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COMMISSION OPINION

of 14.12.2017

under Regulation (EU) No 994/2010 and Regulation (EU) 2017/1938 on the Preventive Action Plan and Emergency Plan submitted by the Competent Authority of the Italian Republic to the European Commission

(Only the Italian text is authentic)

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1. PROCEDURE

Article 4(1) of Regulation (EU) No 994/2010 (hereinafter "the 2010 Regulation" or "the Regulation") required 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 had to be updated every two years, unless circumstances required more frequent updates.

This obligation has been substantively widened and reinforced by Article 8 of Regulation (EU) 2017/1938 (hereinafter "the 2017 Regulation"), which repeals the 2010 Regulation as of 1 November 2017. Article 8(7) of the 2017 Regulation requires the new plans to be made public and notified to the Commission by 1 March 2019. According to Article 8(12), "Preventive action plans and emergency plans developed under Regulation (EU) No 994/2010, updated in accordance with that Regulation, shall remain in force until the preventive action plans and the emergency plans referred to in paragraph 1 of this Article are established for the first time". In line with recital 63 of the 2017 Regulation, this rule aims at ensuring legal certainty. Therefore, the rules applicable to the Plans under the 2010 Regulation remain applicable until the adoption of the first plans pursuant to Article 8 of the 2017 Regulation.

The Plans under the 2010 Regulation (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 2010 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 Italy, the Directorate General for security of energy supply and infrastructure of the Department of energy of the Italian Ministry of Economic Development, has notified its updated Risk Assessment pursuant to Article 9 of the Regulation to the Commission on 3 October 2016.

The Italian Competent Authority notified to the Commission on 17 October 2017 its updated Preventive Action Plan and Emergency Plan. The Italian Competent Authority has consulted other Member States' Competent Authorities on its Plans, including its neighbours.

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 2010 Regulation in respect of the initial Plans, which remains applicable in line with Article 8(12) of the 2017 Regulation.

Thus having assessed the Plans, as updated, in view of the criteria mentioned in Article 4(6)(b)(i) to (iii) of the 2010 Regulation, and having reported its main findings to the Gas Coordination Group on 22 March 2017, 28 June 2017, 27 September 2017 and 9 November 2017, the Commission has the following remarks on the Plans.

2. COMMISSION'S ASSESSMENT OF THE PLANS

As concerns the content of the Plans, the Plans submitted by the Italian Competent Authority are in many aspects detailed and comprehensive. The Commission welcomes in particular the detailed description of the Risk Assessment, the analysis of potential bottlenecks carried out in addition to the calculations for the infrastructure standard, and the calculation of system resilience indicators as defined by ENTSO-G. The Commission also acknowledges the information provided with regard to the development of new gas infrastructure and to the new agreements entered into by the transmission system operator (TSO) with carriers from neighbouring countries to enhance the interoperability of the interconnected pipeline system.

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

2.1 Preventive Action Plan (PAP)

Definition of protected customers

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 scenarios of an exceptionally high gas demand or supply interruptions¹, the so-called "supply standard".

In this regard, the Commission acknowledges the improvements made by the Italian Competent Authority by increasing the information provided with regard to the definition of *protected customers*. However, it remains unclear what precise categories of consumers are covered by the definition of protected customers and whether the conditions set in Article 2(1)(a) of the Regulation in terms of eligibility are respected. More specifically, while the PAP specifies that the consumption of the *protected customers* does not represent more than 20% of the final use of gas as requested by Article 2(1)(a) of the Regulation, the PAP includes in the definition of protected customers the non-residential customers with consumption lower than 50,000 Scm year. According to the PAP, this category includes "*commerce and services, industry, power generation*".

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

The Commission therefore considers that the Italian PAP should further clarify which are the categories of gas consumers that are eligible under Article 2(1)(a) and covered under the group of "protected customers".

