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COMMISSION OPINION

of 15.12.2017

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 Portuguese Republic to the European Commission

(Only the Portuguese 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 Portugal, the Directorate General of Energy and Geology, has notified its updated Risk Assessment pursuant to Article 9 of the Regulation to the Commission on 2 May 2017.

The Directorate General of Energy and Geology has consulted Spain on its Plan.

The Directorate General of Energy and Geology notified to the Commission on 3 October 2017 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 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 notes as follows.

2. ASSESSMENT AND CONCLUSION

The Directorate General of Energy and Geology submitted a set of detailed and comprehensive Plans consistent with their Risk Assessment. The Commission notes that the Portuguese Plans constitute an excellent example of a clear link between risk scenarios and measures.

Nevertheless, the Commission considers that some elements of the Plans should be further aligned 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.

The previous PAP submitted by the Portuguese Competent Authority clearly indicated the estimated consumption volumes of "protected customers" as well as the categories of consumers considered as protected customers and their respective share of the Portuguese gas consumption. However, in the revised PAP part of this information is missing. While the revised PAP contains the overall consumption figures for the protected customers, it does not indicate what the share of each category of protected customer is with regard to the total gas consumption in Portugal.

The Commission considers that the Portuguese PAP should be amended to include information on the gas consumption volumes of protected customers per category of consumers.

2.2 Emergency Plan (EP)

Non-market based measures during the "alert" level

Pursuant to Article 10(3)(b) and (c) and Annex III of the Regulation, non-market based measures shall be used only in the event of an emergency. Measures during an alert can only be market based measures, such as the ones mentioned in the non-exhaustive list in Annex II of the Regulation.

The EP submitted by the Portuguese Competent Authority describes a set of measures to be applied in the case of an alert. While these measures appear under a heading indicating "market-based measures", the EP states that market actors will have to follow the instructions of the transmission system operator (TSO) to put such measures in place, including for the use of commercial stocks. Although the final section of the EP includes in a box some

considerations in this respect, it is unclear how such measures can be considered market-based.

The Commission considers that the Portuguese EP should be amended either to clarify the market-based nature of the measures to be applied in the case of an alert or to limit the use of such measures, should it be confirmed that they are non-market based, to the declaration of an emergency level.

Contribution of market based and non-market based measures for coping with situations at alert and emergency level

Article 10(1) (h) of the Regulation provides that the EP shall identify the contribution of market-based measures for coping with the situation at alert level and mitigating the situation at emergency level. Article 10(1) (i) of the Regulation requires that the EP identify the contribution of non-market based measures for the emergency level 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.

The EP submitted by the Portuguese Competent Authority provides an estimation of the contribution of certain measures for dealing with an imbalance within the normal operation of the gas system. However, no such estimations are provided for the cases of alert or emergency levels.

The Commission considers that the Portuguese EP should be amended to also identify the contribution of the measures to be put in place during the alert and emergency crisis levels, as required by Article 10(1)(h) and (i) of the Regulation.

2.3 Other comments

Apart from the remarks presented above, the Commission would like to draw the attention of the Portuguese 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 prepared by the Competent Authority of Portugal 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 readability of the PAP would be improved if the scenarios used for each risk analysis (base scenario, central or superior, security of supply scenario, central or superior) were clearly defined at the beginning of the PAP.

The PAP contains several references to the so-called "security reserves" but such measure is only explained in the EP. For the sake of clarity, the PAP could indicate that such security reserves are strategic stocks that can only be used in the case of an emergency upon a decision of the Government, as indicated in the EP.

The Commission reminds Portugal that if any of the investments in future infrastructure, pipeline, LNG terminal, storage or interconnector referred to in Section 4.2. of the updated 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 Regulation¹.

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.

The Commission requests the Portuguese 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* Portugal 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 Directorate General of Energy and Geology 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, 15.12.2017

For the Commission
Miguel ARIAS CAÑETE
Member of the Commission

¹ 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)