



Council of the European Union
General Secretariat

Brussels, 30 August 2023

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MEETING DOCUMENT

From: General Secretariat of the Council
To: Working Party on Energy

Subject: Solidarity measures in the recast Hydrogen and Gas Regulation

Delegations will find in the Annex suggestions for compromise amendments to Regulation (EU) 2017/1938 to incorporate key measures improving solidarity in case of a gas emergency adopted under Council Regulation 2022/2576.

This non-paper is an informal courtesy document provided by the Commission, not reflecting the final views of the Commission.

Delegations are invited to send written comments to the Presidency (████████████████████) and (████████████████████) and to the Secretariat (energy@consilium.europa.eu) by 6 September 2023.

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Suggestions for compromise amendments to Regulation (EU) 2017/1938 to incorporate key measures improving solidarity in case of a gas emergency adopted under Council Regulation 2022/2576

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I. Why the suggestions?

The co-legislators have invited the Commission to provide a technical assessment for possible avenues of compromise text, in order to facilitate the interinstitutional negotiations on Article 67 of the proposal for a recast Gas Regulation as part of the Hydrogen and Decarbonised Gas Package.

This courtesy document therefore provides suggestions on a number of provisions where the co-legislators could consider compromises, as amendments to the Gas Security of Supply Regulation, in particular in light of the solidarity provisions adopted under Council Regulation (EU) 2022/2676. This document aims to inform the co-legislators on how the provision could look like when introduced directly in the Gas Security of Supply Regulation.

II. Background

In its amendments, the European Parliament proposed to integrate the “Article 122” measures in the new security of supply framework, while the Council has not included such measures in its General Approach.

The Commission shared a non-paper on solidarity provisions in the Hydrogen and Decarbonised Gas Package (non-paper – solidarity and security) with the co-legislators on 20 July and orally announced them in the Energy Working Party and the technical trilogues on 13 and 14 July respectively.

These drafting suggestions aim at guaranteeing the essential provisions listed in the non-paper while suggesting possible compromises on several targeted elements.

The drafting suggestions are limited to the strictly necessary, using the wording of the Solidarity Regulation (EU) 2022/2576 as a starting point. Text unmarked, is text originating from the Gas Security of Supply Regulation (EU) 2017/1938, while text **marked in grey** is wording stemming from the Solidarity Regulation. Where new wording has been added, it is **highlighted in blue**.

III. What is suggested?

a) Default solidarity rules

The default solidarity provisions are a core element of the solidarity architecture in case Member States have not signed bilateral agreements and were a key element of the Commission's proposal¹. This provision has therefore been included in the drafting suggestions.

With default solidarity provisions in place, bilateral agreements would no longer need to be mandatory, and it could become possible to consider that the 25 related infringement procedures may be stopped.

b) Extension of solidarity to MS with LNG facilities

LNG solidarity is included as a new provision. This is necessary since LNG is now the main supply source of gas. Member States can send a request for solidarity to all Member States with LNG facilities, and those Member States with access to LNG shall reply. However, there are technical difficulties in making the LNG solidarity mandatory, mainly due to the interaction with non-EU third party operators and contractual constraints.

c) Critical gas volumes for electricity

Gas volumes for critical gas-fired power plants are part of the solidarity mechanisms in case the gas deficit can become a threat for the electricity system.

The compromise suggestions outlined below include the following:

1. Critical gas volumes for electricity can be included as part of the protected customers' demand and the solidarity protected customers' demand (critical gas-fired power plants could be prioritised in the existing regulation, but could not be deducted from the solidarity offers, or included in the solidarity requests).
2. The maximum volume that can be added to the (solidarity-) protected demand is unchanged from the Gas SoS Regulation, which is limited to 20% of the annual consumption. The total protected gas volumes are therefore not inflated, which if it were to happen, would seriously risk the effective use of solidarity.

d) Compensation for solidarity

The compensation limitation of maximal 100% of the price of gas is an essential condition of the default rules. However, the provision as introduced in the Solidarity Regulation was considered too strict by certain Member States, though supported by others. The suggested text aims to allow to redefine the scope of the limitation, if agreed between the Member States concerned.

e) Other elements

This courtesy document includes a drafting suggestion for the provisions on the possibility to reduce non-essential consumption of protected customers and on the safeguards for cross-border flows and how this could look like in the Gas Security of Supply Regulation.

