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**COMMISSION OPINION**

**of 28.1.2016**

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of  
Directive 2009/73/EC – Italy - Greece - Certification of TAP AG**

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### I. PROCEDURE

On 2 December 2015, the Commission received notifications from the Italian regulatory authority, Autorità per l'energia elettrica e il gas e il sistema idrico, (hereafter, "AEEGSI") and the Greek regulatory authority, the Regulatory Authority for Energy (hereafter, "RAE"), of the preliminary decisions on the certification of the Trans Adriatic Pipeline AG ("TAP AG") as Transmission System Operator ('TSO') for gas. The two preliminary decisions have been prepared jointly by the National Regulatory Authorities of **Italy and Greece**<sup>1</sup> (hereinafter, "the Authorities" and "Draft Joint Decision") and are consequently similar in substance.

Pursuant to Article 10 Directive 2009/73/EC<sup>2</sup> (hereafter "Gas Directive") and Article 3 Regulation (EC) No 715/2009<sup>3</sup> (hereafter "Gas Regulation") the Commission is required to examine the notified Draft Joint Decision and deliver an opinion to the relevant national regulatory authorities as to its compatibility with Article 10(2) and Article 9 of Directive 2009/73/EC.

### II. DESCRIPTION OF THE NOTIFIED DRAFT JOINT DECISION

The "Trans Adriatic Pipeline" (hereafter "TAP") is a new pipeline project aimed to transport the 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.

TAP AG's shareholders are BP Gas Marketing Ltd (20%), AzTAP AG (former SOCAR Gas Pipelines GmbH) (20%), Snam S.p.A. (20%), Fluxys Europa BV (19%), Enagás International S.L.U. (16%) and Axpo AG (5%)<sup>4</sup>. Its shareholders are either vertically integrated energy undertakings, with interests in supply or production of electricity and gas, or certified gas transmission system operators.

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.

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<sup>1</sup> The Albanian regulatory authority has been involved in the preparation of the coordinated draft certification decision. The Albanian draft decision is reviewed by the Energy Community Secretariat in a similar procedure, in close collaboration with the Commission.

<sup>2</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211/94 of 14.8.2009.

<sup>3</sup> Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211/36 of 14.8.2009.

<sup>4</sup> Source: <http://www.tap-ag.com/about-us/our-shareholders>

On 16 May 2013, the European Commission approved, subject to conditions, an exemption for TAP AG pursuant to Article 36 Gas Directive from certain of the requirements in the Third energy package on third party access, tariff regulation and ownership unbundling for a period of 25 years.<sup>5</sup> The exemption was initially valid until 1 January 2019 by which date TAP was supposed to commence operations. The European Commission subsequently granted a prolongation for the start of commercial operations until 31 December 2020<sup>6</sup>. No prolongation was granted for the start of construction which has to begin by May 2016 for the exemption to remain valid.

Following the European Commission's Decision on TAP AG's exemption, the Authorities adopted in June 2013 the Final Joint Opinion on TAP AG's request for exemption<sup>7</sup> (hereafter, "the Exemption Decision"). Section 4.5 of the Exemption Decision exempted TAP AG from the provisions on ownership unbundling as set out in Article 9(1) Gas Directive, subject to the following conditions, as required by the Commission decision of 16 May 2013:

"[...]

*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:*

*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;*

*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;*

*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;*

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<sup>5</sup> See Commission decision C(2013) 2949 Final of 16 May 2013. [https://ec.europa.eu/energy/sites/ener/files/documents/2013\\_tap\\_decision\\_en.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2013_tap_decision_en.pdf).

<sup>6</sup> [https://ec.europa.eu/energy/sites/ener/files/documents/2015\\_tap\\_prolongation\\_decision\\_en.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2015_tap_prolongation_decision_en.pdf)

<sup>7</sup> <http://www.autorita.energia.it/allegati/docs/13/249-13all.pdf>

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

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

*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 the Exemption Decision, TAP AG has applied for certification according to the independent transmission operator ("ITO") model prior to the start of construction. The Authorities have analysed whether and to what extent TAP AG complies with the unbundling rules of the ITO model following the conditions set out in Section 4.5 of the Exemption Decision.

