

Energy Regulators' 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

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 (hereinafter also "the applicant") 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.

With the present decision, the Authorities assess whether based on the information contained in TAP AG's application, the latter complies with the conditions set in Section 4.5.2 of the FJO and, consequently, whether it can be certified according to the independent transmission operator ("ITO") model as set out in Chapter IV of the Gas Directive, with the exception of Article 22 requirements of the said Directive.

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 2013¹, 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 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*

¹ Commission decision C(2013) 2949 Final of 16 May 2013.

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 categorally 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. The Assessment

4.1 TAP AG's arguments

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 Tests². 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

² 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.

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 TAP AG not to comply with the FJO, [

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] 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 [

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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 therefore 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 risks³. 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'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

³ For further details see section 2 and 3 of Annex I submitted by TAP AG on 1 July 2015.

major risks related to sunk costs (as also recognized by the European 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 authorities⁵. 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.

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 Commission⁶ 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 returns 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.

⁴ See paragraph 165.

⁵ For further details see Annex I and II submitted by TAP AG on 1 July 2015.

⁶ See paragraph 207 of the Commission decision.

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 entrants⁷. 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.

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.

⁷ See Recital 9 of the Gas Directive.

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 threaten 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 construction 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-validated⁸, 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.

⁸ 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.

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 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 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.

4.2 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.

4.3 The Authorities assessment

On the basis of the arguments presented by TAP AG and having regard to the initial assessment of the European Commission Services, the Authorities, hereby, undertake their assessment on the application for certification submitted by TAP AG under the ITO model as set out in Section 4.5 of the FJO.

4.3.1 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 and consistent with the European Commission Services' view (reported in the above mentioned letter of 10 April, 2013) no shareholder enjoys either sole or joint control over TAP AG within the meaning of the EU Merger Regulation⁹. 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 Parties¹⁰ 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.

4.3.2 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).

⁹ Regulation (EC) No. 139/2004.

¹⁰ 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.

Certification should therefore ensure that these commercial operations activities are carried out by TAP AG independently from its shareholders.

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.

4.3.3. 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 Directive¹¹. 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

¹¹ 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”.

bearing on TAP AG's limited commercial operation in the construction phase (i.e. 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 matter¹² 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:

¹² Letter of the European Commission services dated 28 June 2013.

- 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.

4.3.4. 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”*¹³.

4.3.5 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.

4.3.6 Final remarks

In addition to the argumentation above, the Authorities acknowledge that at the time of certification TAP AG will be already able to comply with some of the ITO requirements (listed at 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.

¹³ 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.

Furthermore, as regards the investment decisions, the regulatory regime in place will ensure that TAP AG cannot foreclose any expansion investment in the pipeline if the market so requires; 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 to 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 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

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 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 having regard to:

- 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);
- the commitments undertaken by TAP AG to fulfill at COD all the remaining requirements set out in Chapter IV of the Gas Directive, apart from Article 22, 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 monitored by the Regulatory Compliance Officer. 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, have the overall control and management of the operations of the pipeline;
- 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 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 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 of the Gas Directive,

- and the further obligation upon TAP AG to:
 - review the compliance programme in accordance with the obligations imposed by the Authorities on TAP AG pursuant to the present Joint certification decision;
 - notify, in due time, 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 evaluate the re-opening of the certification procedure in accordance with Article 10 or 11 of the Gas Directive as the case may be;
 - notify, in due time, the Authorities of any change in the Shareholders Agreement which may affect the conditions ascertained in the present decision.

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.

The present certification decision will be notified to the European Commission pursuant to Article 10(6) of the Gas Directive and to the Energy Community Secretariat pursuant to article 11 of the Energy Community Treaty and article 9 of the Decision D/2011/02/MC-EnC of the Energy Community. As set out in Article 3 of the Regulation (EC) No 715/2009, following the European Commission's opinion, the Authorities will adopt their final Joint certification decision of TAP AG.