

**OPINION OF THE AGENCY FOR THE COOPERATION OF ENERGY  
REGULATORS No 20/2017**

**of 14 November 2017**

**ON THE APPLICATION OF POINT 2.2.4 OF ANNEX I TO REGULATION  
(EC) NO 715/2009 OF THE EUROPEAN PARLIAMENT AND OF THE  
COUNCIL OF 13 JULY 2009 ON CONDITIONS FOR ACCESS TO THE  
NATURAL GAS TRANSMISSION NETWORKS**

THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS,

HAVING REGARD to Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators<sup>1</sup>, and, in particular, Article 7(6) thereof,

HAVING REGARD to the outcome of the consultation with the European Commission pursuant to Article 7(6) of Regulation (EC) No 713/2009,

HAVING REGARD to the favourable opinion of the Board of Regulators of 18 October 2017, delivered pursuant to Article 15(1) of Regulation (EC) No 713/2009,

WHEREAS:

**I) THE NOTIFICATION**

1. By letter dated 30 August 2017, which the Agency received on 7 September 2017, the Comisión Nacional de los Mercados y la Competencia (hereinafter referred to as 'CNMC'), the national regulatory authority of the Kingdom of Spain, requested, pursuant to Article 7(6) of Regulation (EC) No 713/2009, the opinion of the Agency for the Cooperation of Energy Regulators (hereinafter referred to as 'the Agency') with regard to the implementation of Point 2.2.4 of Annex I to Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, as amended by Commission Decision 2012/490/EU of 24 August 2012<sup>2</sup>.

**II) THE REQUEST**

2. The CNMC sought the opinion of the Agency as to whether the surrender mechanism foreseen in Point 2.2.4 of Annex I to Regulation (EC) No 715/2009 is exclusively applicable in the event of contractual congestion.

---

<sup>1</sup> OJ L 211, 14.8.2009, p. 1.

<sup>2</sup> OJ L 231, 28.8.2012, p. 16.

3. The request for an opinion relates to the interpretation of the above-mentioned legal provision in the context of a judicial proceeding brought before the Spanish national courts, where the meaning and scope of application of the surrender mechanism is disputed.

### **III) PROCEDURE**

4. The request of the CNMC concerns the application of point 2.2.4 of Annex I to Regulation (EC) No 715/2009 (hereinafter referred to as ‘CMP Guidelines’), as amended by Commission Decision 2012/490/EU of 24 August 2012, adopted as a guideline on the basis of Article 23(1)(b) of Regulation (EC) No 715/2009.
5. According to Article 7(6) of Regulation (EC) No 713/2009, when a national regulatory authority encounters, in a specific case, difficulties with the application of Guidelines referred to in Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009 or Regulation (EC) No 715/2009, it may request the opinion of the Agency.
6. On 7 September 2017, in accordance with Article 7(6) of Regulation (EC) No 713/2009, the Agency consulted the European Commission, seeking its view on the interpretation of point 2.2.4 of the CMP Guidelines and, in particular, on the scope of application of the congestion-management procedures of the surrender of contracted capacity.
7. On 13 November 2017, the Director-General for Energy, replying to the Agency’s consultation, confirmed that the European Commission supports the Agency’s interpretation on the question raised by the CNMC, as presented in the present Opinion, while underlining that the final interpretation with regards to EU law rests with the Court of Justice of the European Union

### **IV) ASSESSMENT**

#### **a. Factual Background**

8. The request relates to a judicial proceeding, pending before the Spanish national courts, related to the following dispute: a shipper (party to a contract) was aiming to exit the contractual obligations linked to the capacity held. To do so, this party chose not to use the surrender mechanism, but other opportunities provided by Spanish national law, to which its counterparty, the national Transmission System Operator (hereinafter referred to as ‘TSO’) did not agree. The case generated legal proceedings before the Spanish national courts. In the first instance, the national court adjudicated the dispute in favor of the shipper, establishing that the CMP Guidelines do not apply in this specific case, as they would only apply in the event of contractual congestion. The national court did not refer the case to the Court of Justice of the European Union.
9. In the context of the judicial proceeding, and with regard to the function of the surrender mechanism provided for in Point 2.2.4 of the CMP Guidelines, the CNMC argued in substance that:
  - a) although a network user holds the right to resell unused contracted capacity in the secondary market or alternatively surrender it to the TSO, the same network user

will nonetheless retain its rights and remain subject to the obligations foreseen under the capacity contract concluded among the user and the TSO, for as long as the surrendered capacity is not reallocated by the latter<sup>3</sup>; and

- b) the surrender mechanism is not exclusively applicable at the time in which contractual congestion arises, insofar the congestion management procedures also aim at the early management of future congestion events, which becomes particularly important in the event of cross-border interconnection flows.

