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Mr. Klaus-Dieter Borchardt

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Comments on the “Energy Regulators’ Joint Opinion on TAP AG’s request for a prolongation of the validity period of the Exemption Decision”

Dear Mr Klaus-Dieter Borchardt,

This comments are written from the Italian Network "Legalità per il clima" (www.giustiziaclimatica.it). We are lawyers and jurists in Climate Law, Business and Human Rights, Tort Law: **prof. Michele Carducci**

Avv. Raffaele Cesari

Avv.

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We are discussing with movements and environmental associations the climate change litigation strategies v. TAP: in fact, the Italian environmental assessment of TAP's "environmental compatibility" has been devoid of the necessary climate studies, required by EU Regulation no. 347/2013 (see annexes 1 and 2).

"Legalità per il clima" finds it as urgent and of utmost importance to provide you and your colleagues at the European Commission with his comments on the “Energy Regulators’ Joint Opinion on TAP AG’s request for a prolongation of the validity period of the Exemption Decision” (hereinafter referred to as “Joint opinion”)¹.

The Joint Opinion was finalised on the 17th June 2020 and was published on the Italian National Regulatory Authority’s (ARERA) website on the 30th of June 2020 (i.e. 13 days after its approval).

With the Joint Opinion, the Energy National Regulatory Authorities of Italy, Albania and Greece have approved TAP AG’s request to postpone by one year the “date by when the infrastructure becomes operational” exemption from Third Party Access condition (i.e. from the 31st of December 2020 to the 31st of December 2021).

¹ <https://www.arera.it/allegati/docs/20/231-20all.pdf>

The Joint Opinion is based on four main reasons provided by TAP AG, which are listed below:

1. Obstacles related to permitting in Italy
2. The need for extraordinary security measures
3. Multiple legal proceedings
4. COVID-19 pandemic.

We note that the four reasons above provided by TAP AG are shallow, unfounded and do not reflect the actual events and the actual causes/real reasons behind TAP AG's request to postponing the "date by when the infrastructure becomes operational" exemption condition.

We also note that TAP delays cause a problem of non-compliance with the EU climate targets of the infrastructure. In fact, EU Regulation no. 347/2013 (TAP is legitimized by this Regulation) indicates the date of 2020.

Therefore, TAP violates EU Regulation no. 347/2013.

TAP violates EU Regulation no. 347/2013 also for the total absence of cost-benefit analysis by the Italian Government².

Due to the climate emergency, declared by the EU Parliament, we ask that the "*in dubio pro clima*" criterion, which is consistent with article 3 (3) of the UNFCCC, be applied to TAP.

Therefore, TAP cannot be extended. TAP is now a fossil "*Stranded Asset*", as shown by science³.

More into details:

1. Obstacles related to permitting in Italy

TAP argues that the procedures to obtain the permitting licenses in Italy, which required the fulfilment of 65 conditions, was a major unpredictable obstacle with lead to an out-of-control delay. Please note that the 65 permitting conditions were known to TAP well in advance and at least before the previous negative decision of the European Commission to postpone in 2015 the Commencement of the Construction Works ("European Commission final decision C(2015) 1852" of 17.03.2015), as TAP's reasonings were already rejected in that Commission Decision.

The real reason behind the delay in the approval process of the project, above all the evaluation of the environmental impacts, is that the technical documentation submitted by TAP, until 2014 and after, during the preliminary check of the 65 conditions, or almost the ones which had to be fulfilled before starting the realization of the pipeline, to the competent authorities did not fulfil quite a relevant number of requirements established by the European and Italian legislation for Environmental Protection (Directive 2011/92/UE and 2014/52/UE)⁴, so that TAP had to integrate the original requests with further documents and field investigations (e.g TAP submitted the geological and geophysical inspections one year after the project's approval, instead during the environmental impact assessment (EIA) as required by the cited directives (2011/92/UE and 2014/52/UE); TAP broadly underestimated the requirements to protect the habitats and landscape protected under "Natura 2000"

² See: <https://comune-info.net/tap-lanalisi-costi-benefici-non-esiste/>

³ See, for example, MERCURE et al. *Macroeconomic Impact of Stranded Fossil Fuel Assets*, 8 *Nat. Clim. Ch.*, 2018, 588-593.

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0092>
<https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A32014L0052>

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network⁵; TAP did not assess, as requested by Directive 2011/92/UE and 2014/52/UE, the joint cumulative effects assessment (CEA) and safety impacts of the construction of both TAP's pipeline and of the gas network to be built by the Italian TSO - SNAM Rete Gas – that allows for TAP's gas to be injected into the Italian gas network). As such, the negative opinions of the local and regional authorities on the project were based on TAP's lack of compliance with key environmental and safety protection provisions.