The Authorities came to the preliminary conclusion that TAP AG complies with these requirements. The Draft Joint Decision is adopted having regard to:

The requirements set out in Chapter IV Gas Directive that are already fulfilled by TAP AG during construction.

The commitments undertaken by TAP AG to fulfil by the commercial operation date ("COD") all the remaining requirements set out in Chapter IV Gas Directive, apart from Article 22, laid down in a Road Map, according to which TAP AG shall:

- maintain, during the construction phase and until COD, the current functional unbundling regime monitored by the Regulatory Compliance Officer;
- twelve months before COD, provide the Authorities with full concrete evidence to prove TAP AG's readiness to comply with 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;
- submit to the Authorities for approval any service agreements with the shareholders not later than twelve month before COD;
- ensure that all seconded personnel from shareholders return to their respective companies not later than COD;
- twelve months before COD, inform the Authorities about the existence of any possible extraordinary circumstances that might justify the extension of the provision of specific services by its shareholders;
- amend corporate statutes so as to comply with the TSO's independence requirements as per Article 18(4) Gas Directive;
- provide the Authorities with all the necessary information on the definitive financial arrangements made for the construction of the pipeline and of the financial arrangements made, before COD, to ensure the financial independence of TAP AG as set out in Article 17 and Article 18 Gas Directive;
- and the further obligation upon TAP AG to: a) review the compliance programme pursuant to the Draft Joint Decision; b) notify the Authorities of any change in its ownership structure that would result in a person acquiring control of TAP AG in

order to evaluate the re-opening of the certification procedure; c) notify the authorities of any change in the Shareholders Agreement which may affect the conditions.

In order to allow the Authorities to monitor TAP AG's compliance with the commitments by COD, the Draft Joint Decision stipulates that the Compliance Officer shall be in charge of: a) supervising the implementation of the commitments provided by TAP AG, b) 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; c) notifying to the Authorities any delay in the implementation of the commitments and any breach of the latter.

### III. COMMENTS

On the basis of the present notification, the Commission has the following comments on the Draft Joint Decision.

#### **Choice of the ITO model**

Pursuant to Article 9 Gas Directive, ownership unbundling is the default unbundling model for transmission system operators of new transmission systems, whereas the use of the ITO model is limited to transmission systems which belonged to a vertically integrated undertaking ("VIU") on 3 September 2009.

TAP AG has applied for and was granted in the Exemption Decision an exemption from the requirement of ownership unbundling. However, pursuant to Section 4.5 of the Exemption Decision, TAP AG is required to comply with and be certified on the basis of an *ad hoc* ITO model. The said *ad hoc* ITO model imposed on TAP in the Exemption Decision requires the fulfilment of all conditions set out in Chapter IV Gas Directive apart from Article 22 therein. The Commission thus agrees with the Authorities in the present case that the application of a tailor-made *ad hoc* ITO model is legitimate, as it was imposed by the Exemption Decision.

#### **Specific circumstances to be taken into account in the ITO-assessment**

The Authorities refer to the particular qualities of the project raised by TAP AG in its application for certification under the ITO provisions, submitted to the Authorities on 1 July 2015. In this context, TAP AG points out that TAP *has not yet been built*, and that TAP AG is not carrying out most of the tasks of a TSO at the time of certification, and that in the absence of control by its shareholders in the meaning of the EU Merger Regulation<sup>8</sup> TAP AG does not belong to a VIU in the meaning of Article 2(20) Gas Directive. TAP AG also notes that further to the Exemption Decision, a *specific regulatory framework* shall apply with regard to the operation of TAP, including the TAP Tariff Code, the TAP Network Code, the TAP Regulatory Compliance Programme and the Market Test Guidelines. Further to these specificities, TAP AG considers that it cannot be certified under the same conditions as an existing TSO belonging to a VIU.

The Commission acknowledges that TAP can be distinguished from the typical case of application of the ITO rules.

Firstly, it should be recognised that TAP's current day-to-day activities solely relate to the construction of transmission infrastructure, which sets it apart from other ITOs, whose primary activity relates to the management and operation of existing transmission infrastructure.

