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PUBLIC LAW

SECURITY OF GAS SUPPLY – THE LATEST ON THE GERMAN GOVERNMENT’S MEASURES

In response to the possibility of Russia blocking gas supplies to Germany, the Federal Ministry for Economic Affairs and Climate Protection triggered the early warning level of the gas emergency plan in March, followed by the second and penultimate level, the alert level, in June. Numerous legislative changes have since expanded the Federal Government’s options for intervening in the market. These include price adjustment provisions that would allow energy providers to pass on soaring gas costs to their customers. The legislator has also introduced ambitious filling level requirements for gas storage facilities. The *Bundesnetzagentur* (Federal Network Agency) has set up a digital gas security platform that can be used – if the emergency level is triggered – to generate IT-based models of different shutdown scenarios on the basis of data collected from all major gas consumers. These models can then be used to initiate specific measures to safeguard supply.

Gleiss Lutz commentary – summary:

By adopting numerous legislative amendments, including to the German Energy Industry Act (*Energiewirtschaftsgesetz*, “EnWG”) and the German Energy Security Act (*Energiesicherungsgesetz*, “EnSiG”), the legislator has laid the groundwork for dealing with an escalation in the energy crisis. The gas shortage and the Federal Government’s measures to maintain security of supply have given rise to the following risks and expectations, although it remains to be seen which of these will materialise and to what extent:

- › If the supply situation worsens, the Federal Government can trigger the emergency level as the final level of the gas emergency plan. The *Bundesnetzagentur* would then assume the role of “federal load distributor”, allowing it to order the partial or complete shutdown of the gas supply to certain consumption points.
- › To facilitate this, industrial companies with a technical connection capacity of at least 10 MWh/h must register on the *Bundesnetzagentur*’s digital gas security platform and regularly update the information on how important the gas supply is to the company.
- › In the event of an acute gas shortage, only a small number of companies, namely those that are indispensable for public supply as so-called critical infrastructures, will qualify as protected customers whose gas supply must be maintained. Beyond this, there is no fixed order of priority. When weighing up which companies to prioritise, criteria such as economic relevance, the possibilities for switching to an alternative fuel source and reducing consumption as well as the necessary lead time for this will probably be as important as the urgency of the measure, the size of the plant and how much gas it uses, the lead time for reducing its gas consumption, the expected financial losses, how long it will take and how much it will cost to start operations again, how crucial the plant is to supplying the general public, whether it belongs to the primary sector, whether it is integrated into supply chains and whether there will be any permanent damage to property or public health risks.
- › In the event of a further drop in gas imports, the *Bundesnetzagentur* is also authorised to give energy providers the option of passing on the additional costs incurred to procure gas from different sources to customers by way of price increases.

- › Alternatively, the Federal Government can introduce a levy on all consumers in the form of a balanced price adjustment, i.e. it can spread the additional costs – including those of struggling energy providers – across all energy providers and therefore all gas customers. The procedure would probably be similar to that for the levy previously imposed under the German Renewable Energy Sources Act (*Erneuerbare-Energien-Gesetz*, “EEG”).
- › Finally, further government measures to secure the gas supply could be introduced in the short term, in particular an incentive system (possibly auction-based) for companies to reduce their own gas consumption and make freed-up gas volumes available to the market.

Background

Germany gets most of its gas from Russia, but following Russia’s war of aggression against Ukraine, would like to become independent of Russian gas. This is not something that can be achieved immediately and without further ado, however. So a shutdown of gas supplies from Russia could lead to shortages in the supply of gas in Germany, either because of a European embargo or, more likely, a Russian boycott.

Based on Article 8 of the Security of Supply Regulation (Regulation (EU) No 2017/1938), Germany has drawn up a “gas emergency plan” (Notfallplan Gas) to ensure gas supply even in crisis situations. This emergency plan dates back to September 2019 and therefore to a time when no-one expected a gas supply crisis to be looming on the horizon. It provides for three warning levels: the early warning level, alert level and emergency level. Whereas there are no formal requirements for triggering the first two levels, the third level requires an ordinance issued by the Federal Government. This has not happened to date.

