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Gas markets in Switzerland: overview of regulatory framework

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Introduction

According to publications of the Federal Office for National Economic Supply, natural gas covers around 15% of Switzerland's energy needs and is mainly used for heating as well as for industrial and other business purposes. While the share of natural gas in Switzerland's overall energy mix is rather low compared with other countries in Europe, Switzerland has neither its own natural gas reserves nor large domestic storage capacities. Thus, it almost fully depends on imports from its neighbouring countries. Natural gas imports are transported and distributed in Switzerland through a widespread gas pipeline infrastructure, which can be subdivided into three levels.

- Transit pipeline – as Switzerland is a major transit country in the heart of Europe, it is integrated into Europe's natural gas transport network and has a transit pipeline, which runs from the northern border to the southern border of Switzerland. This pipeline is constructed, maintained and operated by Transitgas AG with a compressor station, diverse slide-gate valve stations and a metering station.
- Regional gas transport networks – these networks are predominantly operated by four gas network operators (ie, Gaznat SA, Gasverbund Mittelland AG, Erdgas Zentralschweiz AG and Erdgas Ostschweiz AG).
- Local distribution networks – these networks are operated by over 100 gas supply companies.

Gas supply in Switzerland is, in principle, not government controlled. Gas companies purchase natural gas on trading platforms in neighbouring countries. However, if gas companies cannot address a gas supply shortage with their own resources, the federal government may intervene to secure sufficient gas supply. In 2022, the gas markets were affected by a significant reduction in natural gas supplies of Russia to Europe, which also had repercussions for Switzerland due to its proximity and dependence on neighbouring countries as regards gas supplies. Switzerland, therefore, introduced several regulations to address gas shortage scenarios.

Most recently, the amended Gas Supply Ordinance entered into force on 1 June 2023, which established the prerequisite for gas supply monitoring on a national level and is supposed to enable early detection and faster intervention in the event of a gas shortage until the new Gas Supply Act (GSA) enters into force.

Switzerland does not have a legal regime that comprehensively governs its gas markets, the market participants and the operations conducted therein. Rather, various separate laws and regulations address specific topics relevant for the Swiss gas markets.

Swiss Pipeline Act

The Swiss Pipeline Act (SPA) of 4 October 1963 focuses on specific pipeline-related construction, operation, transportation and security requirements. These rules are further specified in the Swiss Pipeline Ordinance (SPO) of 26 June 2019 and the Swiss Pipeline Safety Ordinance (SPSO) of 4 June 2021. The SPA generally applies to pipelines for the transportation of petroleum, natural gas or other liquid or gaseous fuels or combustibles designated by the Federal Council as well as to the equipment used for their operation (eg, pumps and storage facilities) (pipeline installations). This is subject to exemptions for pipeline installations that do not exceed certain diameter or operating pressure thresholds specified in the SPO. The main provisions of the SPA can be summarised as follows.

Gas transportation contracts

With regard to gas trading activities, the SPA stipulates that network operators must enter gas transportation contracts with third parties so long as this transportation is technically possible and economically reasonable and provided that the third-party offers an appropriate consideration for such services. In case of disagreements, the Federal Office of Energy (FOE) is the competent authority to decide on the obligation to enter into such contracts and its modalities, whereas contractual or non-contractual claims in connection with such contracts are decided by the competent civil court.

Planning approval procedure

Pipeline installations may be constructed or modified only following a planning approval procedure conducted in accordance with the SPA, the Swiss Administrative Procedure Act of 20 December 1968 and the Federal Act on Expropriation of 20 June 1930 in which all required licences are granted. A non-Swiss undertaking must establish effective (operational) management in Switzerland, which guarantees compliance with Swiss law.

Operating licence

The operation of pipeline installations requires an operating licence granted by the FOE, which it grants if:

- the pipeline installation complies with the requirements set out in the SPA, its implementing ordinances and the planning approval;
- the applicant has the necessary personnel to operation the pipeline installation safely and to repair any damage immediately; and
- the applicant has taken out a liability insurance (whereby an injured party acquires a direct claim against an insurer under the SPA).

Each of these requirements are further specified in the SPA, the SPO and the SPSO.

Oversight by FOE

Construction, maintenance and operation of pipeline installations is subject to oversight by the FOE, which may order measures required to protect persons, property and other important legally protected rights or assets. In particular, it may order that the pipeline installation be upgraded in line with technical developments. The persons entrusted with the inspection must always be granted access to all parts of the pipeline installation and be provided with all requested information free of charge.