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<sup>8</sup> Regulation (EC) No 139/2004. The definition of "control" in Article 2(36) Gas Directive is the same as in the Merger Regulation.

Secondly, the fact that TAP AG was required to be certified prior to the start of TAP's construction, thus approximately 4 years before the provision of gas transmission services, constitutes an atypical situation.

The Commission also recalls that in the present case the obligation of TAP AG to apply an *ad hoc* ITO model does not stem from the Gas Directive but from the Exemption Decision. Hence, the applications of the respective provisions of Chapter IV Gas Directive in the present case should be considered in the light of the Exemption Decision and the objectives of the exemption.

As regards the issue of control over TAP AG by its shareholders, the Commission notes that the mere fact that TAP AG is not controlled by a single undertaking or VIU cannot *per se* be construed to limit the full applicability of the provisions of Chapter IV Gas Directive on TAP AG, as and to the extent imposed by the Exemption Decision.

The general objective of the unbundling requirements in the ITO model is to constrain the incentives and ability of a VIU to use its control over transmission infrastructure and services to prevent competitors from using the pipeline. Such concerns may, for example, arise with regard to the construction of the so-called expansion capacity and the manner in which it is operated, as rules on the access of competitors to infrastructure would apply in this case (i.e. third party access).

It should be noted here that important safeguards are already enshrined in the specific regulatory framework applicable to TAP AG, in particular the TAP Tariff Code, the TAP Network Code, the TAP Regulatory Compliance Programme and the Market test guidelines

As regards the *incentive* to foreclose, the tariff structure of the TAP contains elements that will significantly mitigate any incentive to foreclose<sup>9</sup>. In particular, incentives to foreclose could emanate from TAP's shareholders' desire to protect potential supply-related activities on adjacent markets, such as the Italian and Greek downstream wholesale and retail gas markets. Whereas the ownership structure of TAP has evolved since the issuing of the Exemption Decision, it remains correct that the currently vertically integrated shareholders of TAP have no or only insignificant interests in any of the Greek and Italian gas markets and therefore no such danger exists at the moment. The Authorities should 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 the current owners moving into the Greek and Italian markets.

This tailor-made regulatory framework sets out the obligations upon TAP to construct necessary expansion capacities, the process and basis on which such decision to build or not to build has to be made and the regime of regulatory oversight. These rules constrain the *ability* of TAP shareholders to foreclose competitors<sup>10</sup>.

It follows that the regulatory framework in which TAP operates contains elements that go beyond those usually applied to an ITO, whereas the factual circumstances that the ITO regulatory framework seeks to address do not apply in full in the present case.

The Commission notes further 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 of the other parts of a VIU. As indicated above, compliance with the

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<sup>9</sup> See the Commission's exemption decision paragraph 113

<sup>10</sup> See also the Commission's exemption decision paragraph 114 and following.

respective provisions of Chapter IV Gas Directive should be assessed in accordance with this objective.

### **Necessary safeguards concerning commercial activities**

It must nonetheless be recalled that the exemption granted to TAP was made conditional on the adherence to the specific regulatory regime developed for this project and the compliance with the ITO requirements as set out in Chapter IV Gas Directive (with the exception of Article 22 therein). The fact that the implementation of the ITO requirements serves similar goals as other regulatory safeguards cannot be considered *per se* as grounds for not implementing the former.

Indeed, whereas TAP AG will not be providing gas transmission services during the construction phase, it already engages in *commercial activities* at this stage. In particular, a first allocation of transmission capacity (i.e. a TSO task) on TAP has already taken place and certain of TAP's shareholders have contracted for capacity with TAP.<sup>11</sup> In parallel, these shareholders concluded gas supply contracts for gas meant to be transported by means of this contracted capacity on TAP once TAP becomes operational. Therefore, regardless as to whether TAP is actually engaged in the transportation of gas, conflicts of interest may well arise<sup>12</sup> implying the need of unbundling measures prior to the start of commercial operations. Further, TAP AG's commercial operations at this stage include the management of information gathered in the previous Market Test, the management of all previously agreed shipping contracts and the execution of further Market Tests.

