Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 26 July 2017 [1]

Case C-226/16

Eni SpA,
Eni Gas & Power France SA,
Union professionnelle des industries privées du gaz (Uprigaz)
v
Premier ministre,
Ministre de l'Environnement, de l'Énergie et de la Mer,
interveners:
Storengy,
Total Infrastructures Gaz France (TIGF)

(Request for a preliminary ruling from the Conseil d'État (Council of State, France))

(Reference for a preliminary ruling — Regulation (EU) No 994/2010 — Security of gas supply — Point 1 of the second paragraph of Article 2 — Concept of 'protected customers' — Article 8(2) — Additional obligations imposed for reasons of security of supply — Article 8(5) — Obligation to locate gas stocks within the territory of a Member State)

1. The present request for a preliminary ruling raises questions relating to the interpretation of Regulation (EU) No 994/2010 concerning measures to safeguard security of gas supply. [2]

2. The request has been made in two cases being heard by the Conseil d'État (Council of State, France), the referring court, in which the lawfulness of Decree No 2014-328, [3] which amended the French rules on access to underground natural gas stocks, is being challenged. Before the Conseil d'État (Council of State), the applicants, Eni SpA and Eni Gas & Power France SA, and UPRIGAZ, two natural gas suppliers, claim inter alia that a number of provisions of Regulation No 994/2010 have been infringed.

3. This is the first time that the Court has been asked to interpret this regulation, which concerns security of gas supply, a highly sensitive sector. The responses given by the Court will be useful in understanding the scope of the obligations which, under the system established by the regulation, the Member States may impose on natural gas suppliers in order to safeguard security of supply.

1 Original language: French.

2 **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 2010 L 295, p. 1).

3 Décret No 2014-328 du 12 mars 2014 modifiant le décret No 2006/1034 du 21 août 2006 relatif à l'accès aux stockages souterraines de gaz naturel (Decree No 2014-328 of 12 March 2014 amending Decree No 2006/1034 of 21 August 2006 concerning access to underground natural gas stocks).

I. Legislative framework

A. EU law

4. Under the second paragraph of Article 2 of Regulation No 994/2010:

'… the following definitions shall apply:

1. "protected customers" means all household customers connected to a gas distribution network and, in addition, where the Member State concerned so decides, may also include:

   (a) small and medium-sized enterprises, provided that they are connected to a gas distribution network, and essential social services, provided that they are connected to a gas distribution or transmission network, and provided that all these additional customers do not represent more than 20% of the final use of gas; and/or

   (b) district heating installations to the extent that they deliver heating to household customers and to the customers referred to in point (a) provided that these installations are not able to switch to other fuels and are connected to a gas distribution or transmission network.'

5. Under Article 3(6) of Regulation No 994/2010:

'The measures to ensure the security of supply contained in the Preventive Action Plans and in the Emergency Plans shall be clearly defined, transparent, proportionate, non-discriminatory and verifiable, shall not unduly distort competition and the effective functioning of the internal market in gas and shall not endanger the security of gas supply of other Member States or of the Union as a whole.'

6. Article 8 of Regulation No 994/2010, entitled 'Supply standard', provides:

'1. The Competent Authority shall require the natural gas undertakings, that it identifies, to take measures to ensure gas supply to the protected customers of the Member State in the following cases:

(a) extreme temperatures during a 7-day peak period occurring with a statistical probability of once in 20 years;

(b) any period of at least 30 days of exceptionally high gas demand, occurring with a statistical probability of once in 20 years; and

(c) for a period of at least 30 days in case of the disruption of the single largest gas infrastructure under average winter conditions.

The Competent Authority shall identify the natural gas undertakings referred to in the first subparagraph by 3 June 2012 at the latest.

2. Any increased supply standard going beyond the 30-day period referred to in points (b) and (c) of paragraph 1 or any additional obligation imposed for reasons of security of gas supply shall be based on the risk assessment referred to in Article 9, shall be reflected in the Preventive Action Plan and shall:

(a) comply with Article 3(6);

(b) not unduly distort competition or hamper the functioning of the internal market in gas;

(c) not impact negatively on the ability of any other Member State to supply its protected customers in accordance with this Article in the event of a national, Union or regional emergency; and

(d) comply with the criteria specified in Article 11(5) in the event of a Union or regional emergency.

In a spirit of solidarity, the Competent Authority shall identify in the Preventive Action Plan and the Emergency Plan how any increased supply standard or additional obligation imposed on natural gas undertakings may be temporarily reduced in the event of a Union or regional emergency.

3. After the periods defined by the Competent Authority in accordance with paragraphs 1 and 2, or under more severe conditions than those defined in paragraph 1, the Competent Authority and natural gas undertakings shall endeavour to maintain, as far as possible, the gas supply, in particular for protected customers.

4. The obligations imposed on natural gas undertakings for the fulfilment of the supply standards laid down in this Article shall be non-discriminatory and shall not impose an undue burden on those undertakings.

5. Natural gas undertakings shall be allowed to meet these obligations at a regional or Union level, where appropriate. The Competent Authority shall not require the standards laid down in this Article to be met based on infrastructure located only within its territory.

6. The Competent Authority shall ensure that conditions for supplies to protected customers are established without prejudice to the proper functioning of the internal market in gas and at a price respecting the market value of the supplies.'

B. French law

7. In France, the storage of natural gas is governed by the provisions of Articles L. 421-1 to L. 421-16 of the code de l'énergie (Energy Code). Those provisions organise access to gas stocks within the framework of the public service obligations which require suppliers to ensure continuity of supply even in extreme situations.