¹ COM(2021) 804 final

Article 2

Definitions

(5) 'protected customer' means a household customer who is connected to a gas distribution network and, in addition, where the Member State concerned so decides, may also mean one or more of the following, provided that enterprises or services as referred to in points (a), (b) **and (d)** do not, jointly, represent more than 20 % of the total annual final gas consumption in that Member State:

(a) a small or medium-sized enterprise, provided that it is connected to a gas distribution network;

(b) an essential social service, provided that it is connected to a gas distribution or transmission network;

(c) a district heating installation to the extent that it delivers heating to household customers, small or medium-sized enterprises, or essential social services, provided that such installation is not able to switch to other fuels than gas;

(d) certain critical gas-fired power plants, if the lack of gas supply to such critical gas-fired power plants either could result in severe damage in the functioning of the electricity system, or would hamper the production and/or transportation of gas.

(6) 'solidarity protected customer' means a household customer who is connected to a gas distribution network, and, in addition, may include one or **bothseveral** of the following, provided that enterprises or services as referred to in points (b) **and (c)** do not, jointly, represent more than 20 % of the total annual final gas consumption in that Member State:

(a) a district heating installation if it is a protected customer in the relevant Member State and only in so far as it delivers heating to households or essential social services other than educational and public administration services;

(b) an essential social service if it is a protected customer in the relevant Member State, other than educational and public administration services;

(c) certain critical gas-fired power plants, if when the lack of gas supply to such critical gas-fired power plants either could result in either or both (i) severe damage in the functioning of the electricity system, or would (ii) hampering the production and/or transportation of gas.

Article 11

Declaration of a crisis

(...)

~~7. During an emergency and on reasonable grounds, upon a request of the relevant electricity or gas transmission system operator a Member State may decide to prioritise the gas supply to certain critical gas-fired power plants over the gas supply to certain categories of protected customers, if the lack of gas supply to such critical gas-fired power plants either:~~

~~(a) could result in severe damage in the functioning of the electricity system; or~~

~~(b) would hamper the production and/or transportation of gas.~~

Member States shall base **any such the** measures **concerning the supply of gas volumes for the functioning of certain critical gas-fired power plants, as referred to in Article 2 (5) (d) and (6) (c)** on the **their respective national** risk assessment.

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The critical gas-fired power plants as referred to in the first subparagraph shall be clearly identified together with the possible gas volumes that would be subject to such a measure and included in the regional chapters of the preventive action plans and emergency plans. Their identification shall be carried out in close cooperation with transmission system operators of the electricity system and the gas system of the Member State concerned, **and in close cooperation with the Electricity Coordination Group and Gas Coordination Group.**

If Member States whose electricity system is synchronised only with the electricity system of a third country are requested to provide solidarity measures, they may exceptionally deduct higher volumes of gas from their offer, in the event that the electricity system is desynchronised from that third country's system for as long as isolated power system services or other services to the power transmission system operator are required to ensure the safe and reliable operation of the power system.

(7a) By way of derogation from Articles 6(1) to (3), 6(b)(1)(a), 6(c)(2)(b) and 10(1)(l), Member States may, exceptionally, take temporary measures to reduce the non-essential consumption of protected customers, in particular when one of the crisis levels pursuant to Article 11(1) and Article 12 is declared. Such measures shall be limited to non-essential uses of gas and shall take into account the following elements:

- (a) the impact of a disruption on supply chains that are critical for society;**
- (b) the possible negative impacts in other Member States, in particular on supply chains of downstream sectors that are critical for society;**
- (c) the potential long-lasting damage to industrial installations;**
- (d) the possibilities for reducing consumption and substituting products in the Union.**

Such exceptional measures may be taken only after an assessment is carried out by the competent authorities, as defined in Article 2, point (7), of Regulation (EU) 2017/1938, with regard to the conditions to determine such non-essential volumes of gas.

As a result of measures referred to in subparagraph 1, the consumption of vulnerable customers, as defined by Member States in accordance with Article XX of [recast Gas Directive], shall under no circumstance be reduced, and Member States shall not disconnect protected customers as a result of the application of subparagraph 1.

Article 12

Regional and Union emergency responses

(...)

5. The Member States, and in particular the competent authorities, shall ensure that:
- (a) no measures are introduced which unduly restrict the flow of gas within the internal market at any time, in particular the flow of gas to the affected markets;
 - (b) no measures are introduced that are likely seriously to endanger the gas supply situation in another Member State; and
 - (c) cross-border access to infrastructure in accordance with Regulation (EC) No 715/2009 is maintained as far as technically and safely possible, in accordance with the emergency plan.

