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**COMMISSION OPINION**

**of 12.4.2017**

**under Regulation (EU) 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

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 consultation provided for between Competent Authorities under Article 4(2) shall be carried out before the adoption of the updated Plans.

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 Austria, the Federal Ministry of Science, Research and Economy (hereafter "FMSRE"), has notified to the Commission its Risk Assessment pursuant to Article 9 of the Regulation on 30 August 2016.

The FMSRE notified to the Commission its updated Preventive Action Plan and the updated Emergency Plan on 22 December 2016. The Commission has no information regarding the consultation on the Austrian Plans with other Member States, in particular with 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 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 18 January and 3 February 2017, the Commission has the following remarks on the Plans.

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

As concerns their content, the Commission considers that the Plans are in general of good quality and in many aspects detailed and comprehensive. However, the Commission considers that some elements of the Plans do not fully comply with the requirements of the Regulation.

#### 2.1 Preventive Action Plan (PAP)

*Lack of clarity regarding the protection of protected customers in Tyrol and Vorarlberg*

It is not clear how the protected customers in the areas of Tyrol and Vorarlberg which are not connected to the Austrian gas transmission grid are indeed protected. It is mentioned in the Austrian PAP that the demand of those areas can be added to the German demand. However, in 2014 Germany clarified that customers in Tyrol and Vorarlberg do not fall under the definition of protected customers under German law and Austria remains solely responsible for those customers, despite the fact that the German supply standard would be met even if those customers were to be included. The PAP notified by Germany in 2016 mentions that the supply standard would still be met when including customers in Tyrol and Vorarlberg, but does not assume responsibility for those areas in relation to obligations pursuant to the Regulation.

The Commission considers that the Austrian PAP should be amended to further clarify the extent of the supply standard obligations as regards the household customers in the areas of Tyrol and Vorarlberg. The clarifications of the Austrian PAP should be consulted and agreed with the German Competent Authority due to the fact that Austrian areas of Tyrol and Vorarlberg can only be supplied technically via Germany.

#### *Concerns regarding the resilience of measures proposed to respond to long term supply disruption*

The measures proposed for ensuring the supply of protected customers in the event of a prolonged interruption of supply from Slovakia appear to rely significantly on storage withdrawals. It is uncertain if the "investigation" of alternative routes will yield the expected results where it is only undertaken in the event of a disturbance.

The Commission considers that the Austrian PAP should be amended to foresee the examination of alternative supply routes and relevant coordination and arrangements with neighbouring countries to ensure compatibility of security of supply measures. In this context it should be considered that a shortage of supplies flowing through Ukraine would likely also adversely affect neighbouring States hosting alternative supply routes.

## **2.2 Emergency Plan (EP)**

Article 10(1) of the Regulation provides for a mandatory list of elements that need to be addressed in the EP. It appears that some of the elements of the EP notified by Austria are not in conformity with Article 10(1).

#### *Missing description of (cross-border) effects of potential measures*

Article 10(1)(i) requires *inter alia* an assessment of the degree of necessity to turn to non-market based measures to cope with a crisis, an analysis of the *effects* of such measures and a definition of the procedures to implement them.<sup>1</sup> The Article is an expression of the general idea of *mutual cooperation and coordination* in the development of Plans and decisions on crisis measures. This principle is underlying the entire Regulation<sup>2</sup>.

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<sup>1</sup> Article 10(1)(i) obliges Member States to "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."

<sup>2</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 functioning of the internal gas market (...); it is necessary to provide for solidarity and coordination in the response to supply crises."

The Austrian EP contains a description of potential market-based and non-market based measures and refers to when such measures could be deployed. The EP also mentions the possibility to reduce the exports, but does not explain when exactly such measure can be triggered. However, the EP does not elaborate on the quantified contribution of particular measures in coping with the crisis. Moreover, the EP should identify what the (quantified) effects of the measures would be, notably on other countries.

Austria has a considerable number of gas interconnections with neighbouring countries and serves as an important hub for imports to other EU countries. 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 reduce the effects of a serious supply disruption and avoid unnecessary harm for single Member States.

It is therefore important that the Risk Assessment and the Plans identify these interdependencies and take full account of risks for the security of supply<sup>3</sup>. In this context, the Austrian Plans lack, inter alia, a description of the *potential effects own measures may have on the internal energy market*.

#### *Qualification as market-based measures*

In the absence of more detailed explanations, measures 1 and 2 listed in section 1.2 of the EP do not appear to be market-based, since they involve the curtailment of capacity or flows. The final EP should provide further details on the market-based nature of these measures or re-classify them as non-market-based measures.

### **2.3 Other comments**

Apart from the substantive remarks presented above, the Commission would like to draw the attention of the FMSRE 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) of the Regulation, but which may provide guidance to the Competent Authority for future amendments of the Plans.

- The district heating companies are among the largest Austrian gas consumers, nevertheless, district heating in Austria does not fall under the definition of protected customers. Therefore the identification of measures and actions in the EP to be taken to mitigate the potential impact of a gas supply disruption on district heating as well as on the supply of electricity generated from gas would also further improve the plan.
- Given the fact that the Austrian areas of Tyrol and Vorarlberg can only be supplied technically via Germany, the Austrian PAP could be complemented by further explaining the cooperation with the German Competent Authority to ensure the gas supply to the protected customers in these areas.
- 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.

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<sup>3</sup> See Article 9(1)(d), obliging Member States to identify the interaction and correlation of risks with other Member States in the Risk Assessment.

- Sections 4 and 5 of the EP notified by Austria contain several charts on information flows, decision making processes, and procedures to be followed during a crisis. However, there are no explanations or comments provided on how to interpret these charts. Legibility could be improved by providing such explanations in future versions of the EP.
- While Austria may have been in contact with its neighbours during the preparation of its Risk Assessment and its Plans, the Plans should clearly indicate whether they have been exchanged with neighbouring Member States.
- The Commission recalls that if any of the investments in future infrastructure mentioned in Section 8 of the PAP involve 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>4</sup>.

### 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 the Regulation.

The Commission requests the FMSRE 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* Austria 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. FMSRE 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.

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<sup>4</sup> Commission Regulation (EU) No 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)

Done at Brussels, 12.4.2017

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

