

Autorità di regolazione per energia, reti e ambiente (ARERA, Italy)

Enti Rregullator i Energjise (ERE, Albania)

Ρυθμιστική Αρχή Ενέργειας (RAE, Greece)

**Energy Regulators' Joint Opinion on TAP AG's request
for a prolongation of the validity period of the
Exemption Decision**

17 June 2020

Whereas:

On August 29th 2011 TAP AG submitted to the Italian Ministry of Economic Development and on August 31st 2011 to the Regulatory Authority for Energy of Greece (RAE) an “Exemption Application for Trans Adriatic Pipeline”, as foreseen by Article 36 of the Gas Directive 2009/73/EC. On September 1st 2011 TAP AG submitted to the Energy Regulatory Entity (ERE) of Albania an “Exemption Application for Trans Adriatic Pipeline”, in accordance with Article 22 of the Gas Directive 2003/55/EC.

In June 2013 the Italian Ministry, RAE and ERE took the decision on the exemption, adopting the *Final Joint Opinion* (hereafter: “the FJO”), a document jointly written by ARERA, ERE and RAE (hereafter: “the Authorities”) and amended to comply with the Commission Decision [C(2013)2949 final] dated 16th of May 2013 and to take note of the Opinion 1/2013 of the Energy Community Secretariat dated 14th of May 2013.

In the aforementioned document, an exemption from the provisions of Articles 9 (Unbundling), 32 (TPA) for the Initial Capacity of 10bcm/y, and 41.6, 41.8, 41.10 (Regulated Tariffs) of the Gas Directive has been granted to TAP AG for a period of 25 years starting from the beginning of the Commercial Operation Date, under several conditions listed in Part 4 of the document.

Pursuant to Section 4.10.2 of the FJO, the exemption decision shall lose its effect 3 years from its adoption (6 June 2016) in the event that construction of TAP has not yet started, and 6 years from its adoption (6 June 2019) in the event that the infrastructure has not become operational.

On 17 December 2014, the Italian Ministry and the Authorities received a request by TAP AG for the prolongation of the validity period of the Exemption Decision (until 31 December 2020), in line with the planned commencement date of Shah Deniz Phase II gas exports to Europe, expected in 2020.

In 2014, the Italian Ministry, RAE and ERE issued an amendment to the FJO on the prolongation of the Exemption, in relation to which they have obtained the approval from the European Commission and the positive opinion of the Energy Community Secretariat (EnCS). The Exemption was prolonged and the condition related to the infrastructure becoming operational was extended until 31 December 2020, “...unless the [EC] decide[d] that any further delay [was] due to major obstacles beyond control of the person to whom the exemption has been granted or transferred in accordance with applicable rules”.

Regarding the conditions required to maintain the effectiveness of TAP’s Exemption, the condition related to start of construction date (16 May 2016) was fulfilled.

Whereas:

On the 15th of June 2020, TAP AG formally applied for a second prolongation of the validity period of the Exemption Decision granted by the Authorities and the Italian Ministry for the Economic Development, more specifically requested a prolongation of the date by when the infrastructure becomes operational (i.e. commercial operations date) condition should be fulfilled, until the 31st of December 2021.

Although TAP expects to be operational prior to the end of 2020, a number of major obstacles beyond TAP's control have significantly increased the risk for a delay to the start of operations into 2021, and thereby the risk of TAP Exemption that provides TAP's regulatory framework to elapse.

In its application, TAP AG argues that the delayed entry into operation of the pipeline is not caused by events within its control. The arguments provided by TAP AG to justify the request for a prolongation of the validity period of the Exemption Decision are the following:

1. Obstacles related to permitting in Italy

Receiving the necessary permitting licensing in Italy imposed the fulfillment of 65 conditions related to all phases of the project. The necessary procedures called for an unforeseeable long duration undertaken by a large number of regional and local authorities for their assessment/approval. In particular, the condition that prevents construction on the Italian territory between June 1st and September 30th enhanced even further the impact of the delay of the construction timeline, especially for the micro tunnel drilling and works at the Italian exit point. The microtunnel construction was delayed for approximately 1 year from the original plan.

The unpredictable duration and necessity of additional procedures required by the Xylella legislation for the removal/storage of olive trees and the duration of two Environmental Impact Assessment Exclusion procedures, also heavily impacted the regular progress of the construction works and misaligned the schedule of the project, leading eventually to 1 year slipping of the construction time schedule.

2. The need for extraordinary security measures

The construction of the TAP pipeline has been and still is strongly opposed on a local level in Italy, with such opposition being expressed by demonstrations and often violent conduct. The damage to construction site assets, time restrictions on activities and transport have led to a slowdown in construction activities. In addition, in order to guarantee greater security to TAP's assets and the security of its workers, numerous mitigation measures had to be put in place, the

implementation of which has considerably compromised the time and smooth running of construction activities. These have been reported by TAP AG to the Judicial Authority, which in 2020 ordered a trial against persons who opposed violent and criminal acts against TAP and its workers. Overall, the estimated delay for extraordinary security reasons is approximately 5 months.

3. Multiple legal proceedings

A Seizure Order imposed by the office of the Public Prosecutor of the Court of Lecce in April 2018 has led to 8 months of project delay. The order affected the area named clusters 4B and 5 of the construction route (Seizure Order). In this area, TAP had opened one of the worksites to construct the onshore pipeline section where the works consisting in the transfer of olive trees interfering with the pipeline route were taking place, as authorized by the competent ministerial and regional authorities. The area was released and works were resumed only in December 2018.

