



A legal perspective on gas solidarity

Ruven Fleming

University of Groningen, The Netherlands



ARTICLE INFO

Keywords:

Energy security
New gas security of supply regulation
Regulation (EU) 2017/1938
Solidarity in gas supply security
Energy justice and 'just' transition in gas supply security

ABSTRACT

The EU introduced a new security of gas supply regulation in November 2017, which now replaced the security of gas supply regulation of 2010. This article is providing a critical assessment of the new Regulation (EU) 2017/1938. Many instruments of the predecessor Regulation (EU) 994/2010 will stay in place unchanged and those have been discussed elsewhere. This contribution will, hence, focus on the novelties and changes that Regulation (EU) 2017/1938 is bringing about.

After some introductory remarks on the structure and the aims of Regulation (EU) 2017/1938, the current article will proceed by discussing the two main novelties of Regulation (EU) 2017/1938, which shall implement the main thrust of the new regulation: imposing obligatory solidarity between Member States in a gas crisis. These are first, the grouping of directly connected Member States into so called risk groups and second the new article 13 of Regulation (EU) 2017/1938, which spells out concrete solidarity measures that Member States have to take. In a third step other novelties of Regulation (EU) 2017/1938 will be highlighted and critically reflected upon before the article is wrapped up with some conclusions.

1. Introduction

The key to understanding the change in attitude of the EU towards its security of gas supplies and the resulting legislation are the 2006 and 2009 Russia-Ukraine gas crises. These crises used law and contractual obligations as 'weapons' for what, in reality, was an energy policy issue.¹ The Ukraine and Russia were at odds about the gas price and how to verify the correct amount of deliveries of gas to Ukraine and to Europe via a transit pipeline.² As both countries could not agree on the facts the result, from a European perspective, was a substantial downfall in the amount of gas that reached Europe during the 2006 and particularly the 2009 gas dispute. This downfall forced, inter alia, Italian and German gas-fired power plants to perform emergency shut

downs.³

Those events were a pivotal turning point in legal thinking about European gas security of supply. Prior to the crises an almost 'laissez-faire' approach to gas security was taken at EU level. By and large EU Member States were considered as being responsible for safeguarding their own gas supplies. The crises exposed their vulnerabilities, as they largely relied upon nationalistic approaches to gas security. Thus, the recognition that coherent and increasingly stringent measures are needed at EU level to guarantee the supply of gas throughout the Union gained momentum. The EU institutions assessed that new measures were needed and that habits need to be changed.

To avoid further replication of the 2006 and 2009 crises the European Commission, Parliament and Council decided to act and in

¹ Jonathan Stern 'The Russian-Ukraine Gas Crisis of January 2006' (Oxford Institute for Energy Studies, 2006) 9, 14; Simon Pirani, Jonathan Stern and Katja Yafimava 'The Russo-Ukrainian gas dispute of January 2009: a comprehensive assessment' (Oxford Institute for Energy Studies, 2008) 8, 19–25, 55; Matthias Neumann, Heiko Pleines and Henning Schröder 'Russland Analysen Erdgaskonflikt mit der Ukraine' [2009] No 176 Forschungsstelle Osteuropa an der Universität Bremen available at: <http://www.laender-analysen.de/rusland/pdf/Ruslandanalysen176.pdf> [accessed 18/July/2013] 4/5.

² Jonathan Stern 'The Russian-Ukraine Gas Crisis of January 2006' (Oxford Institute for Energy Studies, 2006) 9, 14; Simon Pirani, Jonathan Stern and Katja Yafimava 'The Russo-Ukrainian gas dispute of January 2009: a comprehensive assessment' (Oxford Institute for Energy Studies, 2008) 8, 19–25, 55; Matthias Neumann, Heiko Pleines and Henning Schröder 'Russland Analysen Erdgaskonflikt mit der Ukraine' [2009] No 176 Forschungsstelle Osteuropa an der Universität Bremen available at: <http://www.laender-analysen.de/rusland/pdf/Ruslandanalysen176.pdf> [accessed 18/July/2013] 4/5.

