

Gas Supply Crises

SoS Back-and-Forth? Minimum v. Exhaustive Harmonization of the Right to be Protected Customers in Gas Supply Crises: *Eni and Others*

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The Russian-Ukraine gas supply crisis in January 2009 brought an unprecedented disruption for the gas supply in Europe. As a response, the SoS Regulation put in place an ambitious plan to mitigate not only the risks of another gas supply crisis, but also to protect a defined group of customers in case of unavoidable gas shortage – households, small and medium enterprises, institutions providing essential social services among others. While it was thought the SoS Regulation had pursued exhaustive harmonization standards in the definition of protected costumers, the ECJ's judgment in Eni and Others reopened the question. This article, instead, argues that the Court got it wrong. Neither the judgment nor the opinion of the Advocate General took into sufficient account the legal content Fof the provision that defined protected customers. If the Court had done so, the judgment would have likely taken additional linguistic, systemic, and teleological arguments into account. The analyses and comments on Eni and Others here offered focus on the first referred question about whether Member States could impose additional obligation on gas undertakings by reviewing the definition of protected customer.

I. Introduction

If a larger gas pipeline endures a severe disruption in a bitterly cold winter, as households, we will continue living our lives with no impact on our heating systems or gas ovens. This is thanks to the SoS Regulation¹ approved in the aftermath of the major Russia-Ukraine gas supply crisis in January 2009. While the interruption in the flow of gas to the EU from Russia via Ukraine produced a major shortage of heating fuel, the SoS Regulation put in place an ambitious plan to mitigate not only the risks of another gas supply crisis, but also to protect citizens in case of unavoidable gas shortage. Citizens who shivered in the bitter cold winter of 2009 ought to be thereafter protected customers, namely, customers entitled to the right for an uninterrupted gas supply contract in a crisis. But who should be entitled to the status of protected customer: households, hospitals,

small enterprises, or public offices? Though it was believed that the SoS Regulation had answered this question exhaustively, the judgement of the European Court of Justice in *Eni and Others*² reopened the issue.

We, as households, are necessarily protected customers. Small and medium enterprises, essential social services, and district heating systems might be entitled, to the extent that Member States chose to include them to the definition of protected customer. *Eni and Others*, nevertheless, recognizes Member States' discretion to extend protection to customers other than those listed in the SoS Regulation. While the judgement could be perceived as a challenge to precedents at ECJ on provisions to be regard as exhaustive harmonization standards, this case note argues the contrary.

The reasoning of *Eni and Others* will be analysed to inquire whether the Court actually got it wrong.³ The analyses and comments then focus on the first referred

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¹ The SoS Regulation entered into force in March 2011 by the approval of Regulation 994/2010 and was recently replaced by Regulation 2017/1938. Despite the legal reform, the legal provisions at issue in c have not been subject to substantive legal reform. Therefore, *Eni and Others* is still a relevant case for the interpretation of the regulatory framework now in force. All the references to the SoS Regulation hereafter should be understood as referring to provisions in both EU regulations concerning measures to safeguard security of gas supply: Regulation (EU) No994/2010 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 L 295, 12.11.2010, and Regulation (EU) 2017/1938 of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010, OJ L 280, 28.10.2017.

² Case C-226/16, *Eni and Others v Premier Ministre and Ministre de l'Environnement, de l'Énergie et de la Mer*, Judgement of the Court (First Chamber) of 20 December 2017, EU:C:2017:1005.

³ “When the Court gets it wrong” is a reference to the remarkable two-term seminar given by Prof. JHH Weiler entitled “When the Court gets it wrong: reviewing the fundamentally wrong cases from the ECJ” at the European University Institute along the academic year 2014-2015. Accessed on 30 April 2018. Retrieved from: <https://www.eui.eu/events/detail?eventid=104222>. See also Adams, M. and others, *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013).

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question about whether Member States could impose additional obligation on gas undertakings by reviewing the definition of protected customer. In so doing, a broader perspective of the issue is provided. The arguments are divided in three parts. The first part (5.1) recalls the context in which the SoS Regulation was approved, but does so by emphasising the moral justification behind the regulatory choice of protecting a specific group of customers in circumstances of scarcity. The second part (5.2) sheds lights on the provisions defining “protected costumers” to show how the definition could be perceived as an exhaustive harmonization standard from linguistic, systemic, and teleological arguments. The third part (5.3) compares those legal arguments to the reasoning pursued by the ECJ.

II. Factual and Legal Background

The case was triggered by two applications before the *Conseil d'État* against the French State. The first application was brought on 12 May 2014 by Eni SpA and Eni Gas & Power France SA (together, Eni). Eni is a natural gas supplier providing services to a wide range of customers located in France – from large customers as power stations, industries, and heating providers to small business customers and households. On 14 May 2014, the Union Professionnelle des Industries Privées du Gaz (Uprigaz) filed the second application on behalf of the class of private industries operating in the French market for natural gas.

