

Energy Community Secretariat

Opinion 1/2013

on the exemption of the „TAP“ interconnector from certain requirements under Directive 2009/73/EC by the Energy Regulatory Authority of Albania (ERE)

1. Procedure

1. On 6 March 2013 the Secretariat was notified by the Albanian Regulatory Authority, ERE, of the latter's Decision No 27 dated 1 March 2013 concerning an exemption granted to *TAP AG* from the requirements of Articles 9(1), 32, 41(6), (8) and (10) of Directive 2009/73/EC. The notified decision incorporates a Joint Opinion taken by the regulatory authorities of Italy, Albania and Greece on 28 February 2013 (“the Joint Opinion”). The Joint Opinion exempts the *TAP* pipeline from certain requirements under Directive 2009/73/EC.¹
2. According to Article 36(9) of Directive 2009/73/EC, as adapted by Decision 2011/02/MC-EnC of the Ministerial Council of 6 October 2011, “[w]ithin a period of two months from the day following the receipt of a notification, the Secretariat may issue an opinion inviting the regulatory authority to amend or withdraw the decision to grant an exemption. ... The initial two-month period may also be extended with the consent of both the Secretariat and the regulatory authority.” By agreement between ERE and the Secretariat, the two-month period was extended slightly.
3. According to the third subparagraph of Article 36(9) of Directive 2009/73/EC, as adapted by Decision 2011/02/MC-EnC, “[t]he notifying bodies shall take the utmost account of a Secretariat opinion that recommends to amend or withdraw the exemption decision. Where the final decision diverges from the Secretariat's opinion, the regulatory authority concerned shall provide and publish, together with that decision, the reasoning underlying its decision. Diverting decisions shall be included in the agenda of the first meeting of the Ministerial Council following the date of the decision, for information and discussion”.

2. Description of the project

4. The Trans Adriatic Pipeline (*TAP*) project targets transporting gas produced from the Shah Deniz 2 (*SD2*) field in Azerbaijan from Greece via Albania and across the Adriatic Sea to Southern Italy and further markets in Europe. The project is designed to initially carry 10 bcm/yr, with the possibility to expand its capacity to 20 bcm/yr later on by adding new compressor stations on the same pipeline. *TAP* will incorporate the technical arrangements that allow for physical reverse flow.
5. The *TAP* project is being developed by *TAP AG*. Its shareholders are the Swiss company *Axpo* (42.5%), the Norwegian company *Statoil* (42.5%) and the German company *E.ON Ruhrgas* (15%). *Statoil* is also a shareholder (25,5%) in the Shah Deniz Consortium, the company exploiting *SD2*.
6. *TAP* will stretch over approximately 870 kilometers in length. It will enter Greece at the border with Turkey, run over Greek territory, span 204 kilometers in Albania (from Bilisht Qendër at the Albanian-Greek border to the coastal area north of Fier), 105 kilometers offshore through the Adriatic Sea, 5 kilometers in Italy and exit at Melendugno. The onshore part of the pipeline will have a diameter of 48 inches (1,200 millimeters), while the diameter of the offshore segment will be 36 inches (1,059 millimeters).

¹ OJ L No 211 of 14.8.2009, p 94 et seq.

7. The European Union has recognized *TAP* as a Project of Common Interest in its TEN-E Guidelines, as it is seen to contribute to the EU's objectives and policies aimed at diversification and security of energy supply. *TAP* has also applied to become a Project of Common Interest under the new Energy Infrastructure Package currently in the legislative process, as part of the Southern Corridor Group. Moreover, *TAP* applied to become a Project of Energy Community Interest.² In its application(s), *TAP* emphasized its potential for becoming an opener of the so-called Southern Gas Corridor to Europe and establishing a new market outlet for natural gas from the Caspian Sea. It also underlined its importance for Albania and the entire Energy Community gas market.

3. The Joint Opinion

8. The Joint Opinion, as endorsed by individual decisions of the three regulatory authorities involved, exempts *TAP* from the requirement of ownership unbundling in Article 9(1) of Directive 2009/73/EC for a period of 25 years. Furthermore, it grants exemptions from the obligations in Articles 32, 41(6), 41(8) and 41(10) of Directive 2009/73/EC of the initial forward flow capacity (10 bcm/yr) for a period of 25 years. It also exempts the expansion forward flow capacity (another 10 bcm/yr) from Articles 41(6), 41(8) and 41(10) of Directive 2009/73/EC for 25 years.
9. Furthermore, the Joint Opinion makes the exemptions conditional on a multitude of requirements limiting the scope of the exemptions and/or imposing additional requirements on the promoters of *TAP*. They will be discussed in the present Opinion to the extent relevant.

4. The Secretariat's assessment of the conditions for an exemption

10. In the following, the Secretariat, after summarizing the background and making general remarks, will give its Opinion on the application of the criteria relevant for an exemption in the present case.
11. In this context, the Secretariat recalls that exemptions for major new infrastructure according to Article 36 constitute an exception to the general rules on regulated third party access and unbundling in Directive 2009/73/EC. When granting an exemption, the regulatory authority therefore needs to accurately justify its exemption decision and limit its scope and duration to what is strictly necessary.³

a) *The scope of and background for the Secretariat's Opinion*

12. The countries connected by the *TAP* project are Greece and Italy, two EU Member States, and Albania, a Contracting Party of the Energy Community Treaty. Under Article 36(9) of Directive 2009/73/EC, the European Commission may take a decision requiring the Greek and Italian regulatory authorities to amend or withdraw the decision to grant an exemption. In this context, it will assess the impact of *TAP*, as well as of the exemption granted by the Joint Opinion, on competition and security of supply in the two EU Member States involved, and the EU internal market. Under these circumstances, the Secretariat considers it appropriate to focus the present Opinion on the markets and security of supply in Albania and the other Contracting Parties of the Energy Community.

² See details at http://www.energy-community.org/portal/page/portal/ENC_HOME/AREAS_OF_WORK/Regional_Energy_Strategy.

³ Commission staff working document on Article 22 of Directive 2003/55/EC (hereinafter Staff Working Document) 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)642 final of 6.5.2009 at chapter 1.3 and in particular para 17; see also Commission Decision CAB D(2008) 142 of 8 February 2008 (Nabucco / Austrian section), at paragraph 26.

13. Other Contracting Parties of the Energy Community will be affected by the *TAP* pipeline mainly through the envisaged link with the Ionian Adriatic Pipeline project (*IAP*). *IAP* is expected to become a major element of the Energy Community Gas Ring (see below at paragraph 15). The project aims to establish a new supply route for natural gas from the Middle East and Caspian region, northwards along the Adriatic coast. *IAP* relies strongly on *TAP* as potential source of gas but it is planned as a bi-directional pipeline, so the possible supply direction could also be North–South, from an LNG terminal in Croatia or other sources.
14. The *IAP* project was established by a Ministerial Declaration signed in 2007-2008 by the relevant Ministries of Albania, Montenegro, Bosnia and Herzegovina and Croatia. An Interstate Committee, composed of representatives of all four enlisted Contracting Parties, was established in 2010. *IAP* is intended to connect the transmission system in Croatia (in Split) with *TAP* at Fieri in Albania. The planned capacity of the *IAP* pipeline is 5 bcm/yr, of which 1 bcm/yr is envisaged for Albania, 0.5 bcm/yr for Montenegro, 1 bcm/yr for Bosnia and Herzegovina and 2.5 bcm/yr for Croatia. A comprehensive feasibility study with both technical and market study components was launched in May 2012. The study should be ready in early 2014. The *IAP* Interstate Committee meets regularly, provides inputs and guidelines and approves the study's findings. [*confidential - restricted from publication*].⁴
15. The *TAP* project also constitutes a potential major source of supply for the Energy Community Gas Ring. The concept of the Energy Community Gas Ring was first proposed by the South East Europe Regional Gasification Study of 2009.⁵ It encompasses existing and proposed pipelines, interconnectors or parts of national transmission grids, which would increase gas supply diversity by allowing supply to the Ring from multiple directions. It would integrate the Energy Community Contracting Parties' markets into a regional South East Europe gas market, and with the neighbouring EU gas markets. The Gas Ring would further allow for the development of new gas-fired generation plants in these national/regional markets to overcome a widening gap in electricity supply and comply with their environmental obligations, as well as to increase the functioning of the regional electricity market.

