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**COMMISSION OPINION**

**of 17.4.2015**

**under Regulation (EU) No 994/2010 on the Preventive Action Plan and Emergency Plan  
submitted by the Competent Authority of the Kingdom of the Netherlands to the  
European Commission**

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#### **1. PROCEDURE**

Article 4(1) of Regulation (EU) No 994/2010 ("Regulation") requires 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 5(4) and Article 10(2) of the Regulation, the Plans have to be updated every two years, unless circumstances require more frequent updates.

The Plans (as well as their updates) need to be based on the national Risk Assessment which each Competent Authority has to adopt and notify to the Commission before the adoption of the Plans pursuant to Article 9 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 Risk Assessment has to be updated for the first time at the latest 18 months after the adoption of the Plans.

The Competent Authority of the Netherlands, the Ministry of Economic Affairs, has notified its updated Risk Assessment pursuant to Article 9 of the Regulation to the Commission on 18 June 2014.

The Ministry of Economic Affairs notified to the Commission on 22 January 2015 its updated Preventive Action Plan and Emergency Plan.

The Commission considers it appropriate to communicate any comments on the updated Plans by using the same procedure and applying the same assessment criteria as set out in Article 4(6) of the Regulation in respect of the initial Plans.

Thus having assessed the Plans, as updated, in view of the criteria mentioned in Article 4(6)(b)(i) to (iii) of the Regulation, and having reported its main findings to the Gas Coordination Group on 28.01.2015, the Commission has the following remarks on the Plans.

#### **2. COMMISSION'S ASSESSMENT OF THE PLANS**

The Ministry of Economic Affairs has submitted a set of detailed and comprehensive Plans consistent with their Risk Assessment. The Commission welcomes in particular the clear structure of the Plans and the detailed explanations as regards the results of their Risk Assessment. It also welcomes the description of the cooperation and consultations carried out with neighbouring Member States and the analysis about short-term and medium-term security of supply in the Netherlands.

Nevertheless, the Commission considers that some elements of the Plans do not appear to comply with the requirements of the Regulation.

## 2.1 Preventive Action Plan

### *Definition of protected customers and the supply standard*

Article 2(1) of the Regulation contains a definition of certain groups of gas customers as "protected customers" with quantitative limits for some categories of consumers. While all household customers connected to a gas distribution network are to be considered as protected, the Regulation allows the Member States to include in the definition also other categories, provided however that certain conditions are met. In particular, Article 2(1)(a) of the Regulation provides that small and medium-sized enterprises, connected to a gas distribution network, and essential social services, connected to a gas distribution or transmission network, may also be considered "protected" if the Member State so decides, but only in so far as they do not represent more than 20% of the final use of gas. Article 8(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<sup>1</sup>, 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 5(1)(b) of the Regulation.

The PAP submitted by the Ministry of Economic Affairs defines the protected customers in the Netherlands as "*customers who have a connection to a network with a total maximum capacity not exceeding 40m<sup>3</sup>(n) per hour. The protected customers comprise the households and small enterprises*". The PAP also describes the measures in place to fulfil the supply standard as well as the necessary gas volumes to meet such standard in all the different scenarios of high demand or supply interruption contained in Article 8. However, absent further information, it is not possible to conclude whether the definition of protected customers as indicated by the Netherlands complies with the conditions set in Article 2(1)(a) of the Regulation as regards the small and medium-sized enterprises referred to in the PAP. Consequently, it is not possible to determine either whether the gas volumes needed for the supply of the protected customers have been calculated on the right basis.

The Commission considers that the Dutch PAP should be amended in order to further clarify the definition of protected customers and whether such definition falls within the limits set in Article 2(1)(a) of the Regulation. In this regard, the Commission reminds the Netherlands that any increased supply obligation deriving from an extended definition of the categories of protected customers should comply with the condition set in Article 8(2) of the Regulation as explained below.

### *Increased supply standard*

Article 8(2) of the Regulation requires that any supply standard going beyond the 30-day period referred to in Article 8(1)(b) and (c) of the Regulation or any additional obligation imposed for reasons of security of gas supply shall be based on the risks identified in the Risk Assessment<sup>2</sup> and shall comply with a set of conditions. Notably it shall not unduly distort competition or hamper the functioning of the internal market in gas, nor impact negatively on the ability of any other Member State to supply its protected customers in the event of a national, Union or regional emergency. In accordance with Article 5(1)(b) of the Regulation, the PAP must include any increased supply standard under Article 8(2) of the Regulation.

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<sup>1</sup> See Article 8(1) (concerning the "supply standard") and Article 2(1) of the Regulation (concerning the definition of "protected customers").

<sup>2</sup> See Article 9 concerning the Risk Assessment.

