatory Compliance Programme will provide sufficient safeguards against any undue influence on TAP AG's commercial operations as it effectively ring-fences the activities of TAP AG personnel involved in any limited commercial activities during the construction phase and also imposes strict confidentiality obligations which extend to all direct employees after termination of their employment at TAP AG.

Notwithstanding the above, the Authorities equally share the Commission's opinion[17] that the independence rules under Articles 19(3), 19(4), 19(5) and 19(7) of the Gas Directive should be complied with by TAP AG's staff and management once they start being involved in commercial decisions on the use of the pipeline. In this respect, it should be clarified that the cooling-off periods provided for by Articles 19(3) and 19(7) shall be complied with only by the persons responsible for the top management of TAP AG[18].

In the light of the above, the Authorities conclude that the commitments imposed on TAP AG enable the Authorities to closely monitor TAP AG conduct and to impose any additional measure in due time, if need be.

8.7 Final remarks

In addition to the above arguments, the Authorities acknowledge that TAP AG is already able to comply with some of the ITO requirements (listed in paragraph 4.1.h) which, together with the strict regulatory regime applicable to TAP AG pursuant to the FJO (see paragraph 4.1.b), provide the necessary safeguards to exclude any discrimination against third parties within the meaning of Article 18(5) of the Gas Directive.

At the same time, and as supported by the information and documentation submitted as part of the certification application, throughout the construction phase, TAP AG will continue to be legally and functionally unbundled and will conduct market tests on a commercially autonomous basis.

[17] See page 11 of the Commission opinion on TAP AG certification.

[18] See interpretative note on directive 2009/72/EC concerning common rules for the internal market in electricity and directive 2009/73/EC concerning common rules for the internal market in natural gas.

Furthermore, as regards the investment decisions, the regulatory regime in place will ensure that TAP AG cannot foreclose any expansion investment in the pipeline, needed by the market; in fact, according to the FJO, TAP AG is obliged to fulfill the binding capacity requests resulting from each market test and to extend the capacity of the pipeline.

Based on the above, the Authorities consider that, while the existing ITO requirements already fulfilled by TAP AG during the construction phase, together with the tailor-made regulatory regime in place, provide adequate assurance towards the achievement of the purposes of the unbundling regime as set out in the FJO, nonetheless, TAP AG will have to prove full compliance with all the remaining ITO requirements before it starts operations as a TSO. At that point in time, all the existing temporary derogations from the requirements of the ITO model that are justified during the construction phase will have to be lifted.

For these reasons, the Authorities, in line with their preliminary decision, deem appropriate to certify TAP AG as an independent transmission operator subject to full compliance by TAP AG with the commitments illustrated at paragraph 4.1.i ("the commitments") and in accordance with the timeline specified in the Road Map provided by the applicant.

TAP AG shall be deemed to have complied with the commitments, if, at COD, it proves that all the ITO requirements set out in Chapter IV of the Gas Directive, apart from Article 22 of the said Directive, are met. The commitments shall take effect upon the date of adoption of the final certification Decision.

5. Conclusion

Having regard to the Commission's opinion and Secretariat Opinion and based on the above arguments, pursuant to Article 10 of the Gas Directive and Article 3 of the Regulation (EC) No 715/2009, the Authorities, hereby, jointly adopt the final decision on the certification of TAP AG as an ITO as set out in Section 4.5.2 of the FJO.

The present certification decision is adopted subject to the fulfillment by TAP AG of the following conditions and obligations:

- full compliance with the requirements set out in Chapter IV of the Gas Directive that are already fulfilled by TAP AG during construction, as described in paragraph 4.1(h);
- full compliance with the current functional unbundling regime in place at TAP AG approved by the Authorities;
- fulfillment of the remaining requirements set out in Chapter IV of the Gas Directive, apart from Article 22, at the latest at COD according to the time schedule laid down in the Road Map described in paragraph 4.1(i), according to which TAP AG shall:
  - maintain, during the construction phase and until COD, the current functional unbundling regime and the relative Compliance Programme. In this regard, on an annual basis, until COD, the Regulatory Compliance

Officer shall provide a Report to the Authorities describing the progress of the implementation of the aforementioned Road Map. In case of any delay in the implementation of the Road Map, the Regulatory Compliance Officer will provide adequate information in due time to the Authorities in order to justify the delay and will communicate a new deadline for completion of each outstanding step of the Road Map; this new deadline cannot, in any case, allow for the timeline of the Road Map to exceed COD;