b) *Applicable law*

16. The Joint Opinion is based on Article 36 of Directive 2009/73/EC. By Decision 2011/02/MC-EnC of the Ministerial Council of 6 October 2011, the so-called Third Energy Package, including Directive 2009/73/EC, was incorporated in the Energy Community. In Article 3 of the Decision, the Contracting Parties were given a deadline by 1 January 2015 to transpose and apply the provisions of that Directive. By the same Decision, however, Article 11 of and Annex I to the Treaty were amended with immediate effect. Annex I (as amended) lists Directive 2009/73/EC, as adopted by the Ministerial Council, as part of the Energy Community's "acquis communautaire on energy".
17. Albania has not implemented the provisions of the Third Energy Package yet. Nevertheless, the Secretariat is of the opinion that an assessment of the exemption request based on Article 36 of Directive 2009/73/EC – as executed by ERE – is possible and, from the perspective of harmonizing (regulatory) treatment of multi-national projects, desirable.
18. The provision related to exemptions for new gas infrastructure, Article 36 of Directive 2009/73/EC, was preceded by Article 22 of Directive 2003/55/EC⁶. The assessment criteria of two exemption regimes⁷ do not differ in essence; the stronger cooperation requirements for the involved regulatory authorities and

⁴ Joint Opinion, at pages 15 and 42.

⁵ <http://www.energy-community.org/pls/portal/docs/254188.PDF>

⁶ OJ L No 176 of 15.7.2003, p 57 et seq. Implemented into national legislation in Albania by the Law on Gas. Article 22 of that Directive is transposed in Article 40 of the Law on Gas.

⁷ In particular Article 22(1) of Directive 2003/55/EC and Article 36(1) of Directive 2009/73/EC.

additional criteria added by Article 36(6) of Directive 2009/73/EC can only positively contribute to a sound analysis of the exemption request. A regulatory authority is further not hindered to apply assessment elements to an exemption request which go beyond the minimum requirements of national law.

19. As regards the consequences of ERE's decision to assess the project based on Article 36 of Directive 2009/73/EC, the Secretariat notes that Article 36(1) of Directive 2009/73/EC allows for an exemption from the requirements of ownership unbundling (Article 9 of Directive 2009/73/EC), a concept not existent under Directive 2003/55/EC. Current Albanian legislation transposes (only) Directive 2003/55/EC. The Law on Gas does not foresee ownership unbundling but requires legal, functional and accounting unbundling in Articles 20 and 21 of the Law on Gas. Just as Article 22 of Directive 2003/55/EC, Article 40 of the Law on Gas does not provide for the possibility of granting an exemption from the unbundling requirements. Whether in this situation, Albanian law prevents a regulatory authority from granting such an exemption is for the Albanian authorities to decide.
20. From the Energy Community perspective, the Secretariat considers it relevant in this respect that Decision 2011/02/MC-EnC of the Ministerial Council amends the Treaty in Article 11 with immediate effect, thereby anticipating the shift from the Second to the Third Package even before the expiry of the latter's implementation deadlines. Furthermore, the Secretariat acknowledges and supports the intention to accommodate legitimate expectation by the project promoters for a harmonized (regulatory) treatment across borders. An equal treatment of projects in the pan-European internal market established by the Energy Community is also called for by the general principles of homogeneity and non-discrimination (Article 7 of the Energy Community Treaty). In the Secretariat's view, this legitimates an exemption (also) from unbundling requirements already at this stage (i.e. before the entry into force of the Third Package in Albania).
21. However, the condition for an exemption granted by ERE is that the Third Package is fully transposed by Albania before the start of operation of *TAP*, in particular with regard to the unbundling provisions and the conferral of adequate powers on ERE. The Secretariat will monitor this closely and, if needed, enforce through the dispute settlement procedure.
22. Consequently, the Secretariat bases the present Opinion on Article 36 of Directive 2009/73/EC.

c) *Major new gas infrastructure, i.e. interconnectors, LNG and storage facilities (Article 36(1) Directive 2009/73/EC)*

23. Article 36(1) Directive 2009/73/EC defines projects qualifying for an exemption. Accordingly, "interconnectors ..." are eligible for an exemption if they are "major" and "new".

aa) The notion of "interconnector"

24. According to the Joint Opinion, *TAP* is a transmission pipeline which qualifies as an interconnector within the meaning of Article 36 in conjunction with Article 2(17) of Directive 2009/73/EC. It stretches over three countries and connects Komotini in Greece with Melendugno in Italy, where it is supposed to connect to the Italian transmission system.
25. The Secretariat notes that Decision 2011/02/MC-EnC of the Ministerial Council, in its Article 4(1)(a) adapts Directive 2009/73/EC insofar as "the term 'Member States' shall be replaced by 'Contracting Parties'". Hence, Article 2(17), as part of Energy Community law, reads as follows: "'interconnector' means a transmission line which crosses or spans a border between Contracting Parties for the sole purpose of connecting the national transmission systems of those Contracting Parties". This definition excludes transmission lines crossing or spanning borders between a Contracting Party and a Member State, as is the case with *TAP*.

26. However, the Secretariat considers it appropriate from a perspective of EU law to consider the *TAP* pipeline an interconnector. Similar to the *Nabucco* pipeline, it is stretching over EU Member States and a third country.⁸ Based on this assumption, the Secretariat will give its Opinion.

bb) *TAP* as a “major new” interconnector

27. *TAP* constitutes a “major” infrastructure. This follows from both the comparably high investment costs of the entire project and the capacity added in comparison to existing gas transportation infrastructure for Albania, the main geographic focus of the present Opinion.

28. The Secretariat also agrees that the *TAP* pipeline constitutes a major “new” interconnector as required by Article 36(1) of Directive 2009/73/EC. The fact that a relatively small portion of the overall *TAP* capacity can also serve supply of domestic markets along its path⁹ does not prevent the qualification of the entire project as an interconnector.¹⁰

d) *Investment must enhance competition in gas supply and enhance security of supply* (Article 36(1)(a) Directive 2009/73/EC)

aa) Enhancement of competition

29. According to Article 36(1)(a) of Directive 2009/73/EC, the investment must enhance competition in gas supply. This implies that the project must be pro-competitive. The enhancement of competition test is a *sui generis* test. For the analysis of this condition, the likely positive and negative effects of the investment on competition need to be analyzed and balanced. Only if the positive effects of the investment outweigh the negative effects, and benefits are created for consumers, an exemption under Article 36 of Directive 2009/73/EC can be granted.¹¹

30. The Joint Opinion comes to the conclusion that the *TAP* project will enhance competition in the Albanian market. The Secretariat agrees with the Joint Opinion that the construction of *TAP* positively affects competition on the Albanian gas market, and in the markets supplied by the *IAP* pipeline to be connected to *TAP*.

