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COMMISSION DECISION

of 16.5.2013

on the exemption of the Trans Adriatic Pipeline from the requirements on third party access, tariff regulation and ownership unbundling laid down in Articles 9, 32, 41(6), 41(8) and 41(10) of Directive 2009/73/EC

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 (hereinafter "Gas Directive ")¹, and in particular Articles 36 thereof,

Having taken note of the Opinion 1/2013 of the Energy Community Secretariat dated 14 May 2013,

Whereas:

1. PROCEDURE

- (1) On 28 February 2013, the Greek Energy Regulator, Ρυθμιστική Αρχή Ενέργειας (PAE) / Regulatory Authority for Energy (hereinafter, 'RAE'), adopted Decision N° 111/2013, on the "Exemption of TAP AG from the provisions of Articles 9, 32 and 41(6), (8) and (10) of Directive 2009/73/EC on the Trans-Adriatic Pipeline (TAP)" (hereinafter, "Greek Exemption Decision"). The Exemption Decision was notified to the European Commission (hereinafter, "Commission") in full on 9 March 2013.
- (2) On 13 March 2013, the Italian authority, Ministero dello Sviluppo Economico (hereinafter, "MSE"), adopted a specific Decree concerning exemption of TAP AG from the provisions of Articles 9, 32, 33, 34 and 41(6), (8) and (10) of Directive 2009/73/EC on the Trans-Adriatic Pipeline (TAP)" (hereinafter, "Italian Exemption Decision"). The Italian Exemption Decision was notified to the European Commission (hereinafter, "Commission") on 15 March 2013.
- (3) Both the Greek Exemption Decision and the Italian Exemption Decision (hereafter referred as "Exemption Decisions") were notified to the Commission together with a document entitled "Joint Opinion of the Energy Regulators on TAP AG's Exemption Application (Autorità per l'energia elettrica e il gas (hereinafter "AEEG", from Italy), Enti Regulatori i Energjiise (hereinafter 'ERE', from Albania), Ρυθμιστική Αρχή Ενέργειας" (hereinafter 'Joint Opinion'), dated 28 February 2013, which therefore forms an integral part of the Exemption Decisions.
- (4) The Joint Opinion results from the agreement reached by the Regulatory Authorities of Italy, Albania and Greece to review jointly the application and to express the result of this assessment in one single Opinion, based on the criteria of Article 36(1) of Directive 2009/73/EC, supported by the market test results and further considerations agreed among these three authorities. The Italian Authority (MSE) requested the Italian regulatory authority (AEEG) to define, jointly with the Greek and Albanian

¹ OJ L 211, 14.09.2009, p. 94.

Regulatory Authorities, the procedures for the Market Test and provide an Opinion to the Ministry.

- (5) On 22 March 2013, the Commission published² a notice on its website informing the public of the notification and inviting the third parties to send their observations by 5 April 2013.
- (6) In response, on 5 April 2013, the Commission received observations from several third parties.³
- (7) On 27 February 2013 and 23 April 2013, the Commission services met with the relevant national regulatory authorities (hereinafter "NRAs" or "Regulatory Authorities", or "Authorities", the latter when also reference is made to MSE), in particular AEEG and RAE, to discuss the case.
- (8) On 27 March 2013, the Commission services addressed to MSE and RAE a request for additional information, in order to allow a full assessment of the Exemption Decisions. This information was provided on 5 April 2013. Following the state-of-play meeting with the Regulatory Authorities on 23 April 2013, and in response to additional questions raised by the Commission, the Authorities provided additional information, respectively, on 24 April 2013 (RAE) and 26 April 2013 (MSE).
- (9) On 2 April 2013, 11 April and 22 April 2013 the Commission services met with TAP AG to discuss the case. TAP also provided additional information, such as: on 26 March 2013 (on the physical reverse flow capabilities of the TAP pipeline and the costs for Expansion Capacity), on 5 and 9 April 2013 (on upstream arrangements, shareholder structure and envisaged tariff methodology), on 12 April (on TAP's tariff methodology), on 16 April 2013 (on TAP's financial model), on 24 April 2013 (revised draft tariff code), on 26 April 2013 (on likely start of TAP's commercial operations) and on 7 May 2013 (on short term products).
- (10) On 23 April 2013, the Greek Authority (RAE), upon the request of the Commission, agreed by common consent to extend the initial two-month period for taking an exemption decision by the Commission to 16 May 2013. Consequently, the date of adoption of the Commission Exemption Decisions addressed respectively to the Italian and Greek Authorities was aligned to be 16 May 2013.
- (11) On 3 May 2013, the Secretariat of the Energy Community (hereafter 'EnC') notified to the Commission its draft Opinion on the Decision of the Albanian Energy Regulator, Enti Reegullator I Energjise / Energy Regulatory Entity of Albania (hereinafter "ERE"), in accordance with Articles 16 and 30 of Decision 2011/2/MC-EnC of the Ministerial Council of the Energy Community, on the implementation of Directive 2009/73. On 14 May, the Secretariat of the Energy Community adopted its Opinion.

2. DESCRIPTION OF THE PROJECT

- (12) One of the EU's priorities is the Southern Gas Corridor, which aims at providing direct access for the EU to substantial gas reserves in the Caspian, the Eastern Mediterranean Basin and the Middle East region. The Trans-Adriatic Pipeline (hereinafter "TAP") is one of two potential routes to Europe, along Nabucco West, pre-chosen by the Shah Deniz II consortium (hereafter 'SD II') to deliver SD II gas to

² http://ec.europa.eu/energy/infrastructure/exemptions/doc/exemption_decisions.pdf. A first notice was published on 21 March 2013 which was however for technical reasons only accessible on 22 March.

³ As certain Third Parties have expressed the wish to remain anonymous, their identity is not specified here.

the EU. Therefore, the TAP project has a potential to connect the EU with the Caspian gas sources.

- (13) The Trans-Adriatic Pipeline is being developed by TAP AG, a single purpose company with no other interest than the development, construction, ownership and operation, including the marketing and maintenance of TAP. TAP AG is a consortium established by the Norwegian company Statoil ASA (42,5%), the Swiss company Axpo AG⁴ (42,5%) and the German company E.On Ruhrgas AG⁵, (15%).
- Statoil ASA is a member of the upstream consortium of companies responsible for the development of Shah Deniz II gas field, from which TAP will transport gas. Statoil ASA is the second largest supplier of gas to the European markets, the majority of its gas is delivered from Norway to markets in North-West Europe.
 - Axpo AG trades in natural gas, electricity and energy-related financial products, through its subsidiaries it is present in major European markets.
 - E.On Ruhrgas AG covers the entire value chain from production of gas to the supply of gas and electricity to industrial and domestic users.
- (14) According to the Joint Opinion⁶ and based on the information provided in the Exemption Application as notified by TAP AG to the responsible authorities of Italy on 29 August 2011 (referred to hereinafter as "Exemption Application"),⁷ the TAP pipeline will be approximately 800 km long. It is planned to start in Greece at Komotini, to cross Greece, Albania and the Adriatic Sea and to reach Italy in the Puglia region (with foreseen entry point, to the Italian gas transmission network, located in San Foca, near Lecce), to tie into Italy's national gas transportation grid at Meledugno.
- (15) According to the information provided in the Joint Opinion⁸, TAP is a major new project aiming to facilitate the transportation of gas produced in the second phase of the Azerbaijan gas field Shah Deniz (hereafter referred to as "SD II"). The SD II project foresees the building of offshore platforms, gas pipelines from sea to shore, as well as the expansion of Sangachal Terminal and South Caucasus Pipeline for the transportation of gas from Azerbaijan through Georgia to Turkey.⁹ The first substantial amount of gas, approximately 10 bcm/y, will be available from Azerbaijan from 2019 onwards from its Shah Deniz II ('SD II') field, preliminary earmarked for the EU¹⁰.
- (16) The Commission notes that in case the TAP project is selected, it is expected that the SD II shareholders will take up to 50% equity in TAP. However, as this decision has not been yet taken, the Commission's assessment in section 4 of the Commission Decision is based on the current facts and the Exemption Application as submitted by

⁴ Previously EGL AG, change of the company name confirmed by the extract from the commercial registry, showing that EGL AG and Axpo Trading AG bear the same number in the commercial registry (CH-400.3.910.021-7), submitted by TAP on 9 April 2011.

⁵ The Commission services were notified by TAP AG on 5 April 2013 of the planned merger of the gas business activities of E.ON Ruhrgas AG and E.ON Global Commodities SE, which will result in the change of the company name.

⁶ Joint Opinion, p. 2.

⁷ Exemption Application as notified by TAP AG to the responsible authorities of Italy on 29 August 2011, p. 19.

⁸ Joint Opinion, p. 1.

⁹ Joint Opinion, p. 1.

¹⁰ The Shah Deniz field is operated by BP which has a share of 25.5%. Other partners include Statoil (25.5%), SOCAR (10%), Total S.A. (10%), Lukoil (10%), NIOC (10%) and TPAO (9%).

the current project promoters, i.e. TAP AG. Furthermore, the Commission notes, that there is a condition included in the Exemption Decisions that addresses the change of the shareholders' structure.

- (17) Upstream, based on the information provided in the Joint Opinion¹¹, TAP is expected to interconnect with the existing pipeline system operated by DESFA (Greek National Natural Gas System Operator) at Komotini (87 km from the Turkish/Greek border), in Greece through the existing Interconnector Turkey-Greece (hereafter "ITG"), which is linked further to the east with the current pipeline systems in Turkey (in Karcabey). This would require additional capacity upgrade at ITG, along the section Kipoi-Komotini, both on the Greek and Turkish part of the border.¹² Alternatively, based on additional information provided by TAP AG during the national proceedings, the Joint Opinion states that, should the gas from Azerbaijan be transported through Turkey through the envisaged new pipeline Trans-Anatolian Pipeline (hereinafter 'TANAP')¹³, TAP would be directly connected to TANAP, thus bypassing the existing ITG.¹⁴
- (18) According to information provided by TAP AG¹⁵, a Memorandum of understanding was signed between TAP and TANAP in November 2012. In case TANAP is built, TAP will connect directly to TANAP at Kiopi on the Greek-Turkish border and a new extension of TAP with the total length of 87 km will be built along the existing DESFA network.
- (19) According to the information provided in the Joint Opinion,¹⁶ TAP is designed to transport the volumes of gas available from SD II for Europe, i.e. 10 bcm/y (the 'Initial Capacity'). The total cost of the project (in its initial phase with necessary pre-investments related to future expansions), based on TAP AG's financial model as submitted at the time of the Exemption Application, is estimated to be approximately [BUSINESS SECRET] (CAPEX).¹⁷ According to the Exemption Application, the capacity of the pipeline can be expanded by 10 bcm/y (the 'Expansion Capacity') to 20 bcm/y (the 'Total Capacity') in stages¹⁸ by adding compressor stations along the same pipeline.¹⁹ The addition of 10 bcm capacity would increase the overall cost by around [BUSINESS SECRET] (i.e. around 18% of the initial CAPEX).²⁰ This data were updated during the current procedure and the estimate of CAPEX for the Initial Capacity was upgraded to [BUSINESS SECRET]²¹ and up to [BUSINESS SECRET] for the full additional 10 bcm expansion.²²

¹¹ Joint Opinion, pp. 1-2.

¹² Joint Opinion, p. 2.

¹³ Turkey and Azerbaijan signed on 28 June 2012 an Intergovernmental Agreement and a Host Government agreement in order to facilitate building of TANAP, a new pipeline across Turkey to transport gas from the Eastern Turkish border to the Western Turkish border. The planned pipeline will link the expanded Southern Caucasus pipeline starting in Azerbaijan to ultimately one of the proposed pipelines in the EU.

¹⁴ Joint Opinion, p. 2.

¹⁵ Submission TAP AG of 9 April 2013.

¹⁶ Joint Opinion, p.3

¹⁷ Joint Opinion, p. 7, Annex A to the Joint Opinion, p. 67.

¹⁸ From 10 bcm, to 11.8 bcm, from 11.8 bcm to 14.4 bcm, from 14.4 bcm to 16.4 bcm and from 16.4 bcm to 20 bcm.

¹⁹ Exemption Application, pp. 31-32.

²⁰ Joint Opinion, p. 8.

²¹ Reply RAE 5 April 2013 annexe 3.

²² TAP submission dated 25 March 2013, pp. 6-10.

- (20) According to the Joint Opinion²³ and TAP's Exemption Application²⁴, Physical Reverse Flow Capacity will be ensured in line with the requirements of Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010, concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (hereinafter, "Regulation No 994/2010")²⁵. According to the Joint Opinion, this would allow gas to be transported from Italy to Albania and Greece. In the Exemption Application, TAP AG provided the figure of 5-6 bcm/y for physical reverse flow, subject to further study.²⁶ Upon additional request by the Commission services, TAP AG clarified in its submission of 25 March 2013²⁷, that subject to the pressure that can be made available by the Italian Transmission System Operator ("TSO") SNAM at the inlet of TAP to the Italian gas network, physical reverse flow could total up to 10 bcm/y, although the base scenario is a reverse capacity of 5 bcm between the entry point in Italy and the exit point in Greece, crossing Albania. The change of entry point of TAP, further west, and possible connection with TANAP does not affect this analysis.
- (21) According to the information provided in the Joint Opinion and in the Exemption Application²⁸, the construction is forecasted to start in Q4 of 2014 and the pipeline is expected to be operational as of the Q1 of 2017 and, in any case, in time for the first SD II gas deliveries.
- (22) However, the Commission notes that the first deliveries of gas from SD II may start later than envisaged in the Exemption Application and the Joint Opinion. Indeed, by its submission of 26 April 2013, TAP informed the Commission that it now expects start of commercial operations in Q1 2019.²⁹ This delay occurred as a result of a revised SD II production and ramp-up scenario. TAP AG expects that the SD II consortium will make its final selection of pipeline and gas buyers by 30th June 2013 and will proceed to a final investment decision on 31 October 2013. Once these milestones have been reached and all necessary permits and licences are in place, TAP AG expects construction to commence in 2015.

3. THE NOTIFIED EXEMPTION DECISION

3.1 The Greek Exemption Decision

- (23) In its Exemption Decision, RAE decided, in particular,

"to approve the document entitled 'Joint Opinion of the Energy Regulators on TAP AG's Exemption Application: Autorità per l'energia elettrica e il gas (Italy), Enti Regulatori i Energjiise (Albania), Ρυθμιστική Αρχή Ενέργειας (Greece)' attached to this document as an Annex which is an integral part of it;" and "2. to exempt the company TAP AG in accordance with the special terms and conditions of Part 4 (Authorities Joint Opinion) of the text attached to this document".

The Joint Opinion is thus an integral part of the Greek Exemption Decision.

²³ Joint Opinion, p. 3.

²⁴ Exemption Application, p. 32.

²⁵ OJ L 295, 12.11.2010, p. 1.

²⁶ Exemption Application, p. 32.

²⁷ TAP submission, 25 March 2013, pp. 1-2.

²⁸ Joint Opinion, p. 3.

²⁹ Information consistent also with TAP's submission dated 25 March 2013, which foresees also a grace period of 6 months, see Annex 3, Appendix 1.

3.2 The Italian Exemption Decision

(24) Article 1 of the Exemption Decision reads:

*"Pursuant to Article 1, paragraph 17 of Law No 239/04, as amended by Legislative Decree No 93 of 1 June 2011, and on the basis of the provisions of Article 36 of Directive 2009/73/EC, **in accordance with the recommendations of the Joint Opinion of the Italian, Greek and Albanian Regulatory Authorities**, an exemption has been granted for the TAP pipeline, mentioned in the introduction, in regard to the following provisions of the Directive, for the section under Italian jurisdiction". (emphasis added)*

(25) The Italian Exemption Decision thus embraces the Joint Opinion. Moreover, it consistently emphasises that the exemption granted and conditions imposed are in line with Joint Opinion and refers back to the detailed provisions and conditions as laid down in section 4 of the Joint Opinion. This understanding was further re-confirmed by a letter sent by MSE to the Commission on 26 April 2013.

(26) The Commission therefore will also base its assessment of the Italian Exemption Decision on the provisions in section 4 of the Joint Opinion.

3.3 The market test

(27) Pursuant to Article 36(6) of Directive 2009/73/EC:

"Before granting an exemption, the regulatory authority shall decide upon the rules and mechanisms for management and allocation of capacity. The rules shall require that all potential users of the infrastructure are invited to indicate their interest in contracting capacity before capacity allocation in the new infrastructure, including for own use, takes place. The regulatory authority shall require congestion management rules to include the obligation to offer unused capacity on the market, and shall require users of the infrastructure to be entitled to trade their contracted capacities on the secondary market. In its assessment of the criteria referred to in points (a), (b) and (e) of paragraph 1, the regulatory authority shall take into account the results of that capacity allocation procedure."

(28) The purpose of this "market test" is to evaluate the demand for capacity in the projected pipeline from third parties with the aim to assess the likelihood that non-exempted capacity finds buyers, to evaluate the appropriate size of the pipeline and the location of entry and exit points.

(29) Guidelines for the management and allocation of the capacity were issued in April 2012. The NRAs decided to have the Market Test carried-out in two phases: first a (non-binding) expression of interest phase and, subsequently, a (binding) booking phase. The first phase took place in summer 2012 on the basis of the Expression of Interest Notice, jointly approved by NRAs in May/June 2012.³⁰ Although the Expression of Interest phase does not bind participants to book capacity, it is a prerequisite to access the Booking Phase to be performed later. The Authorities decided to postpone the second phase, awaiting the result of SD II's negotiations with potential buyers. Separate guidelines will be issued by the NRAs specifying the procedure, the available products as well as the amount of capacity available for booking. In the Joint Opinion, specific conditions were prescribed that ensure that the following binding stages of the market test will be performed by TAP AG under the regulatory supervision of the NRAs.

³⁰ Joint Opinion, p. 11.

- (30) It is not a requirement that prior to granting an exemption by the Authorities, the binding phase of the market test has been conducted. Indeed, the Directive only prescribes that the rules and mechanisms for management and allocation of capacity are decided before an exemption is granted and lays down certain minimum requirements as to what these rules must contain. It does not require either that these rules are also implemented prior to taking an exemption decision pursuant to Article 36 Gas Directive. Furthermore, the Authorities, by prescribing detailed rules on how the next phases of the market test will be performed, ensured that the bidding stage of the allocation will take place. The Commission notes that this assessment is without prejudice to the Commission's right to adopt Guidelines setting up the procedure to be followed for, among others, the application of paragraph 6 of the Article 36 of the Gas Directive.
- (31) As regards the results of the market test, in total 19 companies, including the TAP AG shareholders and the Shah Deniz Consortium, expressed their interest to book capacity on TAP. The remaining 15 participants are energy traders and suppliers. The overall demand for forward flow was approximately 46,4 bcm/y, a figure that according to the Authorities represents an over-estimation due to the non-binding character of the first phase of the Market test. The large majority of participants sought to ship SD II gas. Some respondents sought capacity to ship gas from other (but largely unspecified) sources.
- (32) TAP shareholders expressed an interest for approximately 10 bcm/y forward capacity for 25 years. The same interest was expressed by SD II consortium. TAP shareholders also expressed the intention to re-allocate the capacity to future buyers of SD II gas should the gas sales purchase ultimately not be concluded by SD with the TAP shareholders only.
- (33) In view of the fact that the SD II field is expected to yield approximately 10 bcm/y and the large majority of potential TAP customers envisage to ship gas from SD II, the Commission deems it likely that the reported 46.4 bcm/y may be an overestimation of real demand for TAP's transportation capacity. However, the Commission considers that, overall, the Expression of Interest phase of the market test, allowed the authorities to conclude that there is a sufficient demand for the Initial Capacity and a high likelihood that there will be further demand for the Expansion Capacity, with the exact size of the expansion to be defined in the subsequent binding phases.
- (34) The large majority of respondents (including TAP's shareholders and SD II) requested long-term forward capacity with an exit point in Italy (in total 40 bcm/y). Some smaller requests were made for long-term forward capacity exiting in Albania (1.45 bcm/y) and in Greece (3.52 bcm/y). For all three countries, some demand existed for products with duration shorter than 25 years (5 to 20 years). Considerable interest was expressed for reverse flow capacity to Albania (1.44 bcm/y) and to Greece (9.53 bcm/y). [BUSINESS SECRET] bcm/y physical reverse flow capacity in the case of emergency. Additional exit points were requested in both Albania and Greece.

