

DECISION No 09/2021
OF THE EUROPEAN UNION AGENCY
FOR THE COOPERATION OF ENERGY REGULATORS
of 23 July 2021

on the request of the regulatory authorities of Austria and the Czech Republic to extend the period for reaching an agreement on the project proposal for incremental capacity between Austria and the Czech Republic

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 Regulators (ACER)¹, 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 outcome of the consultation with ACER's Gas Working Group,

Having regard to the favourable opinion of the Board of Regulators of 13 July 2021, delivered pursuant to Article 22(5)(a) of Regulation (EU) 2019/942,

Whereas:

1. INTRODUCTION

- (1) ACER received via post a letter from E-Control dated 27 April 2021, whereby E-Control:
- a. Informed that a project proposal for incremental capacity between Austria and the Czech Republic was submitted by the project promoters NET4GAS, s.r.o., (N4G)

¹ OJ L158, 14.6.2019, p. 22.

² OJ L 72, 17.3.2017, p. 1.

- and Gas Connect Austria GmbH (GCA) to E-Control in accordance with Article 28(1) of Commission Regulation (EU) 2017/459 (the CAM NC).
- b. Informed that, for administrative reasons in Austria, E-Control was not in a position to issue a decision within the six month period stipulated in Article 28(2) of the CAM NC (i.e. by 5 May 2021).
 - c. Applied to ACER, pursuant to Article 6(10) of Regulation (EU) 2019/942, jointly with Energetický regulační úřad of the Czech Republic (ERU), for a prolongation of the six-month period.
- (2) ACER received via post a letter from ERU dated 4 May 2021, whereby ERU:
- a. Informed that on 5 November 2020, ERU and E-Control received project proposals for incremental capacity between Austria and the Czech Republic submitted by the project promoters N4G and GCA in accordance with Article 28(1) of the CAM NC.
 - b. Informed that, for administrative reasons in Austria, E-Control is not in a position to issue a decision within the six month period stipulated in Article 28(2) of the CAM NC (i.e. 5 May 2021), and that the administrative reasons are that E-Control at the date of 24 April 2021 did not have the Regulatory Commission which is responsible for setting tariffs, while E-Control needs a decision by the Regulatory Commission through an amendment of the Gas System Charges Ordinance, based on a cost decision by the E- Control Management Board.
 - c. Applied to ACER, pursuant to Article 6(10) of Regulation (EU) 2019/942, jointly with E-Control, for a prolongation of the six month period for taking a decision by E-Control and ERU on the project proposal for incremental capacity between Austria and the Czech Republic.
- (3) On 1 June 2021, ACER requested from E-Control and ERU additional information and clarifications related to the incremental capacity procedure and their request for an extension.
- (4) On 8 June 2021 and 10 June 2021, respectively, ERU and E-Control provided separate but coordinated responses to ACER's request for additional information. E-Control and ERU confirmed that, due to administrative reasons in Austria, they were not in a position to issue coordinated decisions by 5 May 2021. In addition, E-Control and ERU pointed out that they share the same view regarding the project, and that they endeavour to reach coordinated decisions by 5 November 2021. E-Control and ERU noted that they informed, respectively, N4G and GCA about their intention to apply before ACER for a six month extension, and that both promoters have coordinated and adjusted their project timeline in view of the ongoing request for an extension.
- (5) On 14 June 2021, ACER shared with E-Control and ERU its preliminary findings on this subject-matter and invited E-Control and ERU to provide comments. ACER preliminary findings are that the granting of a six-months extension (i.e., until 5 November 2021) would be reasonable and appropriate as it would allow the regulatory authorities in

Austria and the Czech Republic to reach an agreement on the project proposal for incremental capacity between Austria and the Czech Republic and to publish the respective coordinated decisions. On 17 June 2021 and 21 June 2021, respectively, E-Control and ERU replied to ACER, agreeing with its preliminary findings.

2. ASSESSMENT OF THE REQUEST

2.1. Legal framework

- (6) According to point (b) of the first subparagraph and point (a) of the second subparagraph of Article 6(10) of Regulation (EU) 2019/942, ACER shall decide on regulatory issues having effects on cross-border trade or cross-border system security which require a joint decision by at least two regulatory authorities, where such competences have been conferred on the regulatory authorities under network codes and guidelines adopted before 4 July 2019 and subsequent revisions of those network codes and guidelines, and where the competent national regulatory authorities have not been able to reach an agreement within a period of six months from the referral of the case to the last of those regulatory authorities. According to the third subparagraph of Article 6(10) of Regulation (EU) 2019/942, the competent national regulatory authorities may jointly request that the six-month period is extended by a period of up to six months.
- (7) According to Article 28(2) of the CAM NC, within six months of receipt of the complete proposal for an incremental capacity project by the last of the relevant regulatory authorities, those national regulatory authorities shall publish coordinated decisions on that project proposal. Moreover, where a national regulatory authority objects to the submitted project proposal, all national regulatory authorities involved shall reach a common agreement, and where they cannot reach an agreement within six months of receipt of the complete project proposal by the last of the relevant regulatory authorities, ACER shall decide in accordance with Article 6(10) of Regulation (EU) 2019/942 (i.e., ex Article 8(1) of Regulation (EC) No 713/2009).