It follows from the above that a deferred implementation of ITO requirements can only be justified where their immediate application would be incompatible with the specific circumstances under which the TAP project is being developed and where any conflict of interest in relation to the commercial and technical operations carried out by TAP is neutralised by the specific regulatory measures in force.

Against this background, the Commission invites the Authorities to assess in greater detail in the final certification decisions whether the grounds for a potential deferred implementation of the respective ITO requirements put forward by TAP are justified. At the same time, the Authorities should also assess 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 urges that Authorities to impose in their final decision additional conditions or safeguards to avoid the aforementioned risks of discrimination and undue influence.

### **Non-applicability of Article 11 of Gas Directive (third country certification)**

The Authorities, based on the information provided by TAP AG in its submission of 1 July 2015, consider that TAP AG should be certified according to the procedure laid out in Article 10 Gas Directive and Article 3 Gas Regulation. As the Authorities indicate in the Draft Joint Decision, none of TAP AG's shareholders enjoy either sole or joint control over TAP AG within the meaning of the EU Merger Regulation.

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<sup>11</sup> The TAP Exemption Decision specifically provided for this possibility in respect of the initial capacity.  
<sup>12</sup> Decisions that may be connected to the interests of the VIU shareholders may for instance be any procedures and decisions related to the allocation of capacity, decisions connected to the commercial operation of the TAP once operational and investment decisions affecting the ability to entry or exit the TAP.

The Commission agrees with the Authorities that Article 11 Gas Directive is not applicable to this case even though some of the shareholders are from third countries, given the fact that none of shareholders, solely or jointly, have control over TAG AG.

### **Rendering of services to the ITO**

Article 17(1)(c) Gas Directive provides for specific rules on the contracting of services between the ITO and other parts of the VIU. As the ITO should be autonomous and not dependent on other parts of the VIU, the rendering of services to the ITO by any other part of the VIU is prohibited by the Gas Directive.

#### *Provision of services by shareholders during the construction phase*

According to the Draft Joint Decision, 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 the project, whereas TAP AG will manage the offshore pipeline construction directly. During the construction phase, TAP AG considers it necessary to receive engineering and supervision services from its shareholders for the purpose of technical realisation of the pipeline.

The Authorities in the Draft Joint Decision consider that TAP AG's shareholders should be allowed to continue providing the engineering and supervisions services, which are strictly necessary for the completion of the pipeline, given that the application of all the requirements of Article 17 Gas Directive is not needed until COD. The Authorities consider that any obligation to put an end to the current service agreement with the shareholders during construction might risk undermining the objective of the exemption that is to allow the investment. Furthermore, they underline that it seems that those technical services have no bearing on TAP AG's limited commercial operation in the construction phase (i.e. market test for the booking of capacity).

The Commission reiterates that the compliance with the ITO model as imposed by and considered in the context of the Exemption Decision aims to ensure that the technical and commercial operation of the pipeline is carried out independently and not that the construction of the pipeline is carried out independently of the other parts of the VIU. In view of this objective, the Commission shares the Authorities' view that Article 17(1)(c) Gas Directive should not be applied in the present case so as to limit the ability of shareholders to provide engineering and supervision services for the purpose of the construction of the pipeline.

However, the Commission is of the view that the Authorities should assess in their final decisions whether there are sufficient measures in place to ensure that the provision of such services by the shareholders will not jeopardise the confidentiality of commercially sensitive information accessible to TAP, and where necessary, impose further measures to this end.

In case certain construction related services are continued to be provided by the TAP shareholders after the start of the pipeline's technical operation, the Authorities should verify that these activities do not interfere with the independent (technical and commercial) operation of the pipeline in compliance with the aim of the ITO model.

#### *Provision of services by shareholders during the operation phase*

According to the Draft Joint Decision, TAP AG envisages the conclusion of service agreements with shareholders that are certified TSOs for some of the technical operation and maintenance activities during the operations phase. In particular, TAP AG stipulates that service agreements between TAP AG and those shareholders that are certified TSOs should be allowed at all times and on an *ad hoc* basis, provided that these agreements do not affect



the autonomy of TAP AG. TAP AG commits to submit these contracts to the Authorities for their scrutiny.