One of the many examples of the negative damages to the environment caused by TAP's negligence with this regard is the destruction of 2000 square meters of protected coralline barrier in the sea where the works were held, in front of the sea town of San Foca, and the destruction of several hundred square meters of protected *sabellaria spinulosa* and *cymodocea nodosa* in the sea in front of the sea town of San Foca, in addition to the destruction and hampering of several other primary habitats on-shore (e.g. habitat 9340 and 6220*⁶).

From the safety point of view, the gas receiving terminal, until now, has not been evaluated according the Directive 2003/105/CE (also known as “Seveso II”) and the Directive 2012/18/EU (“Seveso III”), as opposed to other pipeline receiving terminals across Europe.

2. The need for extraordinary security measures

The lack of local support from citizens and their organisations was already known to TAP AG during the scoping process as it was even legally certified in 2013 via two Open Space Technology (OST)⁷ held by the Italian Apulia Regional Authority⁸. The main reason for the lack of local support to TAP AG is that the construction and use of a natural gas pipeline was openly in contrast to the objectives of greenhouse gasses emissions' reduction already known, publicly discussed and then certified by the European Union with the Paris agreements (COP 21, 2015), signed in order to limit global warming and to fight climate change.

Local citizens and citizens' organisations urged instead for the need to invest in renewable energy sources, distributed generation, “prosumers” role, energy communities, concepts promoted and enhanced even more by the European Commission and Parliament also via the recent issuing of the Clean Energy Package. Please note that protests held by citizens and local population were triggered by the observed and continuous documented violations and breaching of the Italian and the European laws and regulations carried out by TAP (e.g. in 2017 TAP removed many olive oil trees standing on TAP's planned network during seasons forbidden by the regional legislation, TAP stated in the approved documentation of the project not to work during night, instead they worked day and night without pauses, etc.). Also, please note that at least until the beginning of 2020, TAP in their press releases affirmed that, despite the local opposition, the construction works on the various construction sites was progressing smoothly, without any delay⁹.

3. Multiple legal proceedings

⁵ Natura 2000 is a network of core breeding and resting sites for rare and threatened species, and some rare natural habitat types which are protected in their own right. It stretches across all 27 EU countries, both on land and at sea. The aim of the network is to ensure the long-term survival of Europe's most valuable and threatened species and habitats, listed under both the [Birds Directive](https://ec.europa.eu/environment/nature/natura2000/index_en.htm) and the [Habitats Directive](https://ec.europa.eu/environment/nature/legislation/habitatsdirective/docs/2007_07_im.pdf). (https://ec.europa.eu/environment/nature/natura2000/index_en.htm)

⁶ https://ec.europa.eu/environment/nature/legislation/habitatsdirective/docs/2007_07_im.pdf

⁷ Open Space Technology (OST) is a method for organizing and running a meeting or multi-day conference, where participants have been invited in order to focus on a specific, important task or purpose.

⁸ <https://issuu.com/partecipazione/docs/tap-ost.report07/9>

⁹ <http://www.lecronachelucane.it/2019/08/09/tap-lavori-completati-al-90/>

<https://www.tap-ag.it/notizie-ed-eventi/2020/06/09/tap-completati-i-lavori-della-sezione-offshore>

<https://it.finance.yahoo.com/notizie/tap-avanzamento-lavori-al-90-entro-fine-2020-111722503.html>

<https://it.sputniknews.com/economia/202001098502166-entro-la-fine-dell'anno-il-gasdotto-tap-previsto-per-la-fine-del-2020/>

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TAP AG is charged by the Public Prosecutor of the Court of Lecce (attachement A-1) as breaching the European and Italian criminal legislation during the phase of evaluation of the environmental impacts (e.g. EIA and CEA) of being responsible for the pollution the groundwater (hexavalent chromium, Cr(VI)), during the realisation of the “microtunnel”; it has also been charged for having handled the olive-oil trees outside the allowed time of the year established by law. A trial will start in autumn 2020. For the specific case of April 2018 cited by TAP AG, TAP is charged with modifying the layout of the construction site during its building, thus breaching the environmental restrictions of the area.