31. As regards the definition of the *relevant geographical market*, the Secretariat considers that there are significant differences between the Contracting Parties potentially affected by *TAP* and its potential continuation through the *IAP* pipeline (Albania, Montenegro, Bosnia and Herzegovina, Croatia). The differences concern the state of development of infrastructure, the maturity of wholesale and retail gas markets, the design of contractual relationships (long-term vs short-term), the degree of dominance of the incumbent supplier, the availability of different sources of gas etc. These particularities and differences make it essentially impossible to choose and switch gas suppliers without major obstacles regionally. The geographical markets should thus be delineated on the basis of national boundaries.

32. As regards the definition of the *relevant product markets*, a distinction is to be made between the sale of gas by *SD2* (or other sources) to resellers (“the upstream wholesale market”) and the sale of gas by these resellers to further resellers and consumers (“the domestic wholesale and retail market”).

33. In Albania, a domestic gas market does currently not exist. Commercial supply of gas is not taking place. Natural gas is only used for technological purposes in oil production and refining. The infrastructure (some

⁸ Commission Decision CAB D(2008) 142 of 8 February 2008 (*Nabucco Austria*), at paragraph 28.

⁹ In concreto the Greek and Albanian markets.

¹⁰ Cf Commission decision C(2011) 3424 of 20 May 2011 (*Gazelle I*), at paragraph 23 and Commission decision C(2009) 4694 of 12 June 2009 (*OPAL*), at paragraph 24.

¹¹ Commission Decision C(2011) 3424 of 20 May 2011 (*Gazelle I*), at paragraph 27.

400 km of pipelines) is outdated, ill-designed for the supply to the (residential or commercial) gas customers and not connected with neighbouring networks.¹² Domestic gas production in 2011 was only 16 mcm, the prospects of reviving it are rather vague. In Montenegro, gas infrastructure does not exist nor does gas supply take place. Bosnia and Herzegovina has only one supply route (via Serbia). There is one wholesale supplier (*BH Gas*) which is supplied through this pipeline exclusively by *Gazprom* through annual, short-term contracts, whereas capacity with Serbia is booked up to 2017. In Croatia, there is developed gas infrastructure and a relatively large number of participants in the gas market with 51 retailers. *Prirodni Plin* is the incumbent gas supplier dominating the wholesale market. This entity purchases both domestically produced gas from *INA* and imports gas from various sources (mainly from Italian, Slovenian, Hungarian and German companies).

34. The Secretariat agrees with the Joint Opinion that the fact that the *TAP* pipeline will pass through Albania and foresees an exit point, as well as reverse flows from Italy, is the most realistic chance to develop a gas market in Albania and beyond. Given its limited size, it is not realistic to expect companies interested in developing the Albanian gas market to build a pipeline specifically targeted at that market. Furthermore, potential supply of gas through the *IAP* pipeline in the North-South direction is currently less certain than the access to *SD2* gas through the realization of the *TAP* pipeline. The project for an LNG terminal in Krk, Croatia, is in a preparatory phase.¹³ In addition, Western and Central Europe (and not Albania) are likely to be this project's main target markets as they are geographically closer and well connected with Croatia.
35. For the same reasons, *TAP* (together with *IAP*) has the potential to develop markets in Montenegro and provide new sources of supply for the markets in Bosnia and Herzegovina and Croatia, which will enable new market entrants to challenge the monopolies or dominant positions of the respective incumbent gas suppliers. The Secretariat also agrees with the Joint Opinion that the aspect of market integration of the relatively small markets in South East Europe¹⁴ constitutes a major advantage of multi-national pipeline projects such as *TAP* (and/or *IAP*), in particular as the *TAP* project will allow for bidirectional flows and thus connect the underdeveloped markets in South East Europe to more advanced markets in Greece, Italy, Croatia and possibly beyond.
36. While the potential of gas supplied through *TAP* for enhancing competition in these latter markets still remains rather unspecified at this point in time – as stated above, the *IAP* promoters expressed principle interest for the 5 bcm/yr needed to exhaust its planned capacity – the potential for the development of a gas supply market in Albania is already concrete. It is expected that there will be an immediate demand in Albania of 0.3 bcm/yr.¹⁵ The Secretariat deems this assumption realistic as the peak consumption of natural gas in Albania (in the 1980s) was at the level of 0.4 bcm/yr. Moreover, Energy Community studies¹⁶ suggest that natural gas consumption will grow up to 414 mcm/yr in 2020, 1.6 bcm/yr in 2025, 2.27 bcm/yr in 2030 and to 2.9 bcm/yr in 2040. Following the market test, one may also assume that the demand will be satisfied once the infrastructure is in place. Moreover, the realization of *TAP* would stimulate investment in domestic pipeline infrastructure, and eventually may also revive interest in storage sites located in Albania, which in turn will be beneficial for the development of gas markets also in the wider region.
37. In this context, the Secretariat notes that *TAP* already committed to assist the Albanian Government with the creation of a national Gas Master Plan under a Gas Market Development Commitment Agreement.

¹² Joint Opinion, at page 36.

¹³ A feasibility study is currently being performed.

¹⁴ Joint Opinion, at page 42.

¹⁵ Joint Opinion, at page 37.

¹⁶ The data and the forecasts used in th Opinion are provided by several studies: a preliminary Draft Final Report on Security of Gas Supply in the Energy Community (under finalisation); Ionian Adriatic Pipeline Market Study Report. These studies are not publicly available at present. In general, the more conservative projections have been quoted.

38. The Secretariat is therefore of the opinion that the *TAP* pipeline raises the probability of developing markets hitherto non-existent, and would consider this a potential enhancement of competition per se. In this respect, the present case fundamentally differs from cases where gas markets already existed and the construction of a new pipeline may have the potential to strengthen existing dominant players on those markets. To be sure, the Secretariat will assess potential anti-competitive effects of the exemption granted to *TAP* and the conditions imposed in that context below under point h).
39. To reap the potential positive effects for the development of competition in those domestic markets where gas supply does not yet exist (Albania, Montenegro) and to enhance competition in existing gas markets characterized by a high degree of concentration (Bosnia and Herzegovina, Croatia), the Secretariat considers it of utmost importance that at least one exit point is foreseen in Albania.¹⁷ This exit point should have sufficient capacity to cover demand of Albania. It should also be ensured that once *IAP* is realized, gas supplied through *TAP* can be marketed in the countries along the route of the *IAP* pipeline.
40. The Joint Opinion, in its point 4.7.6, imposes an obligation on *TAP* to build at least one exit point in Albania, with a minimum capacity of 2 mcm/day (0.73 bcm/yr), bidirectional and expandable to a maximum of 10 mcm/day, and further expandable in accordance with the obligation imposed by point 4.7.7. The Secretariat will express its view on this condition as part of its assessment on *TAP*'s impact on security of supply (point d) bb) below).