## **b. Legal Background**

10. Contractual congestion and physical congestion are defined in Articles 2(21) and 2(23) of Regulation (EC) No 715/2009, respectively, according to which “*contractual congestion means a situation where the level of firm capacity demand exceeds the technical capacity*» and «*physical congestion means a situation where the level of demand for actual deliveries exceeds the technical capacity at some point in time*”.
11. Contractual congestion is intended to be addressed through congestion management procedures foreseen in the CMP Guidelines<sup>4</sup>.
12. Pursuant to Article 2(5) of Regulation (EC) No 715/2009, congestion management means management of the capacity portfolio of the TSO with a view to achieve optimal and maximum use of the technical capacity and the timely detection of future congestion and saturation points. The addressees of the obligation to carry out congestion management are the TSOs.
13. Recital (21) of Regulation (EC) No 715/2009 establishes that, due to the fact that “*there is substantial contractual congestion in the gas networks [...] the congestion-management and capacity-allocation principles for new or newly negotiated contracts are therefore based on the freeing-up of unused capacity by enabling network users to sublet or resell their contracted capacities and the obligation of transmission system operators to offer unused capacity to the market, at least on a day-ahead and interruptible basis. Given the large proportion of existing contracts and the need to create a true level playing field between users of new and existing capacity, those principles should be applied to all contracted capacity, including existing contracts*”.
14. As a result, pursuant to Article 16(3) of Regulation (EC) No 715/2009, “*in the event of contractual congestion, the transmission system operator shall offer unused capacity on*

---

<sup>3</sup> Underpinned by the Commission Staff Working Document, Guidance on best practices for congestion management procedures in natural gas transmission networks, Brussels, 11.7.2014, SWD(2014) 250 final, page 11: “*This mechanism is intended to allow network users to offer back to the TSO capacity they do not intend to use which the TSO can then reallocate. Importantly, for network users capacity surrender is an entirely voluntary measure and it is an alternative to their rights to offer capacity on the secondary market. Furthermore, as it is a congestion management measure, capacity surrender is only successful in case the TSO is able to reallocate a part or all of the capacity offered.*”

<sup>4</sup> See also Commission Staff Working Document, Guidance on best practices for congestion management procedures in natural gas transmission networks, Brussels, 11.7.2014, SWD(2014) 250 fin.

*the primary market at least on a day-ahead and interruptible basis*". This does not exclude the possibility for network users, pursuant to the same paragraph, *"to re-sell or sublet their unused contracted capacity on the secondary market"*.

15. Congestion management procedures guidelines were first introduced by Annex I to Regulation (EC) No 715/2009. Pursuant to Article 23 of the said Regulation<sup>5</sup>, the European Commission has been empowered further to amend the congestion management procedures guidelines, subject to the fulfilment of the minimum conditions set out in Article 16 of the above-mentioned Regulation.
16. The practice, however, showed that despite the application of certain congestion-management principles such as the offering of interruptible capacities as provided for by Regulation (EC) No 715/2009, contractual congestion in the Union gas transmission networks remained an obstacle to the development of a well-functioning internal market in gas.
17. As a result, Commission Decision No 2012/490/EU of 24 August 2012 partially amended Annex I to Regulation (EC) No 715/2009<sup>6</sup> by laying down new rules on the congestion-management procedures in the event of contractual congestion.
18. As foreseen in the CMP Guidelines, the rules contained therein are aimed at resolving such events of contractual congestion<sup>7</sup>, by bringing unused capacity back to the market to be reallocated in the course of the regular allocation processes<sup>8</sup>.
19. The scope of application of the relevant provisions, as particularly demonstrated in Recital (3) of Commission Decision 2012/490/EU, is referring to the future. Moreover, according to Point 2.2.1(3) of the CMP Guidelines, any additional capacity made available through the application of one of the congestion-management procedures shall be offered in the regular allocation process<sup>9</sup>.
20. In particular, according to the CMP Guidelines, three congestion-management measures are introduced and should have been implemented as of 1 October 2013: i) capacity increase through oversubscription and buy-back schemes, ii) surrender of contracted capacity and, iii) the long-term use-it-or-lose-it (UIOLI) mechanism. National rules on surrender mechanisms, when existent, can apply alongside the CMP surrender mechanism, in so far as they are interpreted in conformity with Union law and do not undermine its effectiveness.