³ Jonathan Stern 'The Russian-Ukraine Gas Crisis of January 2006' (Oxford Institute for Energy Studies, 2006) 9, 14; Simon Pirani, Jonathan Stern and Katja Yafimava 'The Russo-Ukrainian gas dispute of January 2009: a comprehensive assessment' (Oxford Institute for Energy Studies, 2008) 8, 19–25, 55; Matthias Neumann, Heiko Pleines and Henning Schröder 'Russland Analysen Erdgaskonflikt mit der Ukraine' [2009] No 176 Forschungsstelle Osteuropa an der Universität Bremen available at: <http://www.laender-analysen.de/rusland/pdf/Ruslandanalysen176.pdf> [accessed 18/July/2013] 4/5.

2010 put into place Regulation (EU) 994/2010,⁴ as an explicit response to this political crises.⁵ This pioneering piece of legislation has now been replaced by a new security of gas supply regulation in November 2017.⁶ It has to be pointed out that these two regulations are the only legal instruments that are directly imposing strictly binding rules on all EU Member States on gas security of supply. Before these two regulations, gas security of supply was mainly governed by the soft-touch rules of Directive 2004/67⁷ and was considered to be largely provided for by the principles governing the internal European energy market.⁸ The particularities are discussed in more depth below in this article.

The new Regulation (EU) 2017/1938 is, thus, the successor to Regulation (EU) 994/2010 and is supposed to deal with its perceived shortcomings. Many instruments of the predecessor Regulation (EU) 994/2010 will stay in place unchanged and those have been discussed elsewhere.⁹ This contribution, hence, focusses on the novelties and changes that Regulation (EU) 2017/1938 is bringing about.

As this is a legal paper some words on legal methodology might be of interest to the reader. A genuine understanding of how regulation addresses the issue of gas supply security in Europe may not be achieved by superficial reading and comparison of paragraphs. The law texts rather need to be interpreted in the light of their respective contexts in order to distil the genuine meaning of a norm.¹⁰ Two hundred years ago Friedrich Carl von Savigny developed a rigorous methodology of legal interpretation, which is based on four ‘canons’, or methods.¹¹ These methods have been widely accepted in the comparative law literature¹² and are still in use today all over the world.¹³ The four

methods consist of grammatical interpretation (the interpretation of the wording of the law) and systematic interpretation (the logical interaction of different pieces of the law among themselves and with the overall legal system).¹⁴ They also comprise historical interpretation (considering the legal situation and pertaining circumstances at the point in time when the law was enacted) and teleological interpretation (interpretation in view of the underlying aims and rationale of the law).¹⁵ The current analysis is the result of an application of this methodology to the text of the new Gas Security of Supply Regulation (EU) 2017/1938. Its predecessor has been analysed with the help of a comparable methodology by Silke Goldberg¹⁵ and the present article could, hence, be viewed as a logical continuation of her sublime analysis of the old Regulation (EU) 994/2010.

After providing a background on the development of Regulation (EU) 2017/1938, the article is starting off with some remarks on its structure and aims. The reader then learns more about the main novelty that Regulation (EU) 2017/1938 is bringing about in comparison to its predecessor: the imposition of obligatory solidarity between Member States in a gas crisis. This shall be achieved by two means, which are discussed in depth: first, directly connected Member States are being clustered into so called risk groups and second, the new article 13 of Regulation (EU) 2017/1938, spelling out concrete solidarity measures that Member States have to take in case of an emergency. The article concludes with some observations on policy implications of the new means, situating the new regulation on gas supply solidarity within the concepts of energy justice and ‘just’ transitions.¹⁶

2. Background

The EU deemed it necessary to introduce a new security of gas supply regulation after the Commission investigated the implementation of Regulation (EU) 994/2010 in October 2014. Although the EU insists that the old Regulation (EU) 994/2010 had a ‘significant positive impact’ on the security of gas supply in the Union,¹⁷ the October 2014

⁴ Regulation (EU) 994/2010 of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC [2010] OJ L 295/1 (hereinafter: Regulation (EU) 994/2010).