The Commission notes that the Authorities have not assessed the compatibility with the unbundling requirements of such provision of services by those shareholders which are certified TSOs during the operations phase. The Commission invites the Authorities to assess this issue in their final decisions.

The Authorities in this assessment should take account of the fact that the objective of Article 17 Gas Directive is to ensure that transmission system operators shall be equipped with all human, technical, physical and financial resources necessary for fulfilling their obligations under the Directive, in particular, carrying out the activity of gas transmission, so that, in effect, they can act independently from any supply and production interests held by shareholders.

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 commercially sensitive information available to TAP AG.

It is recalled that pursuant to Article 18(6) Gas Directive, TAP shall keep detailed records of such commercial relations and where the provision of such services is the subject of a framework agreement, such agreement shall be submitted to the Authorities for approval pursuant Article 18(7) Gas Directive.

#### *Outsourcing of services to adjacent TSOs during the operation phase*

TAP AG envisages outsourcing some of the technical operation and maintenance activities during the operation phase to adjacent certified TSOs. No information has been made available about, for example, the type and volume of services to be subcontracted and the duration of any outsourcing of services.

The Commission notes that the Authorities have not assessed in the Draft Joint Decision the compatibility with the unbundling requirements of such outsourcing to adjacent TSOs during the operation phase and invites the Authorities to assess this issue in their final decisions.

In this context the Commission recalls 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 performance of the tasks set out in Articles 13 and 17(2) Gas Directive.

#### **Financial autonomy of the ITO**

As regards the financial autonomy of the ITO, the Gas Directive provides in:

- Article 17(1)(d) Gas Directive that appropriate financial resources for investment projects be made available to the ITO by the VIU;
- Article 18(1)(b) Gas Directive, that the ITO is to have the power to raise money on the capital market in particular through borrowing and capital increase;
- Article 18(6) Gas Directive that any commercial and financial relations between the VIU and the transmission system operator comply with market conditions;
- Article 18(7) Gas Directive requires that all commercial and financial agreements between the VIU and the ITO are approved by the national regulatory authority.

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 and their intended transition. TAP AG argues that an immediate implementation of the provisions on unbundling might endanger the completion of the transmission network and the bankability of the whole project.

In the Draft Joint Decision, the Authorities consider that the application of Articles 17(1) (d), 18(1) (b), 18(6) and 18(7) Gas Directive can be deferred until COD, on the grounds that shareholder involvement in TAP financing will not lead to conflicts of interests.

The Commission notes that the objective of the requirements of financial autonomy in Articles 17 and 18 Gas Directive is mainly to guarantee the independence of the ITO in financial terms from the production and supply interests of the VIU. Without such requirement, the VIU could continue to control the ITO, in particular in relation to investment decisions, by withholding the necessary funding in order to obstruct the building of additional transmission capacity or of new connections to the grid, with a view to hindering its actual and potential competitors in production and supply.

Taking into account this objective, in the context of the TAP project and the granted exemption, the arrangements for financing the construction of the TAP and, in particular, its expansion capacity is pertinent.

The Commission understands that TAP AG will in principle be able to raise funding independent from its shareholders, [BUSINESS SECRET].

[BUSINESS SECRET], sufficient assurances exist that shareholders take the required, including financial decisions, to realise TAP AG's investments. As was already mentioned above, the regulatory framework in which TAP operates as defined by the Exemption Decision in fact contains elements that go beyond those usually applied to an ITO in this regard, whereas the factual circumstances that the ITO regulatory framework seeks to address do not apply in full to the present case (e.g. see above in Section 2).

[BUSINESS SECRET].

In view of the above it appears that any loans provided by shareholders within the context of TAP'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.

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) Gas Directive, whilst ensuring proper subsequent monitoring of their ultimate compliance herewith.

### **Independence of TAP AG's staff and management**

Articles 19(3), 19(4), 19(5) and 19(7) Gas Directive prescribe certain requirements with regard to persons responsible for the management of the ITO, the members of the ITO's administrative bodies and its employees with regard to their relations with the VIU, including *ex ante* and *ex post* cooling off periods.

