

OPINION 01/2016 OF THE ENERGY COMMUNITY REGULATORY BOARD

on the Decision of the Albanian Regulatory Authority, ERE, no. 130 of 31 October 2015 on the preliminary certification of TAP AG company as Independent Transmission Operator of Natural Gas

THE ENERGY COMMUNITY REGULATORY BOARD

Having regard to the Treaty Establishing the Energy Community and in particular Articles 5 and 11 thereof;

Having regard to Article 3(1) of Regulation (EC) 715/2009 ('Gas Regulation') in combination with Articles 9(6) and 10(1) of Directive 73/2009/EC ('Gas Directive')¹ according to which the Energy Community Regulatory Board (ECRB) is supposed to issue an Opinion on draft decisions of Contracting Parties' national regulatory authorities on certification of national transmission system operators upon consultation by the Energy Community Secretariat ('Secretariat');

Whereas the Secretariat has submitted the Decision of the Albanian Regulatory Authority, ERE, no. 130 of 31 October 2015 on the *preliminary certification of TAP AG Company as Independent Transmission Operator of Natural Gas* to ECRB with the request for issuing an ECRB Opinion pursuant to Article 3(1) Gas Regulation;

Acting in accordance with Article 60 of the Energy Community Treaty and the procedures laid down in Procedural Act no 01.1/2015/ECRB-EnC;

CONSIDERING THAT:

1. Background

- (1) Trans Adriatic Pipeline AG ("TAP AG") is a company seeking to develop, construct and operate the Trans Adriatic Pipeline ("Pipeline"). The pipeline aims at transporting gas by the Shah Deniz consortium produced mainly from the Phase II development of the Shah Deniz fields ("SD II") in the territory of the Republic of Azerbaijan. It is part of a larger set of interdependent projects both upstream and downstream of the Pipeline, collectively often referred to as the Southern Gas Corridor.

¹ Throughout the entire document reference to the Gas Directive and Regulation shall refer to the versions of the Energy Community *acquis communautaire* as applicable in the Energy Community pursuant to Ministerial Council Decision 2011/02.

- (2) By Decision of ERE² TAP was granted an exemption pursuant to Article 36 Gas Directive from certain requirements set out in the Third Energy Package on third party access, tariff regulation and ownership unbundling as laid down in Articles 9, 32, 41(6), (8) and (10) Gas Directive.

2. Procedure

- (3) On 1 July 2015 TAP AG filed a request for certification with ERE³ based on point 4.5.2 of the Final Joint Opinion (FJO)⁴ including relevant documentation⁵.
- (4) On 2 December 2015 ERE notified to the Secretariat its Decision no. 130 of 31 October 2015 on the *preliminary certification of TAP AG Company as Independent Transmission Operator of Natural Gas* (‘Preliminary Certification Decision’) in line with Article 10(2) Gas Directive.
- (5) On 2 December 2015 the Secretariat forwarded the Preliminary Certification Decision to the ECRB President with the request for providing an ECRB Opinion on the Preliminary Certification Decision pursuant to Article 3(1) Gas Regulation.
- (6) ECRB examined the Preliminary Certification Decision in accordance with the procedures laid down in ECRB Procedural Act no 01.1/2015.

3. Assessment

a. Relevant legal provisions

- (7) According to Article 3(1) Gas Regulation in combination with Article 10(1) Gas Directive ECRB is supposed to issue an Opinion on draft decisions of Contracting Parties’ national regulatory authorities on certification of national transmission system operators.
- (8) Paragraph 4.5 FJO granted TAP an exemption from the rules of ownership unbundling according to article 9(1) Gas Directive for a period of 25 years beginning from the start of the infrastructure operation.
- (9) Paragraph 4.5.2 FJO requires TAP to be certified as ITO before the beginning of infrastructure construction and not later than 1 January 2018.
- (10) Point 4.5 FJO defines the criteria for the certification before the pipeline starts operation, namely:
- 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*

² ERE Decision No 27 of 1.3.2013 amended by Decision No 64 of 13.6.2013 following Opinion 01/2013/ECS-EnC and endorsing the so-called ‘Final Joint Opinion’ (FJO) collectively elaborated by ERE together with the Greek and Italian regulatory authorities. The validity of Decision No 64 of 13.6.2013 has been prolonged by ERE Decision No 135 of 24.12.2014.

³ No.12/11 prot.

⁴ Cf fn 2.

⁵ With reference to its legal obligation to preserve commercially sensitive data, ERE did not make related documentation available to ECRB (cf. ERE Decision no 130 of 31 October 2015, page 2, bullet point 4).