bb) Impact on security of supply

41. In the Joint Opinion, the regulators conclude that *TAP* will enhance the security of gas supply for Italy, Greece, Albania and the European Union as a whole, as it contributes to gas supplies from a new source of gas, a new route and from new gas suppliers. In addition, *TAP* is considered to enhance security of supply in South Eastern Europe by opening a new import route for gas from both the Caspian region and potentially Italy.
42. The Secretariat agrees with the Joint Opinion that *TAP* will contribute to the enhancement of security of gas supply both in Albania and in the region.
43. Firstly, if an investment provides a new route to the relevant market and connects new upstream sources of gas to the market it will typically increase the security of supply. *TAP* constitutes a major new gas route to Albania and the region. It also can connect these markets to new sources of supply, Caspian gas.
44. Secondly, security of supply is also enhanced if in the relevant market, the present or forecast demand/supply balance is tight.¹⁸
45. Today's regional¹⁹ gas consumption (2010) is at a level of 5.902 bcm/yr. It is forecasted that by 2020 regional gas demand should rise to 10.364 bcm/yr, whereas a long-term forecast estimates that it will be as high as 19.057 bcm/yr in 2030, thus making gas demand growth more than threefold within the next 17 years.
46. In principle, *TAP* has the potential to constitute a major source of supply to meet this demand. It would also be valuable for the Energy Community Gas Ring concept, the contribution of which to national and regional security of supply has been confirmed by various institutions many times. The Gas Ring significantly enhances technical security of gas supply, facilitates the future development of regional gas trading from multiple sources of gas, multiple import points into the region and also between countries in the region and links all connected national gas markets to regional underground gas storages.

¹⁷ See also Commission Decision C(2009) 4694 of 12 June 2009 (Opal), at paragraph 49.

¹⁸ Commission Decision CAB D(2008) 142 of 8 February 2008 (Nabucco Austria), at paragraph 41.

¹⁹ For the purpose of this Opinion, 'regional' shall mean the seven Energy Community Contracting Parties located in South East Europe.

47. As regards *Albania* in particular, the *TAP* project can add gas to the country's fuel mix which is currently determined by oil products (49.5 % of total consumption), hydropower (30.2%) and biomass and waste (9.5%). As stated above, the demand for this additional source of energy in Albania is given.
48. Given that *TAP* will also enable reverse gas flows from Italy,²⁰ Albania can be supplied from two different sources. In this case, *TAP* will raise Albania's N-1 criterion to at least 100 per cent.
49. Moreover, the notion of security of supply encompasses also the security of electricity supply. In electricity generation, Albania relies almost exclusively on hydropower (with a share of 99.2%). In the past, this heavy reliance on hydropower has proved to endanger security of electricity supply as it makes the Albanian system very susceptible to changes in the hydrology and unfavourable climate conditions. A combined cycle power generation plant of 97 MW convertible to natural gas and expandable up to 300 MW in Vlora was completed in 2009. So far, this TPP has not been able to run due to lack of gas. Its operation, following connection to the *TAP* pipeline, would diversify the electricity generation mix and significantly increase security of electricity supply in Albania. After the rehabilitation, the thermal power plant in Fieri could also be made operational and improve reliability of the electricity sector in Albania.
50. Moreover, the Secretariat shares the expectation that the *TAP* project may also contribute to increasing security of supply at a regional level.
51. Firstly, it could allow the utilisation of the potential storage capacity for natural gas in Albania in the Dumre area (up to 1.1 bcm of working gas volume) and in the depleted gas field in Divjaka (up to 60 million cm of working gas volume).²¹ This is equivalent to the existing underground storages in Serbia and Croatia taken together. Underground gas storages constitute a very important element in gas transmission systems, necessary to cover peak demands and to balance the seasonal variations. Increased gasification in the Western Balkans will require the parallel development of underground gas storage capacities. The two storage sites in Albania would provide not only a suitable solution for the expected future needs of the Albanian gas market but also offer large scale gas storage services necessary for the development of the regional (and transit) markets along the *TAP* and *IAP* routes.
52. Secondly, the security of supply in the Contracting Parties along the route of *IAP* could be enhanced once the two pipelines are connected with each other. Countries so far not connected at all by gas infrastructure can be interconnected, which would significantly increase their security of supply in cases of a supply crisis. In other countries, the resilience to such crises could be significantly improved.
53. In *Montenegro*, natural gas is currently not used. *IAP* is envisaged to become the country's only source of external gas supply (besides potential domestic off-shore gas production). Natural gas is an important energy carrier in the country's endeavours to diversify its energy resources and to substitute other energy forms. With the development of the *TAP* and *IAP* pipelines, it may be expected that natural gas consumption will grow to 1.0 bcm/yr until 2040, out of which one third is believed to be used for power production.
54. The share of natural gas in total primary energy consumption in *Bosnia and Herzegovina* in 2010 was 2.8%, while in electricity and heat production it was only 0.4%. It is forecasted that the country's gas demand will increase from 0.28 bcm/yr in 2011 to 0.9 bcm/yr in 2020, 1.6 bcm/yr in 2030 and 1.9 bcm/yr in 2040. The realisation of the *IAP* project plays an important role in the development of the Bosnian gas market. Gas supplied through *TAP* and *IAP* would increase the country's infrastructure standard (N-1) – at present close to zero with only a single route of supply – significantly.

²⁰ According to additional information provided by *TAP AG*, the technical design of *TAP* allows 100% of the initial forward capacity of 10 bcm to be also transported backhaul, provided, an adequate pressure level can be provided by the exit connection points from national system in Italy (*TAP AG*, meeting with the Secretariat on 8 April 2013 and ERE, information provided to the Secretariat on 8 April 2013).

²¹ ECA, South East Europe: Regional Gasification Study, January 2009.

55. In *Croatia*, the share of natural gas in total primary energy consumption 2010 was 26.1%, and its share in electricity and heat production 31.9%. The total gas demand is forecasted to increase to 4.6 bcm/yr in 2020, 5.2 bcm/yr in 2030 and 6.9 bcm/yr in 2040. Although Croatia is interconnected with Slovenia and Hungary, it strongly requires another route of supply and from sources other than from Central Europe due to its heavy dependence on gas and decreasing domestic production. *Plinacro*, Croatia's TSO, is a leading stakeholder in the *IAP* project, motivated by the latter's immense potential to bring Caspian gas to Croatia's gas market. *IAP* would significantly increase Croatia's infrastructure standard (N-1) by 31 to 48%.
56. As *IAP* is supposed to constitute the main southern branch of the Gas Ring and is designed to be connected with Croatia's and Bosnia and Herzegovina's existing national transmission grids, it could become a source of supply to Serbia's market (in reverse mode), or vice versa, i.e. the South Adriatic markets could benefit from Serbia's and Croatia's connections with Central Europe.
57. To be sure, the *TAP* project is distinct from *IAP*.²² Whereas the former is at a very advanced planning stage, *IAP* still is in an earlier phase. But if linked with the Gas Ring, and even if *IAP* were not to be built, *TAP* could also open opportunities for both *former Yugoslav Republic of Macedonia* and *Kosovo**²³ to have access to new supply sources, either from the Caspian basin or Italy. There is currently no use of natural gas in *Kosovo**, and gas consumption in the former Yugoslav Republic of Macedonia is relatively low, with all gas consumed being imported from Russia via a single pipeline from Bulgaria.
58. The Secretariat concludes that *TAP* may indeed bring substantial benefits both to Albania directly and also to the wider South East Europe region, if and to the extent it will be connected with the (future) transmission systems in Albania and the *IAP* interconnector.
59. It is on this ground that the Secretariat agrees with the Joint Opinion that an exit point should be immediately built at a minimum capacity of 2 mcm/day (0.73 bcm/yr), bidirectional and expandable to a maximum of 10 mcm/day. Even if the case for alternative demand data (in particular for the region neighboring Albania) could be made based on the figures presented above, the Secretariat cannot, with a sufficient degree of probability, support the assumption that the necessary infrastructure needed to satisfy this demand will be built and linked to *TAP* in the foreseeable future. For this reason, and assuming that any pipeline project can always be linked with *TAP* based on mutual agreements, the Secretariat abstains from proposing capacity increases on the Albanian exit point, both for the initial and the expansion capacity.
60. Even under the prevailing assumptions, the Secretariat believes that *TAP* will be capable of stimulating the realization of *IAP* (and thus the Gas Ring), be further expandable in accordance with the obligation imposed by point 4.7.7. of the Joint Opinion and thus allow for a significant flow of gas supplied to otherwise non-developed or non-connected markets.
61. In any event, the Secretariat deems it essential, for *TAP* to be able to make a meaningful contribution to enhancing security of supply in Albania and the region, that an exit point in Albania is constructed and operational as soon as *TAP* itself starts operating. The reasonable Albanian demand has been established through the market test which justifies the creation of the initial exit point. An existing exit point in Albania will be an important stimulus for any further development of infrastructure and markets in the areas covered by this Opinion. In that respect, the Secretariat welcomes the obligation on *TAP* in the Joint Opinion's point 4.7.6. to "*construct and operate*" an exit point [of the capacity mentioned above] "*from its commercial operation date*". The Secretariat understands this commitment as a clear and unequivocal one. It is to be