3.4 Exemptions granted

- (35) The Exemption Decisions grant, in short, the following exemptions to TAP AG for a period of 25 years:
- (a) Exemption from the provisions in Article 32 of Directive 2009/73/EC (third party access; hereinafter, "TPA") for the Initial Capacity of 10 bcm/y; in line with the provisions and conditions included in point 4.1 of the Joint Opinion.

- (b) Exemption from Articles 41.6, 41.8, 41.10 of Directive 2009/73/EC (Tariff Regulation) for both the Initial (10 bcm) and Expansion Capacity (up to 10 bcm/y); in line with the provisions and conditions included in points 4.2, 4.3 and 4.4 of the Joint Opinion.
- (c) Exemption from provisions of Article 9 (ownership unbundling rules) for the entire project in line with the provisions and conditions included in point 4.5 of the Joint Opinion

subject to a set of conditions, that are specified in more detail below.

- (36) In detail, section 4 of the Joint Opinion specifies the following (in the citation, the original numbering from the Joint Opinion is preserved) :

"This Part contains the decision of the Authorities on the exemption request and the terms and conditions under which the exemption is granted.

Having regard to the assessment of the Exemption Application of TAP AG, as presented in the previous Parts of this document, the Authorities have the Opinion that, under the specific terms and conditions detailed in the following paragraphs, an exemption from TPA should be granted for a maximum of 50% of the Total Capacity of the Project (corresponding to the Initial Capacity) to the shareholders of TAP AG and to allocate the remaining (50% or more) of the Total Capacity of the Project (corresponding to at least the Expansion Capacity) to third parties through the Booking phase of the Market Test currently under progress and, if not allocated, in subsequent market tests.

With reference to each requested exemption by TAP AG as described in §1.3.1, the Authorities jointly express their Opinion as follows.

- 4.1 *Initial Capacity, forward flow: exemption from the requirement of Article 32 of the Gas Directive (TPA)*

"This Opinion is made with reference to the request at point 1a of §1.3.1.

An exemption from the provisions of Article 32 of the Gas Directive for the Initial Capacity should be granted to TAP AG, for the forward transportation of natural gas from the actual TAP entry point in Greece to its exit point in Italy, for a period of 25 years, subject to the following conditions:

1. *Origin of gas – The Initial Capacity will be dedicated to the transportation of gas volumes to be procured by Shah Deniz II gas, according to the business plan of TAP AG, as included in the Exemption Application. Any deviation from this principle will not be possible without prior approval by the Authorities.*
2. *Initial allocation – As requested by TAP AG, the Initial Capacity will be allocated to the shareholders of TAP AG at the time of granting this Opinion (Shareholders as for §1.2.1, i.e. Statoil ASA (42,5%) EGL AG (42,5%) E.On Ruhrgas AG (15%), hereinafter “Current Shareholders”), in proportion to their shares in TAP AG.*
3. *Legal procedure of transferring the Initial Capacity – Any buyer of Shah Deniz II gas, or any shipper on his behalf, shall be entitled to such part of the Initial Capacity that corresponds to its share in the Shah Deniz II gas quantities to be transported through TAP. To this end, once the Shah Deniz Consortium announces its final decision regarding the buyers of the quantities of Shah Deniz II gas to be transported through TAP, the current Shareholders of TAP*

AG will undertake all appropriate legal actions to transfer, in part or as a whole, as the case may be, the capacity rights and obligations allocated to them under point 2 above, to those buyers (or their nominated shippers), upon a request of the latter. Within three months from the date that the present decision becomes effective, according to the provisions of the Directive 2009/73/EC, TAP AG will submit for approval to the Authorities, or the national competent authorities, as the case might be under the relevant national legislation, a proposal for the legal procedure under which this transfer of capacity will be implemented. The Authorities, or the national competent authorities as the case might be, will decide on the legal procedure described above within one month from the date of the submission of the relevant proposal by TAP AG. The approval of the Authorities, or the national competent authorities as the case might be, is deemed granted, if, upon expiration of the deadline above, no decision has been issued. Upon approval of this procedure, subject to provisions of points 2, 5 and 8 of §4.7, the transfer of capacity will be implemented within a month from the date that a final shipper of Shah Deniz II gas will so require from TAP AG.

4. *Final Allocation of Initial Capacity to Shah Deniz II gas buyers and release of Residual Initial Capacity to the Market – Immediately after the conclusion of the procedure above, TAP AG will inform the Authorities on the part of the Initial Capacity finally allocated for the transportation of Shah Deniz II gas volumes, the final list of buyers and their shippers and the amount of capacity allocated to each.*

In case that the part of the Initial Capacity allocated for the transportation of Shah Deniz II gas volumes is less than 10 bcm/year, the remaining part up to 10 bcm/year (hereinafter referred to as Residual Initial Capacity) will be made available to the market through the first Booking phase according to the provisions of points 5 and 6.

5. *Obligation to perform the first Booking phase and to build the capacity requested – No later than three months from the date of the Final Investment Decision, TAP AG will proceed with the second phase of the Market Test as per the Guidelines (i.e. the Booking phase). In this first Booking phase, the Expansion Capacity plus the Residual Initial Capacity will be allocated through auctions and in accordance to the provisions of points 2, 5 and 8 of §4.7. The products offered must be consistent with the result of the Expression of Interest phase, i.e. some products must be offered with a duration of less than 25 years, down to at least 5 years. The guidelines of this first Booking phase have to be approved by Authorities. TAP AG will ensure that any capacity reserved as a result of the Booking Phase will be built and become available to the corresponding shippers not later than 6 months from the Commercial Operation Date of the TAP pipeline.*
6. *Participation in the first Booking phase – All participants to the Expression of Interest phase are allowed to participate to this first Booking phase. However, Shareholders of TAP AG and buyers of Shah Deniz II gas can only participate in this first Booking phase for a total capacity of no more than the Residual Initial Capacity.*

TSOs from Albania, Greece and Italy can participate to this first Booking phase, irrespective of their participation in the Expression of Interest phase on

the same conditions applying to all other participants of the Expression of Interest phase.

7. *Obligation to perform subsequent market tests – TAP AG is obliged to perform other Market Tests on a regular basis starting from no later than the Commercial Operations Date and, subsequently, at least every two years. TAP AG will perform the Market Tests, under guidelines to be approved by the Authorities, with the view to offer to all interested parties additional available capacity up to the Total Capacity.*
8. *Obligation to build Expansion Capacity – In order to fulfil the binding capacity requests resulting from each market test described in point 7, TAP AG will extend the capacity of the pipeline. TAP AG is obliged to build additional capacity in order to accommodate the binding capacity requests resulting from each market test taking into account the provisions of points 2, 5 and 8 of §4.7. If TAP AG considers that, in spite of such binding capacity requests, a pipeline expansion is not economically viable, TAP AG is obliged to demonstrate this situation to the Authorities, and if so requested by the Authorities, to provide an Opinion by a third, independent party. The expansion is economically viable if the incremental demand of capacity resulting from each market test is enough to cover efficient incremental costs, quantified according to the TAP Tariff Code.*
9. *Possibility to further expand capacity – Expansion beyond the Total Capacity, i.e. beyond 20 bcm/year, shall be investigated by TAP AG and if economically and technically feasible, it will be undertaken, with a view to fulfil all requests for long-term capacity (long-term means here a duration of more than 15 years).*
10. *Obligation to offer short-term products – TAP AG will make available to the market and allocate through CAM Network Code procedures, for the whole duration of the exemption, transportation capacity of not less than 5% of the actual level of the technical capacity of the pipeline to be reserved through commitments of not more than a year (Short-Term Capacity). To this end, any part of the Initial Capacity, Residual Initial Capacity and Expansion Capacity could be used for the provision of Short-Term Capacity products.*

4.2 *Initial Capacity, forward flow: exemption from the requirements of Article 41.6, 41.8 and 41.10 of the Gas Directive (regulated tariffs)*

This Opinion is made with reference to the request at point 1b of §1.3.1. An exemption from the provisions of Article 41.6, 41.8, 41.10 should be granted to TAP AG for a period of 25 years starting from the beginning of the Commercial Operation Date, under the following conditions:

1. *At the latest three months after the present decision becomes effective, according to the provisions of the Directive 2009/73/EC, TAP AG will submit for the approval of the Authorities the final methodology for the implementation of the TAP Tariff. The TAP Tariff will reflect efficient costs, it will be transparent and non-discriminatory and will follow the principles described in the Exemption Application (TAP Tariff Code). The methodology will define the pricing mechanism for all forward capacity products offered by TAP, namely capacity products of different durations of firm and interruptible nature, for different entry and exit points. The methodology will be such that*

for any further capacity product offered additional to the initial forward capacity, the TAP Tariff will be reduced.

- 2. TAP AG will ensure that balancing services' charges, when applicable, will be objective, transparent, cost reflective and non-discriminatory and will be published.*

4.3 Expansion Capacity forward flow: exemption from the requirements of Article 41.6, 41.8 and 41.10 of the Gas Directive (regulated tariffs)

This Opinion is made with reference to the request at point 2a of §1.3.1.

An exemption from the provisions of Article 41.6, 41.8, 41.10 should be granted to TAP AG for a period of 25 years starting from the beginning of the Commercial Operation Date, with the following meaning and limitations:

- 1. Capacity products will be offered through auctions, as a result of a Market Test, as described in point 7 of §4.1;*
- 2. Each product (different duration and/or entry or exit point) is priced separately;*
- 3. for each product offered, the reserve price of the auction will be set equal to TAP Tariff, according to the TAP Tariff Code;*
- 4. Users of the Expansion Capacity pay the price set in the item above plus the premium resulting from the auction;*
- 5. Such premium will be allocated according to the provisions of point 9 of §4.7.*

4.4 Reverse flow: exemption from the requirements of Article 41.6, 41.8 and 41.10 of the Gas Directive (regulated tariffs)

This Opinion is made with reference to the request at point 3a of §1.3.1.

Following the analysis of §3.2.1 on the negative effect any exemption from the provisions of Article 41.6, 41.8, 41.10 of the Gas Directive on reverse flow might have on competition, the request for exemption for reverse flow products is rejected.

Reverse flow will be regulated, according to the provisions of the European legislation in place, with the following additional restrictions:

- 1. Reverse flow capacity products will be offered through auctions in the Booking phase of the Market Test and in any subsequent market tests, as described in points 5 and 7 of §4.1;*
- 2. The tariff for a reverse flow product cannot be higher than 5% of the tariff of an equivalent forward flow product. Tariffs for the reverse flow will be approved by the Authorities as part of the TAP Tariff Code referred to in point 1 of §4.3 and can be revised following the provisions of Article 41 of the Gas Directive and any secondary legislation that may result from the provisions of the Gas Regulation.*
- 3. The reserve price of each reverse flow product in the auction, will be set equal to the applicable tariff of that product;*
- 4. Users of the reverse flow capacity pay the price set in item 3 above plus the premium resulting from the auction.*
- 5. The revenues from such premiums paid by the reverse flow capacity users will be allocated according to the provisions of point 9 of §4.7*

4.5 *Exemption from requirement of Article 9 of the Gas Directive (Unbundling)*

This Opinion is made with reference to the request at point 3b of §1.3.1.

An exemption from the provisions of Article 9.1 of the Gas Directive is granted to TAP AG for a period of 25 years starting from the Commercial Operation Date and 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. 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.*
2. *No later than six months prior to the Commercial Operation Date, 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. To this end, the certification application will be based on an ad hoc independent transmission operator model, and include, 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 un- bundling 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 effective 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 this joint Opinion.*

4.6 *Exemption from the provisions of Gas Regulation (with exception of Article 19.4)*
This Opinion is made with reference to the request at point 3c of §1.3.1.

According to the provisions of Article 30 of the Gas Regulation, it would be possible to grant the requested exemption. However, the Authorities believe that an exemption from all the provisions of the Gas Regulation is not justified, since this might have a negative impact on the transparency of access to the pipeline, as well as on the operation of the regulated systems to which TAP will be connected. On the other hand, the implementation of some of the provisions of the Gas Regulation and the rules to be put in force following such provisions might have a negative impact on the implementation of the present decision. To this end, TAP AG will have to comply with the provisions of Gas Regulation, as long as they are not in conflict with the provisions of the exemption decision, in the way described under point 1 of §4.7

4.7 *Additional Terms to safeguard full compliance to the criteria of Article 36.1*

1. *Obligation to issue the Network Code – No later than 12 months prior to its Commercial Operation Date, TAP AG will submit for approval to the Authorities a TAP Network Code. The Network Code shall be compatible with all provisions of Regulation 715/2009 and of the European Network Codes of Article 8.6 of Regulation 715/2009 that are not in conflict with the terms of the present decision. To this end, once each European Network Code becomes binding or it is modified, TAP AG will submit to the Authorities for their approval, a revision of TAP Network Code, which will incorporate those provisions of such European Network Code that are not in conflict with the present decision. The TAP Network Code will be published on the TAP AG website.*

The TAP Network Code will be published on the TAP AG website, and should, at least, include the following:

- *Detailed procedures for normal operations, including nomination of capacity at all entry and exit points of TAP, for forward and reverse flow;*
 - *All procedures necessary for the secondary trading, including a so-called “electronic-bulletin board”, which will be available to all shippers;*
 - *Congestion Management Procedures and use-it-or-lose-it arrangements*
 - *Procedures for the publication of data regarding the operation and the availability of capacity to all users of the pipeline;*
 - *A declaration by TAP AG that sanctioned gas will not be imported or trans-ported through any part of the TAP project.*
2. *Pro-competitive measures for the Italian market – In view of the current gas market structure in Italy (described in §2.2.1.3), it is fundamental not to hamper the positive effects on competition expected from the investment in case an undertaking with significant market power were to reserve TAP import capacity*

on a long term basis either subletting TAP exempted capacity or booking the available capacity through auctions. Against such risks, the Italian legislation provides for a legal mechanism ensuring an ex-ante check in case of changes in relevant rights. Namely, in case of transfer of exempted capacity to third parties, the Decree of Ministro delle attività produttive of April 11th, 2006 (See Article 8 of the Ministry Decree) obliges the importers to obtain the Ministry's prior authorization. Additionally, a relevant request for confirmation of the granted exemption is to be addressed to the Ministry in case of variations of the conditions on which the exemption decision is based, including, inter alia, any change of the identity of the exemption's beneficiaries (See Article 7 of the Ministry Decree). The above mentioned authorization shall be granted only if changes in relevant rights do not negatively affect competition and the functioning of the Italian gas market.

3. *Connection with Greek system – Following cooperation with DESFA, TAP AG will implement and put in operation from the commercial operation date of TAP, one or more connection with the existing Greek National Transmission System (ESFA), owned and operated by DESFA, other than the Entry Point of TAP. These new connection point(s) will have technical capability for bidirectional flow and a capacity of not less than 10 mcm/day for each connection point in both directions. All costs related to the expansion and/or construction and operation of these connection point(s) to the ESFA will be entirely borne by DESFA and incorporated into the tariffs of ESFA, as defined in the relevant Greek legislation. In defining the final capacity of such interconnections, as well as their exact location, TAP AG and DESFA may perform a relevant market test, following the approval of RAE. For the avoidance of doubt, the availability of such connection capacity is not linked to the available capacity of TAP, nor does it imply an obligation of TAP to build additional capacity other than the one resulting from §4.1 above. In addition, costs related to such connection points will not include the investments required for additional capacity resulting from §4.1, which, in any case, will be remunerated through TAP Tariffs.*
4. *Obligation to build additional entry and exit points in Greece – TAP AG will have the obligation, upon request of a third party, as a result of any market test, to construct additional entry and exit points in the territory of Greece, as long as such construction is technically feasible. All costs related to the construction and operation of such entry and exit points will be borne by the third party who made the request, according to the national legislation in place at the time of the request. Costs related to such entry and exit points will not include the investments required for additional capacity of TAP, resulting from §4.1, which will be remunerated through TAP Tariffs.*
5. *Capacity caps for dominant players in Greece – For the prevention of the development of a dominant market position or the reinforcement of existing dominant positions in the Greek gas market, the following conditions shall apply:*
 - (i) *A gas producer or a supplier with a share of more than 40% in any relevant product market in Greece shall not be allowed to reserve more than 50% of the capacity in any of the TAP exit points referred to in points 3 and 4 above.*

- (ii) *In the event that two or more suppliers collectively have more than 80% of the Greek gas market, RAE will have the right to impose a capacity cap in any of the TAP exit points referred to in points 3 and 4 above to any of these suppliers with a share of more than 20% of the market.*
 - (iii) *TAP AG will inform RAE immediately of the results of the market test of point 3 above, or for the request of the third party of point 4 above, so that RAE can express its preliminary or final opposition, according to the points (i) and (ii) above*
 - (iv) *Where, due to lack of interest by other parties, the capacity caps in (i) and (ii) above prevent the expansion of the pipeline or causes existing capacity to remain idle, a derogation from the capacity caps of (i) and (ii) shall apply on the condition that the undertaking(s) concerned shall offer the volume of gas relating to the capacity it/they hold in excess of the cap to the market in an open, transparent and non-discriminatory procedure. The gas volume release shall be followed by a corresponding capacity release following a procedure to be approved by RAE.*
 - (v) *For the calculation of the market share and the percentage of the capacity cap, undertakings belonging to the same group of companies shall be considered together.*
6. *Obligation to build exit points in Albania – Following co-operation with the Albanian Authorities, TAP AG will construct and operate from its commercial operation date, at least one exit point in the territory of Albania, near the city of Fier or as otherwise agreed with the Albanian Authorities, with a minimum technical capacity of 2 mcm/day, bidirectional and expandable to a maximum of 10 mcm/day. All costs related to the construction and operation of this connection will be borne by an entity indicated by the Albanian Authorities. For the avoidance of doubt, the availability of such connection capacity is not linked to the available capacity of TAP, nor does it imply an obligation of TAP to build additional capacity other than the one resulting from §4.1 above. In addition, costs related to such connection points will not include the investments required for additional capacity resulting from §4.1, which, in any case, will be remunerated through TAP Tariffs.*
7. *Obligation to expand existing and/or build additional entry and exit points in Albania – TAP AG will have the obligation, upon request of a third party, as a result of any market test, to expand existing and/or construct additional entry and exit points in the territory of Albania, as long as such construction is technically feasible. All costs related to the construction and operation of such entry and exit points will be borne by the third party who made the request, according to the national legislation in place at the time of the request. Costs related to such entry and exit points will not include the investments required for additional capacity of TAP, resulting from §4.1, which will be remunerated through TAP Tariffs.*
8. *Capacity caps for dominant players in Albania – For the prevention of the development of a dominant market position in the Albanian gas market, the following conditions shall apply:*
- (i) *No gas supplier may hold more than 80% of the transportation capacity of the TAP exit points in Albania referred to in points 6 and 7 above, for the*

initial 10 years from the date when such exit points of TAP in Albania are put in operation. Following this initial period of 10 years, ERE (or the corresponding national authorities according to the national legislation) will decide on how this maximum percentage will decrease.

