

PUBLIC

DECISION No 13/2019
OF THE EUROPEAN UNION AGENCY
FOR THE COOPERATION OF ENERGY REGULATORS

of 22 October 2019

on the application for the approval of an incremental capacity project for the market border of Poland (E-Gas Transmission System) and GASPOOL

THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY REGULATORS,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators¹, and, in particular, Article 6(10) thereof,

Having regard to Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013², and, in particular, Article 28(2) thereof,

Having regard to the consultation with the relevant Transmission System Operators and National Regulatory Authorities,

Having regard to the consultation with the Agency Working Group of 10 September 2019,

Having regard to the favourable opinion of the Board of Regulators of 16 October 2019, delivered pursuant to Article 22(5) of Regulation (EU) 2019/942,

Whereas:

¹ OJ L158, 14.6.2019, p. 22.

² OJ L72, 17.3.2018, p. 1.

1. THE REFERRAL

- (1) On 29 April 2019, Urząd Regulacji Energetyki ('URE'), the National Regulatory Authority ('NRA') for Poland, referred to the Agency, pursuant to Article 28(2) of Commission Regulation (EU) 2017/94, the approval of the incremental capacity project for the market border of Poland (E-Gas Transmission System) and GASPOOL, submitted by ONTRAS Gastransport GmbH and GAZ-SYSTEM S.A. to URE itself and Bundesnetzagentur ('BNetzA') on 23 October 2018.

2. PROCEDURE

2.1 Introduction

- (2) Commission Regulation (EU) 2017/459 laid down a series of procedural steps to assess the demand for incremental capacity, and in case there is such demand, the requirements for the design, submission and approval of the incremental capacity project. Once approved, the incremental capacity must be offered on a joint capacity booking platform.
- (3) Pursuant to Article 28(1) of Commission Regulation (EU) 2017/459, transmission system operators ('TSOs') are required to develop a common project proposal for an incremental capacity project and submit it to the relevant NRAs for approval.
- (4) Pursuant to Article 28(2) of Commission Regulation (EU) 2017/459, the NRAs receiving the proposal on the incremental capacity project shall reach an agreement and take coordinated decisions, in principle within six months of receipt of the complete project proposal by the last NRA.
- (5) According to Article 6(10) of Regulation (EU) 2019/942, the Agency is called upon to adopt a decision concerning the TSOs' proposal, if the proposal concerns a cross-border regulatory issue requiring a joint decision by at least two regulatory authorities and if either the latter fail to reach an agreement within the six-month period or if they jointly request the Agency to decide³.

2.2 Proceedings before the National Regulatory Authorities

- (6) On 23 October 2018, ONTRAS Gastransport GmbH and GAZ-SYSTEM S.A. submitted their application for the approval of an incremental capacity project for the market border of Poland (E-Gas Transmission System) and GASPOOL dated 12 October 2018 ('the incremental capacity project'), to BNetzA and URE, the relevant NRAs.

³ Decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators of 6 August 2019, A-004-2019, *HEA and FGSZ v the Agency*, 104-110.

- (7) On 17 April 2019, BNetzA adopted a decision approving the incremental capacity project upon the condition that the joint capacity booking platform, on which the bundled incremental capacity products had to be offered, were selected at the latest by 30 April 2019 either via a common agreement reached between the involved TSOs or via a decision of the Agency. In case the condition had not been met by this date, the approval of the incremental capacity project would have expired.
- (8) On 29 April 2019, URE informed the Agency that URE and BNetzA had agreed during the six month period on all the relevant elements of the incremental capacity project as required by Article 28(1) of Commission Regulation (EU) 2017/459. However, at the same time, URE stated that Polish procedural and substantive law prevented the approval of the incremental capacity project subject to conditions, as done by BNetzA. In particular, URE stated that the approval of the incremental capacity project would oblige GAZ-SYSTEM S.A. to carry out the decision. Due to the TSO's administrative responsibility and the lack of a joint capacity booking platform to implement the decision, URE instead of adopting a negative decision, concluded in its letter that the incremental capacity project proposal should be referred to the Agency instead.
- (9) On 8 May 2019, URE finally adopted the decision to discontinue its administrative proceeding. In the decision's statement of grounds, URE noted that BNetzA and URE agreed in substance on the parameters referred to in Article 28(1), letters (a) to (g), of Commission Regulation (EU) 2017/459, but that it was not possible to issue coordinated implementable decisions due to the absence of an essential prerequisite, i.e. a joint capacity booking platform for the relevant IPs.