In the two applications, Eni and Uprigaz claimed, *inter alia*, that the French Decree 2014-328 was adopted *ultra vires*. For them, the *Ministre de l'environnement, de l'énergie et de la mer* enacted a set of rules that improperly reviewed the definition of “protected customers” as established by the SoS Regulation. As a result, the Decree granted a larger group of customers with the right to claim protected customer status, which implied additional obligations to Eni and Uprigaz's members, and indeed all gas suppliers operating in France. These additional obligations were what prompted actions from Eni and Uprigaz.

To understand *Eni and Others*, one has to keep in mind that the core legal issue at stake was whether the definition of protected customer within the SoS Regulation was to be treated as exhaustive or whether Member States were accorded a margin of discretion to amend it in light of the regulation. A broader contextualization of the SoS Regulation is needed to apprehend the concept of protected customer, the obligation on gas suppliers implied by this status, and the additional protective measures implemented by Decree 2014-328.

The SoS Regulation entered into force in March 2011. Since then, all suppliers of natural gas, including Eni and Uprigaz' members, have been obliged to ensure an uninterrupted supply of gas to a group of

customers defined as “protected customers” in gas supply crisis situations. This specific obligation born from the undertakings is named the “supply standard” and is to be understood as a mandatory contractual rule between gas suppliers and protected customers. In the provision that describes the supply standard,⁴ paragraph (1) establishes in detail the conditions under which gas undertakings have to perform the obligation of providing an uninterrupted gas supply; namely, the disruption of gas flow or exceptionally high demand.⁵ Paragraph (2), instead, determines the conditions under which a Member State can increase the supply standard to exceed the 30-day period of continuous supply, or impose additional obligations on gas undertakings for security of supply.

Whilst the terms and conditions of the obligation to protected customers is written in provisions about supply standards, the definition of protected customer is established in the list of definitions within the SoS Regulation. Protected customers necessarily include all households connected to the distribution network.⁶ This means that we, as households, are entitled to continue heating our rooms or use our gas stove even if a large pipeline undergoes cut-off. In addition, the EU legislator allowed Member States to decide whether to enlarge the definition of protected customers to the other three categories of customer. The first group encompasses small and medium-sized enterprises (SMEs) connected to distribution networks;⁷ the second group, essential social services such as educational institutions and hospitals;⁸ the third group, district-heating installations to the extent that they deliver heating to the aforementioned customers.⁹ It is worth noting that the Members States should have notified the Commission by 3 December 2011 about their choice of recognizing one or more of the abovementioned groups as protected customers.¹⁰

⁴ Art. 8 of Regulation 994/2010 replaced by Art. 6 of Regulation 2017/1938.

⁵ The SoS Regulation establishes that Member States should take measures to ensure that undertakings do not interrupt the gas supply to protected customers even in the following circumstances: (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.

⁶ Art. 2(1) of Regulation 994/2010 replaced by Art. 2(5) of Regulation 2017/1938.

⁷ Art. 2(1)(a) of Regulation 994/2010 replaced by Art. 2(5)(a) of Regulation 2017/1938.

⁸ Art. 2(1)(a) of Regulation 994/2010 replaced by Art. 2(5)(b) of Regulation 2017/1938.

⁹ Art. 2(1)(b) of Regulation 994/2010 replaced by Art. 2(5)(c) of Regulation 2017/1938.

¹⁰ The last paragraph of Art. 2 of Regulation 994/2010 replaced by Art. 6 of Regulation 2017/1938.

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In 2014, the French government enacted Decree 2014-328, which, *inter alia*, imposed additional obligations on gas suppliers by reviewing the definition of protected customers. This motivated Eni and Uprigaz to request judicial review of two aspects of the legal act.

Firstly, Decree 2014-328 redefined “protected customer” as any customer connected to the distribution networks. By doing so, the French government extended the entitlement to an uninterrupted gas supply contract to customers who are not necessarily households, SMEs or essential social services as listed in the SoS Regulation. For Eni and Uprigaz, the French government had acted *ultra vires*.

Secondly, gas suppliers operating in France are obliged to stock a minimum volume of gas to, among other purposes, safeguard the continuous supply of gas to protected customers in crisis situations. Decree 2014-328 added that gas stocks corresponding to at least 80 percent of storage rights should be held in infrastructures located in national territory. In addition to the storage obligation, the Decree conferred powers to the Minister to enact other regulatory instruments to ensure that gas suppliers would comply with their obligations towards protected customers. Eni and Uprigaz claimed that Decree 2014-328 violated the SoS Regulation.

