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COMMISSION OPINION

of 23.1.2020

under Regulation (EU) No 2017/1938, concerning measures to safeguard the security of gas supply and repealing Regulation No 994/2010, on the Preventive Action Plan and Emergency Plan submitted by the Competent Authority of the Republic of Poland to the European Commission.

(Only the Polish text is authentic)

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1. PROCEDURE

Articles 8(2)(a) and 8(2)(b) of Regulation (EU) 2017/1938 ("Regulation") require the Competent Authority of each Member State to establish a Preventive Action Plan ("PAP") and an Emergency Plan ("EP", together: "Plans"). In accordance with Article 9(11) of the Regulation, the Plans have to be updated every four years, unless circumstances require updates that are more frequent. The consultation provided for between Competent Authorities under Article 8(6) shall be carried out before the adoption of the Plans.

The Plans (as well as their updates) need to be based on the Risk Assessment that each Competent Authority has to adopt and notify to the Commission before the adoption of the Plans pursuant to Article 7 of the Regulation. The Risk Assessment should make a full assessment of the risks affecting the security of gas supply in the Member State on the basis of the common elements which include, inter alia, running various scenarios of exceptionally high gas demand and supply disruption.

The Competent Authority of the Republic of Poland, the Energy Minister, has notified its Risk Assessment pursuant to Article 7 of the Regulation to the Commission on 26 June 2019.

The Energy Minister notified to the Commission on 23 September 2019 its Preventive Action Plan and Emergency Plan.

After having assessed the Plans, in view of the criteria mentioned in Article 8(8) and the templates provided for in Annex VI and VII of the Regulation, and having reported its main findings to the Gas Coordination Group on 19 March 2019, 27 June 2019 and 26 September 2019, the Commission has the following remarks on the Plans.

2. COMMISSION'S ASSESSMENT OF THE PLANS

The Plans are in many aspects detailed and comprehensive in the description of the Polish gas system and the infrastructure standard.

Nevertheless, the Commission considers that some elements of the Plans, partially included in the 2017 and 2015 Commission opinions¹, do not comply with the requirements of the Regulation.

¹ C(2017) 4588 final and C(2015) 1525 final

2.1 Preventive Action Plan (PAP)

Compliance with the supply standard

Article 6(1) of the Regulation requires that gas supply to protected customers be ensured for certain minimum periods in case of an exceptionally high gas demand or supply interruptions - the so-called "supply standard". The measures, volumes, capacities and the timing needed to fulfil the supply standard shall be contained in the PAP submitted by Member States in accordance with Article 9(1)(c) of the Regulation. Any additional obligation going beyond the security of supply standard must be based on the risk assessment, be reflected in the PAP and comply with a set of conditions defined in Articles 6(2) and 6(4) of the Regulation.

According to the PAP, Poland obliges undertakings which import natural gas to the Polish market or trade in natural gas with a foreign country to stockpile gas in the amount corresponding to at least 30 days average daily imports of gas. The supply standard is covered by the volume of these "mandatory stocks", which are an emergency measure and can only be released upon a decision of the Minister of Energy, according to the Emergency Plan submitted by the Polish Competent Authority.

The Commission considers that the supply standard as laid down in Article 6(1) of the Regulation establishes an obligation that natural gas undertakings have to comply with as part of the national array of preventive measures, i.e. measures that are applied also in situations other than crises. In fact, the supply standard was designed to ensure a sufficient level of preparation so that a crisis level as defined in Article 11 of the Regulation would not have to be declared. Therefore, the supply standard cannot be complied with by resorting to a non-market-measure that is aimed at addressing an import or trade related risk for security of supply reasons if the emergency crisis level is declared.

Consequently, the Commission considers that the PAP needs to be amended to indicate the measures to comply with the supply standard other than said emergency measures.

The Commission would like to remind the Competent Authority of Poland that if the storage measure in question were to be used to comply with the supply standard as a preventive measure, and consequently used in circumstances other than an emergency declared under Article 11 of the Regulation, such measure would have to comply with the conditions described in Article 6(2) and 6(4) of the Regulation. Indeed Article 6(2) of the Regulation would have to be complied with as it appears from the PAP that the scope of the storage measure in question goes beyond the gas volumes necessary for the supply to the protected customers as defined in Article 6(1) of the Regulation. Therefore, it appears to be an increased supply standard. For that reason, the PAP should explain, among others, why such a measure would be needed on the basis of the risk assessment. Additionally, as part of the conditions imposed by Article 6(4) of the Regulation, the Competent Authority should explain why the storage measure in question would not be discriminatory, given that, in principle, only undertakings which import natural gas to the Polish market or trade in natural gas with a foreign country have to comply with it.

Missing details on the fulfilment of the supply standard

The PAP must indicate the measures, volumes and detailed capacities needed to fulfil the supply standard pursuant to Article 9(1)(c) of the Regulation and Annex VI, point 4, as well as information on the *ex ante* monitoring system for the compliance with the supply standard (point 4(d)(iii)), the description per measure in terms of economic, environmental, and

consumer impact (point 4(d)(v)), and information per measure where they are non-market based (point 4(d)(vi)). This information is missing in the notified PAP.

The Commission takes the view that the Polish PAP should contain the explicit detail of the economic, environmental and consumer impact of the measures in place to comply with the supply standard in particular as regards the storage obligation imposed on undertakings which import natural gas to the Polish market or trade in natural gas with a foreign country, without prejudice to the considerations expressed in the previous comment under this Section 2.1.