8. In particular, under Article L. 421-3 of the Energy Code:

'The natural gas stocks shall make it possible to ensure, as a priority:

1. the proper functioning and balancing of networks connected to underground natural gas stocks;

2. the direct or indirect satisfaction of the needs of domestic customers and of other customers that have not accepted, under a contract, an interruptible supply or that operate in the public interest;

3. compliance with the other public service obligations laid down in Article L. 121-32.'

9. Article L. 421-4 of the Energy Code provides:

'Any supplier shall hold in France, on 31 October each year, directly or indirectly through an authorised representative, sufficient stocks of natural gas, taking account of its other regulatory instruments, to meet its contractual obligations, for the period between 1 November and 31 March, relating to the direct or indirect supply of customers mentioned in the third subparagraph of Article L. 421-3. …'

10. Under Article L. 421-7 of the Energy Code, a decree of the Conseil d'État (Council of State) must lay down the conditions and implementing arrangements, inter alia, for Article L. 421-4.

11. Decree No 2006/1034, issued pursuant to that provision and subsequently amended by Decree No 2014-328, which is being challenged before the referring court, specifies the conditions in which access to natural gas stocks is organised. According to the order for reference, that decree, as amended, provides, first, for the allocation to each natural gas supplier of rights of access to storage capacity or 'storage rights',[4] determined by reference to its customer portfolio, to enable it to supply those customers during the winter period and, second, for the imposition of obligations on those suppliers.

12. Article 9 of Decree No 2014-328 amended Decree No 2006/1034, providing, first, that the storage obligations imposed on suppliers are to be calculated by reference to 'storage rights' corresponding no longer only to the annual consumption of their domestic customers and of their customers operating in the public interest, as was provided in the earlier version of the decree, but also to the consumption of customers connected to the distribution network that have not accepted, under contract, an interruptible supply. Second, in consideration thereof, Decree No 2014-328 reduced the rate of the storage obligations from 85% to 80% of storage rights.

II. Facts in the main proceedings, national procedure and questions referred for a preliminary ruling

13. By two applications, Eni SpA and Eni Gas & Power France SA (together, ENI), on the one hand, and Uprigaz, on the other, brought an action requesting that the Conseil d'État (Council of State) annul Decree No 2014-328 as having been adopted *ultra vires*.

14. In their actions, ENI and Uprigaz assert, inter alia, that the decree infringes the provisions of Regulation No 994/2010. First, the decree improperly extends the definition of protected customers given in point 1 of the second paragraph of Article 2 of the regulation. Second, it imposes on natural gas suppliers the obligation to locate storage capacities in France, in contravention of Article 8(5) of Regulation No 994/2010.

15. In this regard, the referring court notes, first, that Decree No 2014-328 includes within the definition of 'protected customers' non-domestic customers connected to the distribution network that have not accepted, under a contract, a supply which may be interrupted, which are not necessarily 'small and medium-sized enterprises' within the meaning of point 1 of the second paragraph of Article 2(a) of Regulation No 994/2010. The definition of 'protected customers' adopted in the decree may thus go beyond the ambit of the definition contained in the regulation. The French authorities maintain, however, that those additional customers correspond to sites of modest size which, even if they belong to large enterprises, share many characteristics with small and medium-sized enterprises. In addition, according to the French authorities, such an extended definition attaches to the additional obligations imposed for reasons of security of gas supply by Member States on natural gas undertakings under Article 8(2) of Regulation No 994/2010.

16. In these circumstances, the lawfulness of Decree No 2014-328 depends on whether Article 8(2) of Regulation No 994/2010 must be interpreted as preventing a Member State from imposing on natural gas suppliers additional obligations resulting from the inclusion among 'protected customers' of customers that are not mentioned in point 1(a) of the second paragraph of Article 2 of Regulation No 994/2010.

4 Under Article R. 421-6 of the Energy Code, the right of access to a supplier's storage capacities is equal to the sum of the storage rights of the customers supplied by that supplier having regard to the consumption profile and geographical area of each customer.

17. Second, the referring court states that, in order to ensure continuity of supply to gas customers, Article L. 421-4 of the Energy Code requires suppliers to hold in France sufficient stocks of natural gas, taking account of the other regulatory instruments available to them, and that Decree No 2014-328 means that 80% of the storage rights must be given effect within national territory, whilst nevertheless providing that the Minister responsible for energy is to take account of the other regulatory instruments available to a gas supplier in order to assess whether the storage capacities held by it are sufficient to guarantee compliance with its storage obligation. The lawfulness of Decree No 2014-328 depends on whether Article 8(5) of Regulation No 994/2010 prevents a Member State from imposing such obligations on natural gas suppliers.

18. In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 8(2) of [Regulation No 994/2010] be interpreted as constituting an obstacle to the imposition by a Member State on natural gas suppliers of additional obligations resulting from the inclusion among "protected customers", whose consumption contributes to defining the limits of the storage obligations designed to ensure continuity of supply, of customers who are not mentioned in [point 1 of the second paragraph of Article 2] of that regulation?

(2) Must Article 8(5) of [Regulation No 994/2010] be interpreted as constituting an obstacle to the imposition by a Member State on natural gas suppliers of obligations relating to the volumes of gas stored and the withdrawal rates attached thereto, and to the holding of storage capacities acquired by virtue of rights reflecting the obligation to hold stocks on the territory of that Member State, whilst at the same time providing that the Minister, in assessing a supplier's storage capacities, is to take account of the other regulatory instruments available to that supplier?'

III. Procedure before the Court

19. The order for reference was received at the Court on 20 April 2016. Eni, Uprigaz, Storengy and TIGF, the French and Polish Governments and the European Commission submitted observations and took part in the hearing which was held on 16 March 2017.