In these circumstances, the *Conseil d'État* decided to accept the proceeding and referred the following two questions to the ECJ.

- i. First, could Member States impose on gas suppliers' additional obligations resulting from the redefinition of “protected customer” to include customers who were not mentioned in the SoS Regulation?
- ii. Second, could a Member State impose on natural gas suppliers the obligation of holding gas stocks necessarily and exclusively in infrastructures located within its territory and, at the same time, confer powers to the Minister to take into account other regulatory instruments to ensure the compliance of gas suppliers with their obligations?

III. Opinion of the Advocate General

Before answering the two questions referred by the *Conseil d'État*, Advocate General Mengozzi raised a preliminary point in law. He did so to examine the legal issues in light of the primary purpose of the SoS Regulation i.e. to safeguard the security of gas supply in light of the principle of solidarity. The Advocate General recalled that the SoS Regulation was adopted in the aftermath of the Russia-Ukraine gas crisis in 2009, which brought unprecedented disruption to the gas supply in the EU. The SoS Regulation repealed Directive 2004/67/EC as a response to the needs of adopting harmonized measures.¹¹ For Advocate Gen-

eral Mengozzi, the new regulatory framework provided a comprehensive common approach to security of supply and,¹² to that end, established provisions aimed at safeguarding the effective functioning of the internal gas market in supply disruptions and crisis situations.¹³ The obligation of gas suppliers towards protected customers was, in this regard, one of several mechanisms to ensure security of the gas supply.¹⁴

Having concluded the preliminary point, Advocate General Mengozzi turned to answer the first question. He did so by first assessing a preliminary objection of inadmissibility raised by the French government. While the referring court asked whether the Member State had acted *ultra vires* by reviewing the meaning of protected customer, the French authority contested the extent to which Decree 2014-328 had indeed changed the definition of protected customer at all. For the French authority, the reference to SMEs in the SoS Regulation should be understood not only as entities with the legal status of SMEs, but in light of the objectives of the regulation. If so, enterprises connected to distribution networks could be equated to SMEs for their necessarily low gas consumption. Advocate General Mengozzi, instead, rejected the objection of the French government. He emphasized that the secondary legislation aimed to protect SMEs because of their vulnerability, rather than their average consumption.¹⁵

Given the refusal of the preliminary objection, Advocate General Mengozzi advanced to the core point of the first question. Despite Regulation 994/2010 strictly defining “protected customers” at Article 2(1), the Advocate General considered that Article 8(2) nevertheless permits Member States to enact additional obligations for gas suppliers for security of supply, even though those additional obligation derive from the unilateral definition of protected customers.¹⁶ However, the Decree would have to be subjected to judicial review by the referred court to assess whether its measures met three conditions: the specific conditions laid down in the SoS Regulation,¹⁷ the genuine reasons for security of gas supply,¹⁸ and the general principle of proportionality.¹⁹

Regarding the second question, Advocate General Mengozzi noticed that imposing an obligation to hold minimum gas storage within French territory, *per se*, violated the SoS Regulation whereby Article 8(5) of Regulation 994/2010²⁰ unambiguously prohibits

¹¹ Opinion, para. 23.

¹² Opinion, para. 25.

¹³ Opinion, para. 26.

¹⁴ Opinion, para. 27.

¹⁵ Opinion, para. 77.

¹⁶ Opinion, para. 78.

¹⁷ Opinion, para. 68-74.

¹⁸ Opinion, para. 81.

¹⁹ Opinion, para. 82.

²⁰ Now Art. 6(5) of Regulation 2017/1938.

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measures of this nature.²¹ As for the conferred powers given to the Minister to enact other regulatory instruments, Advocate General Mengozzi revealed that there was nothing in the preliminary reference that could have given meaning to the phrase “other regulatory instruments”.²² In this regard, he concluded that it was for the referring to ascertain whether the conferred power to the Minister to issue other regulatory instruments could guarantee the compliance of gas suppliers with their obligations at regional and Union level.²³

IV. Judgement

On 20 December 2017, the Fifth Chamber of the European Court of Justice answered the questions of the preliminary reference. Like the Advocate General, the Court chose to address preliminary observations before assessing the questions, but it did so to recall *Commission v Spain*.²⁴ In that infringement procedure, the Court had answered questions about the margin of discretion of the Member States with regards to the choice of measure for safeguarding security of supply during crises under Directive 2004/67/EC. The Court recalled that the repealed Directive constituted a minimum common approach to security of supply.²⁵ In contrast, the SoS Regulation was adopted to provide a tighter framework in order to prevent unilateral measures issued by a Member State that could jeopardize the proper functioning of the internal market and the purpose of enhancing security of gas supply.²⁶