The Commission also reminds the Competent Authority of Italy that any increased supply standard or additional obligation in this regard can only be imposed for reasons of security of gas supply and has to comply with the conditions set in Article 8(2) of the Regulation.

Information on public service obligations

Article 5(1)(g) of the Regulation requires that the PAP contains *"information on all public service obligations that relate to security of gas supply"*.

In this regard, while the Italian PAP notes in its Section 1.1 that *"the prevention plan shall include [...] information about the public service obligations with reference to the security of supply"*, such information is not contained in the submitted Plan.

The Commission considers that the Italian PAP should clearly indicate whether such public service obligations pertaining to security of supply exist and in such case provide with sufficient information about them.

2.2 Emergency Plan (EP)

Measures to be adopted in case of an emergency

In accordance with Article 10(1)(l) of the Regulation, the EP shall establish a list of predefined actions to make gas available in the event of an emergency. Moreover, pursuant 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 Italian Competent Authority contains a number of measures to be applied in the case of the declaration of the emergency level. However, the information provided is insufficient to understand how these measures would work in practice and would contribute to coping with the situation, as required by Article 10(1)(f) of the Regulation. In particular, the Commission has the following comments:

- With regard to the *"request for activation of the cooperation and solidarity measures by other Member States"* and while such a measure is certainly welcome, the EP does not indicate what concrete solidarity and cooperation measures it refers to, when and how they would be triggered or which Member States would be involved.

- Regarding the measure called *"Actions to increase gas availability in the network"*, it is unclear how the resort to the *"use it or lose it"* mechanism would concretely be applied in practice, and, in particular, what would happen to the capacity taken away and how it would be ensured that this capacity is re-allocated and used during the emergency. The Commission also wonders to what extent this measure is connected to the reference (in page 23 of the PAP) to the *"increase of import flows"*. Provided this is not a market-based measure, an

assessment of its effects should be provided in the EP, bearing in mind the conditions set out in Article 10(7) of the Regulation.

- The measure called "*definition of new temperature and/or schedule thresholds for domestic heating sector, supplied with natural gas*" shall be clarified, in particular as to when and how it would be triggered.

2.3 Other comments

Apart from the remarks presented above, the Commission would like to draw the attention of the Italian Competent Authority 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)(b)(i) to (iii) of the Regulation, but which may provide useful guidance to the Competent Authority for future amendments of the Plans.

The EP should contain the measures and actions to be taken to mitigate the potential impacts of a gas supply disruption on district heating, or indicate why this would not be appropriate, in accordance with Article 10(1)(e) of the Regulation.

The PAP could further contribute to the transparency of the gas security of supply policy if it contained references to the economic impact, effectiveness and efficiency of the measures, or to their effects on the functioning of the internal energy market and the impact on the environment and on gas consumers, in line with Article 5(3) of the Regulation.

Section 4.5.2. of the PAP promotes demand side measures in Italy, such as interruptible contracts in order to tackle the issue of security of supply. While the Commission has recognised the role of moderating energy demand as a pillar to respond to energy security concerns² and Member States are moreover required to encourage demand side resources, such as demand response³, the Commission reminds Italy that if such demand side response mechanisms entail State resources they might be caught by Article 107(1) TFEU as State aid and they must be notified to the Commission.

The Commission also reminds Italy that if any of the investments in future infrastructure, storage or interconnector referred to in Section 9 of 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 Regulation⁴.

3. CONCLUSION

Based on the above assessment, and in view of Article 4(6)(b)(ii) of the 2010 Regulation, the Commission concludes that some elements of the updated Plans do not comply with certain provisions of this Regulation.

² Communication from the Commission, "European Energy Security Strategy" COM(2014) 330 final.

³ See Article 15 of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, OJ L 315, 18.11.2012, L315.

⁴ 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 Commission requests the Italian Competent Authority 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* Italy 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 Italian Competent Authority 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, 14.12.2017

For the Commission

Miguel ARIAS CAÑETE

Member of the Commission