²² The Secretariat also understands that the technical and economic design of *TAP* is not influenced by a potential future link to *IAP*. While the possibility remains in principle open technically, the economic parameters remain subject to discussions separate from the current design of *TAP*. In particular, any entry/exit point to/from *TAP* to *IAP* would be separate from exit points to Albania. This became clear from additional information provided by *TAP* at a meeting with the Secretariat on 8 April 2013.

²³ Throughout this Opinion, this designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo declaration of independence.

noted, however, that according to the Gas Market Development Commitment Agreement (GMDCA) concluded with the Albanian Government, *TAP* will “*design, procure and construct pressure reduction and fiscal metering facilities at a single exit point*” only if three conditions are fulfilled. The conditions are that (1) in no circumstance the minimum capacity for the Initial Albanian Exit Facility shall fall below 0.3 bcm/yr, (2) there exists, or there will exist by no later than two years after the commercial operation date of *TAP*, an Albanian local gas distribution network and/or direct connection lines; and (3) there exists an appropriate capacity booking subject to *TAP* tariff methodology. Once these conditions are fulfilled, *TAP* will also finance the construction of the exit point.²⁴

62. Given that the preconditions introduced by the GMDCA relate not only to financing but also to the construction of an exit point itself, they pose a certain risk that the construction of an exit point in Albania be delayed until after the date of operation of the pipeline. The Secretariat would expect that in such a situation, the obligation to build the exit point in point 4.7.6. of the Joint Opinion prevails.
 63. Finally, the Secretariat is of the view that the limitation of additional exit points in Albania to cases where they are “technically feasible” in point 4.7.7. should be modified. It is not clear which criteria will be used for assessing technical feasibility and who will be responsible for the assessment. As regards the initial exit point to Albania, the Secretariat considers technical feasibility given. As regards additional exit points, or expansion of the initial exit point capacity, the Secretariat considers it necessary to (1) impose an obligation on *TAP* to construct the exit points timely after the closure of the market test, (2) place the burden of proof on *TAP* to demonstrate a lack of technical feasibility to the regulatory authority of the country in which the exit point is located (for the purpose of this Opinion: Albania) and (3) oblige *TAP* to sustain any claim of non-feasibility by reverting to independent technical expertise.
- e) *The level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted (Article 36(1)(b) Directive 2009/73/EC)*
64. As regards the investment risk, the Joint Opinion essentially follows *TAP*’s request. *TAP* argues that the project is financially viable only if the initial capacity of 10 bcm/yr is exempted to allow for long-term contracting, with the bankability requirement of an IRR index of 10,5% after tax.²⁵ This follows from the project promoters’ calculation that financial viability requires booking of 100% of the initial capacity over a period of 25 years. In this context, *TAP* also argues that the project cannot be realized in a regulated framework due to unpredictability of the future market behavior and the utilization rate of the pipeline. *TAP* further emphasizes the risk of changes in the regulatory framework, especially related to tariff methodologies, which would negatively affect lenders’ requirements.
 65. In general terms, the Secretariat does not support the argument that an investment needs to be protected from future changes in regulation which may affect the value of the investment.²⁶ While acknowledging the desire for utmost stability, it has to be noted that activities of a commercial character are by nature susceptible to legislative development and possible changes of the legal framework. The competence of any legislature to develop and adjust primary and secondary legislation to economic, market and policy considerations would be unduly and unrealistically limited by requiring 25 years of absolute stability of the legal framework.
 66. At the same time, the Secretariat acknowledges the need for long time financial stability and predictability for financing a project involving high investment costs. In this respect, the Secretariat also agrees with the

²⁴ Confirmed in discussions with ERE.

²⁵ Satisfying the DSCR requirements results in an IRR of 10,5% nominal after tax (cf Joint Opinion at Annex 1, chapter 4.4).

²⁶ Staff Working Document, at paragraph 17.

project promoters' argument that this requires a certain minimum of capacity use as well as meeting the IRR requirements of banks and shareholders over a certain pre-defined period.

67. For the case of the Albanian market in particular, the Secretariat agrees with the Joint Opinion's assumption that financial risks cannot be borne by the national gas system users.²⁷ This conclusion is drawn from the relatively low share of expected infrastructure use for the Albanian market²⁸ and the currently quasi-nonexistence of an Albanian gas market and infrastructure.
 68. Having in mind the aforementioned considerations, the Secretariat agrees with the assessment of the Joint Opinion that the risk associated to the project are sufficiently high to justify financial isolation of *TAP* from the regulated systems and confinement of risks to the shareholders of *TAP*.
 69. As regards the requested exemption period of 25 years, the financial model of *TAP* assumes loan maturity already after 20 years.²⁹ *TAP* argues that reducing the exemption from the requested 25 to 20 years would expose the project to an unbearable risk of covering the remaining 5 years until reaching the project's lifetime of 25 years and would not adequately meet the shareholders' requirements by reducing the project's IRR to 9%.³⁰ Thus, the financial model decouples full loan amortization from loan maturity in order to reach the required IRR of 10,5% .
 70. This ignores the impact of higher income from transportation charges when equalizing the amortization period and loan maturity (i.e. 20 years). Such impact may be ignored only if assuming that 100% of the Initial Capacity will be contracted (or the risk of non-contracting will be covered) by *TAP* shareholders, or any capacity transfer to third shippers would exclusively follow the same tariff conditions as for *TAP* shareholders.³¹
 71. According to additional information provided by *TAP*, all shippers of gas will sign gas transportation agreements directly with *TAP* based on the *TAP* tariff approved by the national regulators. In the light of and conditioned to this scenario, the Secretariat does not raise concerns related to the exemption period of 25 years.
- f) *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 system that infrastructure will be built (Article 36(1)(c) Directive 2009/73/EC)*
72. The *TAP* pipeline will be owned and operated by *TAP AG*, which is a legal person distinct from the designated operator of the Albanian transmission system, *Albpetrol*. The criterion of Article 36(1)(c) Directive 2009/73/EC is thus complied with.
 73. This finding is without prejudice to future certification by ERE, in consultation with the Energy Community institutions, of *Albpetrol* under Directive 2009/73/EC. As regards *TAP* as transmission system operator, fulfilling the requirement of Article 36(1)(c) of Directive 2009/73/EC and being exempted from the requirement of ownership unbundling does not mean that *TAP* does not have to comply with any unbundling requirements. The Joint Opinion imposes functional unbundling in points 4.5.1 and 4.5.2 through a

²⁷ Joint Opinion, at chapter 3.3.