When the Court arrived at the first question, it came nevertheless to the conclusions reached by Advocate General Mengozzi. By answering the preliminary objection of inadmissibility, the Court also upheld the claim that customers connected to distribution networks were equated to SMEs. It reinforced that, given their vulnerability,²⁷ the SoS Regulation defined SMEs as protected customers. To examine whether the Member State had acted *ultra vires*, the Court claimed that it is “apparent from the wording” of Article 8(2) that a Member State may have the discretion to impose an additional obligation on gas undertakings, including the redefining of protected customers in the SoS Regulation.²⁸ Like Advocate General Mengozzi, the Court agreed that any additional obligation should be reviewed by the referring court, though the judgement only mentioned the conditions set out in Article 8(2) of the SoS Regulation.²⁹

By answering the second question, the Court also followed the Opinion of the Advocate General. Decree 2014-328 violated Article 8(5) when it imposed on gas suppliers the obligation to hold 80 percent of storage rights in infrastructure located in France.³⁰ Moreover, considering how Decree 2014-328 allowed the Minister to take into account other regulatory measures, it was

left to the referred court to interpret national law and ascertain whether the other regulatory measures could ensure the compliance of gas suppliers with their obligations at regional and Union level.³¹

V. Analyses and Comments

The judgment in *Eni and Others* is unlikely to be remembered for its coherent reasoning. On the one hand, to refuse the preliminary objection raised by the French government, the Court evoked teleological arguments. For the Court, SMEs are listed as protected customers because the EU law recognizes their vulnerability and consequently aimed to grant protection for those specific legal entities. On the other hand, by answering the question of whether a Member State would have discretion to redefine the meaning of protected customer, the Court did not hesitate to refer to the “wording” of one provision of the SoS Regulation.³² In this regard, the reasoning of the Court shifted to a more semiotic or linguistic interpretation. It underlined the expression “additional obligation” to reach the conclusion that a Member State may impose additional obligations on gas suppliers, even to include customers who were not originally listed as protected customers in the definitions of the SoS Regulation.

The key issue in *Eni and Others* is that neither the judgment nor the opinion of the Advocate General paid attention to the legal content of the provision that defined protected customers. If the Court had done so, the judgement would have likely taken additional linguistic, systemic, and teleological arguments into account.³³ These additional arguments may, or may

²¹ Opinion, para. 89.

²² Opinion, para. 92.

²³ Opinion, para. 94.

²⁴ C-207/07, *Commission v Spain*, Judgment of the Court (Third Chamber) of 17 July of 2008, EU:C:2008:428

²⁵ Judgement, para. 21.

²⁶ Judgement, para. 22.

²⁷ Judgement, para. 31.

²⁸ Judgement, para. 37.

²⁹ Judgement, para. 40.

³⁰ Judgement, para. 45.

³¹ Judgement, para. 47.

³² Art. 2 paragraph (1) and its points (a) and (b) of Regulation 994/2010. Now the same provisions is read at Art. 2 paragraph (5) and its points (a), (b), and (c), as well as the second paragraph of Art. 6(1) of Regulation 2017/1938.

³³ See Paunio, E. and Lindroos-Hovinheimo, S., “Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law” (2010) 16 *European Law Journal* 395 (three principal categories of arguments used by the ECJ are distinguishable in its reasoning: semiotic or linguistic arguments, systemic or contextual arguments, and dynamic or functional arguments which include *inter alia* teleological arguments). See also Sankari, S., “Constitutional Pluralism

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not, have led the judgement to opposite conclusions. As the Court made no reference to provisions defining protected customers, it is left to us to assess whether the Court got it wrong.³⁴

If the Court had referred to the legal rule defining “protected customers”, Article 2(1) of Regulation 994/2010, it would have been inevitable to analyze whether the SoS Regulation aimed at an exhaustive harmonization of the definition of protected customer, in contrast to the minimum harmonization concluded by the interpretation of Article 8(2). Given that the Court neglected the provisions in Article 2(1), the judgement missed the opportunity to touch upon the genuine conflict of rules between the provisions listing categories of protected customers and those setting the Member States’ margin of discretion.

The analyses and comments on *Eni and Others* offered here, focus on the first referred question about whether Member States could impose additional obligation on gas undertakings by reviewing the definition of “protected customer”. In so doing, and by allowing for Article 2(1), a broader perspective of the issue is provided.

5.1. A Broader Justificatory Theory to the SoS Regulation

The opinion of the Advocate General rightly begins by observing the SoS Regulation through the lens of its context and purposes. However, it does so by reinforcing statements of the Recitals solely. The SoS Regulation is described as a set of rules aiming at imposing a tighter regulatory framework in order to enhance the security of gas supply by avoiding divergent implementations. This reason is, however, a shallow explanatory argument that hides the broader economic and social rationales behind the public choice of protecting a group of customers in crisis situations.