Lack of information on stakeholders consultation

Article 8(2) of the Regulation requires Member States to consult *the natural gas undertakings, the relevant organisations representing the interests of household and industrial gas customers, including electricity producers, electricity transmission system operators, and, where it is not the competent authority, the national regulatory authority*. The Commission has to assess such Preventive Action Plan (PAP) according to Article 8(7) of the Regulation.

Annex VI point 9 of the Regulation requires the description of the mechanism used for the consultation, and the results of the consultations with the respective groups of stakeholders in the PAP. However, the notified Polish PAP does not contain such descriptions, does not mention a wider consultation and only incidentally refers to views of some stakeholders on aspects of the Plan, thus precluding any assessment of measures.

The Commission considers that the Polish PAP needs to be amended to include information on the mechanisms and the results of the stakeholders consultation.

2.2 Emergency Plan (EP)

Proportionality and non-discrimination of certain measures contained in the EP

Article 8(1) of Regulation (EU) 2017/1938 requires that the measures to ensure the security of gas supply contained in a preventive action plan and an emergency plan be clearly defined, transparent, proportionate, non-discriminatory and verifiable.

The EP submitted by the Polish Competent Authority describes as part of the emergency measures an obligation on undertakings which import natural gas to the Polish market or trade in natural gas with a foreign country to stockpile gas in the amount corresponding to at least 30 days average daily import of gas (see also Section 2.1 *Compliance with the supply standard* on this point). Additionally, undertakings storing gas out of Poland are required to book and use transmission capacity (firm capacity) allocated for the purposes of delivering the total volume of the mandatory stocks of natural gas maintained outside of Poland. However, other market players not using storages outside of Poland are not required to book relevant national capacity. In addition, local suppliers, in part using domestic production (representing more than 20% of the Polish gas consumption), are not subject to any storage or capacity booking obligations.

With regard to the obligation to book firm capacity, in a non-market-based scenario, as the one that triggers the declaration of an emergency and thus enables the use of the storage measure in question, there would be no gas supplied by the market and hence no booked capacities would be used. Reservation of transmission capacities for such a case appears not

be necessary as no capacities would be utilised by the market participants. Attention should be paid in this respect to Article 11(5) of the Regulation, ensuring the priority to transmission capacity toward a Member State having declared an emergency over other capacity, as determined in that Article, and which is relevant to a potential crisis situation in Poland. However, undertakings using storage out of Poland are required to book firm transmission capacity in addition to the general obligation to ensure that they can deliver the total mandatory stocks of natural gas to the national network and to provide documents showing the technical feasibility of such delivery.

The Commission considers that, on the basis of the submitted EP, it cannot be concluded that the measure in question complies with the requirements of proportionality and non-discrimination. Therefore, the Commission considers that the EP needs to be amended to explain and ensure that the emergency measures contained therein comply with the conditions established in Article 8(1) of the Regulation.

Missing information regarding specific measures for the electricity and district heating sectors

Pursuant to Article 10(1)(e) and Annex VII point 3 of the Regulation the EP should indicate the measures and actions to be taken to mitigate the potential impact of a disruption of gas supply on district heating and the supply of electricity generated from gas or indicate why such measures would not be appropriate.

The EP submitted by Poland does not include information on such measures nor indicates why they would not be appropriate and only states in general statements that such measures should not be damaging for technological facilities and entrepreneurs supplying heat and electricity.

The Commission considers that Poland should amend the EP to either include specific measures for the electricity and district heating sectors or indicate why such measures would not be appropriate.

Missing information on the application of solidarity provisions

In a spirit of solidarity, Article 13 of the Regulation requires Member States to adopt a set of provisions to ensure the supply of gas to a minimum number of customers in all Member States and the conditions thereof (hereafter “solidarity obligations”). This is a last resort measure to be applied in extreme situations. Article 10(1)(m) and Annex VII point 8.3 of the Regulation require Member States to describe the arrangements in place to apply the solidarity obligations laid down in Article 13 of the Regulation.

While the Commission is aware of the current on-going work of Poland with other Member States to develop the solidarity provisions and welcomes such work, the EP is missing this information and thus the Commission considers that the EP should be amended to include the detailed provisions for the application of the solidarity obligations contained in Article 13 of the Regulation.

Missing information on market based and non-market based measures

Article 10(1) of the Regulation provides for a mandatory list of elements that need to be addressed in the EP, including the identification of the contribution of market-based measures for coping with the situation at alert level as well as of non-market-based measures for the emergency level pursuant to Article 10(1)(h) and (i) of the Regulation. The notified EP does

include high level and general qualitative information. However, it does not include quantitative information on those measures.

The Commission considers that the Comptent Authority of Poland should amend the EP to include information in accordance with Article 10(1)(h) and 10(1)(i) of the Regulation.

3. CONCLUSION

Based on the above assessment, and in view of Article 8(8)(d) of the Regulation, the Commission concludes that some elements of the Plans do not comply with certain provisions of this Regulation.

The Commission requests the Energy Minister to amend the Plans taking duly into consideration the concerns expressed by the Commission in the present opinion and notify the amended Plans to the Commission within three months pursuant to Article 8(9) of the Regulation.

The Commission's assessment expressed in this opinion is without prejudice to any position it may take *vis-à-vis* the Republic of Poland as regards the compatibility of national measures with EU law, including in the context of infringement proceedings and the enforcement of European Union competition rules, including State Aid.

The Commission will publish this opinion. The Commission does not consider the information contained herein to be confidential, in particular as it relates to the Plans which are publicly available. The Energy Minister is invited to inform the Commission within five working days following receipt of the opinion whether it considers that it contains commercially sensitive information, the confidentiality of which is to be preserved.

Done at Brussels, 23.1.2020

For the Commission
Kadri SIMSON
Member of the Commission