4. COVID-19 pandemic

During all the months of lockdown in Italy due to the Covid-19 pandemic, the works at TAP’s construction site did never stop nor they slowed down, as certified by the Prefect of Lecce, answering to a direct inquiry made by the Mayor of Melendugno, and confirmed by the local Public Health Authorities, as you can find from the attachments to this letter (A-2). As a further proof that the TAP AG’s work did not stop during the lockdown, journalists investigations show that TAP AG tried to cover a case of Covid-19 infection: on March 19th 2020 a biologist aboard the “EDT Protea ship”, which works for TAP, felt sick and had been brought to the port of Brindisi for a check¹⁰. In this news, it was stated that the biologist was not found as affected by SARS-CoV-2 and that he was sent again onboard. However, two weeks later, on April 2nd 2020, on the same ship two other members crew felt sick and resulted positive to the SARS-CoV-2¹¹ and it came out that also the “patient one” (the biologist) was affected by SARS-CoV-2 and was sent home, from Brindisi to Rome, with a private ambulance.

5. The TAP infrastructure does not comply with European climate objectives. We are facing a dramatic scenario of global eco-system, climate, and fossil emergency. **TAP is not a solution but a further problem in this scenario.** It is important to remember some scientific sources that demonstrate the climatic harmfulness of TAP: The "Win-Lose" effect of environmental law, assessing separately the environmental impact on pollution-control and climate change¹²; The "Production Gap" highlighted by UNEP, which shows that without diminishing the growth rates, the emission reduction commitments taken by States with the Paris Agreement are not sufficient to achieve its objectives¹³; The impossibility to calculate all the economic and financial risks (such as the "Green Swan") connected with the emergencies, underlined both by the BIS¹⁴ and by J.P. Morgan¹⁵ in recent reports; The difficulty in disentangling GDP growth and, on one hand, GHGs emissions’ increase¹⁶; on the other, waste and resources overexploitation¹⁷; The "fossil methane emergency", related to the necessary clean energy transition, due to the fact that methane emissions in the atmosphere from fossil fuels is higher than ever¹⁸; Moreover, scientific evidences of methane’s climate utility are faltering, because its mitigation properties have not still been demonstrated¹⁹. Therefore, methane appears as a false promise²⁰; Impacts of the "from fossil through fossil" energy transition (accepted by SDG13) have been largely underestimated, so

¹⁰ <http://www.brindisioggi.it/si-sente-male-sulla-nave-per-tap-sbarcato-a-brindisi-un-biologo-non-ha-sintomi-di-covid19/>.

¹¹ <https://www.brindisireport.it/attualita/nave-tap-marittimo-positivo-sbarcato-porto-brindisi-ricovero-perrino.html>.

¹² WILLIAMS M. *Tackling Climate Change: what is the Impact on Air Pollution?*, in 3 *J. Carbon Manag.*, 5, 2012, 511-519.

¹³ <https://www.unenvironment.org/resources/report/production-gap-report-2019>.

¹⁴ BOLTON P. et al. *The Green Swan. Central Banking and Financial Stability in the Age of Climate Change*, Basel, 2020.

¹⁵ J.P.MORGAN *Special Report: Risky Business: the Climate and the Macroeconomy*, Economic Research January 14, 2020.

¹⁶ PARRIQUE T. et al. *Il mito della crescita verde*, Roma, 2019.

¹⁷ UNEP. *Decoupling Natural Resource Use and Environmental Impacts from Economic Growth*, Paris, 2011.

¹⁸ HMIEL B. et al. *Preindustrial CH Indicates greater Anthropogenic Fossil CH Emissions*, 578 *Nat.*, 2020, 409-412.

¹⁹ KLEMUN M.M. et al. *Timelines for Mitigating the Methane Impacts of Using Natural Gas for Carbon Dioxide Abatement*, 14 *Envntl. Res. Lett.*, 2019 1-14.

²⁰ LANDRIGAN P.J. et al. *The False Promise of Natural Gas*, 382 *N. Engl. J. Med.*, 2020, 104-107.

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that the solution is now becoming a new problem²¹; Higher "Global Potential Warming", due to the permafrost melting.

The unprecedented situation of the convergence of so many problems requires unprecedented answers²². As it is written in the aforementioned BIS study²³, an "*epistemological break*" is needed to build the resilience of complex adaptive systems that will be impacted in one way or another by climate change.

Also, fossil fuels (natural gas included) should be phased-out and not anymore favoured by the European Commission or any other European Institution representing European citizens. The energy sector is responsible for more than 75% of GHG emissions in Europe, for this reason the decarbonisation of the EU energy sector is a key target of the European Commission's Green Deal (December 2019), which aims at reaching climate neutrality in EU in 2050 by starting acting right now.