²⁸ According to the Joint Opinion (chapter 1.4.52) the market test identified a maximum demand of [confidential - restricted from publication] bcm/y for Albania, adding up to only [confidential - restricted from publication]% of the total forward capacity compared to [confidential - restricted from publication]% of the total forward capacity requested for Greece and [confidential - restricted from publication]% for the Italian market. Reverse capacity requests for Albania in the market test add up to [confidential - restricted from publication] bcm/y, i.e. [confidential - restricted from publication]% of the total reverse capacity request.

²⁹ Joint Opinion, in tables 78-79.

³⁰ Joint Opinion at annex A, chapter 4.7.4.

compliance program and based on an “ad hoc independent transmission operator model”. To ensure compliance with this, *TAP* will have to be certified by ERE in accordance with the procedures envisaged by Directive 2009/73/EC as adapted by Decision 2011/02/MC-EnC. Both the Secretariat and the Energy Community Regulatory Board will issue their Opinions in the course of this procedure.

g) *Charges must be levied on users of that infrastructure (Article 36(1)(d) Directive 2009/73/EC)*

74. According to the Joint Opinion, *TAP* intends to charge the users of the pipeline. The Secretariat has no objections against the conclusion that this criterion is fulfilled.
75. The Secretariat deems it important to ensure that the tariff applied by *TAP* is not so excessive as to deter access.³² In this respect, the Joint Opinion in point 4.2.1. tasks the regulatory authorities to approve the methodology for the so-called *TAP* Tariff, making sure it reflects efficient costs, is transparent and non-discriminatory.
76. As the *TAP* shareholders will also engage in supply of *SD2* gas, the Secretariat considers it important to prevent any potential abuses of dominant positions such as margin squeezes and to enforce competition law effectively. The scrutiny of national (competition) authorities notwithstanding, the Secretariat deems it appropriate under Article 41(13) of Directive 2009/73/EC to increase transparency of the setting of the *TAP* Tariff by explicitly empowering the three national regulatory authorities involved to regularly monitor whether *TAP* complies with the approved methodology. In that respect, it is to be noted that the Joint Opinion is without prejudice to the duty of *TAP* to cooperate with the regulatory authorities, which remain obliged to carry out their monitoring tasks under most paragraphs of Article 41 of Directive 2009/73/EC, and keep their authority to deal with complaints. Furthermore, the Joint Opinion does not exempt *TAP* from complying with Regulation (EC) No 715/2009,³³ which in Article 23 tasks the regulatory authorities (in cooperation with each other) to ensure compliance with that Regulation.

h) *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 (Article 36(1)(e) Directive 2009/73/EC)*

aa) Detrimental effect on competition

77. This criterion is meant to prevent negative effects of the exemption to be granted to the *TAP* pipeline on the relevant markets. In principle, granting an exemption is likely to counteract the positive effect on competition of the project as such to some extent. The decisive question is whether, and under which circumstances, on balance the exempted project will still enhance competition.³⁴
78. According to the exemption granted in the Joint Opinion, and the conditions imposed,³⁵ *TAP* will be exempted from third-party access requirements for the initial forward flow capacity. In other words, the *TAP* shareholders will be allocated transmission capacity for the initial 10 bcm/yr pro rata to the values of the shares held, based on long-term ship-or-pay contracts for 18-25 years. (Other) buyers of *SD2* gas (or shippers on their behalf) are entitled to transfers of capacity rights corresponding to their share in *SD2* gas transported through *TAP*. No exemption from third-party access obligations will be granted for the expansion forward flow capacity of another 10 bcm/yr. *TAP* will be obliged to expand capacity in correspondence to

³² Staff Working Paper, at paragraph 57.

³³ Point 4.6. of the Joint Opinion.

³⁴ Staff Working Document, at paragraph 32.

³⁵ Joint Opinion, part 4.

demand established through regular binding market tests, unless it shows that expansion is not economically viable.³⁶ Expansion capacity (as well as any remaining unused initial capacity) will be made available to the market through auctions. Reverse flows will be subject to third-party access at regulated tariffs and allocated through auctions.

79. As regards the products offered by *TAP*, the Joint Opinion envisages that not less than 5% of the capacity offered will be allocated to short-term transportation contracts (not more than one year).
80. In terms of structure, the Joint Opinion exempts *TAP* from ownership unbundling requirements. At the same time, it imposes functional unbundling through a compliance program and based on what is called an “ad hoc independent transmission operator model”.
81. As regards, finally, capacity destined for the exit point in Albania, the Joint Opinion in point 4.7.8 imposes a capacity cap “for the prevention of a dominant market position in the Albanian market”. Accordingly, no gas supplier may hold more than 80% of the capacity of an exit point in Albania for the initial 10 years from the date when these exit points are put in operation. After that period, ERE will decrease the cap. In cases where due to the lack of interest by other shippers the capacity cap would prevent expansion of the pipeline, the capacity cap may be exceeded, provided that the capacity in excess of the cap is offered to the market in an open, transparent and non-discriminatory procedure. The gas volume release shall be followed by a corresponding capacity release.
82. *Firstly*, the Secretariat remarks that *TAP* will potentially lead to the establishment of new gas markets in Albania and beyond. In any assessment of effects on competition, this will have to be accounted for as a potential efficiency gain. From that perspective, the Secretariat agrees with the Joint Opinion that the investment costs in the domestic network triggered by *TAP* are offset by the advantages of gasification. The exemption protects the potential users of the internal infrastructure to be built in Albania against the risk of low levels of usage of *TAP*, the costs of which might otherwise be socialized and shared (also) among the Albanian network users.³⁷
83. *Secondly*, to the Secretariat’s knowledge there are currently no alternative projects planned which would affect the same markets as *TAP* and the commercial viability of which an exemption granted to *TAP* could jeopardize.³⁸ The *IAP* project is not an alternative project to *TAP*, but is complementary in the sense that it will constitute an extension to *TAP* towards the markets of Montenegro, Bosnia and Herzegovina and Croatia.
84. *Thirdly*, the generally positive effect of *TAP* on gas markets in Albania and beyond still requires an analysis of potential negative effects of the exemption on competition in the relevant markets. As stated above, these are the upstream wholesale market and the domestic wholesale and retail markets. To the Secretariat’s knowledge, the present case is the first one of its kind where a major new gas infrastructure projects affects countries where no market has been previously existing. This requires a forward-looking, speculative approach in the assessment of potential effects of the exemption on the future markets.
85. On the *upstream wholesale market*, the exemption benefits the current shareholders of *TAP* as buyers/shippers of *SD2* gas shipped through *TAP*.
86. The potential creation of a collective dominant position of *AXPO* and *Statoil* (each of which holds 42,5% of the *TAP* shares) should be mitigated to a certain extent by the possibility that the initial capacity of 10 bcm/yr may be expanded by another 10 bcm/yr, for which the *TAP* shareholders will be excluded from bidding in the first booking phase according to condition 4.1.6. of the Joint Opinion.