Already at the beginning of the energy crisis, companies and associations submitted preemptive letters to the *Bundesnetzagentur* in which they explained how they would be individually affected if the gas supply were to be shut down. According to reports, the *Bundesnetzagentur* has received around a thousand of these letters. In the vast majority of cases, companies have emphasised that they cannot afford for the gas to be shut off; apparently only a very small number of companies have indicated how much gas they can do without in an emergency situation.

Early warning and alert levels triggered

The Federal Ministry for Economic Affairs and Climate Protection triggered the first level of the gas emergency plan, the early warning level, on 30 March 2022, followed by the alert level on 23 June 2022.

Triggering the early warning level requires there to be indications of an event that is likely to lead to a deterioration in the gas supply. During the early warning stage, European internal market regulations continue to apply without restriction. Gas supply companies can take market-based measures to maintain the security of the gas supply. Under the gas emergency plan, these measures include the procurement of balancing energy or even reductions in gas supplies by the network operators. Transmission system operators must closely monitor the gas supply situation and submit an assessment of this to the Federal Ministry for Economic Affairs and Climate Protection (at least) once a day. There is, however, no government intervention in the market at either the early warning level or the alert level.

The situation was escalated in June when the alert level was triggered. A prerequisite for this is that the gas supply must have been disrupted or there must have been an exceptionally high demand for gas. The significant deterioration in the gas supply resulting from this can however still be offset by market-based measures. The purpose of the alert level is primarily to give consumers and industrial companies a clear signal that they must save as much gas as possible at this stage already instead of waiting until winter. It does not give the Federal Ministry for Economic Affairs and Climate Protection or the *Bundesnetzagentur* a substantially expanded set of instruments to intervene in the market. It does however entail new price adjustment provisions that could significantly impact all gas customers (see below).

Preparations for the emergency level

The *Bundesnetzagentur* is already preparing for the third and highest escalation level of the gas emergency plan, namely the emergency level. The emergency level is triggered when there is a significant disruption in the gas supply and market-based measures are not sufficient to meet gas demand. Such a disruption would certainly occur if Russian gas deliveries were to be stopped in the next few weeks or months.

In addition to the market-based measures, the emergency level gives rise to additional sovereign powers of intervention, in particular the instruments as defined in the EnSiG and the German Ordinance to Ensure the Supply of Gas in a Supply Crisis (*Gassicherheitsverordnung*, "GasSV"). What is particularly relevant for companies that use gas is that the *Bundesnetzagentur* will become the federal load distributor if the emergency level is triggered. It would then be responsible for distributing gas within Germany with the aim – as defined in the GasSV – of ensuring vital gas deliveries, paying particular attention to protected customers and the minimisation of consequential damage. As things currently stand, priority will be given in an emergency to supplying gas to private households, social institutions such as hospitals and other critical infrastructure. Despite concerns from the business community and the associated planning uncertainties, the *Bundesnetzagentur* has not yet laid down a fixed shutdown sequence for companies. Whether or not to shut down the gas supply is to be decided on a case-by-case basis, taking into account a number of factors. These include system relevance, the necessary lead time and the possibilities for switching to alternative fuel sources, the urgency of the measure, the size of the plant and how much gas it uses, the lead time for reducing its gas consumption, the expected financial losses, how long it will take and how much it will cost to start operations again, how crucial the plant is to supplying the general public, whether it belongs to the primary sector, whether it is integrated into supply chains and whether there will be any permanent damage to property, public health risks or any environmental impacts.

Digital gas security platform

The *Bundesnetzagentur* plans to distribute the gas load on the basis of IT-supported modelling if the emergency level is triggered. To this end, it is currently developing a digital gas security platform and collecting relevant data from network operators and major gas consumers. The aim is to have the platform ready for launch on 1 October 2022. In order to prepare for the emergency level, the *Bundesnetzagentur* issued a request for information on 20 April 2022. Should this level be triggered, the *Bundesnetzagentur* must have the most up-to-date data possible to fulfil its role as federal load distributor. Using this data, it can determine the impact of a (partial) shutdown of the gas supply on individual companies or sectors. It can also assess each company's situation on the basis of information about the sector in which the company operates, the shutdown response times and the contractually agreed gas capacities. In this way, the impact of a disruption to the gas supply can be minimised.