IV. Analysis

20. Before answering the two questions referred by the national court, I consider it necessary, as a preliminary point, to examine the purposes and the context of Regulation No 994/2010.

A. The provisions of EU law on security of gas supply, in particular Regulation No 994/2010

21. It is clear from Article 194(1)(b) TFEU that security of energy supply in the Union is one of the fundamental objectives of the Union policy on energy. [5]

22. The first common legal framework to safeguard security of gas supply and to contribute to the proper functioning of the internal gas market in the event of supply disruption was established in 2004 by Directive 2004/67/EC. [6]

5 In this regard, see judgment of 7 September 2016, *ANODE* (C-121/15, EU:C:2016:637; paragraphs 47 and 48), and my Opinion in *ANODE* (C-121/15, EU:C:2016:248, point 56).

6 Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply (OJ 2004 L 127, p. 92).

23. The Russian-Ukrainian gas crisis in January 2009, which brought an unprecedented disruption of gas supplies in the European Union, nevertheless made evident the weaknesses in the system established by Directive 2004/67. The crisis clearly highlighted the need to adopt harmonised measures within the EU in order to ensure that all Member States were prepared on a common minimum level in the event of a crisis caused by serious interruptions to the gas supply. [7]

24. Drawing on the experience gained from the implementation of Directive 2004/67/EC, the EU legislature thus adopted Regulation No 994/2010.

25. Regulation No 994/2010 provides for a comprehensive common approach to security of supply, inter alia through solidarity policies compatible with the functioning of the internal market. [8] To that end, it establishes provisions aimed at safeguarding the security of gas supply by ensuring the proper and continuous functioning of the internal market in natural gas, by allowing for exceptional measures to be implemented when the market can no longer deliver the required gas supplies and by providing for a clear definition and attribution of responsibilities among natural gas undertakings, the Member States and the Union regarding both preventive action and the reaction to concrete disruptions of supply. [9]

26. More specifically, in order to maintain a well-functioning internal gas market, particularly in supply disruptions and crisis situations, Regulation No 994/2010 envisages a three-tier approach: the natural gas undertakings concerned are primarily responsible, based on market mechanisms, for ensuring the continuity of gas supplies; in case the market mechanisms fail to deliver, the Member States take on that responsibility at national level or regional level; then the Union itself takes on that responsibility. [10]

27. Regulation No 994/2010 provides mechanisms, in a spirit of solidarity, for the coordination of planning for, and response to, emergencies at Member State, regional and Union levels. [11] For those purposes it requires, in particular, the Member States to establish two plans: a Preventive Action Plan containing the measures needed to remove or mitigate the risks identified affecting the security of gas supply in the Member State and an Emergency Plan containing the measures to be taken to remove or mitigate the impact of a gas supply disruption. [12]

28. In order to safeguard gas supply during a crisis, Regulation No 994/2010 establishes gas infrastructure standards in order to improve security of gas supply [13] and harmonised security of supply standards. The latter standards lay down an obligation to ensure gas supply to ‘protected customers’ in certain situations of disruption of supplies or exceptionally high demand. They seek to cover at least the situation that occurred during the gas crisis in 2009. [14]

7 In this regard, see the Commission document accompanying the proposal for a regulation (SEC(2009) 979 final, pp. 3 and 17) and the Commission document of 16 October 2014 entitled ‘Report on the implementation of Regulation (EU) 994/2010 and its contribution to solidarity and preparedness for gas disruptions in the EU’ (SWD(2014) 325 final). Recitals 26 and 27 of Regulation No 994/2010 also make explicit reference to the gas crisis which occurred in January 2009.

8 See recital 22 of Regulation No 994/2010.

9 See Article 1 and recitals 3, 5, 23 and 24 of Regulation No 994/2010.

10 See Article 3 and recital 24 of Regulation No 994/2010. See also p. 2 of the Commission document of 16 October 2014 entitled ‘Report on the implementation of Regulation (EU) 994/2010 and its contribution to solidarity and preparedness for gas disruptions in the EU’ (SWD(2014) 325 final).

11 See Article 1 of Regulation No 994/2010.

12 See Article 4 of Regulation No 994/2010, in particular paragraph 1 thereof.

13 See Article 6 and recitals 13 and 15 of Regulation No 994/2010.

14 See recital 26 of Regulation No 994/2010.

29. More specifically, the harmonised security of supply standards contained in Article 8(1) of Regulation No 994/2010 are intended to ensure that supply is maintained *particularly* as regards household customers, as well as a *limited* number of additional customers, who are particularly vulnerable and need special protection,[15] that is, 'protected customers' as defined in point 1 of the second paragraph of Article 2 of the regulation. It is understood that a wide definition of such protected customers must not, however, conflict with European solidarity mechanisms.[16]

30. Although Regulation No 994/2010 seeks to achieve a certain level of harmonisation of security of supply standards, the EU legislature nevertheless recognised the concerns of those Member States which had established further-reaching security of supply standards. With that in mind, the legislature stipulated, in Article 8(2) of the regulation, that the Member States may provide for increased supply standards or additional obligations going beyond the harmonised security of supply standards laid down in Article 8(1). However, in order to prevent the system of guaranteed security of supply, based on solidarity between Member States and established by Regulation No 994/2010, being jeopardised, Article 8(2) of the regulation lays down a strict framework for the possible adoption of such measures by the Member States.

31. It should be noted in this regard that the requirement of solidarity between Member States plays an essential role in the system established by Regulation No 994/2010 and, more broadly, in the context of the Union policy on energy. Against this background, a few brief remarks should be made specifically regarding this aspect.