³⁶ The Joint Opinion (chapter 4.1.8) considers “economic viability” for capacity expansion given “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”.

³⁷ To this effect Commission Opinion C(2009) 4694 of 12 June 2009 (Opal) at paragraph 39.

³⁸ See Commission Decision C(2011) 3424 of 20 May 2011 (Gazelle I) at paragraph 63 and Staff Working Paper, at paragraph 60.

87. Furthermore, the Secretariat notes that *TAP* and its shareholders in January 2013 have concluded an agreement with three members of the Shah Deniz Consortium, *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*.³⁹
88. Finally, the shareholders of *TAP* (as *SD2* buyers) will be entitled to use the initial transmission capacity of 10 bcm/yr for themselves only to the extent the *SD2* consortium does not sell gas to other buyers. In that case the condition imposed by the Joint Opinion kicks in and the shareholders will have to reallocate capacity rights not used by themselves to the (other) buyers of *SD2* gas. The Secretariat leaves it open if this condition amounts to more than the use-it-or lose-it principle to be made applicable under Article 36(6) of Directive 2009/73/EC. It deems that the mandatory and non-discriminatory transfer of capacity is capable of limiting further the impact of the exemption on (potential) competition in the upstream wholesale market.
89. The Secretariat further considers that information flows from the operator of the exempted infrastructure to the supply branch should be effectively limited⁴⁰ in order to counter the risk of collusion and abuses among and by *TAP* shareholders cooperating within and through *TAP AG*. The structural commitments imposed by the Joint Opinion to ensure that no commercially sensitive information is communicated by *TAP* to its shareholders consist in the obligation to implement functional unbundling through a compliance program as well as an “ad hoc independent transmission operator model”. This latter is based on selected duties taken from Chapter IV of Directive 2009/73/EC. To be fully effective, this solution should be complemented by constant regulatory oversight and enforcement. Considering that the Secretariat will be involved in the certification of *TAP* under Articles 10 or 11 of Directive 2009/73/EC, as adapted by Decision 2011/02/MC-EnC of the Ministerial Council, and given the overall positive impact of *TAP* on the enhancement of competition in particular in Albania, the Secretariat refrains from proposing stricter measures.
90. Equally, the Secretariat is of the opinion that the *TAP* should be required to offer a certain share of its capacity for contracts other than long-term. It is to be expected that contracts concluded by and with *SD2* will be essentially long-term (i.e. for 18-25 years). To increase liquidity (also) of the gas markets in Albania, the Secretariat supports the requirement on *TAP* to offer 5% of its capacity by way of non-long-term contracts for the whole duration of the exemption from the third party-access requirement
91. As regards the *domestic wholesale and retail markets* in Albania, Montenegro, Bosnia and Herzegovina and Croatia, the Joint Opinion is correct in stating that the *TAP* shareholders currently have no presence on the markets concerned.⁴¹ The Secretariat also considers it unlikely at this stage that any of them will engage in supply activities in these countries, as in the market test, none of the *TAP* shareholders expressed interest in booking capacity destined for the exit point in Albania. Those markets may, however, be affected by the supply relations in which the shippers in *TAP* will engage with entities active on the downstream market.
92. Albania is the only market (among those on which this Opinion focuses) where the information provided by the Joint Opinion allows for some predictions as to the effect of the exemptions granted to *TAP* on the (future) market structure. The expression of interest by *IAP* is of a more general nature and corresponds to the technical capacity of that pipeline (5 bcm/yr), without allowing conclusions as to whether there is real commercial interest for the supply of gas to any/all of the countries involved. As stated above, the market situations in the countries concerned diverge significantly from one another. The Secretariat considers that any concern with regard to competition on the markets connected by *IAP* may be accommodated in an exemption decision related to that interconnector.
93. For Albania, the (non-binding) market test resulted in an interest in long-term forward capacity of [confidential - restricted from publication] bcm/yr for the exit point in Fier, Albania. According to the findings

³⁹ TAP Media Release of 22.01.2013.

⁴⁰ See Article 9(7) of Directive 2009/73/EC and Staff Working Paper, at paragraph 34 (for dominant undertakings).

⁴¹ Joint Opinion, at page 47.

in the Joint Opinion,⁴² the majority of the parties interested in booking capacity are primarily interested in long-term capacity bookings for [confidential - restricted from publication] years. [confidential - restricted from publication]⁴³

94. Besides, the Albanian Ministry of Energy (*METE*) also participated in the expression of interest, forecasting an initial domestic gas demand at the level of 0.3 bcm/yr. Later on, *METE*, on behalf of the Albanian Government, signed memoranda of understanding for the supply of gas with two of the shareholders of *TAP*, *AXPO* and *E.ON Ruhrgas*. These memoranda envisage that gas sales and purchase agreements are concluded seven months after the selection of *TAP* by *SD2*.
95. The (potential) size of the Albanian market in the first phase has generally been estimated at 0.3 bcm/yr. This corresponds to the capacity requested by *METE* during the market test. Considering the memoranda of understanding signed with two *TAP* shareholders, *METE* is currently also the most likely potential buyer of *SD2* gas for the Albanian market. According to the two MoU signed by *METE*, 2 x 0.25 bcm/yr will be delivered through *TAP* to purchasing entities in Albania, i.e. an overall amount significantly exceeding the estimated 0.3 bcm/yr. The purchasing entities are to be designated by the Albanian State. Even though it is still unclear who will eventually buy and resell those quantities of gas, the involvement of *METE* may suggest that these activities will be performed either through a state-owned company or with the decisive influence of the State.
96. On the other hand, and unlike what seems to be the underlying assumption in the Joint Opinion,⁴⁴ the interest expressed by *Albpetrol* may be not realistic, as a transmission system operator may not engage in the supply of gas according to the unbundling provisions (under both Directives 2003/55/EC and 2009/73/EC). ERE, in reply to a question posed by the Secretariat, clarified that *Albpetrol* (“eventually with the support from the government”) will not become a supplier of gas but will reserve capacity to make it available to other interested parties. This might be a sensible option for TSO in countries where networks already exist and can be connected with *TAP*. For Albania, there is a concern that the cooperation in buying gas and booking capacity between *METE* and *Albpetrol* will increase the state’s influence over this emergent market, taking into account also that the envisaged privatization of *Albpetrol* was recently canceled. The Secretariat believes that the Joint Opinion should be clarified in point 4.1.6. in line with the obligations stemming from Directive 2009/73/EC, to the effect that booking capacity on *TAP* by non-certified TSO and/or for the purpose of supplying gas is explicitly ruled out.
97. The interest expressed by [confidential - restricted from publication] (globally active traders in energy and resources) would be in excess of the presently expected demand. Their participation on the Albanian market may become more realistic once domestic infrastructure is being modernized and/or built, and demand picks up.
98. Under these circumstances, the Secretariat assumes⁴⁵ that there is a certain likelihood that the State will establish a monopoly or at least a dominant position in the domestic wholesale and retail market in Albania. As the memoranda of understanding envisage a contractual duration of 20 years, this position in the gas market would be established for a long term. Moreover, the Secretariat assumes that between 0.2 (nominal capacity of 97 MW) and 0.5 bcm/yr (if capacity is expanded to 300 MW) will be supplied to the Vlora TPP for the generation of base load electricity. Vlora is operated by the State-owned electricity company *KESH*. Reinforcing and diversifying its generation portfolio will strengthen that company’s dominant position on the market for generation of electricity in Albania.