The SoS Regulation was put in force in the aftermath of the 2009 Russia-Ukraine crisis. A cut-off of natural gas in transit from Russia via Ukraine led to immediate shortages in thirteen Member States: Romania, Bulgaria, Hungary, Czech Republic, Poland, Slovakia, Greece, Austria, Germany, France, Italy, Slovenia, and Croatia.³⁵

The headline of the *New York Times* on 6 January 2009 captured perfectly the reason why this breach in the security of gas supply raised an unprecedented alert: “Russia Cuts Gas, and Europe Shivers”.³⁶ Different to previous crises, the 2009 shortage of gas reached a wide group of customers, including households, hospitals, and educational institutions. These were individuals deprived of heating systems in a bitterly cold January at the peak of the winter. This fact matters in grasping why the SoS Regulation introduced the legal concept of protected customers.

Regulation 994/2010 revoked Directive 2004/67/EC to put in place a much tighter regulatory framework.³⁷ The EU legislator recognized that national measures

developed unilaterally by the Member States jeopardized the effective functioning of the international market, the solidarity among Member States, and the security of gas supply in a crisis situation. In order to do so, the SoS Regulation imposed a tighter regulatory framework with regards to not one, but several measures.

The SoS Regulation imposes, for instance, obligations to establish long-term planning of investments in new gas infrastructures to better integrate poorly interconnected regions. Hence, natural gas could flow through more alternative routes. It also determines actions of the Emergency Plans beforehand, which includes the obligation on gas undertakings of releasing gas stocks located on a not-affected Member State to rescue those customers situated on the affected Member States. Having in mind the SoS Regulation as a body of rules, the obligation of guaranteeing the uninterrupted gas supply to protected customers is one among other regulatory mechanism to ensure the security of supply.

The SoS Regulation shares responsibility for security of gas supply with gas undertakings, alongside with national, regional and European authorities,³⁸ and imposes a set of detailed obligations on these market players. Among those obligations, gas suppliers must ensure an uninterrupted gas supply to a selected group of protected customers in crisis situations. At this point, there is a need for a further explanation about the economic, moral, and legal rationale behind the necessity of choosing a group of customers to the detriment of others in a gas supply crisis.³⁹

The technical and economic dilemma is the following. A supply crisis occurs when there is a mismatch between gas supply and demand. For example, a disruption of a large gas pipeline could lead to an abrupt decrease of gas flow to a specific region. This

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and Judicial Adjudication: On Legal Reasoning, Minimalism and Silence by the Court of Justice” in Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar Publishing 2018).

³⁴ *Op. cit.*, *supra* note 2.

³⁵ Commission, “Commission Staff Working Document Accompanying document to the Proposal for a Regulation for the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC” (Communication) SEC(2009) 977 final, p. 4.

³⁶ Kramer, Andrew E., “Russia Cuts Gas, and Europe Shivers”, *The New York Times* (New York, 6 January 2009).

³⁷ Recital 5 of Regulation 994/2010.

³⁸ Art. 3(1) of Regulation 994/2010 replaced by Art. 3(1) of Regulation 2017/1938.

³⁹ Applied to general theories of regulation, see chapter on Congestion by Frischmann, B.M., *Infrastructure: The Social Value of Shared Resources* (Oxford University Press 2012).

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decrease of gas supply could be solved by releasing gas from stocks, if they exist, or by the response of neighbouring areas not affected by the cut-off. The reliance on the latter solution still depends on the infrastructure that interconnects affected and non-affected regions. When those alternatives are insufficient to rebalance supply and demand in areas affected by the disruption of gas supply, gas demand must be quickly reduced, by disconnecting customers from the network. Gas undertakings may or may not be liable for disconnecting customers insofar as they do not contribute to the disruption of the gas flow. The answer to the liability issue, nevertheless, differs according to the legal regime governing the contract relation between suppliers and customers, if negligence or strict liability.

In addition to the liability, it is common to see regulatory frameworks addressing distributive issues in crisis situations as long as gas markets have inelastic demand. Inelastic demand means that end-customers cannot or do not respond to gas supply crisis immediately. Even if the gas price rises, households still need to switch on their heating systems. Industries, moreover, are not informed of unforeseen gas supply crisis by the nature of crisis itself. As a result, the decrease of gas supply or price rise does not cause the short-term reaction to declining demand, as one expects as reaction of markets with elastic demand. To (re)balance the gas flow in the pipelines, governance regimes commonly define who will be cut-off first. There are different governance mechanisms in this regard. For instance, a market mechanism would leave suppliers to decide whom. Suppliers could negotiate with customers a contractual right to have an interruptible supply of gas in crisis situations, which implies that the latter pays a price for the contractual right.