- (ii) TAP AG will inform ERE in good time of any request of a third party, as referred to in points 6 and 7 above, so that ERE can express its preliminary or final opposition, according to the point (i) above.*
 - (iii) Where due to lack of interest by other parties, the capacity cap in point (i) above prevent the expansion of the pipeline or causes existing capacity to remain idle, a derogation from the capacity cap of (i) apply on the condition that the undertaking(s) concerned shall offer the volume of gas relating to the capacity it/they hold in excess of the cap to the market in an open, transparent and non-discriminatory procedure. The gas volume release shall be followed by a corresponding capacity release following a procedure to be approved by ERE.*
 - (iv) For the calculation of the market share and the percentage of the capacity cap, undertakings belonging to the same group of companies shall be considered together.*
9. *Auctions revenues – Any extra revenue beyond the reserve price, from the auction procedures as for §4.3 and §4.4 is transferred by TAP AG to a special fund which will be at the disposal of Authorities to be redistributed to final customers. The procedures of such mechanism will be defined by Authorities by the date of TAP AG commercial operation.*
10. *Changing in TAP shareholding – If shareholders of TAP AG change or if a share- holder is taken over by another undertaking, TAP AG must notify this change to each of the relevant national authorities concerned which must then assess (sometimes in cooperation with a national competition authority) whether the conditions under which the exemption was granted are still met.*

4.8 Governance

- 1. *Regulatory Cooperation – Where the present Opinion foresees an action by the Authorities, for the purpose of the implementation of such an action, the Authorities shall endeavor all efforts to act jointly.*
- 2. *Dispute settlement – Within 6 (six) months prior to the Commercial Operation Date of the TAP pipeline, the Authorities shall issue a joint decision on the settlement of disputes in relation to this joint decision which may arise during the operation of TAP.*

4.9 Violation of the provisions of the present decision

Any infringement by TAP AG of the conditions set in the present joint exemption Opinion, may result in a penalty imposed on TAP AG by the Authorities."

- (37) As was already mentioned in paragraph (24), the Italian Exemption Decision in its Article 1 confirms the general provisions included in the Joint Opinion and systematically refer to the provisions and conditions set out in the Joint Opinion. It however also, in its Article 2, specifies additional conditions addressed to the Italian market. More in particular, its Article 2 states the following:

"Art. 2

Provisions for exercising the exemption

1. *In accordance with Article 7 of the Ministerial Decree of 11 April 2006 and the provisions of paragraph 1.4.10 of the Joint Opinion, if, during the construction of the TAP pipeline or the activities covered by the exemption, changes, even of a partial nature, occur in regard to the TAP AG shareholders, their parent companies or the holders of the exemptions, also pursuant to the provisions of Article 1, paragraph a.3, or to the conditions that conferred entitlement to the exemption, with possible repercussions on the Italian gas market, a confirmatory application for exemption must be submitted to the Ministry of Economic Development.*
2. *The Ministry of Economic Development shall express its view on the confirmation, after hearing the Authority for Electricity and Gas, according to the procedures described in Article 5 of the Ministerial Decree of 11 April 2006, verifying the presence of the conditions that conferred entitlement to the exemption, and shall inform the European Commission of the decision for its approval, pursuant to Article 36 of Directive 2009/73/EC.*
3. *In accordance with Article 8 of the Ministerial Decree of 11 April 2006, the sale or exchange of the exempted capacity is subject to the authorisation of the Ministry of Economic Development, which, after consulting the Authority for Electricity and Gas, shall ensure that the conditions referred to in Article 36, paragraph 1(a) of Directive 2009/73/EC are met and shall forward the analyses referred to in Article 36, paragraph 8(b) of the Directive and the respective assessment to the Commission.*
4. *In order to enhance competition in gas supply, with regard to the second phase of market testing referred to in paragraph a.4., as well as the subsequent market tests referred to in paragraph a.5, no transmission capacity may be allocated or transferred to parties holding a wholesale market share in Italy, calculated according to the criteria referred to in Article 3, paragraphs 1 and 2 of Legislative Decree No 130 of 13 August 2010, greater than the value specified in Article 3, paragraph 1 of Decree-Law No 78 of 1 July 2009, converted with amendments into Law No 102 of 3 August 2009.*
5. *The exemption granted to TAP AG shall no longer be effective if the works for the construction of the pipeline have not begun within two years from the date of approval of the exemption by the European Commission, or if the TAP pipeline is not operating within five years from that date. In the event that the pipeline is not operational by this time, the exemption may be confirmed, subject to the approval of the European Commission, if the delay is due to major obstacles beyond the control of TAP AG and/or the parties on whose behalf the exemption was granted or transferred.*
6. *The provisions of Article 6, paragraphs 3, 4, 5 and 6 of the Ministerial Decree of 11 April 2006 shall be applied for the management of the exempted capacity.*
7. *TAP AG is required to provide the Ministry of Economic Development and the Authority for Electricity and Gas with a progress report on the TAP gas pipeline project and notification of any significant deviation of its economic and financial parameters on a quarterly basis.*

8. *The transmission and importation of natural gas referred to in Article 1, paragraph 3 of Regulation (EU) No 1263 of the Council of 21 December 2012 is not permitted.*
9. *In accordance with Article 6, paragraph 1 of the Ministerial Decree of 11 April 2006, the exemption may be revoked in the case of discovery of information different from that reported, or if the infrastructure to which the exemption refers is built with technical specifications or in a time substantially different from those stated. The provisions of Article 6, paragraph 2 of the Ministerial Decree of 11 April 2006 shall be applied in such cases.*
10. *In the event of violation of the provisions of this Decree or of those of the Joint Opinion, the exemption may be withdrawn and penalties may be determined.*
11. *In the cases referred to in paragraphs 9 and 10, the Ministry of Economic Development shall inform the Authority for Electricity and Gas and the Greek and Albanian authorities, according to the provisions of the intergovernmental agreement signed in Athens on 13 February 2013, in order to hear their Opinions concerning the adoption of a joint decision on these matters."*

4. COMMISSION'S ASSESSMENT OF THE EXEMPTION CRITERIA OF ARTICLE 36 OF GAS DIRECTIVE

4.1 General considerations

- (38) According to Article 36(9) of the Gas Directive, the Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption based on its assessment of the criteria listed in Article 36(1).
- (39) According to Article 36(1) of the Gas Directive,
- "Major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, may, upon request, be exempted, for a defined period of time, from the provisions of Articles 9, 32, 33 and 34 and Article 41(6), (8) and (10) under the following conditions:*
- (a) the investment must enhance competition in gas supply and enhance security of supply;*
 - (b) the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;*
 - (c) the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;*
 - (d) charges must be levied on users of that infrastructure; and*
 - (e) the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected."*
- (40) The Commission's decision is addressed to the Italian Authority, MSE and to the Greek Authority, RAE. In particular, this refers to the general conditions imposed by the Authorities. As regards the specific conditions imposed on the Italian market (included in Article 2 of the Italian Exemption Decision) their assessment and revisions are addressed to MSE. As regards the assessment of the conditions imposed for the Greek market, the Commission addresses them to RAE. As regards the

conditions imposed on Albanian market, the Commission notes that the Energy Community is competent to issue its Opinion and refers to the Opinion of the Secretariat of the Energy Community as adopted on 14 May 2013.

- (41) The present exemption decision concerns TAP and TAP only. Consequently, it is not possible to impose conditions upon the operators of other infrastructure projects, even if potentially interconnecting with TAP, such as TANAP.
- (42) Pursuant to Article 36(9) last subparagraph of the Gas Directive,
"The Commission's approval of an exemption decision shall lose its effect two years from its adoption in the event that construction of the infrastructure has not yet started, and five years from its adoption in the event that the infrastructure has not become operational unless the Commission decides that any delay is due to major obstacles beyond control of the person to whom the exemption has been granted."
- (43) The Commission can grant an exemption despite the fact that the earliest reported commencement date for SD II gas deliveries to the EU is 1 January 2019, i.e. more than 5 years after a final Exemption Decision is likely to be adopted. In order to decide whether or not to grant an extension of the deadlines it is only relevant whether these grounds are beyond the control of the person to whom the exemption is granted.
- (44) The start of construction of TAP as well as the start of its commercial operation are subject to events that are beyond the control of TAP AG. In particular, the start of the operation of TAP is inter-linked with the date the first natural gas will be supplied by the SD II project. It depends solely on the SD II Consortium, on which TAP AG has no influence, how the development of SD II field will be pursued and when the necessary infrastructure and pipelines to deliver gas from Azerbaijan through Georgia to Turkey will be completed. Furthermore, it is beyond TAP AG's control how the transportation of SD II gas through the Turkish territory will be secured. This decision depends on BOTAS Petroleum Pipeline Cooperation (hereafter 'BOTAS'), the owner of the Turkish gas grid, in case an upgrade to facilitate the transport of SD II gas through the existing network is needed. In case a decision is taken to build a new pipeline specifically designed to transport Caspian gas towards the Turkish- EU border (TANAP)³¹, this decision will depend on the SD II consortium, which will be the pipeline majority owner (80%), with the remaining 20% owned by BOTAS. Neither TAP AG nor its shareholders have any influence on these events.
- (45) Consequently, the Commission considers that in case such decisions are not taken, or taken too late to allow for timely deliveries of gas to the EU border with Turkey, they can be considered as major obstacles beyond the control of TAP AG.
- (46) TAP AG informed the Commission that the start of commercial operations of TAP is foreseen for Q1 2019.³² In view of this announcement and the fact that such events are beyond the control of TAP AG, the Commission considers therefore that it is necessary to take this announcement into account already at this stage.
- (47) TAP AG's Exemption Application was submitted to the Italian authority on 29 August 2011 and to the Greek Authority on 31 August 2011.³³ At that time, TAP construction was forecasted to start in Q4 2014 and to be operational as of Q1 2017. During the

³¹ TANAP is not expected to be commissioned before Q4 2018. TAP. Submission TAP AG of 26 April 2013.

³² Information consistent also with TAP's submission dated 25 March 2013, which foresees also a grace period of 6 months, see Annex 3, Appendix 1.

³³ Joint Opinion p. iv.

current proceedings, TAP informed the Commission that the start of commercial operations is now expected to start in Q1 2019³⁴ and explained that this change is due to factors beyond TAP AG's control. Based on the above change, TAP AG requested the Commission to take these factors into account and allow for the necessary flexibility so that the EC exemption decision will not lose its effect automatically within the timeframes envisaged in the Article 36(9).³⁵

- (48) The Commission notes that the presently known delay as to when SD II will start to deliver gas became known after TAP AG submitted its Exemption Application. This provides further grounds to take into account the new information that SD II will start gas deliveries with a delay already at this stage.
- (49) Consequently, the present Commission decision shall lose its effect 3 years from its adoption in the event that construction of TAP has not yet started, and 6 years after its adoption in the event that the infrastructure has not become operational, unless the Commission decides that any further delay is due to major obstacles beyond control of TAP. The distinction made here of the date by which construction has to start and the TAP becoming operational is in accordance with Article 36(9).
- (50) However Article 2(5) of the Italian Exemption Decision states that the exemption granted by that decision shall no longer be effective if the works for the construction of the pipeline have not begun within two years from the date of approval of the exemption by the European Commission, or if the TAP pipeline is not operating within five years from that date. In the event that the pipeline is not operational by this time, due to major obstacles beyond the control of TAP AG and/or the parties on whose behalf the exemption was granted or transferred, the exemption may be confirmed, subject to the approval of the European Commission.
- (51) Consequently in view of the duration of the present Commission Decision, the expiry date in the Italian Exemption Decision should be amended.
- (52) The Greek Exemption decision does not contain a date by which it expires.

4.2 "Major new gas infrastructure"

- (53) Article 36(1) specifies that major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, qualifies for exemption. The concept of 'interconnector' is further defined in Article 2(17) of the Gas Directive, which states that 'interconnector' means a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member states'
- (54) The Joint Opinion explains that TAP is one of the projects of the Southern Corridor, aimed at connecting the European Union to the new sources of gas from Central Asia. It is a major, new gas pipeline stretching over three countries: two EU Member States (Italy and Greece) and one Contracting Party to the Energy Community (Albania). Based on the provisions of the Joint Opinion, it will have entry and exit points in Greece, Albania and Italy and connecting the national transmission systems of those countries.
- (55) In accordance with Article 2(17) of the Gas Directive, the concept of 'interconnectors' must be understood as comprising, inter alia, gas pipelines which span the borders of

³⁴ Submission TAP AG of 26 April 2013. Information consistent also with TAP's submission dated 25 March 2013, Annex 3, Appendix 1, which foresees in addition a grace period of 6 Months from the foreseen starting date of operations, i.e. 1 January 2019.

³⁵ Submission TAP AG of 26 April 2013.

(at least) two EU Member States, regardless as to whether the territory of a non-EU Member State is crossed in between. Too narrow interpretation of the concept ‘interconnectors between Member States’, would exclude the pipelines which connect the EU Member States, but happen to start, end, or cross a third country. This was not the intention of the legislator. In particular Recital 35 of the preamble to the Gas Directive, emphasis that *"the possibility of temporary derogation should apply, for security of supply reasons, in particular to new pipelines within the Community transporting gas from the third countries into the Community"*. This latter approach was confirmed by previous precedents.

- (56) It is also immaterial whether TAP is connected to the existing Greek gas transmission network (ITG) at Komotini or with TANAP at the Greek-Turkish border. This eventuality merely implies that the entry point from TAP to the Greek gas transmission system, currently foreseen at Komotini, will be transferred to the Greek-Turkish border. AP will still interconnect the Greek transmission system with Italy and Albania. In any event, regardless as to whether TAP will have an entry point at Komotini or at the Greek-Turkish border, RAE foresees that TAP AG, in accordance with point 3 of section 4.7 of the Joint Opinion, will provide one or more additional connection points with the Greek transmission system. These connection point(s) will exist as from the commercial operation date of TAP. The fact that the precise capacity and location may still be subject to a market test and that its costs will be borne by DESFA cannot derive from the fact that these connection points will exist and, hence, TAP will also interconnect the Greek transmission system through these additional connection points with other Member States.
- (57) Finally, it should be considered that TAP is still at a planning stage and is a project with a large magnitude, stretching over three countries.
- (58) Based on the above, the Commission concludes that TAP constitutes an interconnector within the meaning of Art 2(17) of the Gas Directive and, hence, it qualifies as a major new gas infrastructure within the meaning of Article 36(1) of the Gas Directive.

4.3 "The investment must enhance security of supply"

- (59) As regards this criterion, the Commission notes that in general, an investment which provides a new route to the relevant market and connects new upstream sources of gas from new suppliers to the market will typically increase the security of supply of that market. This has to be assessed on a case-by-case basis.
- (60) The present exemption concerns an exemption from certain provisions of the Gas Directive only. Consequently, Regulation EU No 994/2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC continues to apply to TAP.
- (61) The Regulatory Authorities in the Joint Opinion present the view that TAP enhances security of supply as it brings new sources of gas from new suppliers to the EU. The fact that the initial forward capacity is essentially dedicated for Italy, and therefore will not have an immediate effect on Greece and Albania, does not change this assessment. The Commission shares this view for the following reasons:
- (62) First, as argued in more detail below, and subject to the commitments imposed both in the Greek and Italian Exemption Decisions and in the present Commission Decision, in each of the countries concerned, the investment will enhance possibilities for diversification of supply sources (due to either initial or expansion forward capacity

and reverse flows) and therefore will provide new connections that will enhance the interconnection capacity between the countries.

- (63) Second, as regards the positive investment effect on the regional and national markets, the Commission notes that the provisions imposed by the Authorities to ensure sufficient physical reverse flows, to incentivize building of the Expansion Capacity, to provide for new entry and exit points and connect the markets, would lead to enhanced security of supply in each of the countries concerned.
- (64) Finally, the Commission notes overall positive impact for the EU of this investment as it is responding directly to the Security of Supply objective of diversification of gas sources, routes and counterparties.
- (65) This enhancement is further strengthened by the additional conditions imposed in the present decision.

4.3.1 Greece

4.3.1.1 *Current gas market in Greece*

- (66) Currently, Greece is supplied with gas from Russia (55%) (arriving in northern Greece at an entry point on the Greek-Bulgarian border), from the Caspian region/Azerbaijan (14%) (arriving at an entry point at the eastern Turkish-Greek border) and from the Revithoussa LNG terminal (31%) located near Athens. The LNG terminal received LNG cargo's mainly (but by far not only) from Algeria.³⁶
- (67) The total firm entry capacity is 9.1 bcm/y, almost equally split between the LNG terminal and the two pipeline entry points to the Greek gas transmission system. This entry capacity is expected to be enhanced to approximately 12 bcm/y by 2015 by the already envisaged upgrading of the Greek LNG terminal and the addition of two compressor stations to the Greek gas transmission network. Greek gas consumption in 2011 reached 4.5 bcm/y (up 16% from the previous year).³⁷ By 2022 Greek consumption is estimated to reach 5.83bcm/y.³⁸ Today, no gas storage exists in Greece, the sole source of flexibility connected to the Greek system is provided by the LNG terminal which is moreover limited as it has only temporary storage capacities for 18 days.
- (68) The need to enhance Greece's security of supply is demonstrated also by the fact that, during the last two years, Greece has had to declare emergency status twice under Regulation No 994/2010.

4.3.1.2 *Impact of TAP*

- (69) The Expression of Interest Phase of the market test demonstrates that, even if most respondents sought to use TAP to transport gas for delivery in Italy, approximately 8% or 3.5 bcm/y of all forward capacity requests were designated for Greece. These values represent approximately 60% of the projected gas demand in Greece in 2022. In addition to diversifying gas sources, TAP will also enlarge the number of shippers potentially providing gas to Greece. The market test demonstrates that TAP will allow for important increase of the gas sourced by Greece from the Caspian region (currently at 14%).³⁹

³⁶ Based on imports in 2012, source: Submission RAE of 24 April 2013 and 5 April 2013 to question 5, Joint Opinion pp. 30 and 35.

³⁷ Joint Opinion p. 30 and 31.

³⁸ Submission RAE 24 April 2013.

³⁹ Joint Opinion p. 34 and 35.