⁴² Joint Opinion, at page 16.

⁴³ Joint Opinion, at pages 15 to 19. Other interested companies mentioned in the Joint Opinion (at page 40) – [confidential - restricted from publication] – seem to be interested mostly in supplying gas from reverse flows.

⁴⁴ Joint Opinion, at pages 38 and 39.

⁴⁵ See Commission Decision CAB D(2008) 142 of 8 February 2008 (Nabucco Austria), at paragraph 35 that in the worst-case scenario.

99. In the Secretariat's understanding, the capacity cap imposed by the Joint Opinion will result in a situation where the shippers on *TAP* as exempted from third-party access for the initial capacity (i.e. the *TAP* shareholders in the first place) may book only 80% of the transmission capacity on the exit point in Albania. However, unlike in the *Nabucco* case,⁴⁶ none of those shareholders enjoys or is expected to enjoy a dominant position on the (future) domestic gas market. A capacity cap would thus only be effective on the downstream market if a potential dominant player bought gas directly from *SD2*, and consequently would benefit from a capacity transfer. Given that *METE* signed already memoranda for supply with a volume of gas exceeding the predicted demand in Albania in the first phase with *AXPO* and *E.ON* as resellers, it is not likely that *METE* (or any other entity to whom *METE* may cede the supply right) as the most likely dominant supplier in Albania becomes a shipper on *TAP*. The effect of the imposed capacity cap on the foreclosure of the future market in Albania is thus likely to remain limited.
100. In the Secretariat's view, the capacity cap should therefore be complemented by a condition on the shippers benefiting from an exemption that they may sell to one undertaking (or entity) in Albania only gas from *SD2* up to a certain volume. This would constitute a more appropriate means to reduce the risk of long-term market foreclosure by a dominant supplier to establish itself on the Albanian downstream market, and to allow new entrants in Albania to have access to *SD2* gas transported through *TAP*. The Secretariat considers 50% of the gas sold to Albania, at least in an initial phase of five years following the start of operations of an exit point in Albania as appropriate. During this initial period, a future market structure is likely to take shape. After that, ERE should be entitled to tailor a gas release program, as a measure promoted also by Directive 2009/73/EC.⁴⁷
101. To rule out a situation where lack of interest from undertakings other than the dominant undertaking would prevent gas from being supplied to Albania, a derogation from the gas volume cap should be introduced. The derogation should be conditioned on the implementation of a gas release program. Under this program the volumes in excess of the cap should be offered by *METE* (or any other entity appointed) to the market in an open, transparent and non-discriminatory procedure and under the supervision of ERE. This program would not exclude *METE* (or any other entity) from keeping the volumes exceeding 50% of the gas sold through the Albanian exit point, if no demand by third parties were established. Evidently, this solution would not exclude scrutiny of the national competition authority with regard to potential abuses.
102. The solution found should also contribute to preventing the strengthening of the State's dominant role on the electricity generation market and contribute to the prevention of dominant positions in gas supply being built and fostered on the markets along the route of the *IAP* pipeline.
103. The approach proposed by the Secretariat is specific for the Albanian (downstream) market, with the particularity that a market is yet to be established and that future market should, in the Secretariat's view, be protected against immediate foreclosure.

bb) Detrimental effect on the functioning of the internal market

104. Even though the internal market created by Title IV of the Energy Community Treaty exceeds the territories of the Contracting Parties, the present Opinion will focus, complementary to what will be covered by the Commission in its Decision under Article 36 of Directive 2009/73/EC, on the markets of the Contracting Parties potentially affected by the *TAP* project.
105. As was stated above, the realization of the *TAP* interconnector and its possible connection with *IAP* will have positive effects on the development of competition and security of supply in Contracting Parties other than Albania. This is to be assumed in particular if the capacity of the exit point(s) in Albania is adaptable to the

⁴⁶ Commission Decision C(2009) 4694 of 12 June 2009 (Opal) at paragraph 82.

⁴⁷ See Recital 33 of that Directive.

expected demand.⁴⁸ The connection with *IAP*, as a major building block for the realization of the Gas Ring, will increase liquidity of the regional gas markets, facilitate the flow of gas in South Eastern Europe and enhance regional integration of gas markets. In this context, it is to be emphasized once more that *TAP* and *IAP* will provide connections between countries which are currently not interconnected at all.

106. This positive effect on the functioning of the (regional) internal market is not likely to be outweighed by the exemptions granted to *TAP*.

cc) Detrimental effect on the efficient functioning of the regulated system to which the infrastructure is connected

107. The *TAP* pipeline will not compromise the functioning of the (future) regulated systems, because the exemption has precisely the effect of shielding the regulatory regimes of the Contracting Parties concerned, some of which are relatively small in size, from the costs of the *TAP* project.⁴⁹

i) *Others* (Article 36(6) Directive 2009/73/EC)

108. The Secretariat is of the opinion that Article 36(6) of Directive 2009/73/EC is satisfied through the obligations related to perform market tests by *TAP*, as well as the applicability of Regulation (EC) 715/2009 to the pipeline within the limits defined by Joint Opinion chapter 4.6 and 4.7.

5. The Secretariat's Opinion

In the Secretariat's Opinion, the Joint Opinion, as adopted by ERE, should be amended as follows:

1. In point 4.1.3., the following sentence is introduced after the fourth sentence: "The legal procedure will ensure that transfers are made based on equal terms and conditions for all buyers of Shah Deniz II gas."
2. In point 4.1.6., the following second sentence is included in the second paragraph: "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".
3. In point 4.2.1, the following new subparagraph is introduced at the end: "The Authorities shall monitor regularly if the *TAP* Tariff complies with the approved methodology. *TAP* shall cooperate with the Authorities in performing this task."
4. In point 4.7.7 ("Obligation to expand existing and/or build additional entry and exit points in Albania"), the following sentences are introduced after the first sentence:
"TAP AG shall enter into a binding agreement to have the additional entry and exit points in Albania constructed no later than two months following the closing dates of the market test.
The burden of proof to demonstrate that the construction of such additional exit point is not technical 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 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

⁴⁸ See also Staff Working Paper, at paragraph 63.

⁴⁹ See Commission Decision CAB D(2008) 142 of 8 February 2008 (Nabucco Austria), at paragraph 56.

for the construction of the additional entry and exit points no later than two months after the Authorities deem their construction technically feasible.”

5. In point 4.7.8 (“Capacity caps for dominant players in Albania”) the following point (v) is introduced: “Shippers on the TAP pipeline shall not sell more than 50% of the total amount of gas supplied through the exit point(s) in Albania to one undertaking buying gas for the markets in Albania, for the first five years after the start of operations of an exit point in Albania. For the calculation of this cap, undertakings under the control of the same entity shall be considered together.

Where there is no sufficient interest by other buyers for gas volumes exceeding this cap, a derogation from the gas volume cap shall apply on condition that the undertaking concerned has offered the volume of gas in excess of the 50% cap to the Albanian markets in an open, transparent and non-discriminatory procedure which is subject to the approval of the regulatory authority.

After the expiry of the five years, ERE may design and impose a gas release program on dominant companies to the extent needed to establish or protect competition.

The Secretariat considers these changes both necessary in order to satisfy Article 36 of Directive 2009/73/EC and the least restrictive conditions to be imposed on the *TAP* project. ERE is invited to amend its decision accordingly.

Vienna, 14 May 2013

For the Secretariat

Janez Kopač
Director