B. Brief remarks regarding the principle of solidarity between Member States in the context of the Union policy on energy

32. Article 194 TFEU, which introduced into EU law for the first time a primary-law provision on Union energy policy, provides, in paragraph 1, that that policy must be pursued 'in a spirit of solidarity between Member States'.

33. This reference to solidarity between Member States, which was added into the wording of the text of the Treaty of Lisbon,[17] is made in a context in which the principle of solidarity between Member States has taken on a character that could be defined as a 'constitutional principle'. The idea of solidarity between Member States is not only expressed in various places in the Treaties,[18] but also, under the third subparagraph of Article 3(3) of the TEU, constitutes one of the objectives of the Union.

34. Furthermore, as is clear from both Article 194(1)(b) and Article 122(1) TFEU, the principle of solidarity between Member States has particular relevance with regard to supply in the area of energy.

35. It is thus in that context that, in accordance with the approach adopted in primary law, the system established by Regulation No 994/2010 is based on the requirement of solidarity between Member States, which permeates the whole regulation. The spirit of solidarity between Member States is expressly mentioned in a number of recitals of the regulation[19] and in a number of its provisions.[20]

15 See recitals 10 and 29 of Regulation No 994/2010 (my italics).

16 See recital 10 of Regulation No 994/2010.

17 Article III-256 of the Treaty establishing a Constitution for Europe signed at Rome on 29 October 2004 (OJ 2004 C 310, p. 1), which inspired the wording of Article 194 TFEU, did not contain any reference to solidarity between Member States.

18 Thus, in the preamble to the TEU, the Member States declare that, in creating the Union, they are seeking 'to deepen the solidarity between their peoples'. Solidarity between Member States is then expressly mentioned in Article 67(2) TFEU in relation to asylum, immigration and external border control; in Title VIII of Part Three of the TFEU, specifically in the chapter on economic policy, Article 122(1) also refers explicitly to solidarity between Member States. In this regard, see also point 142 et seq. of the View of Advocate General Kokott in *Pringle* (C-370/12, EU:C:2012:675).

19 See recitals 10, 22, 25, 36 and 38 of Regulation No 994/2010.

20 Specifically in Article 1, the second subparagraph of Article 8(2), point (b) of the second paragraph of Article 14, and in Annex IV.

36. More specifically, as is expressly stated in recital 36, one of the objectives of the regulation is to strengthen solidarity between Member States in the event of a Union emergency and in particular to support Member States which are exposed to less favourable geographical or geological conditions.

37. In those circumstances, in interpreting the provisions of Regulation No 994/2010, account must be taken of the fundamental role played by the principle of solidarity between Member States in the context of that regulation.

38. It should also be noted in this regard that in a new proposal for a regulation presented by the Commission to repeal Regulation No 994/2010,[21] the principle of solidarity plays an even more important role and is expressly incorporated into the text of the regulation with an article devoted specifically to solidarity.[22]

C. The first question

1. Preliminary remarks

39. The first question which the referring court asks the Court concerns the interrelationship between the definition of 'protected customers' under point 1 of the second paragraph of Article 2 of Regulation No 994/2010 and the additional obligations which Article 8(2) of that regulation permits Member States to impose on natural gas suppliers.

40. More specifically, the French Conseil d'État (Council of State) wishes to know whether or not, where a Member State imposes such an additional obligation, it may 'go beyond' the definition of 'protected customers' in point 1 of the second paragraph of Article 2 of Regulation No 994/2010, including within the scope of the additional obligation customers that are not covered by that definition.

41. This question has its origins in the fact that the definition of 'protected customers' in the French legislation, following the adoption of Decree No 2014-328, includes among protected customers 'non-domestic customers connected to the distribution network that have not accepted, under a contract, a supply which may be interrupted'. According to the referring court, this category includes non-domestic customers that do not necessarily constitute 'small and medium-sized enterprises' (SMEs) within the meaning of point 1(a) of the second paragraph of Article 2 of Regulation No 994/2010.

42. The parties which submitted observations before the Court take opposing positions on the answer to be given to the first question.

43. On the one hand, the French and Polish Governments and Storengy and TIGF, which are natural gas storage undertakings, claim, in essence, that there is nothing in Regulation No 994/2010 to prevent a Member State imposing on natural gas suppliers an additional obligation whose scope includes customers that are not among the protected customers mentioned in point 1 of the second paragraph of Article 2 of that regulation. The French Government even asserts, first and foremost, that the question of the compatibility of the national legislation with Regulation No 994/2010 does not arise because the definition of 'protected customers' adopted in national law is no broader than the definition in Article 2 of the regulation.

21 Proposal for a Regulation of the European Parliament and of the Council of 16 February 2016 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 (COM(2016) 52 final).

22 See Article 12 of the proposal mentioned in the preceding footnote.

44. ENI and Uprigaz, which are natural gas suppliers, maintain, on the other hand, that Article 8(2) of Regulation No 994/2010 does not prevent a Member State imposing on natural gas suppliers additional obligations based on a broader definition of 'protected customers' than the definition in Article 2 of the regulation.

45. The Commission takes a nuanced position. It does not seem to rule out the possibility that a Member State may impose an additional obligation extending the definition of 'protected customers' beyond the limits set out in Article 2 of Regulation No 994/2010. However, it highlights the need for compliance with the strict conditions laid down in the regulation for the imposition of an additional obligation.