- (70) TAP will add, depending on whether only the Initial Capacity or also the Expanded Capacity are taken into account, between 10 and 20 bcm/y entry capacity to the Greek transmission system. These additions are sizable in view of the cumulative entry capacity on other entry points projected to be in place by 2015 of only 12 bcm/y. Consequently, TAP significantly enhances the entry capacity of the Greek gas transmission system.
- (71) TAP will physically connect the Greek market with the Italian gas market. Through virtual and physical reverse flows in essence, a new entry point to the Greek transmission system is created. In accordance with Regulation 994/2010 all cross border interconnections should be physically bi-directorial at any time. TAP is not exempted from the Regulation 994/2010, and therefore is obliged to ensure sufficient physical reverse flows along the pipeline. According to Regulation 994/2010, reverse flows must be commercially and technically feasible. TAP submits that it guarantees the minimum requirements for reverse flow capacities in accordance with the Security of Supply Regulation. According to TAP AG, physical reverse flow capabilities are estimated to be between 30% to 50 % of its design capacity (i.e. 5-6 bcm subject to further study by TAP).⁴⁰ Under sufficiently high pressure at the Pressure Reduction Terminal (PRT) in Italy, a reverse flow capability of as high as 10 bcm/y is achievable.⁴¹
- (72) Consequently, the physical reverse flows possible through TAP from Italy will significantly enhance Greek security of gas supplies.
- (73) In view of the fact that over 28% of Greek electricity⁴² in 2012 was generated by gas fired power plants, also security of electricity supply will increase by the enhancement brought about by TAP to Greece's security of gas supplies.
- (74) It can be mentioned further that Albania offers opportunities to construct significant gas storage facilities⁴³ currently lacking in Greece. TAP will therefore enable Greece to connect to such future gas storage⁴⁴.
- (75) TAP enhances security of supply regardless as to whether (i) it will not increase the transportation capacity between Turkey and Greece and (ii) gas is available for delivery to Greece from Albania.
- (76) The effective entry capacity added by TAP to the Greek gas transmission system will depend on the availability of exit capacity upstream i.e. on the Turkish-Greek border. However, even if this does not correspond fully to TAP's Initial Capacity, capacity currently available at the Greek-Turkish border at the interconnection point Kipi is 34,398 MWh/day.⁴⁵ Consequently, even if no additional capacity is built on the Greek Turkish border, TAP can increase Greece's security of supply.
- (77) Moreover, regardless as to whether currently non-booked exit capacity is available or more capacity will become available (such as through the construction of TANAP), it remains true that TAP enhances security of supply, in view of the fact that TAP enables: (i) more gas from the Caspian region to arrive in Greece (ii) Greece to

⁴⁰ Exemption Request, p. 32.

⁴¹ Reply RAE 5 April 2013 question 7 and annexe I.

⁴² Submission RAE 24 April 2013.

⁴³ Albania has important capacities for underground storage consisting of a number of depleted gas and oil fields and an underground salt dome in the Dumre area. The potential for gas storage in Albania is estimated at a level of at least 2 bcm/y.

⁴⁴ Joint Opinion, p. 36.

⁴⁵ Submission RAE 24 April 2013.

connect, through Albania, to the Italian gas market (providing access to a larger gas market with gas from a variety of sources) and gas storage capacity (iii) in the future, to facilitate a connection to Albanian storage facilities once constructed, and (iv) to improve the ability to react to emergencies through the creation of a loop inside Greece and reverse flow from Italy.

4.3.1.3 Conditions

- (78) In order to ensure that TAP will enhance security of supply in Greece, RAE has imposed conditions on TAP. The Commission agrees with RAE that, in order to ensure that TAP enhances security of supplies in Greece, conditions need to be imposed on TAP. However, certain improvements should be made.
- (79) RAE imposed an obligation to build one or more connections with the existing Greek gas transmission grid, other than the entry point of TAP at Komotini or alternatively, at the Greek-Turkish border. All the costs of expanding, constructing and operating these connection point(s) will be borne by DESFA, the Greek TSO. RAE also imposed an obligation to expand existing and/or to build additional entry/exit points in Greece subject to the result of a market test, as long as it is technically possible. All costs related to construction and operation of these points will be covered by the third party requesting the entry/exit point.
- (80) RAE furthermore imposed that the connections to the Greek gas transmission system are bi-directional. This means that TAP will loop a critical part of the Greek transmission system allowing the diversion of gas to different parts of Greece in case of emergency, thereby reinforcing the resilience of the gas network within Greece in case of emergencies.⁴⁶
- (81) The Commission considers that the technical test foreseen for building of additional connection points, should be strengthened by (i) putting the burden of proof on TAP AG of demonstrating that constructing the entry/exit point is not technically feasible (ii) allow RAE to request an Opinion by an independent technical expert (iii) imposing a process with clear deadlines. In particular, TAP should submit its demonstration within a reasonable amount of time and in any event not later than one month from the day when the request for building additional entry/exit points in Greece was made. If the Authorities request an opinion by an independent technical expert, this one month delay is extended by two months. The Authorities will decide on the technical feasibility of building the entry/exit points within one month of receiving TAP's submission or the receipt of the opinion of the independent third party. Finally, in case that the building of additional or expanding of existing entry/exit points in Greece is deemed technically feasible by the Authorities, TAP should sign binding agreements for the construction of the requested entry/exit points within a 2 months period.
- (82) The Commission considers, that in order to achieve the positive effect of TAP on the security of supply in Greece, the reverse flows should be at least of 5 bcm/y capacity for emergency situations.⁴⁷

4.3.1.4 Conclusion

- (83) Based on the above, the Commission concludes that in Greece, the investment will enhance security of supply within the meaning of Article 36(1) of the Gas Directive, provided that the conditions imposed on TAP are amended as set out above.

⁴⁶ Joint Opinion p. 36.

⁴⁷ Figure corrected in the latest submission by RAE (of 24 April 2013) from approximately 6 to 5 bcm/y.

4.3.2 Italy

4.3.2.1 *Current gas market in Italy*

- (84) In 2011 Italy's gross consumption of natural gas was around 78 bcm/y (that was, 6.2% lower compared to the previous year due to the economic crisis and mild temperatures). The recently issued Italian National Energy Strategy foresees a national gas consumption level in 2020 largely comparable to the current one, due to the significant improvements of the energy efficiency of the Italian system; however it does not exclude either the possibility of a greater increase of the national gas demand up until 90 bcm/year considering the uncertainties on the evolution of the Italian economic system.⁴⁸
- (85) Currently a bit less than 90% of Italy's gross domestic consumption is satisfied by imports while the remaining 10% by domestic production. In 2011, gas imports to Italy amounted to 70.3 bcm/y. The main countries from whom gas is imported are Algeria (33%), Russia (28%), the Netherlands, Norway and Austria (around 5% each), Germany (4%), and other EU (5%) and other non-EU countries (around 3%). In 2011 imports from Libya dropped to the current level (around approximately 3%) against an average value exceeding 12% in the last 4 years. LNG imports represent up to 9% of the total gas imported to Italy and most comes from Qatar.⁴⁹
- (86) Almost all gas from Algeria⁵⁰ is imported through the TTPC pipeline (Trans Tunisian Pipeline Company) which is connected to the Transmed pipeline and access the national transmission network through the entry point at Mazara del Vallo. Gas coming from Russia arrives to Italy at the entry point in Tarvisio (through the TAG pipeline). Gas originating from Northern Europe is imported through the pipelines connected to Transitgas which is in turn connected to the entry point of Passo Gries. Gas coming from Libya is imported through the GreenStream pipeline which is connected to the national transmission network through the entry point of Gela. Additionally, imported gas arrives to Italy at the entry point in Gorizia. Gas originating from Qatar is injected into the national transmission network through the LNG terminal of Rovigo.⁵¹
- (87) The total nominal import capacity of the entry points to the Italian system, in terms of volume, is around 110 bcm/year.⁵² Although the average utilization rate of imports infrastructures in Italy is around 70%, the enhancement of such infrastructures remains very important for the country. Indeed, the large variability of Italy's gas consumption level throughout the year continues to cause critical situations when the daily intake capacity reaches saturation. This occurred for instance in February 2012 due to adverse weather conditions in the whole of Europe. At that occasion, a considerable increase of the gas consumption level occurred concomitantly to a reduction of the available intake capacity, which caused problems to the daily balancing of the system despite the existence of a significant amount of gas in storage.⁵³

4.3.2.2 *Impact of TAP*

⁴⁸ Joint Opinion p. 25 and 26.

⁴⁹ Joint Opinion p. 25 and 26, MSE Reply of 26 April 2013.

⁵⁰ The remaining is injected into the national transmission network through the regasification terminal of Panigaglia.

⁵¹ Joint Opinion p.26.

⁵² Joint Opinion p. 26.

⁵³ Joint Opinion p.26.

- (88) The Expression of Interest Phase of the market test demonstrates that there is a significant interest for the long-term forward capacity with an exit point in Italy (in total 40 bcm/y). Although the Commission notes that the figure is over-estimated (for example double counting of the initial demand for the first 10 bcm/y which SD II requested for its shippers in case TAP shareholders were not selected for the entire initial shipment of gas), still the market test demonstrates that TAP will allow for important increase of gas imports to Italy.
- (89) The construction of TAP enhances security of gas supply in Italy. First, it will diversify Italy's sources of supply by allowing gas from Caspian sources to arrive in Italy. Secondly, TAP will increase the resilience of the Italian gas system to react to situations where the intake capacity reaches its limits. Third, TAP will also add, depending on whether only the Initial Capacity or also the Expanded Capacity is taken into account, between 10 and 20 bcm/y entry capacity to the Italian transmission system. The addition of only Initial Capacity would increase Italy's import capacity by approximately 9%⁵⁴. Furthermore, TAP would enhance the ability of the Italian transmission system to react to emergency situations by enlarging possibilities for gas entering Italy's system from difference origins, reducing the likelihood that Italy's import capacity is affected simultaneously by adverse conditions and events.⁵⁵
- (90) In view of the fact that over 40% of Italian electricity is generated by gas fired power plants, also security of electricity supply will increase by the enhancement brought about by TAP to Italy's security of gas supplies.

4.3.2.3 *Conditions to enhance security of supply*

- (91) The Italian Authorities did not impose conditions particular to Italy to enhance security of supply.
- (92) The Commission agrees that, for Italy, no other conditions need to be imposed on TAP.

4.3.2.4 *Conclusion*

- (93) Based on the above, the Commission concludes that in Italy TAP will enhance security of supply within the meaning of Article 36(1) of the Gas Directive.

4.3.3 Albania

- (94) The Commission notes the Opinion of the Secretariat of the Energy Community dated 14 May 2013 that TAP enhances security of supply in Albania subject to additional conditions proposed by the Secretariat.

4.3.4 Expansion Capacity and gas sources other than SD II

- (95) The Commission notes that TAP's enhancement of security of supply depends not only on its Initial Capacity but also its Expansion Capacity. This is why it is important that the construction of Expansion Capacity is ensured in case there is sufficient demand. As explained in more detail below (see paragraph (217) and onwards) the Commission considers that this is the case. Safeguarding the provision of the Expansion Capacity is necessary to ensure TAP's full potential to enhance security of gas supplies. The Expansion Capacity can moreover serve to transport gas to the EU from sources other

⁵⁴ Initial Capacity of TAP / Italy's currently existing import capacity.

⁵⁵ Joint Opinion p.29.

than SD II as substantiated by the Expression of Interest phase of the market test and, hence, increase security of gas supplies by diversifying further gas sources.⁵⁶

4.3.5 Conclusion

(96) Based on the above, the Commission concludes that TAP enhances security of supply within the meaning of Article 36(1) of the Gas Directive, provided that the conditions imposed on TAP are amended as set out above.

4.4 **"The investment must enhance competition in gas supply [...]"**

(97) The Commission notes that in order to analyse the competitive effect of the exemption, the relevant gas markets and in particular the question whether the investment leads to the creation or strengthening of dominant market position needs to be considered. This has to be assessed on case-by-case basis.

(98) Article 36 of the Gas Directive requires that the investment project enhances competition in gas or electricity supply and that the exemption is not detrimental to competition. While these two requirements are not identical, they imply that the project must be pro-competitive and thus create benefits for consumers.⁵⁷

4.4.1 Greece

4.4.1.1 *Current competitive situation in Greece*

(99) Currently, competition in the Greek gas markets can only be characterised as nascent. Greece has no domestic gas production.⁵⁸ All gas consumed in Greece is imported. The incumbent gas supplier in Greece's wholesale and retail gas markets is DEPA.

(100) At least three market levels are currently dominated by the incumbent player (DEPA) in Greece:

- Gas imports (including both pipeline and LNG imports);
- Wholesale supply;
- Retail supply (including supplies to individual households and industries).

(101) On the upstream level, DEPA has entered into long term contracts with Gazprom Export and the Turkish incumbent BOTAS, from which all gas supplies are sourced for the Greek market.⁵⁹ Thanks to these long term contracts DEPA holds a 90% share on imports.⁶⁰ Access for third parties to the upstream pipelines bringing BOTAS and Gazprom's gas to Greece is currently not possible, reinforcing further DEPA's dominant position.⁶¹

(102) In this respect, it can be noted that a recent decision by the Greek Competition Authority that took effect 1 December 2012 imposes certain obligations upon DEPA, including a gas release programme on both pipeline entry points into Greece and obligations implying that DEPA reduces its capacity reservations on these pipeline entry points to 55% of their technical capacity. This decision represents an important step towards opening up the Greek gas markets to competition. However, it remains to

⁵⁶ See for instance table 1.6 of the Joint Opinion.

⁵⁷ Commission staff working document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity – New Infrastructure Exemptions, §30

⁵⁸ Reply RAE 5 April 2013 p. 1.

⁵⁹ Joint Opinion, p.33

⁶⁰ Reply RAE 5 April 2013 p. 1

⁶¹ Joint Opinion p. 32 and 33.

be ascertained whether and to what extent these measures will be effective considering the market power of Gazprom and, to a lesser extent, BOTAS upstream.⁶² Indeed, the latter may have little incentives to supply gas to companies other than DEPA, even if DEPA relinquishes capacity in the pipelines concerned.

- (103) However, it has to be noted that since the completion of the Greek network code in 2012, competition has started to develop with third parties (power producers and large industrial users) importing LNG spot cargos⁶³, mainly for own consumption. Therefore, currently the sole source of competing gas imports is the LNG terminal. However, even if since 2010 market participants have imported LNG spot cargos, the ability for entrants to enhance and sustain effective competitive pressure on DEPA remains limited.⁶⁴
- (104) DEPA also controls the wholesale and the retail supply of gas to eligible customers. DEPA further has a controlling stake in the three distribution companies in Greece (EPA Attica, EPA Thessaloniki, EPA Thessalia) which supply gas to non-eligible customers, each being a monopoly in a specific geographic area.⁶⁵ When taking into account all gas supplies made to all end customers in Greece, including the supplies made via EPA Attica, EPA Thessaloniki, and EPA Thessalia, DEPA's market share at retail level in Greece effectively amounts to 92%.
- (105) Neither TAP's shareholders nor the SD II consortium members have any presence in any of the Greek gas markets⁶⁶. Similarly, neither TAP shareholders nor the SD II consortium members have imported or supplied gas to and into Greece since the Greek market opening in 2010.⁶⁷ Even if AXPO Hellas A.E., part of the AXPO group and shareholder in TAP, holds a supply licence for gas in Greece, it has not imported or supplied gas in Greece. Moreover, based on the Expression of Interest Phase of the market test, it is not clear whether TAP or SD II consortium will actually enter the Greek market, as the entire capacity booked by them was destined to the Italian market.

4.4.1.2 TAP enhances competition in Greece

- (106) TAP will have an important beneficial effect on the competitive conditions in the Greek market considering that:
- (a) TAP will enable gas from new sources to arrive in Greece, enhancing gas-to-gas competition;
 - (b) TAP enables entrants already active in Greece to diversify their gas supply portfolio with pipeline gas, thereby increasing their ability to compete effectively;
 - (c) Based on the Joint Opinion, five participants in the "Expression of Interest Phase" of the market test expressed interest for forward flows of gas for delivery on Greek exit points for 3.52 bcm/y of gas, a volume that represents 60% of the projected demand of gas in Greece. Two of these participants expressed the willingness to book capacity on TAP of 2.12 bcm/y with duration of more than 20 years, implying a willingness to make long-term

⁶² Joint Opinion p. 32 and 33.

⁶³ Reply RAE 5 April 2013 p. 2. Joint Opinion p. 32.

⁶⁴ Joint Opinion p. 32 and 33.

⁶⁵ Also in view of the derogations from the internal market rules from which they currently benefit.

⁶⁶ Joint Opinion p. 33.

⁶⁷ Replay RAE 5 April 2013 page 2 and 3.

commitments to supply gas in Greece.⁶⁸ Among the two participants was [BUSINESS SECRET], which requested [BUSINESS SECRET] bcm/y.⁶⁹ The remaining three participants expressed interest to book 1.4 bcm/y with transport contracts of shorter duration (5-15 years). However, the mere fact that more parties expressed interest to ship SD II gas to exit points in Greece implies that there is an interest among third parties to compete with DEPA on the Greek gas market;

- (d) Even if the majority of respondents indicated interest to book forward capacity on TAP for delivery in Italy, the gas shipped using this capacity will pass through Greece. For these shippers, entry barriers to the Greek market will be lower, implying that the scope of potential competition substantially increases in Greece;
- (e) TAP will connect the Greek market via physical and virtual reverse flow capacity on TAP from Italy. Italy has a significantly more diversified gas market in terms of sources of gas. Moreover, in Italy wholesale market trading is more developed. TAP therefore opens the prospect of a more liquid gas wholesale market in Greece, in particular once the Greek VGTP gas trading hub is launched. Consequently, the Greek VGTP is likely to be significantly more liquid than it would have been in the absence of TAP. A liquid wholesale market for gas lowers entry barriers for entrants and provides reliable price signals for investments in Greece;
- (f) Five participants in the "Expression of Interest Phase" of the market test expressed interest for reverse flow capacity from Italy for a total volume of 9.55 bcm/y. More than half of this capacity was requested by [BUSINESS SECRET] for usage in case of emergency. The rest of respondents [BUSINESS SECRET] expressed an interest for 4.16 bcm/y reverse flow capacity;⁷⁰ The result of the "Expression of Interest Phase" of the market test therefore points to the fact that TAP's reverse flow capacity is likely to foster gas-to-gas competition in Greece with gas from sources available in Italy in addition to the SD II gas brought to Greece via forward flows.

(107) On the basis of the above, the Commission concludes that TAP enhances competition in Greece within the meaning of Article 36 of the Gas Directive.

4.4.1.3 *TAP's exemption is not detrimental to competition*

The exemption from TPA

(108) TPA seeks to ensure that all competitors in a given market have non-discriminatory access to the infrastructure, including pipelines, and can compete on equal terms. In view of the fact that it is considered to grant an exemption from the TPA requirement for the Initial Capacity of TAP, it is therefore pertinent to assess whether and to what extent TAP's shareholders have the ability and incentive to foreclose competitors on product markets adjacent to the TAP infrastructure if the exemption from TPA is granted.

⁶⁸ Joint Opinion p. 17.

⁶⁹ Reply RAE to question 1, 24 April 2013.

⁷⁰ Joint Opinion pp. 18 and 20.

Incentives to foreclose⁷¹

- (109) The incentives to foreclose mainly emanate from the protection of TAP's shareholders profits from their activities on adjacent markets, such as the Italian and Greek downstream wholesale and retail gas markets.
- (110) As was set out above, (see paragraph (105)), currently neither TAP's shareholders nor the SD II consortium members have any presence in any of the Greek gas markets. Consequently, they do not have incentives to foreclose competitors from the Greek market.
- (111) In any event, the exemption as modified in accordance with the present decision (see paragraph (119) and onwards) foresees conditions enabling RAE to impose caps on the exit capacity that can be reserved by companies dominant in any of the relevant product markets in Greece, including TAP's shareholders and SD II consortium members.
- (112) It follows that, regardless as to whether the members of the SD II consortium or TAP shareholders will eventually develop business activities in Greece and, hence, acquire incentives to foreclose, the exemption foresees proper remedies avoiding that these companies will acquire a market position in which they are no longer exposed to effective competitive pressure. The ability to raise prices and, hence, to reap the benefits from a foreclosure strategy are properly ring-fenced.
- (113) It should be added that the tariff structure also comprises certain elements that reinforce the incentive not to foreclose. In this respect, it is recalled that the TPA exemption relates only to the Initial Capacity. The Expansion Capacity is subject to regulated TPA. In the present case, foreclosure by TAP is therefore related to TAP's ability to avoid (despite its obligations and Authorities monitoring and enforcement) constructing the Expansion capacity. However, TAP shippers, among which TAP's shareholders will be present in view of the exemption from TPA for the Initial Capacity, will be benefiting from building Expansion Capacity through lower TAP Tariffs. Indeed, whereas constructing the Initial Capacity (10 bcm/y) entails a CAPEX of EUR [BUSINESS SECRET], construction of the full Expansion Capacity (also 10 bcm/y) entails a CAPEX of EUR [BUSINESS SECRET].⁷² Construction of the Expansion Capacity will thus lower depreciation per unit of capacity, feeding through into lower, uniform tariffs when applying TAP's tariff setting methodology. Such tariff reduction can amount to 40% of the tariff applying to the Initial Capacity⁷³. Hence, the TAP shareholders will capture part of the beneficial effects of building the Expansion Capacity and therefore any incentives to foreclose third party access by TAP by not constructing the Expansion Capacity will be mitigated.