All major gas consumers with a technical connection capacity in excess of 10 MWh/h, gas network operators and all balancing group managers such as gas supply companies or gas traders are required to register on the platform. Major gas consumers must in particular indicate how much gas they need for their production processes and what impact an interruption in the gas supply would have on them, and a number have already done so. In addition to providing their initial data, these companies must also ensure that the information is regularly updated, especially the data on the importance of gas for their respective business operations. If a company succeeds in the coming months in reducing its need to procure gas, the data provided must be adjusted.

Advice: Section 12 EnSiG provides for hardship compensation if an ordinance enacted on the basis of the Act will jeopardise or even destroy a company's economic existence. In such a case, the company concerned must assert a claim for compensation against the *Bundesnetzagentur*. Hardship compensation under the EnSiG will be granted to companies according to the principle of equity. It is therefore essential for companies to use the digital gas security platform and provide the *Bundesnetzagentur* with comprehensive and pertinent information on the consequences of disconnecting their gas supply. Companies should therefore carefully prepare the data they wish to submit and ensure that they upload any relevant updates to the platform without delay. Unless a partial reduction in the gas supply will already have dire consequences, companies should refrain from submitting "all-or-nothing" notifications. In order to fulfil their responsibility to cooperate with the *Bundesnetzagentur* and safeguard their potential entitlement to hardship compensation, companies must provide accurate information on possible shutdown scenarios and indicate what the consequences of a partial reduction in or complete loss of the gas supply would be.

Price adjustment rights of energy providers

With the introduction of section 24 EnSiG on 25 May 2022, the legislator created a price adjustment mechanism in the event of reduced gas imports. This was already amended with the legislative package adopted in July. There are two prerequisites for the activation of this mechanism. Firstly, the Federal Ministry of Economic Affairs and Climate Protection must have declared the alert or emergency level of the gas emergency plan. This prerequisite has already been met. The second prerequisite, which is still outstanding, is a formal determination by the *Bundesnetzagentur* that there has been a significant reduction in total gas imports to Germany. This decision must be published in Germany's Federal Gazette. As a result of this determination, all energy providers that are affected by the reduction in supply volumes either directly, due to disruptions in supply, or indirectly, due to price increases by their supplier, have the right to adjust gas prices to an appropriate level vis-à-vis their customers along the supply chain. A price adjustment is considered not to be appropriate if it exceeds the additional costs for procuring gas from other sources.

Levy in the form of balanced price adjustment

The EnSiG was amended on 8 July 2022 to include a new section 26 authorising the Federal Government to issue an ordinance replacing the price adjustment rights described above with financial compensation financed by a balanced price adjustment. This provision, which was included at a very late stage, is intended to provide the Federal Government with a means of assisting struggling energy companies. While section 29 EnSiG makes it possible to apply to the Federal Government for stabilisation measures, section 26 EnSiG means that price hikes can in future also be passed on to customers. With the authorisation in this section, the governing parliamentary parties have introduced the option of a levy. The additional costs are to be passed on and distributed equally across all gas customers (along the lines of the former EEG levy), thereby minimising the burden on individual users. The requisite ordinance can only be issued if a significant reduction in gas imports to Germany is imminent or has been determined by the *Bundesnetzagentur* and published in the Federal Gazette. According to press reports, the Federal Government does not want to use this option – at least not at present.

Filling level requirements for gas storage facilities

On 26 April 2022, the *Bundestag* introduced a new section 35b EnWG specifying filling level requirements for the operators of gas storage facilities. According to this, a filling level of 90% is to be achieved by 1 November. The filling levels of the German gas storage facilities are currently at 63.2% and thus in some cases even significantly higher than in previous years. Since only about 40% of the maximum amount is currently flowing through the Nord Stream 1 pipeline, however, it is highly unlikely that a storage level of 90% can be achieved by November without additional measures, according to the *Bundesnetzagentur*.