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 executive decision-making rights;*
- v. Evidence that TAP AG will have a Compliance Programme in place, which is adequately monitored by a compliance officer employed by TAP AG.*

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

b. Assessment by ERE

- (11) ERE by Decision no. 130 of 31 October 2015 considered the requirements of paragraph 4.5 FJO for approving the certification of TAP as ITO in conformity with Article 10 Gas Directive met⁶.

c. ECRB assessment

- (12) TAP AG was granted an exemption from the ownership unbundling requirements of the Third Energy Package subject to its compliance with modified ITO requirements as set out in Articles 18 et seq Gas Directive, with the exemption of Article 22 leg cit and subject to the requirements of paragraph 4.5 FJO.
- (13) While it is true that certain competitive risks normally associated with the operation of a gas transmission infrastructure cannot come to bear during the construction phase, competitive problems resulting from vertical integration may still well occur already at this stage.
- (14) In particular, it should be noted that TAP already engaged in commercial operation by concluding contracts for transmission capacity – including with its shareholders – and by carrying out market tests for additional capacity. The application of the ITO rules was decreed in the exemption⁷ decision to safeguard these very activities against a potential conflict between TAP AG and its shareholders.
- (15) It follows from the above that a deferred implementation of ITO requirements can only be justified where their immediate application would be incompatible with the specific circumstances under which TAP is developed and where any potential or actual conflict of interest in relation to the commercial and technical operation carried out by TAP is neutralised by specific regulatory measures in force – e.g. TAP tariff code, TAP regulatory compliance programme, market test guidelines.
- (16) It is noted that ERE Decision no. 130 at several instances wrongly makes reference to the relevant legal provisions applicable under the EU *acquis communautaire* instead of the Energy Community *acquis communautaire* as applicable pursuant to Ministerial Council Decision 2011/02.
- (17) It is further noted that ERE Decision no 130 in several provisions ignores the competence of the Secretariat and ECRB to issue an Opinion on the Preliminary Certification Decision and, instead, refers to the related competence of the European Commission that is, however, not valid for the case of the Albanian certification decision. The same is the case for the obligation of ERE to notify its draft certification decision to the Secretariat, not the European Commission.

⁶ Cf the arguments of chapter 4 and 5 of Annex A to ERE Decision no. 130 of 31 October 2015.

⁷ Cf paragraph 4.5 FJO.

HAS ISSUED THE FOLLOWING OPINION

on the Decision of the Albanian Regulatory Authority, ERE, no. 130 of 31 October 2015 on the *preliminary certification of TAP AG Company as Independent Transmission Operator of Natural Gas*⁸:

- A. It is recommended that ERE assesses in greater detail in its final certification decision the grounds for a potential deferred implementation of the ITO requirements and, in particular, whether the regulatory safeguards in place sufficiently shield against risks of discrimination in relation to TAP's ongoing commercial operations.
- B. In paragraph 1 of the Preliminary Certification Decision, bullet points 7, 11, 12, 13, 14, 15 and 17 of its chapter titled "considering that" as well as in decision points 1 and 2, reference to legal provisions applicable under the EU *acquis communautaire* should be replaced by reference to the relevant legal provisions applicable under the Energy Community *acquis communautaire* pursuant to Ministerial Council Decision 2011/02 by, e.g., inserting a clarifying footnote with the first quote of the Gas Directive / Regulation⁹.
- C. In bullet points 11 and 13 of the chapter titled "considering that" of Decision no 130 the referred to review competences of the European Commission should be replaced by the relevant competence of the Secretariat and ECRB as applicable for Albania. Alternatively, bullet point 11 could also be cancelled since with the existing reference to the review competence of the European Commission has no relevance for Albania and, on the other hand, with a corrected reference to the review competences of the Secretariat and ECRB would be redundant with bullet point 12. Likewise, the review competence of the Secretariat and ECRB is to be added in the last sentence of Annex A, chapter 5.
- D. It is recommended to replace in Annex A chapter 5 page 21 the phrase "in due time" by a more concrete define the deadline applicable for deadline extension request by TAP concerning to the conditions under which the certification is granted (cf Annex A, chapter 5).

For the Energy Community Regulatory Board

A handwritten signature in black ink, appearing to read 'B. Prelević', is written over a horizontal line.

Branislav Prelević
ECRB President

26 January 2016

⁸ **Note:** the analysis of the present Opinion is based on project related information to the extent made available to ECRB within the limits of ERE Decision no. 130 of 31 October 2015. Additional project related documentation was not presented to ECRB with reference to commercially sensitive data. It follows from this that ECRB was neither in the position to assess and verify the conformity of the documentation presented by TAP with the formal and content related requirements nor the related considerations of the Preliminary Certification Decision.

⁹ Such as, for example: *Throughout the entire document reference to the Gas Directive and Regulation shall refer to the versions of the Energy Community *acquis communautaire* as applicable in the Energy Community pursuant to Ministerial Council Decision 2011/02.*