Ability to foreclose

- (114) The ability to foreclose relates in the present case to the potential ability of TAP shareholders to prevent the Expansion Capacity to be built. This is because, in the present case, third party access to TAP is ensured via the obligation for TAP to build the Expansion Capacity and the effectiveness of the Authorities to ensure enforcement of this obligation.

⁷¹ The present analyses of incentive and ability to foreclose is broadly based on the Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07) C265/6 of 18.10.2008.

⁷² Reply RAE 5 April 2013 annexe 3.

⁷³ Section 1.3.4 and 1.3.6 of the Joint Opinion. Section 4.1 of Annexe 1 to the Joint Opinion

- (115) As is described in more detail below (see paragraph (217) and onwards), the Commission considers that the ability for TAP to avoid the construction of the Expansion Capacity is reduced and can be effectively monitored and enforced.
- (116) The shareholders of TAP (as well as SD II buyers) will be entitled to use the forward Initial Capacity of 10 bcm/y for themselves only to the extent the SD II consortium does not sell gas to other buyers. In that case, the condition imposed by the Joint Opinion prevails and the shareholders will have to reallocate capacity rights not used by themselves to the (other) buyers of SD II gas. It seems that the mandatory and non-discriminatory transfer of capacity is capable of limiting further the ability to foreclose.

The Exemption from tariff regulation

- (117) As the tariffs charged by TAP AG are the same regardless as to whether the TAP shipper concerned is a TAP shareholder or not, the prospective exemption from tariff regulation for the Initial and Expansion capacity is not detrimental to competition.

Conclusion

- (118) On the basis of the above, the Commission concludes that granting the exemption from TPA and regulated tariffs is not detrimental to competition in Greece.

4.4.1.4 Conditions imposed

- (119) The beneficial effects of TAP for competitive conditions in Greece will materialise in particular when the capacity at the TAP exit points to and into the Greek national system is booked either by entrants to the Greek gas markets or by suppliers with limited market shares in Greece. If, instead, most or all capacity is booked by a dominant company, such as DEPA, these beneficial effects will be limited to providing DEPA with a wider choice of potential suppliers but will not enhance competition in the Greek downstream markets.
- (120) The Commission therefore considers that RAE is correct to impose conditions on TAP in order to ensure that TAP will enhance competition by capping the reservation rights on the exit points for large market participants. Imposing such measures is also in line with previous exemption decisions (e.g. OPAL, Nabucco⁷⁴).
- (121) The Commission however considers that the details of the mechanism proposed by RAE can be improved, the improvements concern primarily:
- (a) The imposition of capacity caps should also be possible if the undertaking concerned has a strong position on the upstream market for the supply for gas to Greece (in addition to relevant markets for the supply of gas in Greece itself).
 - (b) In order to prevent that only temporary variations in market share give rise to the imposition of capacity caps, the market shares are to be calculated on the basis of an average of two years.
 - (c) However, in deciding to impose capacity caps in case in Greece new exit points on TAP are constructed, RAE should be allowed to complement the historic market shares with a prospective analyses based on the capacities reserved on the new exit points.

⁷⁴ http://ec.europa.eu/energy/infrastructure/exemptions/doc/exemption_decisions.pdf

(d) The Commission accepts that imposing a viable gas and capacity release programme is a suitable remedy in case the caps imposed prevent the expansion of TAP or causes existing capacity to remain idle. However, in case such a capacity and gas release programme proves ineffective, the Authorities should be granted a degree of discretion to impose temporarily alternative conditions provided that these conditions maintain the competition enhancing effects of TAP.

(122) It is added that the conditions ensuring that TAP enhances competition imposed in the context of TAP's exemption do not prevent EU and national competition and other laws to apply.

4.4.1.4 Conclusion

(123) Based on the above, the Commission concludes that TAP enhances competition within the meaning of Article 36(1) of the Gas Directive in Greece, provided that the conditions imposed on TAP are amended as set out above.

4.4.2 Italy

4.4.2.1 Current competitive situation in Italy

(124) At least four market levels are currently dominated by one incumbent player (ENI) in Italy:

- Gas imports (including both pipeline and LNG imports);
- Infrastructure market for the transport of natural gas to and into Italy;
- Wholesale supply, where despite regulatory caps, ENI maintains a strong market position;
- Retail supply (including supplies to individual households and industries).

(125) Even if Italy counts 48 gas importers, 72.3% is in the hand of three market participants only, namely ENI (41.4%), Edison (17.3%) and ENEL Trade (16.6%). None of the remaining gas importers has a market share higher than 2%.

(126) ENI therefore holds a market share which is over twice as high as its next competitor. Moreover, this figure does not even represent a true power of ENI on the import market. In addition to importing gas into Italy, ENI also supplies gas to the Italian border, which it later sells to other companies, dependent on ENI's supplies. These companies in turn ultimately import the gas into Italy. If ENI's supplies to the Italian border were counted its market share in gas imports would rise to around 68%.⁷⁵

(127) Furthermore, a significant share of Edison and ENEL's imports are dedicated to their own power plants and therefore are internal supplies that do not directly contribute to competition on the Italian gas markets. Finally, the majority of ENI's import contracts are based on long-term supply agreements (of 15 or 20 years),⁷⁶ giving ENI's competitors limited possibilities to challenge its position. ENI's position on the gas import market is further reinforced by its significant shareholdings in the main import infrastructure. Despite the divestment by ENI of its shares in companies related to three pipelines (TAG – bringing Russian gas to Italy, TENP – and Transigas bringing imports from North Europe to Italy), following the commitments offered to the

⁷⁵ TAP notification, page 17 and MSE's reply to Commission's request for information, page 3.

⁷⁶ Joint Opinion, p.28, see also the Commission's Decision

Commission⁷⁷, ENI still owns all shares in TTPC (importing gas from Algeria) and 50% in TMPC (importing gas from Algeria) and the Greenstream pipeline (importing gas from Libya).⁷⁸ The multiplicity of import suppliers therefore does not represent a competitive constraint for ENI.

- (128) ENI's strong position in gas imports to and into Italy reflects its position also on the wholesale market. Despite 143 market players active on the Italian wholesale market, it is still dominated by ENI. Of 140 wholesalers in Italy, none has a market share exceeding 6%⁷⁹ and the majority has much smaller shares. Based on ENI's strong position in gas imports and the market for the transport of natural gas to and into Italy, much of ENI's fragmented competition on the Italian wholesale market is ultimately dependent on ENI in the form of (i) access to the gas infrastructure into Italy, (ii) gas sales at the entry points to Italy or (iii) gas sales in Italy. As the majority of gas purchased by wholesalers comes from imports (74%), dominated by ENI, and strong bottlenecks in import capacity exists, the entry barriers into the Italian wholesale markets are high. Some volumes are secured at PSV ("Virtual Exchange Point"). PSV is developing progressively but remains illiquid, rendering entry and expansion by entrants more difficult. ENI's strong position on the downstream gas supply markets, has been recently confirmed by the Commission antitrust decision.⁸⁰
- (129) TAP's shareholders position on the Italian market is very limited and does not exceed 5% on any of the relevant markets for the supply of gas to and into Italy (Statoil is not present in any of the supply gas markets in Italy).⁸¹ AXPO intends to use gas sourced from SD II for expanding its Italian gas portfolio.⁸² E.ON has requested the Italian authority a permission to sell gas to final customers.⁸³ Thus, these companies will provide additional competitive pressure on ENI in Italy.

4.4.2.2 TAP enhances competition

- (130) TAP will have an important beneficial effect on the competitive conditions in the Italian gas markets considering that:
- (a) TAP will create a new route for importing gas into Italy bringing gas from SD II, i.e. a source of gas previously unavailable in Italy. TAP will therefore enhance gas-to-gas competition in Italy.
 - (b) From the Expression of Interest Phase of the market test it has appeared that 13 out of 20 participants, including the TAP AG shareholders and the SD II consortium seek to acquire, as of TAP's start of commercial operations, forward long-term capacity for delivery to TAP's exit point in Italy for a total of 41.50 bcm/y.⁸⁴ These volumes represent 86% of the total forward capacity request, demonstrating the large interest to supply gas to the Italian markets.

⁷⁷ Commission Decision of 29 September 2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.315 — ENI), OJ C 352, 23/12/2010, pp.8 – 10, full text available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39315/39315_3019_9.pdf

⁷⁸ Joint Opinion p. 26 and 28

⁷⁹ Joint Opinion, p. 28

⁸⁰ Para 33 of the Commission decision dated 29 September 2010.

⁸¹ Joint Opinion, p. 26 and 28.

⁸² MSE's reply to Commission's request for information, page 2.

⁸³ *Ibid.*

⁸⁴ Joint Opinion p. 15. All long term capacity requests considered. Requests for 25 years capacity reservations amounted to 40 bcm/y.

- (c) The capacity requested by the TAP shareholders represents 10.15 bcm/y (Statoil ASA 41.8%, EGL 41.8%, and E.On Ruhrgas 16.2%)⁸⁵ and by the SD II consortium (even if requested on behalf of future customers of SD II, not selected at this stage) another 10.33 bcm/y. ENI is not a shareholder in either TAP or SD II. In contrast, the Commission notes that the current TAP shareholders have either no presence in the Italian gas markets (Statoil) or a very limited one, namely 1.25% EGL AG (now AXPO) and 1% E.On Ruhrgas AG that are active on the Italian gas wholesale market.⁸⁶
- (d) [BUSINESS SECRET].⁸⁷ Consequently, it can be excluded that it will be attributed capacity on any of TAP's capacity available at the start of its commercial operations (of course it cannot be excluded that it will participate in market tests for further Expansion Capacity).
- (131) Consequently, even under the scenario that, initially, only TAP's exempted Initial Capacity will be constructed, TAP will enhance competition in Italy as it will allow entry and expansion of suppliers having currently no or small market shares in Italy. These undertakings will exert competitive pressure on ENI in any of the relevant gas supply markets to and into Italy.⁸⁸ In addition, TAP will result in a reduction of ENI's hold on Italy's import capacity and infrastructure.
- (132) On the basis of the above, the Commission concludes that TAP enhances competition in Italy within the meaning of Article 36 of the Gas Directive.

4.4.2.3 TAP's exemption is not detrimental to competition

Exemption from TPA

Incentive to foreclose

- (133) As was already set out above (see paragraph (129)), currently, neither TAP's shareholders nor the SD consortium members have any substantial presence in any of the Italian gas markets. Consequently, they do not have incentives to foreclose competitors from the Italian gas markets.
- (134) In any event, the exemption as modified in accordance with the present decision (see paragraph (140) and onwards) foresees conditions enabling MSE to impose caps on the capacity that can be reserved by companies dominant in any of the relevant product markets in Italy, including on TAP and SD II consortium members.
- (135) It follows that, even if the SD II consortium members or TAP shareholders will develop or expand business activities in Italy, they will not acquire sufficient incentives to foreclose as it is unlikely that these companies will acquire a market position in which they are no longer exposed to effective competitive pressure. Therefore, the ability to raise prices and, hence, to reap the benefits from a foreclosure strategy are properly ring-fenced.
- (136) As was already explained above (see paragraph (113)) the tariff structure also comprises certain elements that reinforce the incentive not to foreclose.

⁸⁵ Joint Opinion p.13, 14 and 15.

⁸⁶ The market share is calculated, according to Italian legislation, following the criteria established in legislative decree 13th August 2010 n. 130, at Article 3, point 2. See Joint Opinion page 29.

⁸⁷ See for instance table 1.6 of the Joint Opinion, [BUSINESS SECRET].

⁸⁸ Joint Opinion p. 29.

Ability to foreclose

- (137) For the same reasons as were set out above with regard to Greece, the ability for TAP shareholders and SD II consortium members to foreclose is properly ring-fenced.

The exemption from tariff regulation

- (138) As the tariffs charged by TAP AG are the same regardless as to whether the TAP shipper concerned is a TAP shareholder or not, the prospective exemption from tariff regulation for the Initial and Expansion capacity is not detrimental to competition.

Conclusion

- (139) On the basis of the above, the Commission concludes that granting the exemption from TPA and regulated tariffs is not detrimental to competition in Italy.

4.4.2.4 Conditions

- (140) At this stage, it is not clear how much gas will be transported through the TAP pipeline to Italy or which market players will hold capacity on TAP's Initial Capacity. This will become clear only after the capacity allocation procedures have been concluded for TAP's Initial Capacity. Moreover, it cannot be predicted which market participants will hold capacity on TAP's Expansion Capacity if and when build.

- (141) Potential competitive problems may arise in case TAP's shareholders were to sell all or part of their import capacity on a long term basis to the Italian incumbent ENI, or for that matter, any other market participants, including TAP's shareholders and the SD II consortium, that may acquire dominant market positions on the Italian gas markets during the duration of the TAP exemption.

- (142) The Commission therefore agrees with the Authorities that it is necessary, in order to ensure that TAP enhances competition within the meaning of Article 36(1) of the Gas Directive, to impose conditions. As discussed above, imposing such measures is also line with previous exemption decisions.

- (143) Article 2(4) of the Italian Exemption Decision stipulates that:

"In order to enhance competition in gas supply, with regard to the second phase of market testing [...] as well as the subsequent market tests [...], no transmission capacity may be allocated or transferred to parties holding a wholesale market share in Italy, calculated according to the criteria referred to in Article 3, paragraphs 1 and 2 of Legislative Decree No 130 of 13 August 2010, greater than the value specified in Article 3, paragraph 1 of Decree-Law No 78 of 1 July 2009, converted with amendments into Law No 102 of 3 August 2009".⁸⁹

- (144) In essence, the Italian laws referred to in Article 2(4) of the Italian Exemption Decision, concern the manner in which the market share is calculated, defining which values should be taken into account and specifying the applicable market share threshold of 40%. Article 2(4) of the Italian Exemption Decision would therefore imply that current and future market participants having a market share, as calculated by Italian Law, would not be able to import gas through TAP. Based on this

⁸⁹ In contrast, the Joint Opinion (p. 30) also considers that it is necessary to limit the access to TAP's capacity of an undertaking with a significant degree of market power in Italy and that of any affiliated companies, so that they cannot reserve on the long-term basis only and the short-term booking is limited to the 25% of the available capacity for short-term (equal or shorter than 1 year). This restriction should apply to any undertaking with a dominant position in any of the Italian wholesale and retail gas markets.

methodology, the Italian incumbent ENI exceeds the threshold of 40% established by the law decree of 1 July 2009 n. 78.⁹⁰

- (145) The Commission acknowledges the test imposed by the Italian Exemption Decision, however considers that additional competition test should be added. In this context, the Commission notes that:
- (a) The test envisaged by the Italian Exemption Decision will only allow imposing capacity caps in case the market share threshold is surpassed on the wholesale market level as defined in the relevant Italian national law. Consequently, it cannot be applied in case competition concerns emerge on other markets, such as gas retail markets;
 - (b) the conditions that apply are defined in Italian national law, which might change during the time for which the exemption is granted, and;
 - (c) the proposed test and remedy differs from the one envisaged for Greece (as modified above).
- (146) Imposing precise conditions to ensure that TAP enhances competition within the meaning of Article 36(1) of the Gas Directive in the context of the Exemption Decision allows to ensure that these conditions are similar and coherent with those in other jurisdictions in which TAP has to act, such as Greece, and will remain in place regardless as to future modifications of the Italian Law.
- (147) Consequently, the Commission considers that:
- (a) In order to ensure that TAP enhances competition within the meaning of Article 36(1) of the Gas Directive, also capacity caps as proposed in the Joint Opinion similar to the ones for Greece (but modified in accordance with the Commission comments as set out above in paragraph(121)) should be imposed on TAP AG for Italy.
 - (b) In this context it needs to be noted that, as opposed to Greece, in Italy TAP is not obliged to construct additional entry/exit point on request of the regulator or third parties. Consequently, the conditions imposing capacity caps in Italy do not have to take account of this e.g. when calculating market shares or reporting on the related market tests.
- (148) It is added that the conditions ensuring that TAP enhances competition imposed in the context of TAP's exemption do not prevent EU and national competition and other laws, including Article 2(4) of the Italian Exemption Decision, to apply.

4.4.2.5 Conclusion

- (149) The Commission concludes that, provided the above conditions are met, TAP will enhance competition within the meaning of Article 36(1) of the Gas Directive in Italy.

4.4.3 Additional considerations concerning both the Greek and Italian markets - short-term products

- (150) The Authorities impose on TAP that, at a minimum, 5% of the Initial Capacity will be made available to the market as short-term products, i.e. products with duration of up to one year. These products will be allocated according to the Capacity Allocation Mechanism network code (hereafter 'CAM NC') procedures as is projected to be adopted at the time of the present decision in due course.

⁹⁰ MSE submission dated 26 April 2013, answer to question 3.

- (151) Regulation (EC) No 715/2009⁹¹ (hereinafter 'the Gas Regulation') provides the legal basis for the gas network codes, including the projected CAM NC. Article 30(b) of the Gas Regulation excludes major new infrastructure, e.g. interconnectors exempted pursuant to Article 36(1) and (2) of the Gas Directive.
- (152) However, in accordance with Recital 6 of the projected CAM NC and in view of the reasoning in the previous Commission's Certification Opinions⁹², the CAM NC does apply to non-exempted capacities in major new infrastructures which have received an exemption from Article 32 (concerning TPA) of the Gas Directive to the extent the application of this Regulation does not undermine such an exemption and taking into account the specific nature of interconnectors.
- (153) In the current case, only TAP's Initial Capacity is to be exempted from TPA. Consequently, the Commission takes the view that the projected CAM NC, and in particular Article 8(8) thereof⁹³, should apply to TAP's Expansion Capacity and Reverse Capacity.
- (154) Furthermore, ensuring the availability of short term capacity products on TAP for TPA will further contribute to the enhancement of competition due to the investment.
- (155) As regards the additional condition that was imposed by the Authorities to put aside a volume corresponding to 5% of the Initial Capacity for the short term products, the Commission notes that such a condition is justified in order to ensure that the granted exemption from TPA rules for the Initial Capacity is not detrimental for competition. Allowing the 5% of the Initial Capacity to be booked as short term contracts, will create, from the starting date of the operation of the pipeline, possibilities for other players to book the capacity. Therefore, setting aside a volume corresponding to 5% of the Initial capacity as short term products, is essential to justify the TPA exemption given for the Initial Capacity.
- (156) In assessing the additional condition imposed, considerable attention has to be given as to whether its application would not undermine the exemption i.e. the financial model of TAP AG. In this regard, it need to be emphasised that setting aside capacity for short-term products prevents this capacity to be sold on a long term basis and, therefore, to generate the long terms revenues that are taken into account by potential credit providers to TAP AG. TAP's design allows for a maximum capacity of 10.5 bcm/y without the construction of the Expansion Capacity. Consequently, a percentage set aside for short-term products higher than 5% (or 0.5 bcm/y) will immediately affect the volume available for the Initial Capacity (10 bcm/y) on which TAP's financial model is based.⁹⁴ Moreover, putting aside larger capacities for the short term products is also not in line with the transportation contracts envisaged by SD II of much longer duration (i.e. between 18-25 years).