4. COVID-19 pandemic

The measures taken by the national governments of TAP's host countries in order to limit the spread the pandemic triggered by the COVID-19 virus has significantly impacted TAP's construction and operational readiness activities. As examples, restriction of, and/or significant delays to, transportation of people (TAP and contractors) and goods/equipment to and from the construction sites, restrictions in the timely availability of TAP and contractor resources at site in all the host countries because of quarantine requirements, issues with vendors' and contractors' key personnel due to extra health and safety measures.

The potential impact of COVID19 on the project completion and operation readiness schedule and the cost impact of mitigation measures being implemented are still under assessment, adding to the uncertainty about the timely completion of the project.

Based on these considerations TAP AG is asking for a prolongation of the "date by when the infrastructure becomes operational" exemption condition, from the 31st of December 2020 to the 31st of December 2021. The remaining content and conditions of the Exemption remain unchanged.

The rationale for having this date extended until the 31st of December 2021 is two-fold:

1. To align time-wise this request with the two relevant permits in Italy: (a) EIA was already extended until the end of 2021 and (b) in relation to the Italian "Single Authorisation", a request has been filled with the Italian Ministry of Economic Developments to have the date of start of commercial operations extended until the end of 2021.

2. To consider the delays described in the above sections, including, in particular, the ongoing COVID-19 pandemic, whose duration and full impacts are not entirely

foreseeable at the moment, also on the basis of a principle of reasonable and prudent conduct of TAP's operations.

Whereas:

The Authorities assessed TAP AG's request.

Based on the above arguments, the Authorities consider that TAP AG's request for a prolongation of the validity period of the exemption decision in relation to the date by when the infrastructure becomes operational is well grounded for the following reasons.

1. The events described by TAP AG could not have been predicted at the time when the FJO was adopted, as well as when the first prolongation was awarded. Despite a conservative estimation of the completion time, i.e. including extra time for unforeseen events and the adoption of a well-designed mechanism of narrowing time-windows (so called "funneling mechanism") to align the completion of construction with the first delivery of gas in highly uncertain situation, the concurrency of several adverse conditions have overturned any forecast and eroded every reasonable margin that has been taken as argued in TAP's application. Some of the described events (such as violent local opposition and COVID 19 pandemic) can easily be seen as going beyond TAP AG's control.
2. The construction of the TAP pipeline is 95.1% complete as of end of April 2020 and TAP's, as well as its shareholders', primary interest is to deliver the first gas in time (within 2020). However, one of the major uncertainties at the moment remains the COVID-19. Despite the general good trend of reduction in Europe, many epidemiologists warn the possibility of a new wave of disease because of the loosening of restrictions or because of a colder weather in Autumn. This circumstance dictates a new conservative estimate in case new restrictions are taken by governments, allowing for an extension of a full year, i.e. until December 31 2021. Given that TAP is at the very final stage of construction, the risk of another delay of the date by when the infrastructure becomes operational beyond 2021 can be reasonably ruled out.
3. The exemption was granted on the grounds of the Gas Directive which requires an assessment of the level of risk attached to the investment. Without TAP AG taking the major risks such investment would have not taken place without the exemption. Based on the exemption period, TAP concluded the long-term ship-or-pay gas transportation agreements (GTAs) that underpin the investment for a period of 25 years. The project is secured through the exemption from TPA of the initial capacity of 10 bcm/a, from regulated tariffs and from ownership unbundling. In particular, the Tariff Code sets the basis for the calculation of TAP Tariff and the Target Revenue, and has been relied upon by TAP lenders, shareholders and shippers, providing the required certainty for commitments up

until the end of TAP's 25-year operating period covered by the Exemption. Moreover, the GTAs for the allocation of the initial 10 bcm/a TPA exempted capacity to the shippers have been concluded with the shippers on the basis of the Exemption that TAP secured for a 25-year period.

In such context, if the duration of the Exemption and of the GTAs are not fully aligned, it would be detrimental for TAP AG's investment. Any discrepancy between the two dates will inherently create regulatory misalignment and TAP tariff methodology inconsistencies in implementation. Furthermore, the potential expiration of the Exemption triggers major challenges regarding the corporate structure and organisation of TAP as of its Commercial Operation Date, i.e. the constitution of TAP as a fully-fledged ad-hoc ITO TSO starting from its Commercial Operation Date.

Given that TAP is strongly committed in the completion of the infrastructure consistently with the commitments already taken with its shippers and its shareholders, refusing the prolongation would add new uncertainties and additional costs without the benefit of an additional incentive to deliver the gas on time, because all the aforementioned causes of delay are beyond TAP AG's control.

4. The request of a 1-year delay of the date by when TAP AG's infrastructure becomes operational looks in line with the accumulated delay of the activities declared by TAP AG and should also be assessed on the principle of reasonable and prudent conduct of TAP's operations in relation to the still ongoing pandemic COVID-19 whose duration and full impacts for the next months are not entirely foreseeable at the moment.

the Authorities jointly

1. Recognize that the delay of the date by when TAP AG's infrastructure becomes operational is due to obstacles beyond the control of the project developer TAP AG, that could not have been foreseen by the company when the exemption and its first prolongation were granted. Therefore, the conditions of Article 36(9) of Directive 2009/73/EC are met.
2. Propose the amendment of Section 4.10 of the Final Joint Opinion as follows: *"In line with the provisions of Article 36(9) of Directive 2009/73/EC, the present Opinion and the Commission's approval shall lose its effect in the event that construction of TAP has not yet started by 16 May 2016 and in the event that the infrastructure has not become operational on 31 December 2021, 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"*.