- twelve (12) months before COD, provide the Authorities with full concrete evidence to prove TAP AG's readiness to comply with the requirements of the Road Map not later than COD;
- during the construction phase and beyond, submit to the Authorities any technical operation and maintenance agreement signed with adjacent TSOs, together with sufficient justification regarding their purpose and their compliance with the provisions of the Gas Directive. Such justification will include particular reference to the tasks and the responsibility of each TSO vis-à-vis the Gas Directive and, in particular, its independence requirements. Notwithstanding any relevant national provisions regarding the obligations that adjacent TSOs have according to national procedures, the Authorities may require further justification or modifications of such agreements, should compliance with the Gas Directive not be safeguarded; TAP AG shall, at all times, bear full responsibility for performance of tasks set out in article 13 and 17(2) of the Gas Directive;
- submit to the Authorities for approval any service agreements with the shareholders not later than twelve (12) months before COD together with the necessary evidence of compliance of the said agreements with the provisions of the Gas Directive as set out in Article 18.7 of the Gas Directive;
- ensure that all seconded personnel from shareholders return to their respective companies not later than COD and provide evidence that all the independence requirements set out in the Gas Directive for TAP AG's personnel are fully met;
- twelve (12) months before COD, inform the Authorities about the existence of any possible extraordinary circumstances that might justify the extension, in any case for a limited time, of the provision of specific services by its shareholders and only if this is strictly necessary for the operational security of the pipeline;
- amend corporate statutes so as to comply with the TSO's independence requirements as per Article 18.4 of the Gas Directive;
- provide the Authorities with all the necessary information i) on the definitive financial arrangements that are necessary for the construction of the pipeline as soon as they are formalized and ii) on the financial arrangements that will be made, before COD, related to the operations of

the pipeline providing evidence of the compliance of such arrangements with Article 17 and Article 18 of the Gas Directive;

- review of the Compliance Programme in accordance with the obligations imposed by the Authorities on TAP AG pursuant to the present Joint certification decision;
- notification, in due time, to the Authorities of any change in its ownership structure that would result in a person or persons acquiring control of TAP AG within the meaning of the Merger Regulation in order to allow the Authorities to counteract any possible risk of market foreclosure and in any case to evaluate the re-opening of the certification procedure in accordance with Article 10 or 11 of the Gas Directive as the case may be;
- notification, in due time, to the Authorities of any change in the Shareholders Agreement which may affect the conditions ascertained in the present decision;
- application of the independence rules under Articles 19(3), 19(4), 19(5) and 19(7) of the Gas Directive to TAP AG's staff and management once they start being involved in commercial decisions on the use of the pipeline.

In order to allow the Authorities to monitor TAP AG's compliance with the commitments by COD, the Compliance Officer shall be in charge of:

- supervising the implementation of the commitments provided by TAP AG;
- submitting to the Authorities an annual report setting out the measures taken by TAP AG in order to implement the commitments according to the time schedule indicated in the Road Map;
- notifying in due time to the Authorities any delay in the implementation of the commitments and any breach of the latter.

Where TAP AG seeks an extension of a time period, it shall submit a reasoned request to the Authorities, in due time and before the expiry of that period, showing good cause. Any derogation from the commitments submitted by TAP AG can only be granted in exceptional circumstances and where it is proved that full compliance with the requirements of the ITO model laid down in Chapter IV of the Gas Directive might undermine the exemption.

The Authorities may, where appropriate, in response to a request from TAP AG showing good cause and accompanied by a report from the Compliance Officer: (i) grant an extension of the time periods foreseen in the commitments, or (ii) waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these commitments.

Failure of TAP AG to comply with the commitments by COD shall trigger the re-opening of the certification procedure to ensure such compliance pursuant to Article 10 of the Gas Directive.

In any event, non-compliance of TAP AG with the commitments may trigger the imposition of penalties on TAP AG by the AEEGSI pursuant to Article 2(20) of Law

n. 481/95, by the Greek National Regulatory Authority, pursuant to Article 36 of Law n. 4001/2011 and/or other relevant legal provisions, and by ERE pursuant to Article 106 (1) of Law No. 102/2015 and/or other relevant legal provisions**.**