6. Where, at the request of a competent authority or a natural gas undertaking or on its own initiative, the Commission considers that, in a regional or Union emergency, action taken by a Member State or a competent authority or the behaviour of a natural gas undertaking is contrary to paragraph 5, the Commission shall request that Member State or competent authority to modify its action or to take action in order to ensure compliance with paragraph 5, informing it of the reasons therefor. Due account shall be taken of the need to operate the gas system safely at all times.

Within three days of notification of the Commission request, the Member State or the competent authority shall modify its action and notify the Commission thereof, or shall inform the Commission of the reasons for which it disagrees with the request. In the latter case, the Commission may, within three days of being informed, amend or withdraw its request or convene the Member State or the competent authority and, where the Commission considers it to be necessary, the GCG in order to consider the issue. The Commission shall set out its detailed reasons for requesting any modification to the action. The Member State or the competent authority shall **modify its action or take action in order to ensure compliance with paragraph 5**. ~~take full account of the position of the Commission. Where the final decision of the competent authority or the Member State diverges from the Commission position, the competent authority or the Member State shall provide the reasons underlying such decision.~~

Article 13

Solidarity

1. If a Member State has requested the application of the solidarity measure pursuant to this Article, a Member State which is directly connected to the requesting Member State or, where the Member State so provides, its competent authority or transmission system operator or distribution system operator shall as far as possible without creating unsafe situations, take the necessary measures to ensure that the gas supply to customers other than solidarity protected customers in its territory is reduced or does not continue to the extent necessary and for as long as the gas supply to solidarity protected customers in the requesting Member State is not satisfied. The requesting Member State shall ensure that the relevant volume of gas is effectively delivered to solidarity protected customers in its territory.

~~In exceptional circumstances and upon a duly reasoned request by the relevant electricity or gas transmission system operator to its competent authority, t~~ The gas supply may also continue to certain critical gas-fired power plants as defined pursuant to Article **2 points (5) and (6)** in the Member State providing solidarity if the lack of gas supply to such plants would result in severe damage in the functioning of the electricity system or would hamper the production and/or transportation of gas.

The obligation pursuant to this paragraph shall also apply to Member States with LNG facilities, provided the necessary capacity in the relevant infrastructure, including the LNG vessels and carriers, is available.

2. A Member State shall also provide the solidarity measure to another Member State to which it is connected via **another Member State, or** a third country unless flows are restricted through the third country. Such an extension of the measure **may shall** be subject to the agreement of the relevant Member States, who shall involve, as appropriate, the third country through which they are connected.

3. A solidarity measure shall be taken as a last resort and shall apply only if the requesting Member State has:
- (a) not been able to cover the deficit in gas supply to its solidarity protected customers despite the application of the measure referred to in Article 11(3) **or, where a Member State has taken temporary measures to reduce the non-essential consumption of protected customers in accordance with Article 11(7a), the essential volumes of consumption of gas to its solidarity protected customers;**
 - (b) exhausted all market-based measures and all measures provided in its emergency plan;
 - (c) notified an explicit request to the Commission and to the competent authorities of all Member States with which it is connected either directly or pursuant to paragraph 2 via a third country, accompanied by a description of the implemented measures referred to in point (b) of this paragraph;
 - (d) undertaken to pay fair and prompt compensation to the Member State providing solidarity in accordance with paragraph 8.

(3a) The Member States which are obliged to provide solidarity pursuant to paragraph 1 shall be entitled to deduct from the solidarity offer the supplies to its solidarity protected customers to the extent essential volumes are affected or, where a Member State has taken temporary measures to reduce the non-essential consumption of protected customers in accordance with Article 11(7a), the supplies of the essential volumes of consumption of gas of its solidarity protected customers.

4. If there is more than one Member State that could provide solidarity to a requesting Member State, the requesting Member State shall, after consulting all Member States required to provide solidarity, seek the most advantageous offer on the basis of cost, speed of delivery, reliability and diversification of supplies of gas. The Member States concerned shall make such offers on the basis of voluntary demand-side measures as much as and for as long as possible, before resorting to non-market-based measures.

5. Where market-based measures prove insufficient for the Member State providing solidarity to address the deficit in gas supply to solidarity protected customers in the requesting Member State, the Member State providing solidarity may introduce non-market-based measures in order to comply with the obligations laid down in paragraphs 1 and 2.

6. The competent authority of the requesting Member State shall immediately inform the Commission and the competent authorities of the Member States providing solidarity when gas supply to solidarity protected customers in its territory is satisfied or where the obligations under paragraphs 1 and 2 are, based on its needs, reduced, or where they are suspended at the request of the Member State receiving solidarity.