Fiduciary management

In May, the legislator also created a new legal basis for the fiduciary management of companies operating critical infrastructure in the energy sector with section 17 EnSiG. This affects companies involved in the production, transport and storage as well as distribution and trading of gas whose production, storage, distribution or trading volume exceeds 5,190 GWh per year. The provision is aimed at enabling the *Bundesnetzagentur* to act as fiduciary without having to meet the requirements of the German Foreign Trade Act (*Außenwirtschaftsgesetz*, "AWG") (i.e. in particular without acquiring the company concerned). According to the amendment to the EnSiG, the *Bundesnetzagentur* can be appointed as fiduciary of the abovementioned companies if there is a real risk that the companies will not contribute to the functioning of the energy system, thereby jeopardising security of supply. The *Bundesnetzagentur* can then manage the business of the companies concerned to ensure that vital gas needs are met. This fiduciary management may be carried out for a maximum of 12 months. After that, the companies may – as a last resort – be expropriated in return for appropriate compensation if security of supply cannot be guaranteed by the fiduciary management.

Gas backup reserve and fuel stockpiling

The German Act on Keeping Backup Power Plants Available to Reduce Gas Consumption in the Electricity Sector (*Gesetz zur Bereithaltung von Ersatzkraftwerken zur Reduzierung des Gasverbrauchs im Stromsektor*) also came into force on 12 July 2022. This allows coal-fired power plants forming part of the grid reserve to participate in the

electricity market again, subject to two prerequisites. Firstly, the alert level must have been triggered in accordance with the gas emergency plan. This is already the case. Secondly, participation in the electricity market must be authorised by an ordinance issued by the Federal Government. This was published in the Federal Gazette on 13 July 2022 under the title "Ordinance on the Temporary Expansion of Electricity Generation using Plants from the Grid Reserve" (*Verordnung zur befristeten Ausweitung des Stromerzeugungsangebots durch Anlagen aus der Netzreserve*) and came into force on 14 July. The ordinance stipulates that the power plants forming part of the grid reserve may participate in the electricity market until midnight on 30 April 2023. This is less than the maximum period laid down in the Act, namely until 31 March 2024. The plant operator must then notify the *Bundesnetzagentur* of the plant's participation in the electricity market five working days in advance. The Act also bans the closure of coal-fired power plants that were supposed to be shut down this year and in 2023 until 31 March 2024.

As from 1 November 2022, operators of reserve plants must keep these ready for continuous operation as temporary participants in the electricity market. To comply with this obligation, the EnWG now requires fuel to be stockpiled. It provides that – as of 1 November in 2022 and 2023 and as of February in 2023 and 2024 – sufficient fuel stocks must be available to generate electricity at the maximum possible net nominal capacity for 30 calendar days if coal is used and 10 calendar days if oil is used.

It also provides that lignite reserve plants will be transferred from the grid reserve to a newly created supply reserve from 1 October 2022 until 31 March 2024 and will be permanently decommissioned as of midnight on 31 March 2024. These plants will serve the purpose of making additional generating capacities available to the electricity supply system at short notice, in particular to reduce the amount of gas consumed for electricity generation. The supply reserve will also have to be activated by means of an ordinance. Operators must ensure that their plants – while part of the supply reserve – can be operational within 240 hours of such an ordinance coming into force. The supply reserve is currently still subject to approval under state aid law, as the plant operators are to receive remuneration for the period during which this reserve applies.

Conclusion

The legislator has initiated a wide range of regulatory measures to secure the gas supply in Germany, picking up the tempo in the run-up to parliament's summer recess. These measures have two aims: storing gas and stockpiling substitute fuels, on the one hand, and reducing gas consumption, on the other. In addition, preparations are underway in the background for a possible emergency level scenario, in which – as far as can be foreseen at present – there will be considerable gas reductions for companies and consumers.

This is a very comprehensive package of measures. Companies that use gas and operators of generating plants should carefully assess what impact this will have on their business. The last few weeks have also shown that companies should keep a close eye on regulatory developments to stay abreast of the rapid changes in this sector.

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