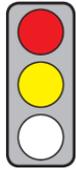


MAIN ISSUES

Objective of the Regulation: Safeguarding the supply of natural gas

Groups Affected: Natural gas undertakings, private and commercial natural gas consumers



Pros: All Member States are obliged to take a minimum amount of preventive action.

Cons: (1) The proposed extension of the Commission's powers infringes the principle of subsidiarity.

(2) Replacing the legal act of a directive by a regulation infringes the principle of proportionality.

(3) Cost allocation is not regulated appropriately.

CONTENT

Title

Proposal COM(2009) 363 of 16. July 2009 for a **Regulation** of the European Parliament and of the Council concerning measures to **safeguard security of gas supply** and repealing Directive 2004/67/EC

Brief Summary

► Aim and background

- The security of the gas supply is to be safeguarded "so as to ensure the proper and continuous functioning of the internal market for gas" (Art. 1).
- Natural gas ("gas") is mainly used to generate electricity and heat. In the EU it covers 25% of the primary energy supply; 58% is imported, whereby 42% of the imports are from Russia.
- The EU is seeing a huge increase in gas consumption and dependence on gas imports, as well as in the risks associated with the supply of gas and transit through third countries.
- According to the Commission, the Russian-Ukrainian gas crisis of January 2009, which caused a major disruption in the gas supply from Russia to the EU, demonstrated that the existing Directive 2004/67/EC of 26. April 2004 for safeguarding the supply of gas is inadequate and must be replaced.

► Supply standard for "protected customers"

- Member States must ensure that the gas supply to "protected customers" is safeguarded for a period of at least sixty days (Art. 7 (2)).
- "Protected customers" means all private customers already connected to a gas distribution network. Member States may decide that this also includes small and medium-sized enterprises, schools or hospitals. (Art. 2 (1))
- Member States must ensure that the gas supply to "protected customers" through natural gas undertakings is safeguarded in the following cases:
 - "Extremely cold temperatures during a seven day peak period statistically occurring only once every twenty years" (Art. 7 (1) lit. a).
 - A period of "sixty days of exceptionally high gas demand during the coldest weather periods statistically occurring every twenty years" (Art. 7 (1) lit. b).

► Infrastructure standard ("n-1 standard")

- Member States must ensure that even in the case of a disruption to the "largest gas supply infrastructure" (e.g. a production facility) within a certain area, the remaining infrastructure ("n-1") has the capacity to satisfy an "exceptionally high gas demand". The standard to be applied should be the volume necessary to satisfy the demand of a period of sixty days during the "coldest period" statistically occurring only once every twenty years (Art. 6 (1)).
- In order to calculate whether or not the infrastructure of a certain area can comply with the "n-1-standard", an EU-wide harmonised methodology is to be applied which takes into consideration the network configuration and actual gas flows as well as the production and storage capacities (Art. 6 (3), Annex I).
- Member States are entitled to fulfil the "n-1 standard" jointly (Art. 6 (2)).
- Transmission system operators must ensure that the physical capacity to transport gas in both directions is given on all interconnections ("bi-directional flow capacity", Art. 6 (5)).
- If costs are incurred in more than one Member State for fulfilling the "n-1 standard", the national regulatory authorities of the Member States concerned are to decide jointly on the pertaining cost allocation (Art. 6 (7)).

► **Risk Assessment**

Member States must “fully assess the risks” affecting the security of gas supply every two years (Art. 8).

► **Preventive Action Plan**

- Member States must establish a “Preventive Action Plan” containing measures to mitigate the risks affecting the security of gas supply (Art. 4 (1) lit. a, Art. 5).
- The Preventive Action Plan, in particular, regulates (Art. 5 (1)):
 - the measures to fulfil the supply standard (Art. 7) and infrastructure standard (Art. 6),
 - risk assessment (Art. 8), and
 - the measures to avoid risks.
- The Commission can obligate a Member State to revise the Preventive Action Plan if, according to the Commission, it fails to mitigate (Art. 4 (6)) the identified risks (Art. 8).

