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COMMISSION OPINION

of 2.3.2015

pursuant to Article 4(6)(b)(ii) of Regulation (EU) No 994/2010 on the assessment of the Preventive Action Plan and Emergency Plan submitted by the Competent Authority of Republic of Croatia 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"). Pursuant to Article 4(2) and (3) of the Regulation, the Competent Authority shall *consult* the draft Plans with other Member States, in particular neighbours, and the Commission before adopting the Plans at national level, and the Commission may provide recommendations. Pursuant to Article 4(5) of the Regulation, the Plans shall then be *adopted*, made *public* and *notified* to the Commission.

The Plans need to be based on the national *Risk Assessments* 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 Republic of Croatia has notified its Risk Assessment pursuant to Article 9 of the Regulation to the Commission on 11.08.2014.

Croatia did not consult the Commission before the adoption of the draft Plans. A pre-notification procedure with the Commission pursuant to Article 4(2) and (3) could therefore not be carried out. The Plans do not contain information on whether other Member States were consulted on the draft Plans.

The Republic of Croatia directly notified to the Commission on 27.11.2014 its *adopted* Preventive Action Plan and Emergency Plan.

Having assessed the Plans in accordance with 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

2.1 Absent consultation of the Commission on the draft plans

Croatia did not consult the Commission before the adoption of the draft Plans, and there is no indication in the Plans that other Member States were consulted on the draft Plans. The Commission therefore had no opportunity to provide feedback on the draft Plans. As set out in Article 4(2) and (3) of the Regulation, the "pre-notification" procedure under Article 4(2) and (3) aims at avoiding inconsistencies between national Plans, should allow for regional cooperation and ensure compliance of the Plans with the Regulation and EU law.

The pre-notification procedure is not only important from a procedural point of view, given the relatively short 3-months deadline for the formal assessment of the adopted Plans by the Commission and for feedback from the Gas Coordination Group pursuant to Article 4(6) of the Regulation. The consultation of the Commission and Member States is also important to improve the substance of the Plans, as it allows taking into account the interdependencies with other - e.g. neighbouring - Member States and identifying possible inconsistencies with the assumptions of other Member States - before the adoption of the final Plans.

The Commission therefore considers that the adoption of the Plans without prior consultation of the Commission *is not in line with Article 4(2) of the Regulation*.

The Commission has nevertheless assessed the notified Plans against the criteria set out in Article 4(6)(i) to (iii) of the Regulation.

2.2 Substantive Assessment of the Plans

As concerns their content, the Plans are in many aspects detailed and comprehensive and provide for solutions to mitigate the main risks identified in the detailed Risk Assessment. However, the Commission considers that some elements of the Plans do not comply with the requirements of the Regulation.

2.2.1 Preventive Action Plan

The Regulation obliges Member States to ensure gas supply to a specifically defined group of customers ("protected customers") for certain minimum periods in case of an exceptionally high gas demand or supply interruptions¹. This "Supply Standard" shall provide for a protection of certain customers in case of a crisis. At the same time, Article 2(1) of the Regulation contains also *limits* for the definition of certain groups of gas customers as "protected customers". These limits are meant to avoid that Member States declare an unnecessarily high proportion of their customers as "protected", thereby impeding physical or virtual cross-border exchanges with neighbouring countries, notably during times of a parallel gas supply crisis².

According to Article 5(1)(b) of the Regulation, the *"measures, volumes, capacities and the timing needed to fulfil the [...] supply standard"* pursuant to Article 8 of the Regulation shall be contained in the PAP.

Inclusion of customer groups beyond the limits of Article 2(1) of the Regulation

Article 2(1) of the Regulation sets out that all household customers shall be considered as "protected customers" under the Regulation. However, under certain conditions, Member States can include other categories of customers into the group of "protected customers", such as small and medium-sized enterprises connected to a gas distribution network, essential social services and district heating installations.

According to the notified PAP, the definition of "protected customers" in the Croatian PAP includes, *inter alia*, the following two categories of customers:

"customers of special significance" and

"customers engaging in especially sensitive technological and/or manufacturing processes;"

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

² See in this context also recital 10 and Article 8(2) of the Regulation.

Absent further specifications on these two groups, it appears that the group of protected customers in the notified PAP **goes beyond the categories provided for in Article 2(1)** of the Regulation.

Missing elements to quantify the 20% threshold in Article 2(1)(a)

Article 2(1)(a) of the Regulation further 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 only be considered "protected" in so far as they do not represent more than 20% of the final use of gas.