The Dutch PAP describes an existing increased supply standard in the form of an additional national legal standard for the peak supply. Such increased standard entails higher obligations in terms of gas volumes than Article 8(1) of the Regulation. While the possibility to use an increased supply standard exists under Article 8(2) of the Regulation, it is not fully clear, on the basis of the information provided in the PAP, whether the additional obligations in place in the Netherlands fulfil the conditions set in Article 8(2) of the Regulation. The PAP does not describe either how such increased supply standard could be temporarily reduced, in a spirit of solidarity, in the event of a Union or regional emergency, as required by Article 8(2) of the Regulation.

The Commission takes the view that the Dutch PAP should be amended in order to include further information as regards the compliance of their increased supply standard with the obligations contained in Article 8(2) of the Regulation. The amended PAP should also indicate how the supply standard could be temporarily reduced, in a spirit of solidarity, in the event of a Union or regional emergency.

## 2.2 Emergency Plan

### *Definition of crisis levels*

Pursuant to Article 10(1)(a) of the Regulation, the EP shall build upon the three "crisis levels" defined in Article 10(3) of the Regulation, i.e. an "early warning", "alert" and "emergency"<sup>3</sup>. The different levels are, *inter alia*, relevant for the *measures* allowed under the Regulation to mitigate a supply disruption or exceptionally high gas demand.

The Dutch EP refers to four phases for the designation of the different crisis levels, i.e. "normal phase", "alert phase", "crisis phase" and "post-crisis phase". Furthermore, the Dutch EP refers at some point to an "emergency situation" which is not defined among the national crisis levels described in the EP. Since the Regulation is directly applicable in all the Member States, using different national definitions of crisis levels compared to the Regulation is not appropriate. Moreover, introducing diverging definitions on national level could create confusion as to the situations referred to, amongst others, in case of contacts with other Member States, which use the Regulation's terminology.

The Commission considers that the Dutch EP should be amended in order to align its definition of the crisis levels with the definitions provided in Article 10(3) of the Regulation.

### *Predefined actions to be taken in the case of an emergency*

In accordance with Article 10(1)(1) of the Regulation, the EP shall establish a list of predefined actions to make gas available in the event of an emergency. Moreover, according

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<sup>3</sup> See Article 10(3)(a) of the Regulation: "**early warning level (early warning)**: when there is concrete, serious and reliable information that an event may occur which is likely to result in significant deterioration of the supply situation and is likely to lead to the alert or the emergency level being triggered; the early warning level may be activated by an early warning mechanism". Article 10(3)(b) of the Regulation: "**alert level (alert)**: when a supply disruption or exceptionally high gas demand occurs which results in significant deterioration of the supply situation, but the market is still able to manage that disruption or demand without the need to resort to non-market based measures". Article 10(3)(c) of the Regulation: "**emergency level (emergency)**: in the event of exceptionally high gas demand, significant supply disruption or other significant deterioration of the supply situation and in the event that all relevant market measures have been implemented but the supply of gas is insufficient to meet the remaining gas demand so that non-market measures have to be additionally introduced with a view, in particular, to safeguarding supplies of gas to protected customers according to Article 8".

to Article 10(1)(i) the EP shall identify the contribution of non-market based measures planned or to be implemented for the emergency level, notably those listed in Annex III, and assess the degree to which the use of such non-market based measures is necessary to cope with a crisis, assess their effects and define the procedures to implement them, taking into account the fact that non-market based measures are to be used only when market-based mechanisms alone can no longer ensure supplies, in particular to protected customers.

The EP submitted by the Ministry of Economic Affairs contains a detailed description of the roles and responsibilities of different actors, showing a well-established emergency system. As regards the concrete measures, the Dutch Plan states that "*the Netherlands have no predefined actions to make gas available in the event of an emergency*". The EP also indicates that "*given the situation in the Netherlands with regard to natural gas, there is no need to fall back on non-market based measures*" and that "*domestic production may and can be relied upon to absorb any gas supply problems*". Nevertheless, the EP contains some scattered references, sometimes as an example, to concrete measures that could be adopted in the case of a crisis, such as the indication by the Minister as to whether certain groups of customers or sectors are to be given priority access to energy supply, which the transmission system operator (TSO) has to take into account in their interruption plans, the use by the TSO of the LNG peak shaver installation in Rotterdam or the possibility for the TSO to give instructions as regards the system's exit points.

The Commission takes the view that the EP should be amended to further explain the range of possible measures that could be adopted in the Netherlands in the case of a crisis, in particular as regards to what appear to be, absent further information, non-market based measures such as the instructions regarding the exit points. This explanation should also cover, to the extent possible, the means that the TSO may contract for emergency situations, as referred to in the Plans, and the measures that the Energy Crisis Team (ECT)<sup>4</sup> described in the EP may draw up in the case of a crisis.

#### *Compliance with the conditions for the emergency measures*

Article 10(7) of the Regulation establishes an obligation on Member States and in particular the Competent Authorities to ensure that: "*(a) no measures are introduced which unduly restrict the flow of gas within the internal market at any time; (b) no measures are introduced that are likely to endanger seriously the gas supply situation in another Member State; and (c) cross-border access to infrastructure in accordance with Regulation (EC) No 715/2009 is maintained as far as technically and safely possible, in accordance with the Emergency Plan*".