---

<sup>5</sup> Article 23(1)(b).

<sup>6</sup> OJ L 231, 28.08. 2012, p. 16.

<sup>7</sup> *Ibid.*, Recital (2).

<sup>8</sup> *Ibid.*, Recital (3).

<sup>9</sup> The measures according to which capacity, including unused capacity, shall be offered were established in the Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems. (See Article 6 of Commission Regulation (EU) 2013/984 of 14 October 2013 establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems and supplementing Regulation (EC) No 715/2009 of the European Parliament and of the Council, OJ L 273, 15.10.2013, p. 5).

21. The additional firm day-ahead UIOLI mechanism should be implemented as of 1 July 2016, in the event where the Agency's monitoring report demonstrates that there is over-demand for firm capacity products which are offered in the next three years or in the event where no firm capacity whatsoever is offered.
22. With regard to the congestion-management procedure of the surrender of contracted capacity, Point 2.2.4 of the CMP Guidelines foresees that the TSO shall accept any surrender of firm capacity which is contracted by the network user at an interconnection point (hereinafter referred to as 'IP'), with the exception of capacity products with a duration of a day or shorter. However, the network user shall retain its rights and obligations under the capacity contract until the capacity is reallocated by the TSO and to the extent that the capacity is not reallocated by the TSO. Surrendered capacity shall be reallocated only after all the available primary capacity has been allocated. The TSO shall notify the network user without delay of any reallocation of its surrendered capacity. National Regulatory Authorities shall approve specific terms and conditions for surrendering capacity, in particular for cases where several network users surrender their capacity.
23. The capacity surrender mechanism described in Point 2.2.4 of the CMP Guidelines allows network users, as an alternative to their right to offer capacity on the secondary market, to offer back to the TSO the capacity they do not intend to use, which the TSO can then reallocate. This measure takes effect only insofar as the TSO is able to reallocate part or all of the surrendered capacity.
24. The aim of the surrender mechanism is to facilitate the optimal use of capacity booked and should apply to every IP side, independently of whether there was actual congestion in the past or if there will be congestion in the auction into which the capacity is surrendered. It could thus be ensured that congestion management procedures are applied in the most effective way at all IPs, with a view to maximising available capacities in all adjacent entry-exit systems<sup>10</sup>.

### **c. Agency's Assessment**

25. The request concerns the application of the surrender mechanism and, in particular, whether the surrender mechanism apply only once contractual congestion has effectively emerged.

#### ***i. Conditions of application of the CMP surrender mechanism***

26. The Agency is of the opinion that the provision of Point 2.2.4 of the CMP Guidelines applies prior to the occurrence of contractual congestion so as to prevent it by bringing unused capacity back to the market to be reallocated in the course of the regular allocation processes.

---

<sup>10</sup> See Articles 23(1)(b) and 23(2) of Regulation (EC) No 715/2009.

27. This interpretation of Point 2.2.4 of the CMP Guidelines is also supported by the reply of the Director-General for Energy of the European Commission to the Agency's consultation.
28. The literal, teleological and contextual interpretation of Point 2.2.4 of the CMP Guidelines support the interpretation presented in Recital (26) above.

*ii. Literal interpretation*

29. Point 2.2.4 falls under Title 2 of the CMP Guidelines containing "*congestion management procedures in the event of contractual congestion*".
30. It is, therefore, necessary to establish the meaning of the term '*in the event of*' contractual congestion.
31. As reported in Recital (0) above, this idiom is, at first, encountered in Article 16(3) of Regulation (EC) No 715/2009 and then reflected in the CMP Guidelines.
32. First of all, it should be pointed out that preceding the CMP measures by the wording '*in the event of contractual congestion*' is a clear way to indicate that these measures relate to contractual rather than physical congestion.
33. Second, in the English language, the idiom '*in the event of*' is employed as a synonym for '*if something should happen*' and therefore is it meant to be employed when anticipating a future unplanned occurrence.
34. This intended meaning is reflected in Article 16(3)(a) of Regulation (EC) No 715/2009, where it is established that, '*in the event of contractual congestion*' the TSO shall offer unused capacity on the primary market '*at least on a day-ahead*' and '*interruptible basis*', and therefore establishing measures to exclude the future occurrence of contractual congestion. This principle is further reflected in the CMP Guidelines but widened to any timeframe.
35. This reading is reinforced by the second and third sentence of Point 2.2.4 of the CMP Guidelines. In fact, three suspensive cumulative conditions are set to mitigate the effect of the surrender principle as follows:

*"The network user shall retain its rights and obligations under the capacity contract*

- (i) *until the capacity is reallocated by the transmission system operator; and*
- (ii) *to the extent the capacity is not reallocated by the transmission system operator.*

*Surrendered capacity shall be considered to be reallocated only after all the available capacity has been allocated".*

36. As a result, if the surrender mechanism were to be applicable only after contractual congestion has taken place, the term '*until*' would be deprived of any meaning and it

would imply that the network user remains solely responsible until contractual congestion takes place.