In order to verify that this limit is respected by the definition in Croatia, it would be necessary to quantify the consumption volume of the additional customers pursuant to Article 2(1)(a) of the Regulation (i.e. small and medium-sized enterprises and essential social services).

A sufficiently clear quantification of the volumes of the additional customers *is missing in the Plans*. It therefore cannot be concluded that the 20% threshold is respected.

2.2.2 Emergency Plan

Non-market based measures during "alert" level

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. The different levels are, *inter alia*, relevant for the *measures* allowed under the Regulation to mitigate a supply disruption or exceptionally high gas demand. Pursuant to Article 10(3)(b) and (c)³ and Annex III of the Regulation, so-called "non-market based measures" shall be used only in the event of an "emergency" crisis level. Measures during an "alert" can only be market-based measures, as mentioned in the non-exhaustive list in Annex II of the Regulation.

The Croatian EP contains a description of possible measures under each of the three crisis levels in Section 2.3 (pages 5-6). According to this description, the Croatian Government can revert to non-market based measures already during the so-called "*alert level*".

This is in contradiction to the definition of an "alert level" in Article 10(3)(b) of the Regulation and with Annex III therein.

Missing mandatory descriptions pursuant to Article 10(1) of the Regulation

Article 10(1) of the Regulation provides for a mandatory list of elements that need to be addressed in the EP. Some of these elements are missing in the notified EP, such as, in particular:

³ See 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*".

- the degree of *necessity to turn to non-market based measures* to cope with the crisis, taking into account their effects (e.g. by a quantified analysis of necessity and effects), see Article 10(1)(i)⁴;
- no description of the *mechanisms to cooperate with other Member States* for each crisis level is provided, see Article 10(1)(j).

2.3 Other comments

Apart from the procedural and substantive remarks presented above, the Commission would like to draw the attention of the Competent Authority of Croatia, the Ministry of Economy, 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, also taking into account that the Commission did not have an opportunity to comment on the draft Plans in a pre-notification procedure.

- No measures and actions are defined to mitigate the potential *impact related to district heating and electricity generation* (see Article 10(1)(e)) and there is no indication in the Plans why it would not be appropriate to identify such measures and actions;
- The Croatian PAP does not always sufficiently link the preventive measures to the different risk scenarios developed in the Risk Assessment. A *quantitative assessment* of the possible impacts of the measures is not provided.
- As described above, 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. The Commission welcomes in this respect the *Cooperation Agreement* between the Republic of Croatia and Hungary concluded on the 8.2.2011 and the adoption of the “Act Promulgating the Cooperation Agreement” on 1.3.2012. Given the high interdependency between the Republic of Croatia and neighboring countries in case of a parallel crisis, it would be useful if the Plans could describe the Cooperation Agreement and resulting measures in more detail.
- It cannot be excluded from the data available that the infrastructure projects mentioned in Section 9 of the PAP may involve State resources which could constitute State aid within the meaning of Article 107(1) TFEU. Should it be the case, the Commission reminds Croatia to notify such aid under Article 108(3) TFEU.
- Croatia explains in many references that the TSO, DSOs and gas storage facility operators or other undertakings engaging in energy activities carry out a public service obligation pursuant to Article 5 of the Gas Market Act. The Commission reminds Croatia that if such public services obligations entail State aid within the meaning of Article 107(1) TFEU, they must be notified to the Commission.

⁴ See in this respect also Article 5(3) of the Regulation (underlining the need to take into account the impact of measures).

3. CONCLUSION

Based on the above assessment, and pursuant Article 4(6)(b)(ii) of the Regulation, the Commission concludes that some elements of the Plans do not comply with certain provisions of this Regulation⁵.

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

In view of the omitted "pre-notification" procedure on the draft Plans (see above 2.1), the amended Plans should in particular contain detailed information on the consultation process with other Member States.

The Commission's assessment expressed in this opinion is without prejudice to any position it may take *vis-à-vis the Republic of Croatia* as regards the 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 the Plans which are publicly available. The Ministry of Economy is invited to inform the Commission within five working days following receipt of the opinion whether it considers nevertheless that it contains commercially sensitive information, the confidentiality of which is to be preserved.

Done at Brussels, 2.3.2015

For the Commission
Miguel ARIAS CAÑETE
Member of the Commission

⁵ As concerns the Commission's assessment of the *consistency* of the Croatian Plans with Plans of other relevant Competent Authorities under Article 4(6)(ii) of the Regulation, it should be noted that the Commission had to base its assessment on the initially submitted Plans by the neighbouring countries (in particular Hungary and Slovenia), since no updated Plans from the Competent Authorities have been notified to the Commission by these countries by 3.12.2014.