46. I consider it necessary, first of all, to make a few remarks regarding the scope of the definition of 'protected customers' in point 1 of the second paragraph of Article 2 of Regulation No 994/2010. Those remarks would seem to be useful in allowing the referring court to consider the arguments presented by the French Government claiming that the definition of 'protected customers' under the national legislation does not go beyond the definition of that concept in Regulation No 994/2010. Second, further to those remarks, I will address the question of the interrelationship between the definition of 'protected customers' contained in point 1 of the second paragraph of Article 2 of Regulation No 994/2010 and the possibility of imposing additional obligations under Article 8(2) of that regulation.

2. *The scope of the definition of 'protected customers' in point 1(a) of the second paragraph of Article 2 of Regulation No 994/2010*

47. The French Government asserts that, by including among protected customers not only household customers, but also 'non-domestic customers connected to the distribution network that have not accepted, under a contract, a supply which may be interrupted', Decree No 2014-328 did not go beyond the definition of 'protected customers' under point 1(a) of the second paragraph of Article 2 of Regulation No 994/2010.

48. This category of customers encompasses entities of modest size, such as small enterprises, small branches of large enterprises, small businesses belonging to integrated networks or small industrial plants belonging to a larger enterprise, the larger entities not being connected to the distribution network, but directly to the transmission network.

49. According to the French Government, the reference to SMEs in Regulation No 994/2010 should be understood as not being limited to entities with legal status as an SME but, in the light of the objectives of the regulation, as also including entities which in fact constitute autonomous units that consume an equivalent volume of gas to an SME.

50. It asserts that such an approach is practically necessary for the management of load shedding in the event of insufficient supply. It is also consistent with the margin of discretion given to Member States by Regulation No 994/2010. Lastly, it is also required by the principle of equal treatment, under which the concept of SME must be interpreted as including entities having the same degree of vulnerability.

51. It should be noted that the definition of 'protected customers' in point 1 of the second paragraph of Article 2 of Regulation No 994/2010 provides, first, that all household customers connected to a gas distribution network must *necessarily* be considered as 'protected customers'. Second, in letters (a) and (b), it permits Member States to add two specific categories of 'protected customers'.

52. In so far as is of specific interest in the present case, under point 1(a) of the second paragraph of Article 2 of Regulation No 994/2010, Member States may consider as protected customers 'small and medium-sized enterprises, provided that they are connected to a gas distribution network … and provided that all these additional customers do not represent more than 20% of the final use of gas'.

53. The provision of an exhaustive list of potential 'protected customers' means that, whilst Regulation No 994/2010 grants Member States some margin of discretion in the definition of 'protected customers', a strict framework for exercising that margin of discretion is nevertheless laid down by the regulation. The rationale for that strict framework is clear from recital 10 of Regulation No 994/2010, which stresses the risk that a wide definition of 'protected customers' might conflict with solidarity mechanisms between Member States.

54. As the Commission rightly pointed out in its observations, the idea underlying the harmonisation of the concept of 'protected customers' was to avoid the provision of protection at national level for too wide a group of persons jeopardising the functioning of the European solidarity mechanisms provided for in Regulation No 994/2010, thereby creating additional risks for protected customers in the other Member States. [23] Similarly, recital 29 of the regulation mentions, alongside household customers, 'a limited number of additional customers'.

55. The definition of 'protected customers' is intended to guarantee security of supply to the most vulnerable customers in the event of a crisis. Such protection, having a higher degree, cannot be guaranteed for all customers, otherwise the guaranteed gas supply system under Regulation No 994/2010 would be deprived of its substance. The definition of 'protected customers' thus determines the scope *ratione personae* of the supply standards.

56. Furthermore, with regard to the margin of discretion available to Member States more generally, it is clear from recital 5 of Regulation No 994/2010, to which the French Government refers in support of its argument, that although the measures regarding the security of gas supply adopted before the regulation accorded Member States a large margin of discretion as to the choice of measures, Regulation No 994/2010 is intended to frame that margin of discretion further in order to avoid measures developed unilaterally by a Member State jeopardising the proper functioning of the internal gas market and the supply of gas to customers, thereby causing a shortage of gas in neighbouring countries. [24]

57. Accordingly, the reference to SMEs in point 1(a) of the second paragraph of Article 2 of Regulation No 994/2010 cannot be understood as an open-ended reference to be freely interpreted by Member States. Instead, it constitutes a reference to a precise legal notion. Although Regulation No 994/2010 does not give an express definition of the concept of 'SME', in the absence of a reference to national law, that concept cannot be defined by reference to the laws of the Member States. [25] On the contrary, in view of the objective pursued by Regulation No 994/2010 and the context of Article 2, that provision must be considered to make reference to the concept of 'SME' used in EU law. [26]

23 In this regard, see also the Commission document of 16 October 2014 entitled Report on the implementation of Regulation (EU) 994/2010 and its contribution to solidarity and preparedness for gas disruptions in the EU (SWD(2014) 325 final), p. 2.

24 As the Commission stated in the Explanatory Memorandum for its Proposal for a Regulation of the European Parliament and of the Council of 16 February 2016 concerning measures to safeguard the security of gas supply and repealing Regulation No 994/2010 (COM(2016) 52 final), the 'need for EU action is clear, given the evidence that national approaches both result in sub-optimal measures and aggravate the impact of a crisis'(see p. 3).

25 See, to that effect, inter alia, judgment of 11 November 2015, *Pujante Rivera* (C-422/14, EU:C:2015:743, paragraph 48).

26 See, to that effect, regarding different areas, judgments of 9 November 2016, *Wathelet* (C-149/15, EU:C:2016:840, paragraph 29), and of 2 March 2017, *J. D.* (C-4/16, EU:C:2017:153, paragraph 24).