TAP seeks the non-application of these provisions until COD in order to ensure that it can hire and retain personnel originating from its shareholders with experience pertinent for the management of complex construction projects such as the one that TAP entails.

The Authorities consider that the application of the said rules as of COD is appropriate, in particular in view of the compliance programme approved by the Authorities that has been put in place by TAP AG which serves to safeguard the confidentiality of commercially sensitive information gathered by TAP AG and the limited commercial activities carried out by TAP AG, referring in this context to the market test for capacity allocation purposes.

The main objective<sup>13</sup> of the cooling-off periods is to limit indirect influence on the ITO from the VIU and to ring-fence information flows between these entities. Indeed, such information flows may undermine the level playing field in particular when such information is commercially sensitive.

It is acknowledged that TAP's main activities are currently focused on construction of a gas transportation network as opposed to the day-to-day management of an already existing gas transportation network.

In this context it is noteworthy that TAP's currently existing compliance programme imposes obligations upon TAP's employees and personnel seconded to TAP, not to disclose commercially sensitive information (including but not limited to information in relation to the marketing of TAP's capacity) until at least two years post contract termination and foresees the imposition of sanctions in case such obligations are breached. The present compliance rules expire upon TAP's certification and are foreseen to be prolonged further and to be updated in accordance with the Authorities' final decisions.

Therefore, the Commission considers that, taking into account the granted exemption, during construction up until COD, it would not be proportional to apply the requirements of Article 19 (3) and (7) Gas Directive to TAP management and staff that are solely engaged in the management or execution of construction-related activities. This provided that effective measures are in place to prevent that such personnel have access to information pertinent for TAP's operations as a TSO. The Authorities should, however, make sure in their final decisions 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.

Moreover, the Commission considers that the application of Article 19 Gas Directive in the present case should not be such so as to prohibit the secondment of personnel to TAP AG from its shareholders, provided that such personnel is not involved in the commercial operations carried out by TAP AG or in the management of information related to such commercial operations.

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<sup>13</sup> See in this regard recital 16, but also 12, of Directive 2009/73/EC

## Supervisory Body

Article 20 Gas Directive prescribes that an ITO shall have a supervisory body and details what decisions will fall within the remit of its power what which not. In particular, "*The decisions falling under the remit of the Supervisory Body shall exclude those that are related to the day to day activities of the transmission system operator and management of the network [....]*"<sup>14</sup>.

In the Draft Joint Decision, 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 not required 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.

It is acknowledged that TAP's main activities are currently focused on construction of a gas transportation network as opposed to the day-to-day operations of a transmission system and management of a network.

It must equally be recognised that to the extent the activities of a typical ITO and TAP AG overlap, in particular as regards investing in the development of the network, the regulatory framework applicable to TAP AG provides guarantees over and above those typically applied to a ITO, whereas the factual circumstances that the ITO regulatory framework seeks to address do not apply in full to the present case.

The Commission therefore is of the opinion that the introduction of a supervisory body until COD is not required to protect against risks of undue shareholder influence on the full scope of commercial operations carried out by TAP AG.

## IV. CONCLUSION

Pursuant to Article 3 Gas Regulation, AEEGSI and RAE shall take utmost account of the above comments of the Commission when taking their final decisions regarding the certification of TAP AG, and when they do so, shall communicate their decisions to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* national regulatory authorities on any other notified draft measures concerning certification, or *vis-à-vis* national authorities responsible for the transposition of EU legislation, on the compatibility of any national implementing measure with EU law.

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<sup>14</sup> It also stipulates that the remit of the supervisory board does not include activities necessary for the preparation of the ten-year network development plan developed pursuant to Article 22. However, the Commission's exemption decision explicitly provides that Article 22 does not apply to TAP AG for the reasons stated there.

The Commission will publish this document on its website. The Commission does not consider the information contained therein to be confidential. AEEGSI and RAE are invited to inform the Commission within five working days following receipt whether and why they consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which they wish to have deleted prior to such publication.

Done at Brussels, 28.1.2016

*For the Commission*  
*Miguel ARIAS CAÑETE*  
*Member of the Commission*