However, there are objections against this kind of market mechanism that are based on moral and ethical considerations.⁴⁰ Interrupting the gas supply to a hospital and, at the same time, not interrupting the supply to a factory is likely to harm the moral and ethical principles of a society. Having this in mind, it is expectable that a regulatory agency chooses a group of customers who cannot be disconnected or, at least, will be the last group disconnected from the network.

In the EU, the aforementioned dilemma faced by regulators gains an additional layer of complexity. Suppose that, before the SoS Regulation, a Member State had granted an uninterruptable gas supply to a group of customers equivalent to 50 percent of its domestic market and, moreover, imposed storage obligation on gas undertakings. It is plausible that the national measure would have undermined the functioning of the internal market, the solidarity between Member States, and maybe even competition. Having in mind this contextualization of the SoS Regulation, one could better understand the technical, economic, and moral reasons for the strict definition of customers protected by regulation.

5.2. List of Protected Customer Regarded as Exhaustive

The SoS Regulation defined protected customers in its list of definitions. However, it did so in an unusual way in comparison to other secondary legislation. If Article 2(1) of Regulation 994/2010⁴¹ is read in isolation from other provisions, one might notice that the SoS Regulation defines protected customers by enclosing customers in general into three different categories. The first category encompasses all households connected to the distribution network. These are necessarily protected customers as neither Member States, nor households connected by themselves can wave their rights. In contrast, the second and third categories of customers refer to a sort of harmonization that resembles an *opt-in* or *opt-out* system. The regulation leaves Member States to decide whether including one or more categories of customers in the definition of protected customer, a decision that needed to be notified to the Commission by a specific day. Besides households, Member States could have decided to include customers in the point (a), SMEs connected to distribution networks and also essential social services; and or point (b), district-heating installations that delivered heating to households and customers listed in the point (a).

It is undisputable that the SoS Regulation applies an unusual harmonization standard. Member States' margin of discretion seems confined to the possibility of answering *yes-or-no* to the inclusion of predetermined categories of customers to the definition of protected customers. To make things even more complicated, Regulation 994/2010 stated this harmonization standard within its list of definitions.⁴² A list of definitions in secondary legislation is likely to be ancillary to the interpretation of legal rules, rather than to state reasons for actions. Nevertheless, had the legislator done so, there are no reasons for not referring to those legal rules as part of a broader systemic body of rules.

By reading Article 2(1) of Regulation 994/2010 by itself, one could reach the conclusion that the SoS Regulation can be regarded as an exhaustive list of possible protected customers. Some EU legislation expressly acknowledges the exhaustive character of this provision and, when they do so, are indisputable cases of exhaustive harmonization. The SoS Regulation, instead, does not use the term "exhaustive list"

⁴⁰ Sovacool, B.K. and Dworkin, M.H., *Global Energy Justice: Problems, Principles, and Practices* (Cambridge University Press 2014), pp. 353–356.

⁴¹ Now Art. 2(5) of Regulation 2017/1938.

⁴² It is worth noting that Regulation 2017/1938 did not substantially reform the text of the legal provision dealing with the Member States' choice to include predetermined categories of customers as protected customers, but it did reallocate the provision from Article 2(1) to Article 6(1).

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expressly. In contrast, when express indication is absent, it is for the ECJ to decide whether the regulatory provision can be regarded as exhaustive or not. There are precedents at ECJ ruling that comprehensive and detailed regulatory schemes are more likely to be regarded as exhaustive.⁴³ Once the ECJ rules that a certain regulation has laid down an exhaustive system, Member States cannot unilaterally impose stricter standards because their action is pre-empted.⁴⁴

Eni and Others does not refer to the provision listing the categories of protected customers. Had the referred court requested the ruling of Article 2(1) of Regulation 994/2010, the judgement would have answered whether the definition of protected customer effects an exhaustive harmonization. Having the Court not referred to Article 2(1), it remains for us to speculate how the Court would have ruled if it had done so. By considering the three principal categories of arguments used by ECJ in its reasoning - linguistic, systemic, and teleological arguments,⁴⁵ we argue the Court would have inescapably ruled in favour of exhaustive harmonization.

Firstly, linguistic arguments refer to legal reasoning that takes into account the wording or meaning of a contentious provision in a legal text to reach a judgment.⁴⁶ SoS Regulation establishes that Member States “should notify the Commission whether they intend to include points (a) and/or (b) in their definition of protected customers”.⁴⁷ One could argue that, according to the wording of the regulation, Member States “intent to include” other customers in the definition of protected customers could have done so by choosing point (a), point (b), or both. In this case there would be no room for further discretion.