We follow with great interest and full support the European Commission's efforts and initiatives aimed at promoting a carbon neutral economy and a carbon-free energy sector in EU. The current EC's work is aimed at reaching decarbonisation and climate neutrality targets. In order for these targets to be reached, partially in 2030 and fully in 2050, it is necessary to start acting right now. The tools identified by the European Commission are: full decarbonisation of the gas sector via hydrogen and decarbonised gases, energy system integration via an horizontal and bidirectional "whole system approach", holistic approach to all the energy infrastructures planning and operations, TEN-E review, increase in the electrification of demand, clean energy storage, energy communities, distributed generation, increase the demand response in all sectors, digitalisation, waste-to-energy and circular economy, improving consumers' right, energy efficiency first principle etc. Natural gas is not one of the abovementioned tools, due to both its GHG emissions and its methane emissions, the latter is needed to be better assessed and measures as the current data on methane emissions from gas production sites are based on the gas producers' methodologies, which and are likely to be underestimated (furthermore, more than 80% of the gas consumed in EU is imported by Third Countries, on which EU bodies have no monitoring powers).

In this context, an approval decision from the European Commission on such unfounded and unjustified request from TAP is very likely to be considered as a further sign of European support to fossil fuels, even worse to a fossil fuel company breaching environmental and safety legislations at European and national level.

We are in a situation of climate "threat" (Dec. no. 1/CP21-2015 *UNFCCC*²⁴).

How can law be interpreted and applied with a "threat" not only "urgent" but also "irreversible"? This premise explains the centrality of the criterion "*in dubio pro clima*". This criterion appears in the art. 2 (3) of the "*Model Statute for Proceedings Challenging Government Failure to Act on Climate Change*" (2020) of the International Bar Association²⁵. Furthermore, this criterion does not regulate scientific uncertainty but instead seeks to "save" the climate to "save" the future of all human beings. Regarding the issue of the causes and impacts of climate change, there is no longer a real "scientific uncertainty".

²¹ ELDER C.D. et al. *Airborne Mapping Reveals Emergent Power Law of Arctic Methane Emissions*, 47 *Geophysical Research Letters*, 3, 2020.

²² See: Methane Emergency: <https://www.scientistswarning.org/wiki/methane-emergency/>, and *World Scientists' Warning of a Climate Emergency*, 70 *BioScience*, Issue 1, January 2020, 8-12, and *World Scientists' Warning to Humanity: A Second Notice*, 67 *BioScience*, Issue 12, December 2017, 1026-1028.

²³ See BOLTON P. et al. *The Green Swan*, cit.

²⁴ «Recognizing that climate change represents an urgent and potentially irreversible threat to human societies and the Planet»

²⁵ <https://www.ibanet.org/Climate-Change-Model-Statute.aspx>

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This is demonstrated by: the amount of studies confirming the anthropogenic hypotheses ; agreement on the work done by the IPCC ; the validation of scientific hypotheses ; the empirical emergence of the hypothesized events; the consolidation of statistical probabilities. In this scenario, it is no longer possible to speak about a mere "precaution". With this scientific knowledge and forecast, we must decide and act for the safety of the life system and therefore also of human beings. In any case, art. 3 (3) *UNFCCC* complies perfectly with the criterion "*in dubio pro clima*", even in the presence of scientific uncertainty. So it is always applicable.

Due to the ecosystem, climate and fossil emergency²⁶, it is necessary to apply the "*in dubio pro clima*" criterion towards TAP and to reject its proposals.

In the name of this criterion, TAP's reasons are not legitimate.

For all the reasons above, TAP AG's arguments are unfounded. TAP AG's delay is not due to major obstacles and it is not beyond TAP AG's control. As such, the arguments provided by TAP AG do not justify the request to postpone the "date by when the infrastructure becomes operational" exemption condition.

Sincerely,

Prof. Avv. Michele Carducci

Avv. Raffaele Cesari

Avv. Luca Saltalamacchia





Annex 1: *Statement by the Italian Government on the absence of climatic assessment of the TAP infrastructure.*

Annex 2: *Notice to the Italian Government on TAP's climate non-compliance*

²⁶

See: *World Scientists' Warning to Humanity: A Second Notice*, 67 *BioScience*, 12, 2017, 1026-1028; *World Scientists' Warning of a Climate Emergency*, 70 *BioScience*, 1, 2020, 8-12; Methane Emergency: <https://www.scientistswarning.org/wiki/methane-emergency/>.