2.2. Admissibility

- (8) The project proposal for incremental capacity between Austria and the Czech Republic is a matter within the meaning of the first and second subparagraphs of Article 6(10) of Regulation (EU) 2019/942, as it has effects on cross-border trade, requires an agreement and coordinated decisions by at least two regulatory authorities, and has been assigned to the regulatory authorities by a network code adopted before 4 July 2019.
- (9) Therefore, for an extension under the third subparagraph of Article 6(10) of Regulation (EU) 2019/942 with regard to the project proposal for incremental capacity between Austria and the Czech Republic, E-Control and ERU should request such extension before the end of the period for reaching an agreement and for a period of not more than six months.
- (10) Since both E-Control and ERU received the project proposal for incremental capacity between Austria and the Czech Republic on 5 November 2020, they were required to agree on it, in accordance with Article 28(2) of the CAM NC and Article 6(10) of

Regulation (EU) 2019/942, by 5 May 2021. Accordingly, an extension of this period for reaching an agreement should be requested by 5 May 2021.

- (11) E-Control's and ERU's joint request for extension is dated 27 April 2021 (E-Control) and 4 May 2021 (ERU), before the date of 5 May 2021 mentioned in (10) supra.
- (12) In their response to ACER's request of additional information and clarifications dated 1 June 2021, E-Control and ERU ask for an extension of six months, i.e. until 5 November 2021. As such, the requested extension does not exceed the maximum limit of six months stipulated for in Article 6(10) of Regulation (EU) 2019/942.
- (13) Therefore, ACER considers the request for granting an extension to be admissible.

2.3. Grounds for granting an extension

- (14) E-Control and ERU consider the extension necessary in order to allow them to overcome administrative reasons in Austria beyond the control of E-Control and ERU, which would otherwise impede reaching an agreement and subsequently issuing coordinated decisions on the proposal at hand within the six month period. In that regard, it should be noted that, although E-Control and ERU indicated having a shared view on the project proposal, they have not yet been able to reach an agreement forming the basis for coordinated decisions within the period of six months from the referral of the case to the last of those regulatory authorities.
- (15) Moreover, ERU and E-Control informed N4G and GCA about their intention to apply for a six month extension, and both promoters coordinated and adjusted their timeline in view of the request of extension submitted by ERU and E-Control.
- (16) Against this background, ACER is of the view that granting the requested six month extension would be reasonable and appropriate in order to ensure that the regulatory authorities in Austria and the Czech Republic reach an agreement on the project proposal for incremental capacity between Austria and the Czech Republic. ACER considers that such an extension is the most appropriate step to take, given the exceptional administrative circumstances that occurred in Austria. At the same time, ACER notes that a new incremental cycle will start following the auctions of July 2021³ and that the regulatory authorities in Austria and the Czech Republic, E-Control and ERU respectively, would have the competence to decide on how to proceed with the incremental capacity project proposal at hand.

3. CONCLUSION

³ Article 26(1) of the CAM NC.

(17) For these reasons, ACER considers the request for a six (6) month extension submitted jointly by the national regulatory authorities of Austria and the Czech Republic to be justified,

HAS ADOPTED THIS DECISION:

Article 1

The period within which the national regulatory authorities of Austria and Czech Republic shall reach an agreement on the project proposal for incremental capacity between Austria and the Czech Republic submitted by the project promoters N4G and GCA in accordance with Article 28(1) of Commission Regulation (EU) 2017/459 is extended, in accordance with Article 6(10) of Regulation (EU) 2019/942, by six months until 5 November 2021.

Article 2

This Decision is addressed to:

E-Control Austria
Energetický regulační úrad of the Czech Republic (ERU)

Done at Ljubljana, on 23 July 2021.

- SIGNED -

*For the Agency
The Director*

C. ZINGLERSEN

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.

In accordance with Article 29 of Regulation (EU) 2019/942, the addressees may bring an action for the annulment before the Court of Justice only after the exhaustion of the appeal procedure referred to in Article 28 of that Regulation.