7. The obligations laid down in paragraphs 1 and 2 shall apply subject to the technically safe and reliable operation of the gas system of a Member State providing solidarity and the limit of the maximum interconnection export capability of the relevant Member State infrastructure towards the requesting Member State. Technical, legal and financial arrangements may reflect such circumstances in particular those under which the market will deliver up to maximum interconnection capacity.

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8. Solidarity under this Regulation shall be provided on the basis of compensation. The Member State requesting solidarity shall promptly pay, or ensure prompt payment of, fair compensation to the Member State providing solidarity.

Where two Member States have agreed on the necessary technical and legal arrangements pursuant to paragraph 10 ('solidarity agreement'), such fair compensation shall cover at least:

- (a) the gas delivered into the territory of the requesting Member State;
- (b) all other relevant and reasonable costs incurred when providing solidarity, including, where appropriate, costs of such measures that may have been established in advance;
- (c) reimbursement for any compensation resulting from judicial proceedings, arbitration proceedings or similar proceedings and settlements and related costs of such proceedings involving the Member State providing solidarity *vis-a-vis* entities involved in the provision of such solidarity.

Fair compensation pursuant to the first subparagraph shall include, inter alia, all reasonable costs that the Member State providing solidarity incurs from an obligation to pay compensation by virtue of fundamental rights guaranteed by Union law and by virtue of the applicable international obligations when implementing this Article and further reasonable costs incurred from payment of compensation pursuant to national compensation rules.

By 1 December 2018, the Member States shall adopt the necessary measures, in particular the technical, legal and financial arrangements pursuant to paragraph 10, to implement the first and second subparagraphs of this paragraph. Such measures may provide for the practical modalities of prompt payment.

(8a) Where two Member States have not agreed on the necessary technical, legal and financial arrangements by way of a solidarity agreement under paragraph 10, the delivery of gas pursuant to the obligation in paragraph 1 in the event of an emergency shall be subject to the conditions set out in this paragraph.

The compensation for the solidarity measure shall not exceed reasonable costs and, unless both the Member State requesting solidarity and the Member State providing solidarity agree otherwise, it shall in any event include:

- (a) the price for gas in the Member State providing solidarity;**
- (b) the storage and transport costs, including possible fees resulting from the deviation of LNG cargoes to the interconnection point requested;**
- (c) litigation costs for related judicial or arbitration proceedings involving the Member State providing solidarity;**
- (d) other indirect costs that are not covered by the price for gas, such as the reimbursement of financial or other damages resulting from enforced firm load shedding of customers related to the provision of solidarity, provided that those indirect costs do not exceed 100 % of the price for gas.**

Unless the Member State requesting solidarity and the Member State providing solidarity agree on another price, the price for the gas supplied to the Member State requesting solidarity shall correspond to the day-ahead market price in the Member State providing solidarity the day preceding the request for solidarity or the corresponding day-ahead market price at the closest accessible exchange, at the closest accessible virtual trading point, or at an agreed hub over the day preceding the request for solidarity.

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Compensation for the gas volumes delivered in the context of a solidarity request shall be paid directly by the Member State requesting solidarity to the Member State providing solidarity or the entity both Member States indicate in their response to the solidarity request and the confirmation of receipt and of the volume to be taken.

The Member State to which the request for a solidarity measure is addressed shall provide the solidarity measure as soon as possible and no later than the indicated delivery time for the request. A Member State may refuse to provide solidarity to a Member State requesting solidarity only if it demonstrates that:

**(a) it does not have enough gas for the volumes referred to in Article 2(6)Article 23(2); or
(b) it does not have sufficient interconnection capacity available, as set out in Article 13(7), and it does not have the possibility to provide sufficient volumes of LNG.**

In addition to the default rules provided for in this paragraph, Member States may agree on technical arrangements and coordination of the provision of solidarity.

This paragraph shall be without prejudice to existing arrangements for the safe and reliable operation of the gas system.

(8b) Where two Member States have not agreed on the necessary technical, legal and financial arrangements by way of a solidarity agreement pursuant to paragraph 10, the Member State requesting the application of the solidarity measures shall issue a solidarity request to another Member State, indicating at least the following information:

(a) contact details of the competent authority of the Member State;

(b) contact details of the relevant transmission system operators of the Member State (if relevant);

(c) contact details of the third party acting on behalf of the Member State (if relevant);

(d) delivery period including timing of the first possible delivery and the anticipated duration of deliveries;

(e) delivery and interconnection points;

(f) gas volume in kWh for each interconnection point;

(g) gas quality.

The solidarity request shall be sent simultaneously to Member States potentially being able to provide solidarity measures, to the Commission and to the crisis managers designated pursuant to Article 10(1), point (g).

