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PUBLIC LAW

EU COMMISSION PRESENTS PROPOSAL FOR GAS EMERGENCY PLAN

On 20 July 2022, the EU Commission presented the proposal of its so-called Gas Emergency Plan. This plan sets a 15 percent savings target for gas consumers in the Member States and should also allow for a forced reduction in gas consumption in all EU Member States in the event of a gas shortage in order to secure their gas supply throughout the winter. The Gas Emergency Plan also provides criteria for a cut-off order for non-protected (industrial) customers. The Commission stresses that the gas savings targets can be achieved not only by reducing gas consumption within industry or households, but also, for example, by substituting fuels used - thus the Commission again opens the discussion on the further use of nuclear power.

Gleiss Lutz - Comment

The EU sets a target for Member States to reduce gas consumption by public authorities, households, energy suppliers and industrial customers by 15 percent until 31 March 2023. In order to achieve this target, the Commission is initially relying on voluntary action and individual responsibility on the part of the Member States. If it becomes apparent that the Member States will not achieve this target, the EU Commission can issue a so-called Union Alert. By issuing a Union Alert, the savings target of 15 percent becomes mandatory in all Member States.

This savings target - should the proposal become a legally binding Regulation - may have an impact on the gas consumption behaviour of large parts of the industry. This became apparent shortly after the proposal was published: The Federal Ministry for Economic Affairs and Climate Protection announced another energy security package and already referred to the 15 percent target. It is therefore increasingly likely that there will be fixed savings targets for the gas-consuming industries in the coming days and weeks, so that Germany will meet its own and the European gas savings targets.

The proposal is also relevant for industrial companies because the Commission provides prioritisation criteria according to which a cut-off order for non-protected industrial consumers can be established. Although the catalogue of criteria, which focuses in particular on the overall social importance of the company and aims to protect sensitive supply chains, is neither conclusive nor fully specified, it does give the criteria mentioned a particular weight in the establishment of a national cut-off order.

Principle of voluntariness and responsibility of the Member States

The Regulation proposal on coordinated demand reduction measures for gas is based on Article 122 TFEU. In essence, it provides for the Member States to initially reduce national gas consumption (in particular in the public, commercial and household sectors) on a stand-alone and voluntary basis between 1 August 2022 and 31 March 2023 by 15 percent compared to the average of the past five years. The Member States are requested to update their national emergency plans by the end of September 2022 and to outline how they intend to achieve the 15 percent reduction target (compared to the average of the past five years). The Commission is thus initially relying on the principle of "voluntariness" and leaving the responsibility for gas reduction with the Member States for the time being.

Union Alert

Should it become clear, however, that this target will not be met or that there is a significant risk of a severe gas shortage, a so-called Union Alert can be declared. The Union Alert would impose on all Member States a mandatory 15 percent reduction in gas demand in the period from 1 August to 31 March (compared to the average of the previous five years). The aim of the Union Alert is to ensure the supply of gas to households and public consumers, such as hospitals, but also to industries that are crucial for the provision of essential products and services to the economy, as well as to the EU's supply chains and competitiveness.

Implementation of the gas consumption reduction

The Commission's current proposal provides - both in the phase of voluntary gas reduction and after the Union Alert has been issued - that the Member States are in principle free to take appropriate measures to reduce gas consumption. However, the measures must be transparent, proportionate, non-discriminatory and verifiable. Furthermore, the measures should not lead to an undue distortion of competition, an impairment of the functioning of the internal gas market or endanger the security of gas supply of the other Member States.

The framework thus set is double-edged for Member States and companies: on the one hand, it leaves considerable scope for Member States to decide which measures they will use to reduce gas consumption; on the other hand, the EU framework is only defined by a large number of undefined legal terms, so that it will be difficult for companies to adequately prepare for a gas shortage situation and to legally monitor government measures taken.

The Regulation proposal also stipulates that Member States should think "more broadly" than just strictly reducing gas consumption. In the text of the Regulation, the Commission mentions, for example, the possibility of using alternative fuels (coal, oil, nuclear power), of carrying out a national energy saving campaign or of implementing incentive systems for the change of energy sources or the reduction of consumption within industry.

Prioritisation of non-protected customers

The Regulation proposal also provides for criteria on the basis of which the Member States can apply the gas reduction for non-protected customers. The Commission thus defines guidelines for the Member States to ensure the application of objective and transparent principles in the selection process, which also takes into account the economic importance of the companies concerned. In addition, further, non-exhaustive criteria are to be used in the prioritisation:

- › the impact of a disruption on supply chains that are critical for society;
- › the possible negative impacts in other Member States, in particular on supply chains of downstream sectors that are critical for society;
- › the potential long-lasting damage to industrial installations;
- › the possibilities to reduce consumption and substitute products in the Union.

The Regulation proposal thus largely fits into the context of the already ongoing discussion about possible (national) cut-off criteria. The criteria named in a (legally binding) EU Regulation would be given special weight within this discussion, so that gas-consuming companies should check whether they fulfil individual criteria of the above list. At the same time, it should also be recognised that this list is not exhaustive and that other criteria can also be used for the cut-off order. This also applies, for example, to the regional distribution of gas in gas shortage areas, which follows technical specifications in particular.

Control mechanisms envisaged

According to the proposal, the Member States are initially required to monitor their gas demand reduction measures themselves. They are to report to the Commission every two months on the measures taken and the gas savings achieved. If it becomes clear that a Member State's measures cannot ensure that it will voluntarily reduce

its gas consumption by 15 percent, the Commission will require it to submit a plan setting out a strategy and measures to effectively fulfil the demand reduction obligation.

Solidarity in the event of a gas shortage

In addition, Member States can already apply for so-called gas solidarity supplies under Article 13 of Regulation (EU) 2017/1938 if they face a gas shortage even though they have demonstrably taken all possible measures to reduce their domestic demand. In this case, the immediate neighbouring states are obliged to supply the state in shortage with enough gas from their own reserves so that its vulnerable users can continue to be supplied with gas. For these gas supplies, the neighbouring states receive financial compensation from the supplied state. So far there has been no practical application of this; in view of the tense gas supply situation throughout the EU, gas solidarity will probably become a political point of controversy among the Member States.

Conclusion

With the announced proposal, the EU Commission has now introduced an EU-wide Gas Emergency Plan into the discussion. This contains, in particular, specific criteria for prioritising unprotected customers, which can be an indicator for gas-consuming companies for a gas cut-off order.

However, initial reactions indicate that the proposal will still undergo some changes. It therefore remains to be seen in which form this EU Gas Emergency Plan will come into force and what implications it will have for the Member States and companies. In any case, this development should be closely monitored, as the EU gas emergency plan could come into force at short notice and have a timely effect within the economy. Close monitoring is also important with regard to the national measures, as since the publication of the Commission's proposal, the local discussion on gas supply security has also gained new momentum. The Federal Ministry for Economic Affairs and Climate Protection has already announced a further energy security package and since 22 July 2022 it has also been clear that a gas levy to support gas importers will be activated from 1 October 2022.

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