⁹¹ 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).

⁹² In particular the Commission Opinion concerning certification of BBL of 11 March 2013 and the Commission Opinion concerning certification of Nabucco of 11 December 2012

⁹³ Article 8(8) of the projected CAM NC reads *'In the case of new capacity, an amount at least equal to 10% of the technical capacity at each interconnection point shall be set aside and offered no earlier than the annual quarterly capacity auction as provided for in Article 12, held in accordance with the auction calendar during the gas year preceding the start of the relevant gas year.'*

⁹⁴ Submission TAP AG dated 7 April 2013

- (157) Both the Italian and Greek Authorities⁹⁵ as well as TAP⁹⁶ have argued that setting aside a larger amount of TAP's technical capacity for offering short term capacity would have consequences of TAP AG's business case and on the economic feasibility of the TAP project, as the capacity set aside for short-term products must be build and may remain empty even for a long time. This assertion is fully substantiated with the results of the Expression of Interest Phase of the market test. The large majority of participants expressed interest for long-/medium-term products whereas no short-term products were requested.⁹⁷
- (158) Consequently, the Commission considers that, in this particular case, there are no objective grounds for imposing on TAP a condition to offer a volume higher than the equivalent of 5% of TAP's exempted Initial Capacity (in addition to the short-term products that will be offered on the Expansion Capacity and the Reverse Capacity in accordance with the projected CAM NC) and that, in addition, such a condition would undermine the exemption granted. Therefore, the Commission accepts the Authorities' condition to set aside 5% of the Initial Capacity for short term products as a pre-condition for granting TPA exemption for the Initial Capacity.

4.4.4 Albania

- (159) The Commission notes of the Opinion of the Secretariat of the Energy Community that TAP enhances competition in Albania, subject to additional conditions proposed by the Secretariat.

4.4.5 Conclusion

- (160) Based on the above, the Commission concludes that, provided that the Exemption Decision is amended in accordance with the above, TAP enhances competition in gas supply within the meaning of Article 36(1) of the Gas Directive.

4.5 "the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted"

4.5.1 The investment would not be realised under the Italian and Greek regulatory regimes

- (161) TAP entails investment in infrastructure that is associated with sizable risks of a financial, regulatory, political and legal nature as well as market risks related to (the appearance of) competing infrastructures transporting gas to the EU from the Caspian region.⁹⁸
- (162) Under a typical regulated access regime, the owner of the infrastructure (the TSO) enjoys a large degree of revenue certainty and protection from volume risks or construction risks, given that its investments are planned (and therefore approved) through the corresponding development plan and the revenues guaranteed through regulated tariffs approved by a regulatory authority to be paid by the rate-payers of the infrastructure itself. This mechanism ensures the compatibility between the size of the project and the level of the resulting tariffs.
- (163) TAP is however a commercial initiative of its shareholders, not incorporated or imposed by any national development plan of any of the three countries involved. Shareholders and lenders invest in a project of this scale only after they have been assured that the potential risks have been covered to a maximum degree and that future

⁹⁵ Submission RAE and AEEG dated 26 April 2013

⁹⁶ Submission TAP AG dated 7 April 2013

⁹⁷ Joint Opinion page 19.

⁹⁸ Joint Opinion section 1.3.3 as well the reply of RAE of 5 April 2013 annexe 2.

revenues have a high degree of predictability. In the case of TAP, the project involves, except from standard risks, also capacity utilisation risk and risks of changes in any of the three regulatory regimes of the countries that the TAP will cross.

- (164) With regard to Greece, it can be added further that the Greek regulated gas transmission system currently does not have the capacity to transport gas in the quantities envisaged by TAP, i.e. 10bcm/y or even 20 bcm/y in East to West direction. Enabling the Greek regulated gas transmission system to transport such capacities, would require major investments, such as additional compression in the Greek part of the Greek-Turkey interconnector (as well as further compression in the Turkish part of the border), duplication of the Komotini-Thessaloniki branch and a new arm towards the North-West. To put the size of these investments into perspective, RAE considers that the cost of a comparable pipeline to Italy is of the same order of magnitude as the overall book value of the currently existing Greek regulated gas transmission system.⁹⁹ Moreover, as the gas volumes, at least initially, will be targeted at the Italian market, the costs within Greece could be disproportionate to the benefits for the Greek consumers.
- (165) The Commission therefore takes the view that the size of the TAP project is such that due to its volume and construction risks, the costs cannot be borne by the users of the Greek and Italian regulated gas transmission system under a regulated TPA regime without undermining the viability thereof.¹⁰⁰ Consequently, in order for the investment to be made, an exemption is required as the investment will not be made under a regulated network regime by national transmission system operators. The exact scope of the exemption required is discussed further in the decision.

4.5.2 The investment under exempted regime

4.5.2.1 *Introduction*

- (166) The TAP project in essence seeks to secure part of the transportation route for the SD II gas fields to the EU. Indeed, the TAP pipeline is part of a chain of investments required to render the production and transportation of SD II gas to the EU possible. Other parts of the same chain are the upstream SD II project as described in paragraph (15), including the expansion of Sangachal Terminal and the South Caucasus Pipeline for the transportation of gas from Azerbaijan through Georgia to Turkey. Upstream either an upgrade of the existing BOTAS network will be needed or a new pipeline, TANAP, will be constructed to transport SD II gas from the eastern to the western boarder of Turkey.
- (167) The SD II consortium seeks to attribute gas supply contracts of a 25 years duration, on the grounds that this duration is required in view of current gas prices in Europe and in order to recover their investment costs.
- (168) TAP requested that the various exemptions pursuant to Article 36 Gas Directive have a 25 year duration, from the start date of operations.¹⁰¹ TAP AG argues that the investments in the SDI value chain require that all gas supply and transport capacity contracts along the chain have an equal duration and need to fall into place at the same time. This necessity is derived from the fact that (i) gas supply and gas transportation contracts must match in duration; and (ii) the economic viability of the project depends on the competitiveness of SD II gas relative to gas from other sources, in turn

⁹⁹ Reply RAE 5 April 2013 p. 6.

¹⁰⁰ Joint Opinion section 3.3 page 50.

¹⁰¹ TAP Exemption Application, page 15.

a function of the cumulative costs of producing SD II gas and its transportation through various pipelines, including, but not only, TAP, to the EU. When costs of production and transportation are considered relative to EU gas prices, the 25 year duration would be required. This argument applies in particular to the forward Initial Capacity, i.e. the capacity and direction of flow required to bring SD II gas to the EU as was substantiated in the Expression of Interest Phase of the market test.

- (169) As regards the duration of an exemption, the relevant Guidelines¹⁰² precise that, the following should be taken into consideration:
- (c) Throughput contracts for terminals, duration of underlying transportation contracts for pipelines and cables, and/or upstream and downstream supply contracts;
 - (d) The level of risk, notably, the duration of the exemption does not have to correspond to the full length of the amortisation period. The exemption duration should be equal to or less than the expected period for cost recovery of the new infrastructure.

4.5.2.2 *Scope and duration of the exemption from TPA*

- (170) TAP AG requested an exemption from TPA rules for forward Initial Capacity for a period of 25 years from the starting date of the pipeline operation.
- (171) The Authorities granted the exemption from TPA for the Initial Capacity of 10 bcm/y. The Authorities exempted the forward Initial Capacity, subject to the fulfilment of ten conditions described in detail in the Joint Opinion and related to (1) the origin of the gas: gas from SD II, (2) the initial allocation to the TAP shareholders, (3) the legal procedure of transferring the Initial Capacity to SD II shippers/buyers, (4) the final allocation of the Initial Capacity to SD II gas buyers and release of the residual initial capacity to the market, (5) the obligation to perform the first booking phase and to build the capacity requested, (6) the participation in the first booking phase limited to the participants of the Expression of Interest Phase, (7) the obligation to perform subsequent market tests, (8) the obligation to build Expansion Capacity, (9) the possibility to further expand capacity, and (10) the obligation to offer short-term products..
- (172) The Commission notes that the exemption from TPA on the forward Initial Capacity is directly based on the need to secure transportation capacity of the gas produced in SD II, which will be sold under 25 year gas supply contracts. In view of the fact that TAP constitutes one of the investments required to develop the SD II project and to transport gas to the EU, it warrants that the shippers of SD II gas are provided with corresponding transport capacity on TAP on a secure basis. Therefore, the duration of the TPA exemption should correspond to the duration of the gas supply contracts and, thus, should be of a 25 year duration, starting from the date on which TAP becomes operational.
- (173) It is therefore justified and proportional that the forward Initial Capacity is exempted from TPA subject to additional conditions imposed by the Authorities and their requested modifications by the Commission.

¹⁰² Commission staff working document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity SEC (2009) 62 final.

- (174) As TAP's financial model is based on forward Initial Capacity, it is not proportional to grant an exemption from TPA for the forward Expansion Capacity. Furthermore, such exemption was neither requested by TAP AG nor granted by the Authorities.
- (175) As TAP's financial model is based on forward Initial Capacity, it is not proportional to grant an exemption from TPA for reverse flows. Furthermore, such exemption was neither requested by TAP AG nor granted by the Authorities.
- (176) The volume equivalent to 5% of the Initial Capacity for short-term products, i.e. products with a duration of 1 year or shorter will also not be subject to TPA.

4.5.2.3 *Scope of exemption from regulated tariffs*

Introduction

- (177) TAP requested to sell the entire pipeline capacity (forward and reverse flow for both Initial and Expansion Capacity) at a uniform tariff exempted from tariff regulation. When the Expansion Capacity is realized, the single, unified TAP tariff will be adapted downwards because the additional capacity is relatively inexpensive and ensuing cost benefits are to be spread across initial and new shippers alike. TAP also requested an exemption from tariff regulation for reverse flow capacity which is also to be offered at the unified "TAP tariff".
- (178) In order to guarantee stable financing of the pipeline, the Authorities grant the exemption from regulated tariffs for forward flows (both for Initial and Expansion Capacity), but not for the reverse flows, subject to the following additional provisions:

For Initial Capacity:

- (a) The methodology for the implementation of the TAP tariff will be subject to the Authorities' approval;
- (b) The TAP Tariff will reflect efficient costs, it will be transparent and non-discriminatory;
- (c) The methodology will define the pricing mechanism for all forward capacity products offered by TAP, namely capacity products of different durations of firm and interruptible nature, for different entry and exit points;
- (d) The methodology will be such that for any further capacity product offered, additional to the initial forward capacity, the TAP Tariff will be reduced;
- (e) TAP AG will ensure that balancing services charges, when applicable, will be objective, transparent, cost reflective and non-discriminatory and will be published.

For Expansion Capacity,

- (a) capacity products will be offered through auctions; and
- (b) for each product offered, the reserve price of the auction will be set equal to the TAP Tariff.

For reverse flows, the NRAs concluded that it should be subject to regulated tariffs, with additional conditions, such as:

- (a) that reverse flow capacity products will be offered through auctions; and
- (b) the reserve price for a reverse flow product cannot be higher than 5% of the tariff of an equivalent forward flow product.

- (179) Whereas TAP has requested an exemption from tariff regulation, it should be emphasized that TAP's tariff code is subject to approval by the Authorities. TAP's tariff code is currently under discussion.
- (180) The Commission notes, that in order to render the project an attractive lending investment opportunity, it is required that a degree of predictability exists as to the returns over the life time of the project. This predictability is required for prospective lenders, as they will assess the credit risks attached to the project on the basis of the secured and stable revenues generated, as well as for shareholders, which will partially finance the project through equity.¹⁰³
- (181) Whereas, in general, shareholders should be expected to assume risks associated with investments, it should nonetheless be assessed whether their returns are sufficiently secure in order to render it an attractive investment. Indeed, if sufficient grounds exist to assume that without an exemption securing reasonable return to investors would not be possible and therefore the project would not take place, it is proportional that the exemption also considers securing shareholder returns. Proper attention should be given in this assessment to the risks attached to the various parts and stages of the investment project.

Initial Capacity

- (182) The financial model of TAP is based on a full recoupment of amortisation on the TAP assets and shareholders return through the sale of the forward Initial Capacity under long term contracts.
- (183) Consequently, the Commission considers that an exemption from tariff regulation for the forward Initial Forward capacity is justified.

Expansion Capacity

- (184) The Commission takes the view that building Expansion Capacity is considerably less costly than building the Initial Capacity as it does 'only' involve adding compressor stations and upgrading existing compressor stations along the existing pipeline providing the Initial Capacity. The Expansion Capacity can therefore be realised against substantially lower costs and in incremental steps.¹⁰⁴ It follows that the realisation of the Expansion Capacity is both substantially less costly as well as less risky as it can be expanded if and when new demand for capacity becomes apparent from the (required) market tests. Such additional demand may arise from further developments by the SD II consortium or from gas originating from other sources fed-in upstream from TAP. It can therefore be questioned whether the envisaged exemption from tariff regulation for the Expansion Capacity is justified.
- (185) TAP AG argues that, when regulated tariffs are applied for TAP's Expansion Capacity, the resulting tariff for the Expansion Capacity would be substantially lower than the tariff for the Initial Capacity due to the substantially lower CAPEX for Expansion Capacity relative to the one for the Initial Capacity.¹⁰⁵ This would expose the investors in the Initial Capacity to the additional risk that during the lifetime of TAP they will be confronted with competition from gas brought through TAP to the EU using the Expansion Capacity (which TAP is obliged to construct, see paragraph (217) and onwards) that is transported against substantially more attractive tariffs than the shipper using the Initial Capacity can enjoy. A tariff structure that would differentiate

¹⁰³ Annex III to Reply RAE of 5 April 2013.

¹⁰⁴ Annex 3 to RAE reply of 5 April 2013.

¹⁰⁵ Annex 3 to RAE reply of 5 April 2013.

between (higher cost) Initial and (lower cost) Expansion Capacity would thus renders the Initial Capacity unattractive as it entails much higher costs and commercial risks in the marketing of gas. These considerations are the more pertinent in view of the rational of the project, i.e. gas sales from SD II into the EU, and the fact that the risks of the TAP project are associated mainly with the construction of the Initial Capacity.

- (186) Consequently, the Commission considers, as it will not be possible to internalise the commercial risks when the Expansion Capacity is not exempted from tariff regulation, it is reasonable to grant, apart from an exemption from tariff regulation for the Initial Capacity, also an exemption from tariff regulation for the Expansion Capacity.
- (187) TAP AG also argues that the TAP tariff methodology¹⁰⁶ deviates from the tariff methodology that is usually employed for regulated assets the common tariff methodology for regulated assets is, *inter alia*, based on linear amortisation of the regulated asset base. Such a methodology would result in relatively high tariffs at the beginning of the economic life of the asset concerned and lower tariffs at the end of its economic life. Such a tariff methodology, however, would render the overall costs of transporting SD II gas to the EU non-economic during the earlier stages of the overall project. TAP therefore has proposed to adopt a tariff methodology that results in a tariff structure that is more stable over the life time of the asset in order to render TAP compatible with the return required for the entire value chain to bring SD II gas to the EU.
- (188) The Commission considers the fact that, in order to render the project viable, a tariff structure different from the one that would result from regulated tariffs is required, provides a further ground for granting an exemption from tariff regulation of forward capacity, regardless as to whether this is forward Initial Capacity or forward Expansion Capacity.

IRR on Initial and Expansion Capacity

- (189) In order to internalise the risk that holders of Initial Capacity are confronted with when holders of Expansion Capacity can transport gas through TAP at more favourable tariffs, TAP proposes a tariff structure that is uniform and does not discriminate between Initial and Expansion Capacity. In the proposed model, the targeted IRR is ensured by the Initial Capacity and is capped. This means that any additional income from selling the Expansion Capacity (or the Reverse flow capacity) reduces the tariff for all the shippers on TAP by an amount that keeps the IRR constant.¹⁰⁷ In order to reflect the lower risks and costs associated with the construction of the Expansion Capacity, the uniform tariff will be lowered if and when the Expansion Capacity is built. Such reduced tariff will be equally applicable to all shippers, irrespective of which capacity, i.e. Initial or Expansion Capacity they book.
- (190) TAP has not proposed a specific lower IRR that would apply to the Expansion Capacity reflecting the lower CAPEX and risk profile of investments in the Expansion Capacity, when compared with the Initial Capacity. Instead, TAP¹⁰⁸ proposes that the Expansion Capacity will be amortised over 25 years but it will only benefit from TAP tariffs over the remaining duration of the exemption for the Initial Capacity. The tail of the economic life span of the Expansion Capacity would be amortised under the regulated tariff regime that would apply after the expiration of the Exemption

¹⁰⁶ Presentation TAP meeting 11 April 2013, received 12 April 2013 p. 4.

¹⁰⁷ Joint Opinion, p. 6 and Annex to the Joint Opinion, pp. 75-76.

¹⁰⁸ Presentation TAP meeting 11 April 2013, received 12 April 2013.

Duration. Depending on when the Expansion Capacity would be built, this tail will be longer or shorter.

- (191) As was already explained above in paragraph 44, the TAP tariff methodology differs from a methodology usually applied to regulated assets. Whereas the TAP methodology is based on the wish to arrive at a relatively stable tariff over the life time of the asset, regulated tariffs are based on amortisation of the non-amortised asset base. This difference in methodology means that, at the expiry of the Initial Exemption, the tariff and revenues for the remainder of TAP's assets base (which will only contain investments in Expansion Capacity as the Initial Capacity will be fully amortised during the 25 year exemption period) will be lower than the tariff that would be applied if the TAP tariff methodology would have continued to apply. This results in a lower average IRR for the Expansion Capacity than for the Initial Capacity if built after TAP's first date of commercial operations.
- (192) The difference in IRR between Initial and Expansion Capacity depends on when the Expansion Capacity is built, with Expansion Capacity early in the life time of TAP receiving a higher IRR than that constructed later.¹⁰⁹ Expansion Capacity that is built together with the Initial Capacity will have the same IRR as the Initial Capacity.

Incentive to invest in Expansion Capacity

- (193) As is explained below in (217) and onwards, the grounds for the TPA exemption for the Initial Capacity depend on the effectiveness of the obligation imposed on TAP to construct Expansion Capacity if and when the (required) market test demonstrates that this is economically viable. The TAP tariff methodology implies however that IRR on Expansion Capacity built later in the life time of TAP will, for the shareholders, require higher revenues in order to remain economically viable. In order to ensure that the test to decide whether to build expansion capacity remains effective, TAP proposes that, when the decision to construct Expansion Capacity is made, the test to decide its economic viability will be based on revenues based on TAP's tariff structure, i.e. it is assumed that the revenues on Expansion Capacity are rewarded on the basis of TAP's tariffs. The fact that the revenues beyond the expiry date of the exemption will most likely be lower will be ignored for the purpose of deciding whether the Expansion Capacity is build and the lower IRR on Expansion Capacity will not affect the decision to invest in Expansion Capacity
- (194) By this tariff structure, the TAP shareholders not only assume a lower IRR on the Expansion Capacity, they also assume higher risks as (i) the precise regulated tariff applied to non-amortised Expansion Capacity post the exemption period is unknown; and (ii) the risks assumed on Expansion Capacity constructed late in the exemption period are relatively high.