► **Emergency Plan**

- Member States must establish an “Emergency Plan” containing measures to mitigate the impact of a gas supply disruption (Art. 4 (1) lit. b, Art. 9).
- The Emergency Plan, in particular, is to regulate (Art. 9 (1)):
 - the responsibilities of the “competent authorities” in charge of safeguarding gas supply in Member States (Art. 2 (2)) and
 - the responsibilities of natural gas undertakings and commercial consumers and their co-operations with “competent authorities”.
- The Emergency Plan defines procedures for the “emergency level”. An emergency level is given if there is a “credible risk” that the supply standard for protected customers (Art. 7) can no longer be met “with market based instruments” (e.g. diversification of supplies and routes, Annex II), but only with “non-market based instruments” (e.g. use of strategic gas storage, Annex III). (Art. 9 (2))
- The Commission may obligate a Member State to revise the Emergency Plan if, according to the Commission, it fails to mitigate (Art. 4 (6)) the identified risks (Art. 8).

► **Declaration of an “emergency” by a Member State**

- If a Member State declares an “emergency”, it has to notify the Commission of all planned measures “immediately” (Art. 9 (4)).
- The Commission may “ask” the Member State:
 - to modify measures “imposing an undue burden” on natural gas undertakings and
 - to lift its declaration of emergency if the Commission considers it unjustified (Art. 9 (6)).

► **Declaration of a “Community emergency” by the Commission**

- The Commission may declare a “Community emergency”:
 - at the request of a Member State;
 - or if the European Network of Transmission System Operators for Gas “ENTSO-G “ identifies a loss of more than 10% of the daily EU gas imports;
 - or if more than one Member State declares an emergency
 - or if the Commission deems it necessary for “specifically affected geographical regions” comprising more than one Member State. (Art. 10 (1))
- The Commission is to coordinate the national, regional and EU-wide actions (Art. 10 Abs. 3).
- The Commission is to be supported by the “Gas Coordination Group” (Art. 10 (2), Art. 11 (2) lit. f). It is to be composed of representatives of the “competent authorities”, the Agency for the Cooperation of Energy Regulators, ENTSO-G and representative bodies of the gas industry and customers (Art. 11 (1)).
- The Commission may convene a “crisis management group” composed of representatives of the gas industry and the Member States concerned (Art. 10 (3)).
- If the Commission considers that an action taken by a Member State or a natural gas undertaking is “inappropriate” or “seriously endangers” another Member State, the Commission may demand that the action be changed “without delay” (Art. 10 (4)).
- The Member States or natural gas undertakings may not restrict the flow of gas within the internal market at any time (Art. 10 (5)).
- Member States must ensure that cross-border access to the storage facilities is maintained (Art. 10 (6)).

Changes Compared to the Status Quo

- To date, the legal instrument in the EU for measures governing the safeguarding of the gas supply has been a Directive (2004/67/EC). Now it is to be replaced with a Regulation.
- To date, the Directive has “in particular” been based on Art. 100 TEC, whereby the Council is entitled to take action “if severe difficulties arise in the supply of certain goods”. The Regulation proposed now is to be based exclusively on internal market competences pursuant to Art. 95 TEC.
- To date, there have been no requirements as to the capacity of infrastructures for gas supply. Now Member States are to be obliged to establish and ensure an infrastructure standard (“n-1”).

- ▶ To date, a “major disruption to the gas supply” has meant when more than 20% of the EU gas supply from third countries fails and supply shortages within the EU cannot be solved through national action. Now it should be possible for the Commission to declare a “Community emergency” when more than 10% of daily EU gas imports fail.
- ▶ To date, the “Gas Coordination Group” headed by the Commission has supported the Member States in “dealing with major gas supply disruptions” and, “if necessary”, in coordinating national actions (“Community Mechanism”). Now the Commission is to coordinate the Member States’ actions and natural gas undertakings and may order them to act.

Statement on Subsidiarity

In the event of an emergency, the Commission deems itself “best placed” to coordinate the actions of the Member States to ensure the security of gas supply. In view of the “more and more important” relevance of a secure gas supply in the EU, the increased involvement of Community institutions is “justified”.

Political Background

The Regulation (EC) No. 713/2009, passed on 13. July 2009 within the Third Energy Liberalisation Package on the establishment of the Agency for the Cooperation of Energy Regulators [Proposal COM(2007) 530, cp. [CEP Policy Brief](#)], the Directive 2009/73 EC on the internal market in natural gas [Proposal COM(2007) 529, cp. [CEP Policy Brief](#)] and the Regulation (EC) No. 715/2009 on access to natural gas transmission networks [Proposal COM(2007) 532, cp. [CEP Policy Brief](#)] are to improve the security of energy supplies.