37. In the same vein, in case contractual congestion already occurred, the TSO could reallocate the unused capacity only to a residual extent, depending on the current needs of network users. The objectives of Regulation (EC) No 715/2009 and especially of the amendment of the CMP Guidelines, namely removing the obstacle of contractual congestion for the development of a well-functioning internal market in gas, would therefore be hindered.
38. In light of the above, the Agency is of the opinion that the term ‘*in the event of contractual congestion*’ contained in Title 2 of the CMP Guidelines refers to a situation in which contractual congestion may happen and a set of measures are put in place to counteract its potential occurrence. As a result, contractual congestion does not constitute a precondition for the application of the rules contained in Title 2 of the CMP Guidelines, but, instead, an (inherent) feature of the gas networks which needs to be addressed ahead of its future occurrence.

### *iii. Teleological interpretation*

39. The conclusions of the literal interpretation are reinforced by the interpretation of the relevant provisions in light of the aim and objectives of the CMP Guidelines in consideration of the current market dynamics.
40. As reported above in Recitals (13) to (18), Regulation (EC) No 715/2009 intends to tackle contractual congestion by establishing principles of congestion management, ensuring the freeing-up of unused capacity in the gas networks with the direct effect of guaranteeing a level playing field between users of new and existing capacity. This objective contributes to the achievement of efficiency gains, competitive prices, higher standards of service, security of supply and sustainability<sup>11</sup>.
41. Pursuant to Article 23 of Regulation (EC) No 715/2009, Guidelines, such as the CMP Guidelines, have the objective of introducing a minimum degree of harmonisation across Member States so as to achieve the aims of the Regulation itself, as reported above in Recitals (13) to (18) and (37).
42. As a result, the CMP Guidelines shall have a general character and application *erga omnes*.
43. Looking at market dynamics, contractual congestion is hardly predictable and is detectable on the basis of an *ex-post* assessment only. In particular, contractual congestion (i.e. demand exceeding the offer) normally becomes evident only once the capacity auction for a certain product has commenced and the accumulated amounts of bids exceed the offered amount.

---

<sup>11</sup> Recital (1), Regulation (EC) No 715/2009.

44. In such a case, it is already too late to try to resolve the particular congestion (for a certain standard product at this IP).
45. The application and structuring of the surrender mechanism should not lead to perverse outcomes. The surrender mechanism was not meant to provide a way to network users, who strategically booked in the capacity auctions capacity in excess of their requirements, to give this capacity back to the TSO<sup>12</sup>. Rather, the application of the CMP Guidelines prior to the occurrence of contractual congestion is pursued so as to ensure that unused capacity is reallocated via the primary market in the form of bundled capacity to the greatest possible extent and provided that “*all the available capacity has been allocated*”<sup>13</sup>.
46. In fact, the capacity surrender mechanism differs in its function from capacity offered in the secondary market, in that it provides the TSO with the possibility to offer the surrendered capacity in the manner in which it can satisfy existing demand in the most effective way. Contrary to the secondary market, where network users can only resell the capacity product auctioned, surrendered capacity returns to the market in the form of primary capacity having exactly the same characteristics as any other capacity offered by the TSO<sup>14</sup>.
47. If contractual congestion were to be considered as a condition triggering the application of the surrender mechanism, it would result in this mechanism being employed as a measure of last resort, with little effectiveness in pursuing the above-mentioned objectives.
48. By way of example, in a scenario in which contractual congestion were to arise at a monthly auction, the application of the surrender mechanism would no longer be possible for this period and could only be provided afterwards, i.e., for day-ahead auctions. At this stage, the application of the surrender mechanism would have only a residual character as the TSO could only provide, if at all, for a more limited re-allocation of capacity on the primary market. Also, the chances to employ the secondary market at such a moment in time would be even more limited as the chances to resell the product originally auctioned are rather limited.
49. As a result, due to higher prices at the auction (given lower supply, as surrender capacity will not yet be offered prior to the auction according to this logic), shippers could end up paying more than what they would have paid had the TSO been able to offer and allocate the unused capacity prior to the occurrence of contractual congestion.