Conclusion on tariffs structure for forward Initial and Expansion Capacity

- (195) Based on the above, the Commission accepts the Authorities decision to exempt both the Initial and the Expansion Capacity from tariff regulation under the condition that the TAP tariff methodology is subject to the approval of the Authorities.
- (196) The Commission recognizes ultimately the role of regulatory authorities in deciding on the final tariff structure, however the Commission encourages the Regulatory authorities, when approving the Tariff code for TAP pipeline, to properly take into

¹⁰⁹ See presentation TAP meeting 11 April 2013, received 12 April 2013 p. 7.

account where relevant different risk levels attached to TAP's investments in the Initial and Expansion Capacity and to reflect them in the accepted tariff.

Reverse flows

- (197) Both the costs as well as related risks involved in offering reverse flow capacity are substantially lower than in the case of the forward capacity (either initial or expansion), as discussed in detail in paragraph (184) above. Furthermore, the revenues from reverse flows were not included in TAP's financial model.
- (198) Therefore, the Commission agrees with the Authorities' decision to reject the requested exemption from the provisions of regulated tariffs for the reverse flows. Instead reverse flow will be regulated according to the provisions of the European legislation in place.
- (199) The Commission also agrees with the Authorities that in order to incentivize the use of reverse flow, additional provisions listed in section 4.4 of the Joint Opinion should be taken into account. Those provisions include the following: (1) capacity products will be offered through auctions as a result of a Market Test; (2) each product (different duration and/or entry or exit point) is priced separately; (3) for each product offered, the reserve price of the auction will be set equal to TAP Tariff according to the TAP Tariff Code; (4) users of the Expansion Capacity pay the reserve price set in the item above plus the premium resulting from the auction; and (5) such premium will be transferred to a special fund, which will redistribute the premium to TAP shippers, lowering the overall tariff.
- (200) To these conditions, the Commission adds the provision that, from the starting date of the operation of the pipeline, the reverse flows provided should be at least 5 bcm/y capacity for commercial operations, based on the result of the Market test.

4.5.2.4 Duration of exemption from regulated tariffs

- (201) The Commission notes that the financial model of TAP is based on the full recoupment of the investment costs and shareholders return at the level of [BUSINESS SECRET]%¹¹⁰ of the Initial Forward Capacity to be depreciated over a 25 year period. When Expansion Capacity is available, its costs are added to the overall investment cost and included in the TAP tariff.
- (202) Currently, the financing of the TAP project is not yet secured and is not expected to be before Q4 2014. Prospective lenders include however multilateral agencies (European Investment Bank, European Bank for Recovery and Development, Export Credit Agencies) and commercial banks. Annex I to the Joint Opinion as well as Annex III to the reply by RAE¹¹¹ contain information as to the expected duration of the loans that are expected to be secured. None of the terms however surpasses 14.5 years. These terms concern the repayment terms starting at commercial operation. Currently foreseen financing thus would end approximately by Q3 2031 or 14.5 years after the start of TAP's commercial operation on the schedule foreseen in the Exemption Application.¹¹²
- (203) TAP AG argues that, in order to render the TAP project bankable, also a certain "tail period" is required by Lenders. A tail period is a period of a few years following maturity of the debt in order to ensure that lenders have access to the cash-flows

¹¹⁰ Pre-tax IRR is presumed to be [BUSINESS SECRET]%.

¹¹¹ Reply by RAE dated 5 April 2013.

¹¹² Annexe III to reply RAE of 5 April 2013.

generated by the project to recoup the loans in case the project's cash flows fall short of the debt service needs in its early years. Only secured cash flows would normally be considered. TAP AG argues that a tail period of 3 to 4 years will be required.¹¹³

- (204) The Commission takes the view that, regardless as to whether the arguments of TAP as to the financing of the TAP project can be accepted or not, a 25 years duration for tariff regulation cannot be justified solely on the basis of the need to secure stable revenues in order to render TAP bankable. At the same time, basing the duration of the exemption from tariff regulation on the currently known financing is not acceptable either in view of the following factors:
- (a) The financing of TAP is not yet secured and is not expected to be before Q4 2014. The resulting uncertainty as to TAP's financing structure does not allow a solid assessment at this stage;
 - (b) Indeed, already today, two of the currently envisaged loans foresee refinancing 25% of outstanding debt over the remaining term of the TPA exemption.¹¹⁴ As explained by TAP, current expected financial arrangements are set to be refinanced after the start of TAP's operations. This will be required as current envisaged loans will be repaid substantially before the expiry of the exemption and, hence, refinancing is required to retain a gearing compatible with TAP's financial model.
- (205) In order to assess the appropriateness of the duration as regards tariffs, it needs to be considered that:
- (c) The construction of the Initial Capacity results in assuming important risks associated with the TAP project itself that cannot be fully remedied though TAP's exemption from tariff and TPA regulation;
 - (d) Even if TAP's loans will be refinanced, their reimbursement will necessarily end substantially before the end of the exemption's term in view of the need for a 'tail period'. Consequently, in view of the tariff structure of TAP, that envisages a stable tariff over the entire duration of the project, the reward for shareholders is essentially displaced towards the end of the exemption's term. This fact renders the investment less attractive for any investor in view of the larger risks and payback period that must be assumed accordingly; and
 - (e) As explained above, certain of the terms for exemption, in particular those that relate to ensuring the Expansion Capacity, result in TAP shareholders assuming additional risks over and above those that would otherwise have to assume.
- (206) It needs to be recalled that TAP is merely one element in a chain of investments that need to occur in order to ensure the production of SD II gas and its transportation into the EU. Even if all elements of this chain are required and interlinked, it is unavoidable that certain mismatches will occur, such as the ramping up of the SD II project that will affect the revenue stream of TAP as envisaged gas flows will not materialize or not at the time currently expected. This risk is entirely borne by the TAP shareholders. It implies that, unlike other infrastructure investments, TAP also assumes risks not immediately related to the TAP project itself but also risks related to the materialisation of other projects beyond the scope of control of TAP.

¹¹³ Annexe III to reply RAE of 5 April 2013.

¹¹⁴ Annexe III to reply RAE of 5 April 2013. Annexe A to Exemption Decision.

- (207) Based on the above, the Commission considers that in the present case, not only the mere bankability of the project needs to be considered when evaluating the duration of the exemption from regulated tariffs, but also the fact that shareholder rewards are distant in future and have a high risk profile. Whereas, in general, shareholders should be expected to assume risks associated with investments, in this particular case shareholders 'residual' risks (i.e. those risks that can be secured via the present exemption) are such that, in order for the investment to take place, it is necessary and therefore proportional to also provide security to shareholder's returns via this exemption. Consequently, granting an exemption from tariff regulation for 25 years is reasonable.
- (208) Finally, it must be taken into account that not granting a tariff exemption or not for the entire 25 years duration, does not only increase price risks to TAP but also to other parts of the SD II value chain. Indeed, prospective TAP shippers will not be able foresee with sufficient certainty shipping tariffs and, ultimately, contractors with SD II for gas supply will be more uncertain as to whether supplying gas into the EU can be undertaken at a competitive price level in comparison with gas originating from other sources. These spill-over effects across the SD II value chain provide a further argument to grant an exemption from tariff regulation and a ground for this exemption to have the duration of 25 years.

4.5.3 Conclusion

- (209) Based on the above, the Commission takes the view that TAP's exemption from tariff regulation should have a duration of 25 years from the start of TAP's commercial operations. As the above arguments apply regardless as to whether it concerns tariffs on forward Initial Capacity or forward Expansion Capacity, this duration should apply to all forward capacities.

4.6 "The infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built"

- (210) Legal unbundling from existing TSOs is fulfilled as TAP AG is a separate and independent legal entity from the relevant and existing system operators SNAM Rete Gas S.p.A (Italy), DESFA SA (Greece) and Albpetrol sh.a. (new gas TSO in Albania).
- (211) It follows that TAP is separate in its legal form from existing TSOs within the meaning of Article 36(1) of the Gas Directive.

4.7 "Charges must be levied on users of that infrastructure"

- (212) Access to transmission capacity will be subject to the TAP Tariff, which is to be submitted to the Authorities' approval (in line with additional commitments imposed in the Joint Opinion). No charges relating to the project will be imposed on final consumers in any of the host countries of TAP.
- (213) It follows that TAP charges levies on users within the meaning of Article 36(1) of the Gas Directive.

4.8 "The exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected"

- (214) TAP will improve the functioning of the internal gas market by increasing its liquidity due to the additional gas imports and some short-term capacity. Furthermore, the pipeline is complementary to other infrastructure projects. It will thus contribute to a

more comprehensive gas network and wider and more developed gas market in Southern Europe. As to the functioning of the internal market, there are no concrete indications that the capacity of TAP would be below demand. The Exemption Decision foresees certain stipulations ensuring that in case the demand exceeds the Initial Capacity, the Expansion Capacity would be built.

- (215) TAP will not compromise the functioning of the regulated system because the exemption has precisely the effect of shielding the regulatory regimes of the Member States concerned from the costs of the TAP project.
- (216) Finally, for the reasons specified in paragraphs (108) to (118) and (133) to (139) above and in the following section, the exemption from TPA rules for the Initial Capacity and the exemption from tariff regulation for both the Initial and Expansion Capacities will not be detrimental to competition.

4.8.1 Forward Expansion capacity: market testing and nature of the test to assess its economic viability

- (217) In order to assess the demand for the Expansion Capacity, TAP will be required to organise market tests on a regular basis. The first market test will be organised no later than on the date when commercial operation of TAP starts and, subsequently, at least every two years. The market tests will be conducted according to guidelines approved by the Authorities.¹¹⁵
- (218) TAP will be under an obligation to build the additional capacity provided only that doing so is economically viable. Building the Expansion Capacity will be deemed economically viable if the incremental demand of capacity resulting from each market test is enough to cover efficient incremental costs, quantified according to the TAP Tariff Code (as approved by the Authorities).¹¹⁶
- (219) Therefore, the inability of TAP to foreclose third parties from the infrastructure is assured by the obligation imposed on TAP to construct the Expansion Capacity. Particular care must therefore be taken that the obligation to construct the Expansion Capacity can be effectively and timely enforced. In this context, the Commission notes that:
 - (a) The economic viability test essentially requires matching incremental revenues for TAP with the incremental cost of constructing the Expansion Capacity. Incremental revenues will be known from the results of the binding market test and will be quantified according to the TAP Tariff code. The incremental costs of the Expansion Capacity entail, in essence a feasibility study with quantified cost estimates. Such studies are routinely performed and/or commissioned from third parties;
 - (b) The Authorities, via the TAP Network Code and the Guidelines for the performance of the markets test that is subject to their approval, retain the ability to control the modalities as to how TAP must assess the economic feasibility of constructing the Expansion Capacity;
 - (c) It is upon TAP to demonstrate a lack of economic viability, should this be the case and, consequently, it is upon TAP to carry the burden of proof if it deems that the Expansion Capacity should not be built. In the Commission's view, the test of economic viability should be further strengthened by requiring TAP to

¹¹⁵ Joint Opinion p. 56.

¹¹⁶ Joint Opinion p. 56.

demonstrate the lack of economic viability within a limited period of time and in any event within at the most a one month period;

- (d) In the Commission's view, this provision can be equally strengthened by requiring TAP, upon request by the Authorities, to present an opinion by an independent third party. If the Authorities make such a request to TAP, the one month period is extended by two months;
 - (e) The Authorities will decide upon the economic viability of constructing the Expansion Capacity within one month after TAP has made its submission or the receipt of the opinion of the independent third party, as the case may be
 - (f) The obligation to construct the Expansion Capacity will be reinforced further by requiring TAP to order the constructing the Expansion Capacity at the latest 2 months after the Authorities deem this is economically feasible;
 - (g) Technical feasibility is not part of the test designed to determine whether TAP has to build the Expansion Capacity;
 - (h) If TAP despite the obligations imposed does not build the Expansion Capacity or is not complainant with any other obligation attached to the Exemption Decision, the Authorities are entitled to impose penalties proportional to the non-compliance and, as the case may be, even revoke any license granted to TAP, including their exemption pursuant to Article 36 of the Gas Directive. In particular, Italian Exemption Decision provides for a possibility to revoke the exemption in case the requirements provided in the Joint Opinion are not met. The Commission encourages the Greek Authority to add a similar provision to the Exemption Decision;
 - (i) It is also useful to recall here that, as the tariff structure of TAP means that the TAP shareholders will capture part of the beneficial effects of building the Expansion Capacity, any incentives to foreclose third party access to TAP by not constructing Expansion Capacity will be mitigated;
 - (j) As was already explained above in paragraph(193), TAP has proposed that the test to build Expansion Capacity is redesigned to eliminate any disincentive for building the Expansion Capacity as a result of the lower IRR and higher risks for the shareholders on the Expansion Capacity that may result from the fact that Expansion Capacity revenues and amortisation will be governed by a regulated regime beyond the expiry date of the exemption.
 - (k) It should be added that the tariff structure also comprises certain elements incentivising TAP to build the Expansion Capacity. These reasons were discussed in more detail in paragraph (113) above. Hence, the TAP shareholders will capture part of the beneficial effects of building the Expansion Capacity, and any incentives to foreclose third party access to TAP by not constructing Expansion Capacity will be mitigated.
- (220) However, the Commission recognizes ultimately the role of the regulatory authorities in deciding on the final tariff structure, which, based on the additional conditions imposed by the Authorities, the parties will have to put forward for the NRA's approval.
- (221) In this context, the Commission encourages the Authorities, through their rights to approve the TAP tariff code, to adapt the test to also take into account the following:
- (a) The term 'demand' needs to be replaced with 'revenues'; and

- (b) The test needs to ensure that the lower tariff revenues resulting from the transition to a regulated system post the exemptions expiry dates, do not reduce the incentives to invest in Expansion Capacity; the same applies if the Authorities decide to differentiate between different IRRs for the Initial and Expansion capacities in line with the Commission's proposal.

4.8.2 Additional Considerations

- (222) The Joint Opinion foresees that, during the Booking phase of the first market test only, the forward Expansion Capacity will be allocated to third parties (e.g. it excludes TAP shareholders) and that it will be dedicated to gas sources different than SDII gas.
- (223) In this context first, it must be emphasised that the obligation upon TAP to build the expansion capacity applies regardless as the origin of the gas that the prospective shipper using the Expansion Capacity seeks to transport. Moreover, the Authorities imposed on TAP an obligation to construct additional entry and exit points in Greece and Albania¹¹⁷ (an obligation further reinforced by the present Decision (see paragraph (78) above), an obligation that also applies regardless as the origin of the gas that the prospective shipper seeks to transport.
- (224) The Commission therefore considers that the exemption provides sufficient guarantees that gas from non-SD II sources is provided access to TAP. These guarantees apply to gas that may be transported through TAP by the Expansion Capacity through existing entry and exit points as well as gas that may be transported through TAP via pipelines connecting to TAP via new entry and exit points.
- (225) The Exemption Decisions also imposes on TAP that, for the first market test only, the Expansion Capacity will only be available for (i) third parties other than TAP shareholders; and (ii) who are also not buyers of SD II gas. All subsequent market tests for Expansion Capacity, however, will be open for all parties and origins of gas.¹¹⁸
- (226) According to the Authorities, the rationale behind this provision is that Initial Capacity has been allocated exclusively to SD II volumes and the Expansion Capacity should be used to serve the binding requests of third parties seeking to transport gas from non-SD II sources, with the view not to hinder competition. According to AEEG, this is also fully consistent with the results of the Expression of Interest Phase of the Market Test.¹¹⁹
- (227) The Commission considers however that these limitations (both as regards the gas sources and the parties to which Expansion Capacity can be made available) are not justified. First, TAP and SD II shareholders have limited incentives to foreclose. Secondly, such limitations could actually be detrimental to competition. Indeed, currently there are limited possibilities of supplying gas from non-SD II sources. Finally, imposing such a condition would be disproportional as the Exemption Decisions (as modified by the present Decision) will contain effective remedies in case competition concerns arise.

¹¹⁷ In view of the fact that TAP will connect immediately upon landing in Italy to the Italian gas transmission network, there is no need to foresee a similar condition to construct entry/exit points in Italy.

¹¹⁸ Joint Opinion paragraph 4.1.6.

¹¹⁹ Reply EEG 5 April 2013 Q11, Joint Opinion, paragraphs of § 2.1.2. of page 24. See also replay of RAE 5 April 2013.

4.8.3 Conclusion

(228) In the view of the above, the Commission concludes that granting TAP an exemption from the rules on third party access for the Initial Forward Capacity and tariff regulation for the Initial and Expansion capacity is neither detrimental to competition, the effective functioning of the internal gas market or the functioning of the regulated system to which TAP will be connected. This assessment is subject to the detailed conditions imposed by the authorities in the joint Opinion and the Commission.

4.9 **Exemption from Article 9 - Unbundling**

(229) The Authorities granted an exemption from the provisions of Article 9 of Directive 2009/73/EC (unbundling) for a period of 25 years starting from the commercial operation date subject to some detailed conditions, concerning: (i) TAP AG's functional unbundling is 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 applies to be certified under Articles 10 and 11 of the Directive, based on an ad hoc independent transmission operator model, fulfilling certain requirements described in more detail in the Joint Opinion, aiming at safeguarding the degree of independence of the top and executive management of TAP AG from its shareholders.

(230) The Commission agrees that this approach is largely in line with previous exemption decisions (Gazelle, Nabucco).¹²⁰ Moreover, the fact that TAP is registered in Switzerland does not prevent it from being subject to effective unbundling rules. The Gas Directive, and in particular Article 11 thereof, provide explicitly for the eventuality that a network operator is owned by a person from a third country.

(231) However, the Commission notes that the compliance programme is not part of the Exemption Decisions. Although the Authorities require TAP AG to implement functional unbundling prior to allocating capacity as a result of the first booking phase and the compliance programme will be subject to approval by the Authorities, the Commission underlines the necessity to prepare such a compliance programme as soon as possible, and not later than 6 months after the adoption of the Commission's decision. The detailed compliance plan should, apart from the functional unbundling principles as described in the Joint Opinion, also set out the principles of non-discrimination, the tariff methodology and congestion management rules that have to be applied to the marketing of capacity by TAP AG. The compliance officer should be established not later than 1 month from the approval of the compliance programme by the Authorities.

(232) Furthermore, in order to ensure that the unbundling is effective, the Commission deems it appropriate to impose on TAP that it complies with all conditions set out in Chapter IV of the Gas Directive (i.e. Independent Transmission Operator model – hereinafter 'ITO'). This is in line with the previous exemption decisions under the Gas Directive, such as Gazelle. The Commission agrees with the Authorities however that, in view of the other conditions imposed on TAP, it is not necessary to impose compliance with Article 22 of the Gas Directive.

(233) Furthermore, the Commission considers that, where existing infrastructure has not received a full exemption under Article 36 of the Gas Directive, the unbundling rules of the Gas Directive are in principle to be complied with as regards the non-exempted part of the capacity, unless this is not possible without undermining the exemption

¹²⁰ http://ec.europa.eu/energy/infrastructure/exemptions/doc/exemption_decisions.pdf.

obtained. Whether this is the case is to be subject to a case-by-case analysis, which needs, in particular, to focus on whether it is ensured that the non-exempted capacity is marketed independently from any production or supply interests of the shareholders of the pipeline.