Legislative Procedure

16.07.09 Adoption by Commission
 Open Adoption by European Parliament and Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Energy
Committees of the European Parliament:	Industry, research and energy (leading), rapporteur Alejo Vidal-Quadras (EPP Group, ES); economic and monetary affairs; environment, public health and food safety; internal market and consumer protection
Committees of the German Bundestag:	n/a
Decision mode in the Council:	Qualified majority (adoption by majority of Member States with 255 of 345 votes; Germany: 29 votes)

Formalities

Legal basis:	Art. 95 TEC (Internal market)
Form of legislative competence:	Concurrent legislative competence
Legislative procedure:	Art. 251 TEC (Co-decision)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

In the event of a crisis, Member States and natural gas undertakings are obliged to support each other; therefore, it is to be welcomed that they are to be committed to taking a minimum amount of preventive action themselves.

Increasing the security of gas supplies means enormous costs incurred by, amongst other things, its provisioning and the investment in additional infrastructures. It must be ensured that the beneficiaries of an increase in the security of supply bear these costs, so that an incentive for “free riding” is not created. The Proposal, however, recommends allocating such costs to Member States only if more than one Member State is affected. Yet where bi-directional gas flow capacities are established it is even more likely that investments made in one Member State increase the security of supply in another Member State. **It would therefore be appropriate if costs were allocated whenever costs and benefits affect different Member States.**

Impact on Efficiency and Individual Freedom of Choice

The threshold for declaring a Community Emergency at a loss of more than 10% of the daily EU gas imports is too low. The last crisis demonstrated that in the event of such disruptions undertakings are capable of securing an adequate supply. **To this end, the threshold should remain at more than 20%.**

The obligation to ensure the physical capacity of transmission systems to transport gas in both directions on all interconnections is too far-reaching. It would be appropriate to limit said obligation to interconnections where the bi-directional gas flow capacities actually increase the security of the gas supply.

Impact on Growth and Employment

Unproblematic.

Impact on Europe as a Business Location

A secure gas supply has a positive impact on the quality of a business location, in particular in vulnerable countries. Unnecessary investments and an inappropriate cost allocation, however, increase the costs for gas supply and thus have a negative impact on Europe as a business location.

Legal Assessment

Legal Competence

The Commission wrongly bases its Regulation Proposal on the internal market competence following from Art. 95 TEC. Even if its allegations were right, for example that the establishment of new infrastructure “also” improves the well-functioning of the internal gas market, the main focus lies in securing gas supply in times of crisis. For such “difficulties in the supply of certain goods” Art. 100 (1) TEC, which has hitherto been referred to as the legal basis, is more appropriate. Compared to the existing Directive, the planned changes do not justify a change to the legal competence.

Subsidiarity

The extended **competences of the Commission**, which even as far as having the authority to give orders to Member States in the case of “Community emergency”, **infringe the principle of subsidiarity**. The Commission cannot state any objective reasons which would justify such an abundance of competences. Moreover, the work hitherto done by the “Gas Coordination group” demonstrates that its composition of representatives of Member States and of representative bodies of the gas industry and customers headed by the Commission is the appropriate coordination forum.

Proportionality

Changing the legal instrument from a Directive **to a** directly applicable **Regulation infringes the principle of proportionality**. The Commission does not state any reasons which would justify the intensified far-reaching effects resulting from that change. However, it does emphasize correctly that the Proposal allows Member States a certain amount of leeway when it comes to the question of details. Therefore, a Directive which leaves it up to the Member States to choose the appropriate form and means for implementation, would be sufficient and – as a more gentle tool – more preferable than a Regulation.

Compatibility with EU Law

Unproblematic.

Compatibility with German Law

The proposed Regulation would have to be integrated into the German law on electricity and gas supply (Energy Industry Act – *EnWG*). This applies, in particular, to §§ 15 to 16a (responsibilities of gas transmission systems and networks) and §§ 49 to 53a (security and reliability).

Alternative Actions

The Commission should propose a Directive instead of a Regulation and should base it on Art. 100 (1) TEC. The Gas Coordination Group should be leading in the event of a Community emergency. The threshold for the declaration of a Community emergency should be set at more than 20% of daily EU gas imports.

Possible Future EU Actions

Currently not foreseeable.

Conclusion

On the one hand it is to be absolutely welcomed that all Member States are to be obliged to take a minimum amount of preventive actions. On the other hand, however, the proposed extension of the Commission’s powers, in particular the authority to give orders to Member States, infringes the principle of subsidiarity. Changing the legal instrument from a Directive to a Regulation infringes the principle of proportionality. Cost allocation is not regulated appropriately. The lowering of the threshold to a 10% disruption to import in order to declare a Community emergency is too low and should remain at the value of more than 20% as before. The Regulation should be withdrawn.