Secondly, systemic or contextual arguments suggest that a legal rule has to be interpreted in accordance to a large body of rules, as part of a legal system.⁴⁸ As mentioned above, the SoS Regulation repealed the Directive 2004/67/EC to establish a tighter regulatory framework. This objective can be read in the recital (5) of Regulation 994/2010 and was restated in *Eni and Others*. If the definition of protected customer had been interpreted as an exhaustive list, the arguments would have been coherent to the other legal rules in the regulation that enhance a tighter governance regime at EU level, so well as to the motivation to repeal the Directive, to avoid that national measures jeopardized the proper functioning of the internal market and the security of supply.

Thirdly, teleological arguments are a legal interpretation that takes as its starting-point the purpose of the text in question i.e. the values.⁴⁹ The contextual arguments already anticipated the purpose of the SoS Regulation. Being its purpose to ensure security of gas supply without distorting competition, the functions or internal market, and the solidarity among the Member States. Considering the dilemmas involved in the regulatory choice of whether and who might be

protected customers, one could argue that, in principle, the unilateral enlargement of right to an interruptible supply of gas to customers that are not necessarily vulnerable could compromise the continuous gas supply of those who are listed as protected customers by the SoS Regulation. Furthermore, considering the interconnected European gas market, enlarging the entitlement to be protected customers in one Member State could compromise the capacity of gas undertakings operating in another neighbouring State to ensure uninterrupted gas supply to those protected customers. Not only the security of gas supply of a network system at regional and Union level would be at risk, but above all the principle of solidarity among Member States.

5.3. Exhaustive v. Minimum Harmonization: the (Non)balanced Conflict of Norms

Whilst the Court said nothing about the provision defining protected customers, it devoted a sizable proportion of the judgement to analyse the supply standard. The SoS Regulation uses the term “supply standard” for heading all the rules regulating the obligations of gas suppliers towards protected customers. Paragraph (1) sets the obligation of undertakings to provide an uninterruptible gas supply to protected customers. It is then followed by three points stating the conditions in which the obligations

⁴³ C-255/86 *Commission v Belgium* EU:C:1988:63, and C-278/85 *Commission v Denmark* EU:C:1987:439. See also Arena A, “The Twin Doctrine of Primacy and Pre-emption, in Schütze, R. and Tridimas, T. (eds), *Oxford Principles of European Union Law: Volume 1: The European Union Legal Order* (Oxford University Press 2018), pp. 331–333.

⁴⁴ Barnard, C., *The Substantive Law of the EU: The Four Freedoms* (Fifth edition, Oxford University Press 2016), pp. 582–583.

⁴⁵ Paunio, E. and Lindroos-Hovinheimo, S., *op. cit. supra* n. 32, p. 400. See also Komárek J, “Legal Reasoning in EU Law”, *The Oxford Handbook of European Union Law* (Oxford University Press 2015), p. 50.

⁴⁶ Conway, G., *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012), p. 248; and Hartley, T.C., “The European Court, Judicial Objectivity and the Constitution of the European Union” [1998] *The Law Quarterly Review*. See also in general theory of legal interpretation, Bix, B.H., “Legal Interpretation and The Philosophy Of Language” [2012] *The Oxford Handbook of Language and Law*; and Wróblewski, J., “Legal Language and Legal Interpretation” (1985) 4 *Law and Philosophy* 239.

⁴⁷ The last paragraph of Art. 2 of Regulation 994/2010 replaced by Art. 6 of Regulation 2017/1938.

⁴⁸ Paunio, E. and Lindroos-Hovinheimo, S., *op. cit. supra* n. 32, p. 404.

⁴⁹ Maduro, M., “Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism” (2007) 1 *European Journal of Legal Studies*. Paunio, E. and Lindroos-Hovinheimo, S., *op. cit. supra* n. 32, p. 405.

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are triggered and, if so, for how long they must be performed. Paragraph (2), instead, regulates the Member States' discretion to unilaterally enact further obligations for gas undertakings. "Any increased supply standard going beyond the 30-day period" or "any additional obligation imposed for reasons of security of gas supply" could not undermine the functions of the internal market, the purposes of security of gas supply, competition, and solidarity among Member States.

The judgment in *Eni and Others* is meticulous in interpreting paragraph (2) of the provisions on supply standards in the SoS Regulation. Indeed, the Court referred to the wording of each sentence. For the Court, the first sentence of paragraph (2), "any increased supply standard going beyond the 30-day period", allows Member States to only extend the time-clause in which the obligation must be performed. By contrast, the Court understood the second sentence of paragraph (2), "any additional obligation imposed for reasons of security of gas supply", to mean at a Member States' broader discretion.