2.3 Proceedings before the Agency

- (10) Following the letters of 16 and 29 April 2019 from BNetzA and URE respectively, the Agency requested further information regarding the extent of the agreement between the two NRAs for each of the elements established in Article 28(1), letters (a) to (g), of Commission Regulation (EU) 2017/459. Furthermore, BNetzA and URE were requested to clarify the applicable national framework with regard to the situation in which the precondition for the conclusion of a procedure is missing (i.e., the lack of a joint capacity booking platform).
- (11) On 7 and 14 June 2019, BNetzA and URE respectively replied to the Agency's request for information.
- (12) On 3 and 4 July 2019, ONTRAS Gastransport GmbH and GAZ-SYSTEM S.A. respectively asked the Agency whether it intended to initiate an administrative proceeding and, if so, whether and when it would adopt a decision on the incremental capacity project.

- (13) On 6 August, the Agency issued Decision No 10/2019 on the selection of a web-based booking platform to be used by TSOs for the offering of bundled gas transmission capacity at the “Mallnow” physical interconnection point and “GCP” virtual interconnection point, the booking platform relevant for the purpose of the incremental capacity project submitted by ONTRAS Gastransport GmbH and GAZ-SYSTEM S.A. on 23 October 2018.
- (14) On 7 August 2019, the Agency consulted the TSO concerned and the relevant NRAs on its preliminary conclusions on the referral of the approval of the incremental capacity project for the market border of Poland (E-Gas Transmission System) and GASPOOL, submitted by ONTRAS Gastransport GmbH and GAZ-SYSTEM S.A. to URE and BNetzA on 23 October 2018.
- (15) On 21 August 2019, ONTRAS Gastransport GmbH expressed its views on the preliminary conclusions of the Agency of 7 August 2019.
- (16) On 28 August 2019, GAZ-SYSTEM S.A., URE and BNetzA expressed their views on the preliminary conclusions of the Agency of 7 August 2019.

3. THE AGENCY’S COMPETENCE TO DECIDE ON THE PROPOSAL AND ITS ADMISSIBILITY

- (17) Pursuant to Article 28(2) of Commission Regulation (EU) 2017/459, the relevant NRAs are required to adopt coordinated decisions on incremental capacity project proposals.
- (18) At the time when the proceedings before BNetzA and URE ended, Article 8(1) of Regulation (EC) No 713/2009 applied to the Agency. According to Article 8(1) above, the Agency was competent for regulatory issues on cross-border infrastructure falling within the competence of the NRAs, *inter alia* where the latter did not succeed in reaching an agreement within six months of referral of the case to the last of those NRAs. Whilst Regulation (EC) No 713/2009 has meanwhile been recast, the Agency’s decision competence and the conditions related thereto remained, for the present purposes, in essence, the same⁴.
- (19) It is clear from the decisions adopted by BNetzA and URE that both NRAs did reach an agreement on the substantial requirements of the incremental capacity project proposal of ONTRAS Gastransport GmbH and GAZ-SYSTEM S.A.⁵.

⁴ See also footnote No 3.

⁵ Thus, in the statement of grounds of URE’s decision of 8 May 2019, URE noted that the two NRAs “agreed on the parameters referred to in Article 28(1)(a)-(g)” of Commission Regulation (EU) 2017/459. This positive assessment of the incremental capacity project proposal can also be found in the decision of BNetzA of 17 April 2019, where it is stated in chapter 3 that “[t]he project proposal has been approved in accordance with Article 28(2) of Regulation (EU) 2017/459 (operative part 1). The substantive requirements for approval have been met.

- (20) BNetzA and URE agreed also in linking the feasibility of the implementation of the incremental capacity project to the establishment of a joint capacity booking platform at the market border of Poland and GASPOOL.
- (21) When BNetzA and URE adopted their decisions in April and May 2019, the relevant joint capacity booking platform was not yet in place. In fact, the related procedure pursuant to Article 37 of Commission Regulation (EU) 2017/459 was still pending⁶ and could not be reasonably foreseen to be concluded on time to respect the timing of the auction of incremental capacity products. In fact, by 1 May 2019, the TSOs should have published the information related to the incremental capacity products offered for auction⁷. In addition, the annual auctions, on which the proposed incremental capacity products had to be offered, should have been organised on 1 July 2019⁸.
- (22) To the contrary, on 23 April 2019, i.e. at the time the proceedings for the incremental capacity project proposal ended before the NRAs, the Agency was still holding a public consultation on the booking platform selection procedure, which ran until 30 April 2019. With the capacity booking platform selection procedure thus still fully in progress, and even disregarding a reasonable period of time for possible implementation measures of the Agency's capacity booking platform decision, the selection of the capacity booking platform could not be expected by 1 May 2019.
- (23) In fact, as reported above in paragraph (13), this condition happened only on 6 August 2019 when the Agency issued the relevant Decision. This Decision however will be implemented within three months from the date of the notification to the relevant TSOs and is not yet firm.
- (24) Hence, despite having agreed in substance on the proposed incremental capacity project, BNetzA and URE were not in a position to adopt a decision whereby they could approve the proposed incremental capacity and require the TSOs to offer it on the upcoming annual auction, as it would have been impossible properly to implement such a decision.
- (25) The two NRAs then proceeded with issuing decisions, which, although based on the reached agreement, appear to diverge with regard to the conclusion of the procedure,

The decision was made following appraisal of the aspects of the project proposal set out in Article 28(1) of Regulation (EU) 2017/459”.