⁵ European Commission, Commission Staff Working Document accompanying the Proposal 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 ‘The January 2009 Gas Supply Disruption to the EU: An Assessment’ COM (2009) 977 final page 7.

⁶ Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 [2017] OJ L280/1 (hereinafter: Regulation (EU) 2017/1938).

⁷ Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas.

supply [2004] OJ L127/92. Directive 2004/67 was the first attempt to deal with the issue of security of gas supply, but did not succeed, partly due to its nature as a Directive (not immediately applicable and enforceable in the Member States national law).

⁸ See for example preamble 22 and art. 1 (32), 3 (5) and (7) or art. 5 Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

⁹ Silke Muter Goldberg ‘Chapter IV Regulation 994/2010: A Measure to Improve The Security of Gas Supply in The EU?’ in Martha M Roggenkamp and Ulf Hammer ‘European Energy Law Report VIII’ (Intersentia, Cambridge 2011) 61–92 (hereinafter: Goldberg); Silke Muter Goldberg ‘Security of Supply in the context of European Energy Market Liberalisation – a Brief Overview’ (2011) 4 International Business Law Journal 433–462 in particular 438 et sqq.

¹⁰ Konrad Zweigert and Hein Kötz and Tony Weir ‘Introduction to comparative law’ 3rd edition (Clarendon, Oxford 1998) 35/36 (hereinafter: Zweigert/Kötz/Weir).

¹¹ Friedrich Carl von Savigny ‘System des heutigen römischen Rechts Band I’ (Veit, Berlin 1840) 212–214 (hereinafter: Savigny).

¹² Heiko Sauer ‘Juristische Methodenlehre’ in Julian Krüper (edt.) ‘Grundlagen des Rechts’ 2nd edition (Nomos, Baden-Baden 2013) § 9 paragraph 17 (hereinafter: Krüper); Karl Larenz ‘Methodenlehre der Rechtswissenschaft’ 2nd edition (Springer, Berlin 1991) 231 Larenz 231.

¹³ Günter Hager ‘Rechtmethoden in Europa’ (Mohr Siebeck, Tübingen 2009) 26/27 and 37 (hereinafter: Hager); Krüper § 9 para. 5; Jean-Louis Bergel ‘Méthodologie juridique’ (Presses Universitaires de France, Paris 2001) 231 et sqq.; Jean-Louis Bergel ‘Théorie générale du droit’ 4th edition (Daloz, Paris 2003) No 231 et sqq.; the German Federal Constitutional Court ruled that

(footnote continued)

Savigny’s means of legal interpretation must be adhered to by all users of the law and that a conclusion from interpreting a norm which was not reached by one of these methods is invalid, see: BVerfGE 93, 37 (81); 113, 88 (104).

¹⁴ Savigny 212–214.

¹⁵ Goldberg.

¹⁶ More on those concepts can be found at Raphael J Heffron and Darren McCauley ‘The concept of energy justice across the disciplines’ 105 (2017) Energy Policy 658–667 (hereinafter: Heffron/McCauley 2017); Benjamin K. Sovacool and Michael H. Dworkin ‘Global Energy Justice’ (Cambridge University Press 2014); Raphael J. Heffron and Darren McCauley ‘What is the ‘Just Transition?’ 88 (2018) Geoforum 74–77 (hereinafter: Heffron/McCauley 2018).

¹⁷ Preamble 4 of the new Regulation (EU) 2017/1938. The preamble is referencing the E-Directive (Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55)), the G-Directive (Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94)), the ACER-Regulation (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 (OJ L 211, 14.8.2009, p. 1)), the E-Regulation (Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ L 211, 14.8.2009, p. 15)), the G-Regulation (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 and repealing Regulation (EC) No 1775/2005 (OJ L 211, 14.8.2009, p. 36)) and Regulation 994/2010 (Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (OJ L 295, 12.11.2010, p. 1)).

Download English Version:

<https://daneshyari.com/en/article/11016125>

Download Persian Version:

<https://daneshyari.com/article/11016125>

[Daneshyari.com](https://daneshyari.com)