- (234) Therefore, TAP AG will need to be certified in each Member State, which territory it crosses, based on the ITO model (with the exception of Article 22 of the Gas Directive) in accordance with Articles 10 or 11 of the Gas Directive. The 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 Exemptions Decisions and the present Decision.
- (235) The Authorities have foreseen in the Joint Opinion that such certification procedures will take place no later than six months prior to the Commercial Operation Date. However, in view of the envisaged delay in the start of the operation of the pipeline, the Commission considers that this provision can and should be reinforced and that TAP should be required to be fully certified before the start of the construction of the pipeline (and not later than 1 January 2018).
- (236) Based on the above, the Commission concludes that provided it is imposed on TAP AG to comply with all conditions as set out in the Joint Opinion and the Commission's decision, and that TAP AG will be subject to a certification procedure allowing to verify whether all unbundling provisions are complied with in full, the exemption from the unbundling provisions could be granted.

4.10 Other matters

4.10.1 Changes in shareholder structure

- (237) The Commission notes that TAP and its shareholders have concluded in January 2013 an agreement with three members of the Shah Deniz consortium, i.e. SOCAR, BP and Total. The agreement gives the latter an option to join TAP by taking a combined stake of up to 50% in TAP AG.¹²¹ In view of this foreseen development, and the fact that neither the Exemption Decisions nor the Joint Opinion addresses the impact of this change on the exemptions granted and the conditions imposed, it is necessary to address it and any other changes in the shareholders' structure.
- (238) By section 4.10 of the Joint Opinion, the Authorities impose on TAP that, if shareholders of TAP AG change or if a shareholder is taken over by another undertaking, TAP AG must notify this change to each of the relevant national authorities concerned, which must then assess whether the conditions under which the exemption was granted are still met.
- (239) Moreover, the Italian Exemption Decision in Article 2(1) stipulates that,

"[...] In accordance with Article 7 of the Ministerial Decree of 11 April 2006 and the provisions of paragraph 1.4.10 of the Joint Opinion, if, during the construction of the TAP pipeline or the activities covered by the exemption, changes, even of a partial nature, occur in regard to the TAP AG shareholders, their parent companies or the holders of the exemptions, also pursuant to the provisions of Article 1, paragraph a.3, or to the conditions that conferred entitlement to the exemption, with possible repercussions on the Italian gas market, a confirmatory application for exemption must be submitted to the Ministry of Economic Development."

¹²¹ TAP Media Release of 22.01.2013.

- (240) To the contrary, the Greek Exemption Decision does not contain further precisions as to when a notification in shareholder structure is required other than section 4.10 of the Joint Opinion.
- (241) The Commission agrees that precautionary measures are required to ensure that the conditions under which the exemption was granted continue to be met if changes to the shareholder structure of TAP AG or its shareholders occur.
- (242) In order for such precautionary measures to be effective, it is appropriate to ensure that they apply to all circumstances in which changes to the shareholder structure of TAP AG occur that could give rise to changes in the ability of undertakings to, directly or indirectly, exert decisive influence over the business conduct of TAP AG. Consequently, in order to render the condition enshrined in section 4.10 of the Joint Opinion more precise, it should be specified that notification is required if, directly or indirectly, an undertaking acquires joint or sole control over or merges with TAP AG or one of its shareholders. The relevant notions of e.g. "undertaking", "acquisition of control" and "merger" are to be understood as within the meaning of Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) and the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).¹²²
- (243) As Article 2(1) of the Italian Exemption Decision is not incompatible with these provisions, it is not pertinent that it is repealed. In order not to increase unnecessarily TAP's administrative burden, it is recommended however to interpret Article 2(1) of the Italian Exemption Decision in this manner.

4.10.2 Violation of the provisions of the present Decision

- (244) The Joint Opinion foresees that any infringement by TAP AG of the conditions set in the Joint Opinion may result in a penalty imposed on TAP AG by the Authorities. If TAP is not compliant with this obligation, as for any other obligation attached to the exemption, the Authorities are entitled to impose penalties proportional to the non-compliance and, as the case may be, even revoke any license granted to TAP including their exemption pursuant to Article 36 of the Gas Directive. The Italian Exemption Decision provides for a possibility to revoke the exemption in case the requirements provided in the Joint Opinion are not met. The Commission encourages the Greek Authority to add similar provision to the Exemption Decision.

4.10.3 State aids

- (245) It needs finally to be mentioned that any plans to grant State aid through public funds, including EU Structural funds, to the TAP project is subject to a notification to the Commission under the EU state aid rules (Art. 107-108 TFEU). In that respect, it is established Commission decision-making practice that for such state aid to be compatible with the internal market pursuant to Article 107 3) c) TFEU, the beneficiary/operator must grant third party access to the publicly aided infrastructure.

5. CONCLUSION

- (246) Considering what was set-out above and provided that the Italian and Greek Exemption Decisions are amended in the manner as set out in the operative part of the present Decision, the Commission can approve the Italian and Greek Exemption Decisions in accordance Article 36(9) of the Gas Directive.

¹²² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF>

HAS ADOPTED THIS DECISION:

Article 1

1. The European Commission requests the Regulatory Authority for Energy of the Hellenic Republic (RAE) to amend, in accordance with Article 36(9) of Directive 2009/73/EC, its Decision No 111/2013 of 22 February 2013 (the Greek Exemption Decision), as notified to the Commission on 9th March 2013, as set out in the following Articles.
2. The European Commission requests the Italian, Ministero dello Sviluppo Economico (MSE) to amend, in accordance with Article 36(9) of Directive 2009/73/EC, its Decree of 13 March 2013 concerning exemption of TAP AG from the provisions of Articles 9, 32, 33, 34 and 41(6), (8) and (10) of Directive 2009/73/EC on the Trans-Adriatic Pipeline (TAP) (the Italian Exemption Decision), as notified on 15 March 2013 to the Commission, as set out in the following Articles.

Article 2

In the preamble to the Part 4 of the Joint Opinion, the text laid down in the second paragraph shall read:

"Having regard to the assessment of the Exemption Application of TAP AG, as presented in the previous Parts of this document, the Authorities have the Opinion that, under the specific terms and conditions detailed in the following paragraphs, an exemption from TPA should be granted for the Initial Capacity (i.e. a maximum of 50% of the Total Capacity of the Project) to the shareholders of TAP AG and to allocate the Expansion Capacity (i.e. remaining 50% or more of the Total Capacity of the Project) to the market through the Booking phase of the Market Test currently under progress and, if not allocated, in subsequent market tests. The allocation of both the Initial and the Expansion Capacity will be subject to the same capacity caps as envisaged by the Authorities in the Joint Opinion and amended in line with the Commission's decision."

Article 3

Condition 4.1 in the Joint Opinion shall be amended.

[...]

"An exemption from the provisions of Article 32 of the Gas Directive for the Initial Capacity should be granted to TAP AG, for the forward transportation of natural gas from the actual TAP entry point in Greece to its exit point in Italy, for a period of 25 years starting from the beginning of the Commercial Operation Date, subject to the following conditions:

[...]

4.1.2 Initial allocation – As requested by TAP AG, the Initial Capacity will be allocated to the shareholders of TAP AG at the time of granting this Opinion (Shareholders as for §1.2.1, i.e. Statoil ASA (42,5%) Axpo AG (42,5%) E.On Ruhrgas AG (15%), hereinafter "Current Shareholders", in proportion to their shares in TAP AG.

[...]

4.1.3 Legal procedure of transferring the Initial Capacity – Any buyer of Shah Deniz II gas, or any shipper on his behalf, shall be entitled to such part of the Initial Capacity that corresponds to its share in the Shah Deniz II gas quantities to be transported through TAP.

To this end, once the Shah Deniz Consortium announces its final decision regarding the buyers of the quantities of Shah Deniz II gas to be transported through TAP, the current Shareholders of TAP AG will undertake all appropriate legal actions to transfer, in part or as a whole, as the case may be, the capacity rights and obligations allocated to them under point 2 above, to those buyers (or their nominated shippers), upon a request of the latter. Within three months from the date that the present decision becomes effective, according to the provisions of the Directive 2009/73/EC, TAP AG will submit for approval to the Authorities, or the national competent authorities, as the case might be under the relevant national legislation, a proposal for the legal procedure under which this transfer of capacity will be implemented. The legal procedure will ensure that transfers are made based on equal terms and conditions for all buyers of Shah Deniz II gas. The Authorities, or the national competent authorities as the case might be, will decide on the legal procedure described above within one month from the date of the submission of the relevant proposal by TAP AG. The approval of the Authorities, or the national competent authorities as the case might be, is deemed granted, if, upon expiration of the deadline above, no decision has been issued. Upon approval of this procedure, subject to provisions of points 2, 5 and 8 of §4.7, the transfer of capacity will be implemented within a month from the date that a final shipper of Shah Deniz II gas will so require from TAP AG.

[...]

4.1.5 [...] The products offered must be consistent with the result of the Expression of Interest phase, i.e. of different duration, including a duration of less than 25 years, down to at least 5 years to be defined in line with methods similar to those applicable to non-exempted capacity.

[...]

4.1.6. Participation in the first Booking phase – All participants to the Expression of Interest phase are allowed to participate to this first Booking phase subject to the same capacity caps as envisaged by the Authorities in the Joint Opinion (as amended in line with the present Commission Decision).

TSOs from Albania, Greece and Italy can participate to this first Booking phase, irrespective of their participation in the Expression of Interest phase on the same conditions applying to all other participants of the Expression of Interest phase. TSO participating must have been certified in accordance with each participating country's obligations under Directive 2009/73/EC, and may not use the capacity booked for gas supply"

[...]

4.1.8. "[...] TAP AG is obliged to build additional capacity, above the Initial Capacity, in order to accommodate the binding capacity requests resulting from each market test taking into account the provisions of points 2, 5 and 8 of §4.7. TAP AG shall enter into a binding agreement to have the requested capacity constructed no later than 2 month following the closing date of the market test.

If TAP AG considers that, in spite of such binding capacity requests, a pipeline expansion is not economically viable, TAP AG is obliged to demonstrate this situation to the Authorities within one month following the closing date of the market test. If so requested by the Authorities, TAP will provide an Opinion by a third, independent party. In case such an Opinion is requested by the Authorities, the one month deadline is extended by two months. The Authorities will decide upon the economic viability of a pipe line expansion within one month after receipt of TAP AG's submission or receipt of the opinion from an independent third party, as the case may be. TAP AG shall enter into a binding agreement to have the

Expansion Capacity constructed no later than 2 month after the Authorities have deemed its construction economically viable.

The expansion is economically viable if the incremental revenues from capacity resulting from each market test is equal or larger than the efficient incremental costs quantified according to the TAP methodology as laid down in the TAP Tariff Code. To the extent that (in accordance with Article 4 of the present Decision) the TAP Tariff Code will remunerate TAP AG differently for Initial Capacity and Expansion Capacity, proper account will be taken in the TAP Tariff code to ensure that the test for deciding whether construction of the Expansion Capacity is economically viable is unaffected.

[...]

4.1.10. Obligation to offer short-term products – For the whole duration of the exemption, TAP AG makes available to the market short term products (with a duration of upto one year) of a volume that, cumulatively, at least amounts to:

- 5% of the Initial Capacity, and
- 10% of the actually built Expansion Capacity;

The capacity shall be offered by methods similar to those applicable to short-term products offered on non-exempted capacity.

Article 4

Conditions 4.2 and 4.3 in the Joint Opinion shall be amended and additional conditions shall be imposed on the addressee of the Exemption Decisions:

The Commission recognizes ultimately the role of Regulatory authorities in deciding on the final tariff structure, however the Commission encourages the Regulatory authorities, when approving the Tariff code for TAP pipeline, to properly take into account where relevant different risk levels attached to TAP's investments in the Initial and Expansion Capacity and to reflect them in the accepted tariff.

The Authorities shall monitor regularly if the TAP Tariff complies with the approved methodology. TAP shall cooperate with the Authorities in performing this task.

Article 5

Condition 4.4 in the Joint Opinion shall be amended and additional conditions should be imposed on the addressee of the exemption decision

An additional condition shall be imposed on the addressee of the exemption decision to ensure that the physical reverse flows it shall provide are at least of 5 bcm/y capacity for emergency operations.

An additional condition shall be imposed on the addressee of the exemption decision to ensure that the reverse flows it shall provide are at least of 5 bcm/y capacity for commercial operations.

Article 6

Condition 4.5 in the Joint Opinion shall be amended and should read as:

"[...]"

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 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 effective 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 this joint Opinion.

Article 7

Condition 4.6 in the Joint Opinion shall be amended.

The test laid down in the last line of this condition shall read:

"[...] According to the provisions of Article 30 of the Gas Regulation, it would be possible to grant the requested exemption to fully exempted infrastructure. As TAP is not fully exempted, the Authorities believe that an exemption from all the provisions of the Gas Regulation is not justified, since this might have a negative impact on the transparency of access"

Article 8

1. Condition 4.7.2 in the Joint Opinion shall be amended.

The amended condition shall read:

[...]

4.7.2

[...]

"Capacity caps for dominant players in Italy – For the prevention of the development of a dominant market positions or the reinforcement of existing dominant positions in the Italian gas market, without prejudice of requirements established by Article 2 of the Italian decree dated March 13th 2013, the following conditions shall also apply:

- (i) Any undertaking with a share of 40% or larger in any relevant product market for the supply of gas in Italy, or on the upstream market of supplying gas for Italy, shall not be allowed to reserve more than 50% of the capacity on the TAP exit point in Italy.*
- (ii) In the event that two or more undertakings together hold a market share of at least 80% and each of these undertakings have a market share of more than 20% in any relevant product market for the supply of gas in Italy, or on the upstream market of supplying gas for Italy, AEEG will have the right to impose a capacity cap on these undertakings on the TAP exit point in Italy.*
- (iii) Where, due to lack of interest by other parties, the capacity caps in (i) and (ii) above prevent the expansion of the pipeline or causes existing capacity to remain idle, a derogation from the capacity caps of (i) and (ii) shall apply on the condition that the undertaking(s) concerned offer to the market the entire volume of gas in excess of the capacity that the undertaking(s) hold in an open, transparent and non-discriminatory procedure. The gas volume release shall be followed by a corresponding capacity release. The gas volume release and the capacity release will be subject to a procedure approved by AEEG.*

- (iv) For the calculation of the market share and the percentage of the capacity cap, undertakings belonging to the same group of companies shall be considered together. The market share shall be calculated as the average of the last two consecutive years.
- (v) Only in case the imposition of the gas and capacity release will give rise to a situation where the undertaking(s) concerned has/ve no incentives to utilise the capacity above the capacity cap imposed, on request of the undertaking concerned or on its own initiative, AEEG can provide a temporary derogation to provide for the gas and capacity release. Such derogation shall be subject to other conditions that maintain the competition enhancing effects of the investment for competition. Such a derogation is given by the Regulatory authority, after consulting the National Competition authority."

3. Condition 4.7.4 and 4.7.5 in the Joint Opinion shall be amended.

4.7.4. " Obligation to build additional entry and exit points in Greece – TAP AG will have the obligation, upon request of a third party, as a result of any market test, to construct additional entry and exit points in the territory of Greece, as long as such construction is technically feasible. TAP AG shall enter into a binding agreement to have the additional entry and exit points in Greece constructed no later than 2 month following the closing date of the market test.

The burden of proof to demonstrate that the construction of such additional entry and exit point is not technically feasible rests with TAP AG. If so requested by the Authorities, TAP AG is to provide an Opinion from an independent third party.

If TAP AG seeks to demonstrate that the construction of additional entry and exit points is not technically feasible, TAP AG will do so within one month after the closing of the market test, a period that can be extended with an additional two months if the Authorities request an opinion from an independent third party. The Authorities will decide upon TAP AG's request within one month after TAP AG's request or the receipt of the opinion from an independent third party, as the case may be. TAP AG will enter into a binding agreement for the construction of the additional entry and exist points no later than 2 months after the Authorities deem their construction technically feasible.

All costs related to the construction and operation of such entry and exit points will be borne by the third party who made the request, according to the national legislation in place at the time of the request. Costs related to such entry and exit points will not include the investments required for additional capacity of TAP, resulting from §4.1, which will be remunerated through TAP Tariffs."

4.7.5 Capacity caps for dominant players in Greece – For the prevention of the development of a dominant market position or the reinforcement of existing dominant positions in the Greek gas market, the following conditions shall apply:

- (i) Any undertaking with a share of 40% or larger in any relevant product market for the supply of gas in Greece, or on the upstream market of supplying gas for Greece, shall not be allowed to reserve more than 50% of the capacity on any of the TAP exit points referred to in points 3 and 4 above;
- (ii) In the event that two or more undertakings together hold a market share of at least 80% and each of these undertakings have a market share of more than 20% in any relevant product market for the supply of gas in Greece, or on the upstream market of supplying gas for Greece, RAE will have the right to

impose a capacity cap on these undertakings on any of the TAP exit points referred to in points 3 and 4 above;

- (iii) TAP AG will inform RAE immediately of the results of the market test of point 3 above, or for the request of the third party of point 4 above, so that RAE can express its preliminary or final opposition, according to the points (i) and (ii) above;
- (iv) Where, due to lack of interest by other parties, the capacity caps in (i) and (ii) above prevent the expansion of the pipeline or causes existing capacity to remain idle, a derogation from the capacity caps of (i) and (ii) shall apply on the condition that the undertaking(s) concerned offer to the market the entire volume of gas in excess of the capacity that the undertaking(s) hold in an open, transparent and non-discriminatory procedure. The gas volume release shall be followed by a corresponding capacity release. The gas volume release and the capacity release will be subject to a procedure to be approved by RAE;
- (v) For the calculation of the market share and the percentage of the capacity cap, undertakings belonging to the same group of companies shall be considered together. The market share will be calculated as the average of the last two consecutive years. In case of the construction of new exit points referred to in points 3 and 4 above, due account shall be given to the prospective effects thereof on the market share of the undertakings concerned;
- (vi) Only in case the imposition of the gas and capacity release will give rise to a situation where the undertaking(s) concerned has/ve no incentives to utilise the capacity above the capacity cap imposed, on request of the undertaking concerned or on its own initiative, RAE can provide a temporary derogation to provide for the gas and capacity release. Such derogation shall be subject to other conditions that maintain the competition enhancing effects of the investment for competition. Such a derogation is given by the Regulatory authority, after consulting the National Competition authority."

Article 9

1. Condition 4.7.10 in the Joint Opinion shall be amended.

"4.7.10 "Changing in TAP shareholding – If, directly or indirectly, an undertaking acquires joint or sole control over or merges with TAP AG or one of its shareholders, TAP AG must notify this change to each of the relevant national authorities concerned which must then assess (if deemed necessary in cooperation with a national competition authority) whether the conditions under which the exemption was granted are still met.

The provision will be applied in accordance with Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) and the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01)"

Article 10

Condition 4.9 of the Joint Opinion and Article 2.10 of the Italian Exemption Decision shall be amended.

The amendment should specify that the Exemption Decision will also provide for the possibility to withdraw the exemption in case of a serious violation of the conditions imposed and that penalties shall be determined in accordance to national law and procedures.

Article 11

In line with Article 36(9) of Directive 2009/73/EC, the Commission's approval shall lose its effect 3 years from its adoption in the event that construction of TAP has not yet started, and 6 years from its adoption in the event that the infrastructure has not become operational, unless the Commission decides that any further delay is due to major obstacles beyond control of the person to whom the exemption has been granted.

In any event, TAP shall be put into operation no later than 1 January 2019.

The Italian and Greek Exemption Decisions should contain an expiry date whilst taking proper account of this provision.

Article 12

This Decision is addressed to:

- the Italian Authority, Ministero dello Sviluppo Economico(MSE), via Molise, 2 00187 Rome.
- the Regulatory Authority for Energy of the Hellenic Republic (RAE), Piraeus Street 132, 118 54 Athens.

Done at Brussels, 16.5.2013

For the Commission
Siim KALLAS
Vice-President

