



*Committee on Legal Affairs
The Chair*

13.6.2017

Mr Jerzy Buzek
Chair
Committee on Industry, Research and Energy
BRUSSELS

Subject: Opinion on the legal basis on the proposal for a Regulation of European Parliament and of the Council concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 (2016/0030(COD))

Dear Mr Chair,

By letter of 11 May you asked the Committee on Legal Affairs, pursuant to Rule 39(2) of the Rules of Procedure to provide an opinion on the appropriateness of the legal basis for the proposal for a Regulation of European Parliament and of the Council concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 (2016/0030(COD)).

The legal basis proposed by the Commission is Article 194 TFEU, which sets out the legal base for energy policy; however, during the inter-institutional negotiations, it was considered necessary to add a reference to paragraph 2 of the above mentioned Article, which stipulates that the measures shall be established in accordance with the ordinary legislative procedure. Therefore, ITRE requests an opinion on the appropriateness of Article 194(2) TFEU as legal basis for the above proposal.

The committee considered the above question at its meeting of 12 June 2017.

I. Background

The Regulation in question is aimed at ensuring that all the necessary measures are taken to safeguard an uninterrupted supply of gas throughout the Union, in particular to protected customers in the event of difficult climatic conditions or disruptions of the gas supply.

To meet this objective, the draft regulation proposes stronger regional coordination, with certain principles and standards being set at EU level. The approach proposed is that Member States should cooperate closely within their regions when conducting regional risk assessments. To ensure EU-wide consistency, regional risk assessments will be conducted on the basis of an EU-wide simulation, with common standards and a specific scenario. Risks identified through regional risk assessments will be addressed in regional preventive action plans and emergency plans, to be peer-reviewed and approved by the Commission.

The proposal refers to Article 194 TFEU as legal basis; however, the Commission did not specify on which paragraph of the article the proposal should rely on.

II. Relevant Treaty Article

The following Article of the Treaty on the Functioning of the European Union, under Title XXI on 'Energy', is presented as the legal basis in the Commission proposal (*emphasis added*):

Article 194 TFEU

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

III. Case-law

It is settled case-law of the Court of Justice that "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in

particular the aim and content of the measure".¹ The choice of an incorrect legal basis may therefore justify the annulment of the act in question. Moreover, the Court has held that the indication of the legal basis is necessary in order to determine the voting procedure within the Council.² Accuracy in the indication of the legal basis is particularly important in the present case, since paragraphs 2 and 3 of Article 194 make reference to the ordinary legislative procedure and to a special legislative procedure with unanimous vote in Council, respectively.

IV. The aim and content of the proposed regulation

This Regulation 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. This Regulation also provides transparent mechanisms, in a spirit of solidarity, for the coordination of planning for, and response to, an emergency at Member State, regional and Union levels.

V. Analysis and Determination of the appropriate legal basis

The aim of the concerned Regulation is to ensure that all the necessary measures are taken to safeguard an uninterrupted supply of gas throughout the Union, and in particular to protect customers in the event of difficult climatic conditions or disruptions of the gas supply.

As the EP Legal Service stressed out in its opinion, *"the agreed amendment to the legal basis does not substantively change the basis selected by the Commission for its Proposal, but it renders the choice of legal basis more precise by specifying the relevant paragraph of Article 194 TFEU on which the co-legislators seek to rely."*³

Article 194 TFEU contains, in paragraphs 2 and 3, two different legal bases for measures of different nature. While paragraph 3 refers to measures that are mainly of a fiscal nature, paragraph 2 refers to the adoption of measures necessary to achieve the objectives in paragraph 1, which include, *inter alia*, security of supply. Furthermore, it is important to notice that Article 194 TFEU provides for different legislative procedures depending on the nature of a measure. Pursuant to Article 194(3) TFEU, a special legislative procedure applies, where Parliament is only consulted and unanimity in Council is required for measures which are primarily of fiscal nature; instead, pursuant to Article 194(2) TFEU, the ordinary legislative procedure applies for the adoption of measures necessary to achieve the objectives set out in Article 194(1), including security of supply.

¹ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] E.C.R. I-9097; Case C-411/06 *Commission v. Parliament and Council* [2009] ECR I-7585.

² See judgment of 1 October 2009 in *Commission v Council (CITES)*, C-370/07, EU:C:2009:590, in particular paragraphs 37-38 and 56.

³ SJ-0277/16.

Since it is clear from the foregoing that the Regulation falls within the latter category of measures, a specific mention of paragraph 2 of Article 194 TFEU in the legal basis is useful and appropriate.

VI. Conclusion and recommendation

In the light of the foregoing, Article 194(2) TFEU should be indicated as legal basis for the proposal.

At its meeting of 12 June 2017 the Committee on Legal Affairs accordingly decided unanimously¹, to recommend to the Committee on Industry, Research and Energy to indicate Article 194(2) TFEU as the legal basis for the proposed Regulation.

Yours sincerely,

Pavel Svoboda

¹ The following were present for the final vote: Pavel Svoboda (Chair), Lidia Joanna Geringer de Oedenberg (Vice-Chair), Jean-Marie Cavada (Vice-Chair), Laura Ferrara (Vice-Chair), Max Andersson, Joëlle Bergeron, Heidi Hautala, Mary Honeyball, Sajjad Karim, Sylvia-Yvonne Kaufmann, Gilles Lebreton, António Marinho e Pinto, Emil Radev, József Szájer, Axel Voss; Dominique Bilde, Antanas Guoga, Danuta Jazłowiecka, Kateřina Konečná, Merja Kyllönen, Victor Negrescu, Virginie Rozière, Elly Schlein, Kosma Złotowski (suppleants).