58. Against this background, Recommendation 2003/361/EC of the Commission of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [27] becomes relevant. That recommendation establishes precise criteria for identifying that category of enterprises, [28] and it is that recommendation to which reference must be made in defining that concept. [29] Moreover, I note that, according to information contained in the observations of the French Government, the definition of 'SME' in French law corresponds to the definition proposed in the recommendation.

59. As regards the French Government's reliance on the principle of equal treatment at the hearing, it stems from the fact that a branch or subsidiary of a large enterprise is as vulnerable as a SME. However, I consider this premiss to be manifestly incorrect. Belonging to a sizeable entity (a group) permits such entities to have (economic and technical) resources which SMEs generally do not have and which can make it possible to deal with energy supply crises. Thus, branches and subsidiaries of large enterprises and SMEs are not objectively in the same situation.

60. Furthermore, in identifying vulnerable customers that warrant increased protection, the legislature does not use the criterion of energy consumption. The French Government cannot therefore use it as the basis for an analogy between SMEs and branches or subsidiaries of large enterprises.

61. Whilst it is ultimately for the referring court, and not the Court, to determine whether the national legislation at issue is compatible with Regulation No 994/2010, in the light of the arguments presented by the French Government itself it would seem that the definition of 'protected customers' in the French legislation does not appear to be consistent with the definition provided for in point 1 of the second paragraph of Article 2 of Regulation No 994/2010. The referring court also seems to concur with this view in the order for reference. [30]

3. The possibility of imposing additional obligations in respect of customers not covered by the definition of 'protected customers'

62. It is now necessary, in the light of all the above considerations, to examine the question whether a Member State may impose an additional obligation on natural gas suppliers pursuant to Article 8(2) of Regulation No 994/2010 which includes within in its scope customers other than those covered by the definition of 'protected customers' under point 1 of the second paragraph of Article 2 of Regulation No 994/2010.

63. As I stated in point 30 of this Opinion, Article 8(2) of Regulation No 994/2010 gives Member States the possibility to adopt two kinds of measures that go beyond the harmonised security of supply standards provided for in Article 8(1): increased supply standards and additional obligations.

64. These are, in my view, two different kinds of measures, whose scope is apparent from their very name.

27 OJ 2003 L 124, p. 36.

28 See Article 2 of the Annex to the recommendation.

29 A number of Union acts, in particular regulations, have regard explicitly to the definition contained in that recommendation in defining the concept of SME. See, for example, Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (Text with EEA relevance) (OJ 2014 L 187, p. 1; see recital 3 and Annex I) or Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 — the European Fund for Strategic Investments (OJ 2013 L 169, p. 1; see Article 2(4)).

30 See point 15 of this Opinion.

65. The first kind of measures is 'supply standards', namely those provided for in Article 8(1) of Regulation No 994/2010 — to which paragraph 2 also makes explicit reference — which are, however, 'increased', that is, extended in time, as is clear from the words 'going beyond the 30-day period'. It is apparent from the wording of paragraph 1 that the supply standards apply solely to the protection of protected customers.

66. On the other hand, the second kind of measure is 'additional' obligations which may be imposed on natural gas undertakings. The use of the term 'additional' makes it clear that they are supplementary obligations, different in nature from the supply standards mentioned in Article 8(1) of Regulation No 994/2010, to which the provision in question does not refer in respect of this second kind of measure.

67. It is evident from a literal analysis of Article 8(2) of Regulation No 994/2010 that there is nothing to prevent a Member State imposing on natural gas undertakings an *additional obligation* which applies to a wider group of customers than is covered by the definition of 'protected customers' under Regulation No 994/2010.

68. However, it is clear from that provision, read in the light of the objectives of Regulation No 994/2010, that such a possibility is subject to compliance with very strict conditions. Article 8(2) of that regulation establishes a strict framework for exercising that possibility, laying down a number of conditions which must be met if such an additional obligation is to be considered as compatible with Regulation No 994/2010.

69. Thus, first, it is apparent from the very wording of the introductory words of Article 8(2) of Regulation No 994/2010 that the additional obligation must be imposed 'for reasons of security of gas supply'. If that condition is to be met, the additional obligation must be intended to increase the resilience of the gas supply system to exceptional and unforeseen events that jeopardise the supply capacity.

70. Second, still according to the introductory words of Article 8(2) of Regulation No 994/2010, such an additional obligation must be based on the assessment, referred to in Article 9 of Regulation No 994/2010, of the risks affecting the security of gas supply in the Member State concerned.

71. Third, under Article 8(2)(a) of Regulation No 994/2010, such an additional obligation must comply with the requirements set out in Article 3(6) of that regulation. Thus, it must be clearly defined, transparent, proportionate, non-discriminatory and verifiable; it must not unduly distort competition and the effective functioning of the internal market in gas [31] and it must not endanger the security of gas supply of other Member States or of the Union as a whole.

72. Fourth, under Article 8(2)(c) of Regulation No 994/2010, in accordance with the spirit of solidarity between Member States on which the system established by that regulation is based, the additional obligation must not impact negatively on the ability of any other Member State to supply its protected customers in the event of a national, Union or regional emergency.

73. Fifth, such an obligation must comply with the criteria specified in Article 11(5) of of Regulation No 994/2010 in the event of a Union or regional emergency. [32]

31 This condition is repeated in Article 8(2)(b) of Regulation No 994/2010.

32 Article 11(5) of Regulation No 994/2010 provides that: (a) no measures may be introduced which unduly restrict the flow of gas within the internal market at any time, notably the flow of gas to the affected markets; (b) no measures may be introduced that are likely to endanger seriously the gas supply situation in another Member State; and (c) cross-border access to infrastructure must be maintained as far as technically and safely possible, in accordance with the Emergency Plan, in accordance with 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 2009 L 211, p. 36).