---

<sup>12</sup> In particular, the Commission services' view is that care should be taken by NRAs not to structure capacity surrender in a way that would perversely incentivise network users to initially reserve excessive capacity, beyond what they estimate is necessary, in order to return it to the TSO later. See also Commission Staff Working Document, Guidance on best practices for congestion management procedures in natural gas transmission networks, Brussels, 11.7.2014, SWD(2014) 250 fin. p. 11.

<sup>13</sup> *Ibid.*.

<sup>14</sup> *Ibid.*.



50. As a result, if contractual congestion were to be considered as a pre-condition for the employment of the surrender mechanism, it could become a stable feature of the gas networks. In fact, there would be more limited chances to reallocate unused capacity on the primary and secondary markets. Such interpretation would unnecessarily and negatively influence markets and price signals. The effectiveness and efficiency of gas networks would therefore be hindered, and the above-mentioned objective of Regulation (EC) No 715/2009 not achieved.
51. To the contrary, the Agency is of the opinion that the overall aim of the CMP Guidelines is to avoid, to the extent possible, the occurrence of contractual congestion. In particular, their application has a fundamentally preventive function, notably the prevention of capacity hoarding<sup>15</sup>, especially in view of the difficulty in predicting congestion before occurrence. Only by intending the surrender mechanisms as a preventive measure, the objectives of Regulation (EC) No 715/2009 can be achieved in terms of guaranteeing a level playing field between users of new and existing capacity and contributing to the achievement of efficiency gains, competitive prices, higher standards of service, security of supply and sustainability.

#### *iv. Contextual interpretation*

52. Finally, it is also worth considering the context and general scheme of the CMP Guidelines which also point towards the application of the surrender mechanism prior to the occurrence of contractual congestion.
53. The CMP Guidelines contain a set of measures beyond the application of the surrender mechanism, all applicable ‘*in the event of contractual congestion*’. In particular, in addition to the surrender mechanism, the CMP Guidelines introduce three measures: i) capacity increase through oversubscription and buy-back schemes, ii) firm day-ahead UIOLI mechanisms, and iii) long-term UIOLI mechanism.
54. From a reading of these measures, as foreseen at Points 2.2.2, 2.2.3 and 2.2.5 respectively, of the CMP Guidelines, it is clear that such measures do apply in order to prevent or minimise future contractual congestion. In fact, it is worth noting that, pursuant to paragraph 3 of Point 2.2.1, “*additional capacity made available through the application of one of the congestion-management procedures as provided for in points 2.2.2, 2.2.3, 2.2.4 and 2.2.5 shall be offered by the respective transmission system operator(s) in the regular allocation process*”. As a result, since those mechanisms, including the surrender mechanism, should make capacity available to be offered in the regular allocation process, it is clear that they have to be applied before the occurrence of contractual congestion.

---

<sup>15</sup> The Commission Staff Working Document, Guidance on best practices for congestion management procedures in natural gas transmission networks, Brussels, 11.7.2014, SWD(2014) 250 fin. states that “(…), the rules on capacity surrender in the CMP Guidelines are set out in a way so as to offer this mechanism to network users but not to incentivize them specifically. Therefore, in the Commission services’ view, care should be taken by NRAs not to structure capacity surrender in a way that would perversely incentivize network users to first book more capacity than necessary only to easily hand it back to the TSO”.

55. In particular, oversubscription and buy-back schemes have the purpose of providing incentives to offer additional capacity on a firm basis in addition to the technical capacity of an IP, so as to guarantee capacity closer to market reality. Such schemes shall be approved by the relevant national regulatory authorities beforehand and apply in a preventive manner to counteract contractual congestion. Similarly, the firm day-ahead UIOLI mechanisms are intended to be employed as a preventive tool to address past trends of demand exceeding offer at IPs. Finally, the same consideration applies to long-term UIOLI mechanisms in so far as such measures are directed to reduce the level of stable underutilised contracted capacity by a network user, so as to exclude, from the outset, the possibility for contractual congestion to occur on a regular basis.

**HAS ADOPTED THIS OPINION:**

Point 2.2.4 of Annex I to Regulation (EC) No 715/2009 is to be interpreted to the effect that the surrender mechanism is not exclusively applicable in the case of contractual congestion. Given its ultimate aim to prevent contractual congestion, the surrender mechanism should be applied prior to such an event.

Done at Ljubljana on 14 November 2017.

For the Agency:



Alberto Pototschnig  
Director