The Member States receiving a solidarity request shall send a response that indicates the contact details referred to in paragraph 1, points (a), (b) and (c), and the volume and quality that can be supplied to the interconnection points at the time requested as referred to in paragraph 1, points (d) to (g). The response shall indicate the volume resulting from possible curtailment, or where it is strictly indispensable, release of strategic stocks if the volume that can be supplied by voluntary measures is insufficient.

Solidarity requests shall be submitted at least 72 hours before the indicated delivery time for LNG and at least 24 hours before the indicated delivery time for gas transported by pipeline.

The response to solidarity requests shall be effective within 12 hours. The confirmation of receipt and of the volume to be taken by the Member State requesting solidarity shall be effective within four hours of receipt of the solidarity offer.

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The request may be submitted for a period of one day or several days, and the response shall match the requested duration.

Where there are several Member States providing solidarity and bilateral solidarity arrangements are in place with one or several of them, those arrangements shall prevail between the Member States having agreed bilaterally. The default rules provided for in this paragraph shall only be applicable in relation to the other Member States providing solidarity.

The Commission may facilitate the implementation of solidarity agreements, in particular by means of a template accessible on a secured online platform to enable real-time transmission of requests and offers.

9. Member States shall ensure that the provisions of this Article are implemented in conformity with the Treaties, the Charter of Fundamental Rights of the European Union, as well as the applicable international obligations. They shall take the necessary measures to that effect.

10. By 1 December 20²⁴¹⁸, the Member States shall **make their best endeavours to** adopt the necessary measures, including those agreed in technical, legal and financial arrangements, to ensure that gas is supplied to solidarity protected customers in the requesting Member State in accordance with paragraphs 1 and 2. The technical, legal and financial arrangements shall be agreed among the Member States which are directly connected or, in accordance with paragraph 2, via a third country, and shall be described in their respective emergency plans. Such arrangements may cover, among others, the following elements:

- (a) the operational safety of networks;
- (b) gas prices to be applied and/or the methodology for their setting, taking into account the impact on the functioning of the market;
- (c) the use of interconnections, including bi-directional capacity and underground gas storage;
- (d) gas volumes or the methodology for their setting;
- (e) categories of costs that will have to be covered by a fair and prompt compensation, that may include damages for curtailed industry;
- (f) an indication of the method how the fair compensation could be calculated.

The financial arrangement agreed between Member States before solidarity is requested shall contain provisions that allow for the calculation of the fair compensation of at least all relevant and reasonable costs incurred when providing solidarity and an undertaking that such compensation will be paid.

Any compensation mechanism shall provide incentives to participate in market-based solutions such as auctions and demand response mechanisms. It shall not create perverse incentives, including in financial terms, for market players to postpone their action until non-market-based measures are applied. All compensation mechanisms or at least their summary shall be included in the emergency plans.

11. For as long as a Member State can cover the gas consumption for its solidarity protected customers from its own production, it shall be exempt from the obligation to conclude technical, legal and financial arrangements with Member States with which it is directly connected or, in accordance with paragraph 2, via a third country, for the purpose of receiving solidarity. Such an exemption shall not affect the obligation of the relevant Member State to provide solidarity to other Member States pursuant to this Article.

~~12. By 1 December 2017 and after consulting the GCG, the Commission shall provide for legally non-binding guidance for the key elements of the technical, legal and financial arrangements especially on how to apply the elements described in paragraphs 8 and 10 in practice.~~

~~13. Where Member States do not agree on the necessary technical, legal and financial arrangements by 1 October 2018, the Commission may after consulting the competent authorities concerned, propose a framework for such measures setting out the necessary principles to make them operational which shall build on the Commission's guidance set out in paragraph 12. Member States shall finalise their arrangements by 1 December 2018 taking utmost account of the Commission's proposal.~~

~~14. The applicability of this Article shall not be affected if Member States fail to agree or finalise their technical, legal and financial arrangements. In such a situation the Member States concerned shall agree on the necessary ad hoc measures and the Member State requesting solidarity shall provide an undertaking in accordance with point (d) of paragraph 3.~~

~~12.~~ The obligations laid down in paragraphs 1 and 2 of this Article shall cease to apply immediately after the declaration of the end of an emergency or the Commission concludes, in accordance with the first subparagraph of Article 11(8), that the declaration of an emergency is not or is no longer justified.

~~13.~~ Where the Union incurs costs by virtue of any liability, other than for unlawful acts or conduct pursuant to the second paragraph of Article 340 TFEU, in respect of measures that Member States are required to take pursuant to this Article, those costs shall be reimbursed to it by the Member State receiving solidarity.