74. Sixth, under the second subparagraph of Article 8(2) of Regulation No 994/2010, it is necessary, in a spirit of solidarity between Member States, for the Competent Authority to identify in the Preventive Action Plan and in the Emergency Plan how that additional obligation may be temporarily reduced in the event of a Union or regional emergency.

75. In the context of a preliminary ruling, it is for the national court to determine whether the national measures are compatible with EU law, the jurisdiction of the Court of Justice being limited to providing the national court with all the criteria for the interpretation of EU law which may enable it to make such a determination. It will accordingly be for the national court to establish whether, in the circumstances of the present case, the laying down of an additional obligation in the form of the obligation imposed on natural gas suppliers to extend stocks of natural gas, in order to ensure security of supply in the event of a crisis, to 'non-domestic customers connected to the distribution network that have not accepted, under a contract, a supply which may be interrupted' which are not SMEs meets the conditions mentioned in points 69 to 74 of this Opinion. In making its assessment of compatibility, the national court must have due regard to the guidance on interpretation provided by the Court of Justice. [33]

76. In this context, I will simply make a few remarks regarding two aspects: the condition that the additional obligation must be imposed 'for reasons of security of gas supply' and the requirement of the proportionality of the additional obligation mentioned in point 71 of this Opinion.

(a) *The requirement that the additional obligation must be imposed for reasons of security of gas supply*

77. The first condition to be complied with if an additional obligation imposed on natural gas undertakings by a Member State is to be compatible with Regulation No 994/2010 is that it is imposed for reasons of security of gas supply.

78. The French Government claimed at the hearing that there was no doubt that the additional obligation in question met this condition as it was intended to guarantee security of supply for additional customers that, for technical reasons, could not be distinguished from protected customers. In the same context, the French Government also stated that such an additional obligation in respect of 'additional' protected customers did not impair the protection of protected customers as defined by Regulation No 994/2010 and thus the effectiveness of Article 2 and Article 8(2) of that regulation.

79. I am not certain that the simple need to protect further categories of customers, for purported technical reasons whose existence is, moreover, strongly contested, can constitute a genuine reason of security of gas supply with a view to increasing the resilience of the supply system — as identified in point 69 of this Opinion — which might justify the adoption of an additional obligation like that at issue. Such an additional obligation must be intended to reduce risks affecting the security of gas supply in the Member State in question, as identified in the assessment referred to in Article 9 of Regulation No 994/2010, on which, as was noted in point 70 of this Opinion, that additional obligation must be based.

80. These doubts are further reinforced if it is considered that, as was stated in point 54 of this Opinion, the provision of protection at national level for too wide a group of persons is likely to create additional risks for protected customers in the other Member States and to jeopardise the European solidarity mechanisms established by Regulation No 994/2010.

81. It will, in any event, be for the referring court to ascertain that in the present case the imposition of the additional obligation in question is based on genuine reasons of security of gas supply

33 See, to that effect, judgments of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 34), and of 7 September 2016, *ANODE* (C-121/15, EU:C:2016:637, paragraph 54).

(b) *The proportionality of the additional obligation*

82. As was stated in point 71 of this Opinion, the additional obligation which, under Article 8(2) of Regulation No 994/2010, may be imposed on natural gas undertakings must comply with the principle of proportionality. In order to meet this condition, the additional obligation must be *appropriate* for achieving the objective pursued, namely to guarantee security of gas supply, and must not go beyond what is necessary to achieve that objective.

83. In this regard, I consider that although, as the Commission has observed, when the referring court assesses the proportionality of the additional obligation at issue, it may be able to draw inspiration from the Court's case-law relating to regulated prices for gas and electricity,[34] the relevance of that case-law in a case like the present one must nevertheless be reviewed.

84. As the French Government has noted, there is a substantial difference between the factual and legal contexts of the situations analysed in that case-law, which related to national measures in respect of the imposition of a price on the market, and in the present case, which relates to measures concerning security of supply.[35]

4. *Conclusions on the first question*

85. In the light of all the foregoing considerations, I take the view that the first question should be answered to the effect that Article 8(2) of Regulation No 994/2010 does not prevent the imposition by a Member State on natural gas suppliers of an additional obligation extending to customers that are not covered by the definition in point 1 of the second paragraph of Article 2 of that regulation, provided only that it is proven, which must be examined thoroughly by the referring court, that the conditions laid down in Article 8(2), as specified in points 68 to 74 of this Opinion, are strictly complied with.

D. The second question

86. By its second question, the referring court asks the Court, in essence, whether Article 8(5) of Regulation No 994/2010 precludes legislation of a Member State which imposes on natural gas suppliers an obligation to hold gas stocks on its territory, in order to guarantee security of supply in the event of crisis, whilst at the same time providing that the Competent Authority, in assessing the supplier's storage capacities, is to take account of the other regulatory instruments available to that supplier.

87. It should be noted in this regard that Article 8(5) of Regulation No 994/2010 contains two provisions: first, an enabling provision and, second, a prohibitory provision. The first sentence of paragraph 5 provides that natural gas undertakings must be allowed to meet obligations imposed on them for the fulfilment of the supply standards laid down in Article 8 of the regulation at a regional or Union level, where appropriate. The second sentence, on the other hand, provides that the Competent Authority at national level may not require gas undertakings to meet those obligations based on infrastructure located only within its territory.