The Dutch EP indicates that, during an emergency, the TSO can give "*instructions regarding exit points of the transmission network. This means that exits can be instructed to reduce their off-take ...*".

Given the manifold interconnections between the Netherlands and its neighbours and the mutual interdependencies resulting from this close integration, it is important that Plans analyse the possible effects of national emergency measures carefully and take full account of risks for the security of supply in other Member States<sup>5</sup>. The recent "Energy Stress Tests"<sup>6</sup>

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<sup>4</sup> According to the EP, the Energy Market Director can activate an Energy Crisis Team (ECT) in the case of a crisis. One of the tasks of the ECT is to "*draw up the measures to be taken*".

<sup>5</sup> See in this respect also Article 5(3) of the Regulation (obliging Member States to take into account the *impact of measures in the internal market*); see also Article 9(1)(d), obliging Member States to identify the *interaction and correlation of risks with other Member States*; Article 4(3) of the Regulation (Joint Plans); see also recital 5: "*...there is a clear risk that measures developed unilaterally by [a] Member state may jeopardise the proper*

have shown that missing coordination of emergency measures in case of a severe crisis can significantly weaken the resilience of Member States. By contrast, close coordination of emergency measures can dampen the effects of a serious supply disruption and avoid unnecessary harm for single Member States. The Commission considers that the Dutch emergency measure described in the previous paragraph, i.e. the possibility for the TSO to give instructions regarding exit points, may have effects on neighbouring countries which may not be in line with the provisions set in Article 10(7)(a) and (c) of the Regulation. As regards Article 10(7)(b), the Commission cannot conclude at this stage, on the basis of the information available, that such measure could endanger the security of supply of another Member State, in particular because the Netherlands states that the EP was submitted to neighbouring countries for consultation.

The Commission takes the view that the measure in question should be further explained in the EP, indicating at least its extent, the conditions that would trigger its application, its effect on neighbouring countries and the justification of the compliance of such measure with the conditions established in Article 10(7) of the Regulation.

### 2.3 Other comments

Apart from the remarks presented above, the Commission would like to draw the attention of the Ministry of Economic Affairs to some other elements of the submitted Plans, which do not raise legal concerns in terms of their compatibility with the elements mentioned in Article 4(6)(i) to (iii), but which may provide useful guidance to the Competent Authority for future amendments of the Plans.

- The Dutch PAP refers in its section on the supply standard to a licensing system for suppliers of protected customers. According to the PAP, a supplier will get license "*only when he can prove his ability to provide his customers in the circumstances stipulated in the license.*" The PAP would improve in terms of transparency and comprehensiveness if some further indication were provided as to how it is considered that a supplier has proven its ability to provide customers.
- Cooperation with other relevant Member States in the development of preparatory and mitigating measures in case of a crisis is of key importance to maximize national supply security. In this context, the analysis of potential effects of measures adopted by neighbouring countries on the own system in case of parallel emergencies would increase the effectiveness of the Plans.
- The Commission reminds the Netherlands that if any of the investments in future infrastructure or interconnector referred to in the PAP involves State resources they could constitute State aid within the meaning of Article 107(1) TFEU (if the other conditions therein are also met) and must be notified to the Commission under Article 108(3) TFEU unless they are caught by the General Block Exemption Regulation<sup>7</sup>.

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*functioning of the internal gas market (...); it is necessary to provide for solidarity and coordination in the response to supply crises."*

<sup>6</sup> Communication of 16.10.2014 on the short term resilience of the European gas system Preparedness for a possible disruption of supplies from the East during the fall and winter of 2014/2015 ("Stress Test Report"), COM(2014) 654 final.

<sup>7</sup> Commission Regulation ([EU N°651/2014 of 17 June 2014](#)) declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1–78)

- The Netherlands explains in Section 3.3 of the PAP that, within the meaning of the Dutch Gas Act and the "Decision in Relation to Security of Supply Pursuant to the Gas Act", the TSO can be under different public service obligations. The Commission reminds the Netherlands that if such public service obligations, in particular the TSO's obligation to take action in case of bankruptcy of a supplier entail State resources, they could constitute State aid within the meaning of Article 107(1) TFEU and they must be notified to the Commission.

### 3. CONCLUSION

Based on the above assessment, and in view of Article 4(6)(b)(ii) of the Regulation, the Commission concludes that some elements of the updated Plans do not comply with certain provisions of this Regulation.

The Commission requests the Ministry of Economic Affairs to amend the Plans taking duly into consideration the concerns expressed by the Commission in the present opinion.

The Commission's assessment expressed in this opinion is without prejudice to any position it may take *vis-à-vis* the Netherlands as regards compatibility of national measures with EU law, including in the context of infringement proceedings.

The Commission will publish this opinion. The Commission does not consider the information contained herein to be confidential, in particular as it relates to documents which are publicly available. The Ministry of Economic Affairs 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, 17.4.2015

*For the Commission*  
*Miguel ARIAS CAÑETE*  
*Member of the Commission*