⁶ The decision was the culmination of the regulatory process whereby first ONTRAS Gastransport GmbH and GAZ-SYSTEM S.A. and subsequently BNetzA and URE did not reach an agreement on the selection of a joint capacity booking platform. The Agency's initial decision (Decision No 11/2018 of 16 October 2018 establishing the capacity booking platform to be used at 'Mallnow' interconnection point and 'GCP' virtual interconnection point) was annulled on 14 April 2019 by Decision A-002-2018 of the Board of Appeal of the Agency, which caused the Agency to restart the selection procedure. The selection of the capacity booking platform was concluded on 6 August 2019.

⁷ Cf. Article 28(3) of Commission Regulation (EU) 2017/459.

⁸ Cf. Article 11(4) of Commission Regulation (EU) 2017/459.

properly with regard to the treatment of the absence of an essential operational prerequisite, being the presence of a joint capacity booking platform.

- (26) As reported above in paragraphs (7) to (9), BNetzA adopted a decision approving the incremental capacity project subject to the condition that the joint capacity booking platform, on which the bundled incremental capacity products had to be offered, were selected at the latest by 30 April 2019. In case the condition had not been met by this date, the approval of the incremental capacity project would have expired.
- (27) URE instead discontinued the administrative proceeding by referring the case to the Agency, noting i) the impossibility under Polish procedural law to issue a conditional decision, but, for instance, not a negative or an inadmissibility decision, and ii) the absence of an essential prerequisite, being the presence of a joint capacity booking platform.
- (28) In light of the above, both NRAs adopted decisions addressing differently the same issue of an incremental capacity procedure devoid of purpose in light of the absence of an essential operational prerequisite.
- (29) As regards the admissibility of the proposal, the existence of a capacity booking platform, or, in the alternative the perspective of such a platform being established within a foreseeable short period of time, constitute an essential operational prerequisite for implementing the incremental capacity project. In fact, Articles 19, 29(1) and 37 of Commission Regulation (EU) 2017/459 require a joint capacity booking platform to auction the TSO's bundled incremental capacity products previously approved by the NRAs.
- (30) This prerequisite was lacking at the time of the adoption of the decisions of BNetzA and URE respectively.
- (31) In addition, the incremental capacity project submitted on 23 October 2018 for the market border of Poland (E-Gas Transmission System) and GASPOOL, cannot be implemented further as the timing for its execution, as reported above at (21) can no longer be met.
- (32) Furthermore, a new incremental capacity cycle started immediately after the start of the annual yearly capacity auction of 1 July 2019⁹. On the basis of this cycle, if the TSOs' common market demand assessment reports identify demand for incremental capacity projects, its design phase shall start and, once finalised, the concerned TSOs shall send the project to the relevant NRAs for coordinated approvals.¹⁰

⁹ Cf. Article 26(1) of Commission Regulation (EU) 2017/459.

¹⁰ Cf. Article 28(1) of Commission Regulation (EU) 2017/459.

- (33) As a result, the proposal for an incremental capacity project submitted on 23 October 2018 by ONTRAS Gastransport GmbH and GAZ-SYSTEM S.A. has been superseded by a new incremental capacity cycle, making therefore the project itself obsolete.
- (34) According to the general principle of Union law ‘*Impossibilium nulla obligatio est*’, recorded per established case-law¹¹, no organisation should be required to fulfil an obligation that it cannot, *a priori*, fulfil.
- (35) As a result, the Agency shall not be considered under an obligation to decide upon the incremental capacity project proposed by ONTRAS Gastransport GmbH and GAZ-SYSTEM S.A., given the absence of an inherent essential prerequisite and the consequential impossibility further to implement the project,

HAS ADOPTED THIS DECISION:

Article 1

The Agency considers the application for the approval of an incremental capacity project for the market border of Poland (E-Gas Transmission System) and GASPOOL as inadmissible.

Article 2

This Decision is addressed to the following gas transmission system operators:

- ONTRAS Gastransport GmbH,
- GAZ-SYSTEM S.A.

Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (‘BNetzA’), and Urząd Regulacji Energetyki (‘URE’) shall be informed of the adoption of this Decision.

Done at Ljubljana on 22 October 2019.

- SIGNED -

For the Agency
Director ad interim
Alberto POTOTSCHNIG

¹¹ See e.g. Case C-664/15 of 20 December 2017.

In accordance with Article 28 of Regulation (EU) 2019/942, the addressees may appeal against this Decision by filing an appeal, together with the statement of grounds, in writing at the Board of Appeal of the Agency within two months of the day of notification of this Decision.