34 See, inter alia, judgments of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205, paragraph 69); of 21 December 2011, *ENEL* (C-242/10, EU:C:2011:861, paragraph 55 et seq.); of 10 September 2015, *Commission* v *Poland* (C-36/14, not published, EU:C:2015:570 paragraph 45 et seq.); and of 7 September 2016, *ANODE* (C-121/15, EU:C:2016:637 paragraph 53 et seq.).

35 This observation seems particularly relevant as regards the periodic re-examination of the measure envisaged in paragraph 35 of the judgment of 20 April 2010, *Federutility and Others* (C-265/08, EU:C:2010:205). In that judgment, the Court justified the requirement of such a re-examination by referring to the fact that, by its very nature, the measure in question constituted an obstacle to the realisation of an operational internal market in gas. However, a re-examination could prove necessary where the conditions in which the measure was adopted have changed (for example in connection with cooperation between Member States or the infrastructure situation).

88. The provisions laid down in Article 8(5) of Regulation No 994/2010 are intended to bring about the completion of a genuine internal market in gas and, in accordance with recital 12 of Regulation No 994/2010, to ensure that measures taken to safeguard the security of gas supply do not unduly distort competition or the effective functioning of the internal gas market.

89. In the present case, Article 9 of Decree No 2014-328, read in conjunction with Article L. 421-4 of the Energy Code, requires gas suppliers to hold in French territory, on 31 October each year, gas stocks corresponding to at least 80% of the storage rights relating to the consumers included within the scope of the obligation. However, the minister responsible must take account of the other regulatory instruments available to the supplier in order to establish that it is meeting its obligations.

90. I note in this regard that, as the Commission has pointed out, the French legislation requires *de jure* that suppliers hold in France sufficient stocks of natural gas to meet their obligations. In isolation, an obligation of this nature is incompatible with the second provision of Article 8(5) of Regulation No 994/2010 in that it obliges gas undertakings to meet their obligations under Article 8 of the regulation necessarily through infrastructure located only within national territory.

91. The French legislation nevertheless permits the minister responsible to take account of the 'other regulatory instruments' of the supplier in question. However, the referring court does not provide sufficient information in this regard to clarify the scope, in practice, of the assessment made by the minister responsible.

92. First, there is nothing to give an understanding of the meaning of the concept of 'regulatory instrument'. In response to a specific question asked at the hearing regarding the scope of this concept, the French Government merely referred to gas storage reserves which may be held by the supplier in question in other Member States. However, I consider that, as the Polish Government has observed, a supplier should be able to show that it is capable of meeting the obligations imposed on it for the fulfilment of the supply standards or additional obligations provided for under Article 8 of Regulation No 994/2010, including by means of the market instruments mentioned by way of example in Annex II to Regulation No 994/2010. The assessment of the capacity to meet those obligations should take account of the overall individual situation of each supplier.

93. Second, it is not clear that the examination conducted by the minister responsible in order to 'take account of the other regulatory instruments' can *actually* guarantee the possibility, in practice, for natural gas suppliers to meet their obligations at regional level or at Union level. In particular, it must be ascertained whether, in its practical application, that assessment is based on precise and verifiable criteria.

94. In these circumstances, I consider that the second question should be answered to the effect that Article 8(5) of Regulation No 994/2010 precludes legislation of a Member State which requires natural gas suppliers to meet their obligations to hold gas stocks under Article 8 of the regulation necessarily through infrastructure located only within national territory. In the present case, however, it is for the referring court to ascertain whether the possibility offered by the national legislation to the minister responsible to take account of the 'other regulatory instruments' of the suppliers concerned guarantees them an actual opportunity, in practice, to meet their obligations at regional level or at Union level.

V. Conclusions

95. On the basis of the foregoing considerations, I propose that the Court answer the questions referred by the Conseil d'État (Council of State, France) as follows:

Article 8(2) of 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 must be interpreted as not preventing the imposition by a Member State on natural gas suppliers of an additional obligation extending to customers that are not covered by the definition in point 1 of the second paragraph of Article 2 of that regulation, provided only that it is proven, which must be examined thoroughly by the referring court, that the following conditions are strictly complied with:

- first, such an additional obligation must be imposed for genuine reasons of security of supply;

- second, such an additional obligation must be based on the assessment of the risks affecting the security of gas supply in the Member State concerned referred to in Article 9 of the regulation;

- third, in accordance with Article 3(6) of the regulation, such an additional obligation must be clearly defined, transparent, proportionate, non-discriminatory and verifiable, must not unduly distort competition and the effective functioning of the internal market in gas and must not endanger the security of gas supply of other Member States or of the Union as a whole;

- fourth, in accordance with the principle of solidarity between Member States underlying Regulation No 994/2010, such an additional obligation must not impact negatively on the ability of any other Member State to supply its protected customers in accordance with Article 8 of that regulation in the event of a national, Union or regional emergency;

- fifth, such an additional obligation must comply with the criteria specified in Article 11(5) of the regulation in the event of a Union or regional emergency;

- sixth, it must be identified in the Preventive Action Plan and in the Emergency Plan how, having due regard to the principle of solidarity between Member States, such an additional obligation may be temporarily reduced in the event of a Union or regional emergency.

Article 8(5) of Regulation No 994/2010 precludes legislation of a Member State which requires natural gas suppliers to meet their obligations to hold gas stocks under Article 8 of the regulation necessarily through infrastructure located only within national territory. However, it is for the referring court to ascertain whether the possibility offered by the national legislation to the minister responsible 'to take account of the other regulatory instruments' of the suppliers concerned guarantees them an actual opportunity, in practice, to meet their obligations at regional level or at Union level.