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## COMMISSION OPINION

of 20.11.2019

**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 Austria to the European Commission.**

(Only the German 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 Austria, the Federal Ministry for Sustainability and Tourism (FMST), notified its Risk Assessment pursuant to Article 7 of the Regulation to the Commission on 3 April 2019.

The FMST notified to the Commission on 2 August 2019 its Preventive Action Plan and Emergency Plan. The Commission has no information regarding the consultation on the Austrian Plans with other Member States, in particular with its neighbours.

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 Austria gas system and the infrastructure standard.

Nevertheless, the Commission considers that some elements of the Plans, already partially included in the 2017 Commission opinion<sup>1</sup>, do not fully comply with the requirements of the Regulation.

## **2.1 Preventive Action Plan (PAP)**

### *Missing details on the fulfilment of the supply standard*

The PAP must indicate the volumes and detailed capacities needed to fulfil the supply standard (for the respective scenarios described in Article 6 of the Regulation) pursuant to Article 9 and Annex VI, point 4 of the Regulation.

While the notified PAP contains a section on the fulfilment of the supply standard, the information on volumes and detailed capacities needed to fulfil the supply standard for the respective scenarios is missing. The Commission takes the view that the Austrian PAP should be updated with the required details on the fulfilment of the supply standard for each of the respective scenarios described in Article 6 of the Regulation.

### *Missing information on stakeholder consultation*

Pursuant to Article 8(2) and Annex VI point 9 of the Regulation, the PAP should provide information on the mechanism for and results of consultations with stakeholders, including organisations representing the interests of households and organisations representing the interests of industrial gas customers.

The Austrian PAP contains basic information on consultations with certain stakeholders, but there is no information on consultations with the two above-mentioned groups.

The Commission considers that the Austrian PAP should be updated to include information on consultations with organisations representing the interests of households and industrial gas customers. In the event that these groups have not been consulted, additional consultations should be carried out and the results should be included in the final PAP.

### *Missing information on the economic impact of the preventive measures, as well as their impact on the internal market, the environment and on customers*

Article 9(1) (f) to (h) as well as Annex VI points 4 and 5 of the Regulation require Member States to include in their PAP information on the economic impact of the envisaged measures as well as a description of the effects of such measures on the functioning of the internal market, the environment and consumers.

The notified PAP refers to a number of preventive measures but does not assess the expected impacts of these measures from the different perspectives stated in Article 9 (1)(f) to (h) of the Regulation.

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<sup>1</sup> C(2017) 2390 final of 12 April 2017.

The Commission considers that the PAP should be amended to include the above-mentioned information.

#### *Missing information on regional measures*

Pursuant to Article 8(3) and Annex VI, point 10 of the Regulation, preventive action plans must contain a regional dimension with appropriate and effective cross-border measures, based on the simulation referred to in Article 7(1) and the common risk assessment.

The Austrian PAP states that further to the risk assessments carried out for each of the risk groups, no regional preventive measures were agreed.

In light of the obligation set out in Article 8(3) and Annex VI, point 10 of the Regulation, the Commission takes the view that the final PAP should provide explanations on why no regional measures are considered necessary in any of the risk groups to which Austria adheres.

## **2.2 Emergency Plan**

#### *Missing information on market based measures*

Pursuant to Article 10(1) and Annex VII point 2 of the Regulation, the EP should set out, for each crisis level, the measures to be taken and the expected contribution of these measures to address the respective situation.

The Austrian EP provides a list of envisaged market-based measures<sup>2</sup>. For each measure, the respective actor and the legal basis in the national law is mentioned. The description of each of the crisis levels makes reference to this list and states that the listed measures should be applied? to address the situation. However, there is no distinction which of these measures should be taken at which crisis level and in which order, nor is there any information on the expected contribution of the listed measures.

The Commission considers that the EP should be amended to include the details in question.

#### *Classification of measures*

Pursuant to Articles 10(1)(i) and 11(1), non-market based measures can only be adopted in the case of an Emergency after all market-based measures have been implemented and are still insufficient. Therefore, the classification of measures into market based and non-market based measures is essential for the correct implementation of the Regulation.

The Austrian EP provides a list of market-based measures<sup>3</sup> which are to be used by the relevant actors at all three crisis levels. However, one of the measures listed in the EP – the prioritisation of gas flows to final customers – appears to be a non-market based measure as it

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<sup>2</sup> „Tabelle 1: Übersicht über marktkonforme Maßnahmen in Versorgungsengpasssituationen“, pages 2-4 of the Austrian EP

<sup>3</sup> Ibid.

constitutes a compulsory demand reduction.<sup>4</sup> This point was raised in the 2017 Commission’s opinion<sup>5</sup> and, in its reply, Austria had agreed to re-classify the measure as a non-market-based measure.

The Austrian EP should therefore be amended to re-classify the measure in question as non-market-based measure, which can only be adopted in the case of an emergency and after all market-based measures have been implemented and are still insufficient.

#### *Missing information on non-market based measures*

According to Article 10(1)(i) and (o) of the Regulation, the EP shall identify the contribution of non-market based measures planned for the emergency level as well as establish a list of predefined actions to make gas available in the event of an emergency. Additionally, Article 11 paragraph 6 of the Regulation requires Member States to ensure that measures adopted during a crisis comply with a set of conditions.

The notified EP refers to the Austrian system of “intervention measures” (“Energielenkungsmaßnahmen”) which are adopted by the FMST during a crisis situation in accordance with the Austrian Energy Intervention Powers Act (“Energielenkungsgesetz 2012”). The EP states that such measures can be categorised as measures aiming at the “activation of additional supply” and measures resulting in the curtailment of final customers. The EP states further that it is not possible to quantify the expected contribution of such emergency measures, noting that all adopted measures would have to comply *inter alia* with the requirements of Article 11 paragraph 6 of the Regulation.

The Commission considers that in the absence of concrete and quantified non-market based measures set out in the EP, it is not possible to assess the compliance of the Austrian Plan with the requirements of Article 11 of the Regulation.

The Commission also notes that the Austrian Energy Intervention Powers Act expressly envisages measures concerning “the supply of gas from and to EU Member States and third countries” (Section 26 paragraph 1 point 3). It appears that such measures could include restrictions of gas imports or exports between Austria and other Member States.

Therefore, the Commission considers that the Austrian EP should be amended to provide information on the possible scope of such measures and how the compliance of such measures (if taken) with the requirements of Article 11 paragraph 6 of the Regulation would be ensured.

#### *Missing information on solidarity arrangements*

Article 13 of the Regulation requires Member States to, in a spirit of solidarity, 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

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<sup>4</sup> Cf. indicative list of non-market based measures in Annex VIII of the Regulation.

<sup>5</sup> C(2017) 2390 final of 12 April 2017.

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.

The Austrian EP does not include any information on arrangements in place to apply the solidarity obligations, referring only to ongoing negotiations with neighbouring Member States.

While the Commission is aware of the current on-going work of the FMST with other Member States to develop the solidarity provisions and welcomes such work, 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.

#### *Other missing information*

While the notified EP contains a brief chapter on the regional dimension, the provided information remains superficial and does not provide the level of detail on measures, procedures, and expected contributions of the measures per crisis level required pursuant to Article 8(3) and Annex VII point 8 of the Regulation.

The EP contains a brief section on emergency test but does not include a calendar of tests nor any information on the procedure for tests and the concrete scenarios simulated, as required by Article 10 paragraph 2 and Annex 7 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 FMST 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* Austria 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 rules.

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 FMST 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, 20.11.2019

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