Before *Eni and Others*, it was indisputable that the Member States had the discretion to impose an additional obligation on gas undertakings to ensure their compliance with supply standards. However, if this discretion could be also extended to the authority of redefining the list of protected customers, this is the key question at stake as mentioned above. *Eni and Others* itself refers to the national measures that impose on gas undertakings the duty of holding a minimum gas stock for a certain time during winter seasons. It is worth noting that the duty of holding a gas stock is a means to the end of guaranteeing the compliance with the supply standards. The French measure illustrates how a Member State could exercise this margin of discretion established in the second sentence of Article 8(2) without changing the definition of protected costumers. However, the judgment in *Eni and Others* underlined the term "additional obligations" to consider as lawful any unilateral protection measure, including uninterrupted gas supply to customers not originally listed as protected customers in the SoS Regulation. By not referring to the provision that exhaustively defined protected customers the judgement wrongly implied a minimum harmonization standard for an apparent exhaustive list of protected customers in the SoS Regulation.

There are two issues that must be raised regarding the Court's reasoning. First, *Eni and Others* recognizes the lawfulness of additional protective measures by applying a narrow and shallow argument in its reasoning.⁵⁰ Such judicial minimalism has already been subjected to criticism elsewhere.⁵¹ Moreover, the judgment does not provide a systemic reading of the SoS regulation in so far as it fails to refer to other provisions regulating the same matter. Nor did it give due attention to the context in which SoS Regulation was approved to establish a tighter regulatory frame-

work. Furthermore, *Eni and Others* could have solved the conflict of rules in the SoS Regulation. One the one hand, the SoS Regulation generally allows Member States to impose additional obligations on gas suppliers for security of gas supply. One the other hand, with regards to the specific obligation of providing an uninterrupted gas supply to protected customers, the legislator opted to list customers entitled to be protected. Regardless of whether the Court applied the maxim of *lex specialis derogat legi generali* or a more "contextualist" reasoning, *Eni and Others* could have reached the opposite conclusion.

VI. Final Remarks

The judgement in *Eni and Others* is interesting in many aspects. When the Court reassures us that SMEs are protected customers, given their vulnerability, it sheds light upon the social values inherent in the SoS Regulation. It serves as a counter-argument to those who have denied the existence of social values in EU law.⁵² *Eni and Others* could also serve as an alert to the Commission's failure in monitoring the implementation of EU law by Member States. Although Decree 2014-328 was obviously in violation of the SoS Regulation for restraining the location of gas stocks within France territory, the claim of unlawfulness was brought to the surface via private enforcement before national courts, rather than infringement procedure, as one would expect.

Notwithstanding the abovementioned aspects of *Eni and Others*, the comments on the case focus on the legal arguments of the Court that directly impact the harmonization regime of the SoS Regulation and, at worst, challenge the precedents at ECJ on exhaustive harmonization. The analyses and comments on *Eni and Others* raise two critical points.

Firstly, *Eni and Others* recognizes Member States' discretion to unilaterally amend an exhaustive list of protected customers despite the judgment making no reference to the provision that actually addresses the exhaustive list. Rather, the preliminary ruling restrains its reasoning to a shallow linguistic argument of a provision generally addressing Member States' discretion. *Eni and Others* lacks analytical strength in reading the SoS Regulation as a systemic body of

⁵⁰ About narrow and shallow judicial decisions, cf. Sunstein, C., "Beyond Judicial Minimalism" [2008] Law & Economics Working Papers. See the minimalist argument applied to ECJ's judgments in Sankari, S., *op cit. supra* n. 32, pp. 317–321.

⁵¹ About the emptiness of linguistic arguments, cf. Paunio, E. and Lindroos-Hovinheimo, S., *op. cit. supra* n.32, pp. 406–7. See also Maduro, M., *op. cit. supra* n. 48.

⁵² Davies, G., "Democracy and Legitimacy in the Shadow of Purposive Competence" (2015) 21 *European Law Journal* 2.

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legal norms. As a result, the effect of an exhaustively harmonized standard for security of gas supply, intended by the SoS Regulation after the 2009 Russia-Ukraine crisis, moved backward to the minimum harmonization existing in the previous regime.

Secondly, *Eni and Others* could be perceived as a challenge to the precedents at ECJ that recognizes the effects of exhaustive harmonization. Whilst the Court has long recognized the effects of pre-emption of EU legislation that exhaustively regulates a matter, the

judgement in *Eni and Others* indirectly undermined it. The core issue in *Eni and Others* is that the Court does so by not referring to the apparent exhaustive list. Whether the list of protected customers is or is not an exhaustive list, the Court missed the opportunity to say so. One way or another, having in mind the lack of analytical strength of the judgement, *Eni and Others* should not be taken as a precedent to challenge any exhaustive harmonized standards in EU law.