Liability

The possessor of a pipeline installation is liable for damages if, either as a result of the operation of a pipeline installation, a defect or incorrect handling of a non-operating pipeline installation:

- a person is killed;
- a person's health is impaired; or
- if property is damaged,

If the pipeline installation is not owned by the possessor, the owner is jointly and severally liable with the possessor. The possessor or owner is discharged from liability if it proves, without any fault on its part or on the part of any person whom it is responsible for, that the damage was caused by:

- extraordinary natural phenomena;
- warlike events; or
- gross negligence of the injured party.

Liability for damages to the transported gas is governed by the Swiss Code of Obligations of 30 March 1911.

Partially or fully exempt from SPA

Pipeline installations that are partially or fully exempt from the SPA are only subject to:

- the provisions on the obligation of network operators to enter into gas transportation contracts with third parties;
- the liability and insurance;
- the criminal and administrative sanctions; and
- the security requirements.

Licences for the construction and operation of such pipeline installations are granted by the competent cantonal authorities, whereby the SPA specifies in which cases a licence may be refused or where restrictive conditions and requirements may be imposed. The cantonal authorities are also in charge of ongoing supervision of such pipeline installations.

Criminal and administrative sanctions

The SPA provides for criminal sanctions if pipeline facilities are damaged or if operations are disrupted as well as administrative sanctions enforced by the FOE in case of certain violations of the SPA (eg, providing false or incomplete information, gun jumping, violations of requirements and conditions, failure to take measures and make notifications in case of leakages).

Competition law

Besides the specific obligation the obligation of network operators to enter into gas transportation contracts with third parties under the SPA, the conduct of the participants in the Swiss gas markets is also governed by the general provisions of the Swiss Cartel Act (CartA)of 6 October 1995, and the Swiss Price Surveillance Act of 20 December 1985. The Swiss Competition Commission (ComCo) has issued a series of important decisions and consultations with the purpose of increasing competition in the Swiss gas markets:

Closing report of 16 December 2013

In its closing report of 16 December 2013, ComCo assessed an associations template agreement regarding gas network access, which was drafted by:

- the Association of the Swiss Gas Industry (VSG ASIG) cooperative (representing the network operators);
- the interest group IG Erdgas; and
- the interest group IG Energieintensiver Branchen (representing the interest of energy-intensive companies and network customers).

This set of rules is governed by Swiss private law and specifies the conditions of third-party transportation to industrial gas customers. Most importantly, this template agreement contains a provision pursuant to which only certain end customers that use gas as process gas and that exceed a minimum threshold of contractual transport capacity are granted network access. In this regard, ComCo stated that a denial of network access based on such (or similar) restrictions would likely be treated as a violation of the CartA and, more specifically, an abuse of a dominant position in the form of a refusal to deal and/or a discrimination between trading partners (if not justified based on objective economic criteria).

Decision of 25 May 2020

In its decision of 25 May 2020, ComCo investigated whether a regional gas network operator and an operator of a local distribution network's decision to not allow third parties to supply their end customers through their pipeline networks constituted an unlawful refusal to do deal pursuant to the CartA. It concluded that these network operators had abused their dominant position in the relevant market for the transportation and distribution of natural gas through their pipeline networks and imposed sanctions.

More specifically, these network operators had refused to allow a third-party supplier transit access to supply end customers that use gas for heating purposes in the city of Lucerne. They had only granted this transit access to major customers that use process gas and that fulfilled the requirements of the associations' agreement on network access. This led to these network operators receiving all revenues from the sale of natural gas to their de facto tied end customers without being subjected to any competitive pressure, thereby generating monopoly profits.

Consultation of 6 January 2022

In its consultation of 6 January 2022, ComCo was requested to analyze the following facts. An administrative department of a city operated a local gas network to end customers. The department intended to introduce a model that would allow third parties to supply connected end customers without delay. The third party would be the contractual counterparty of a connected end customer and notify the requested gas supplies to the department. However, the department would also enter into a contract with the third party and assume the obligation to purchase and deliver gas to the end customer based on pre-defined tariffs (consisting of a base price and an offer price less costs saved on the department's side), which would be calculated in accordance with certain principles issued by VSG ASIG.

ComCo could not exclude the possibility that this model violates the CartA in several ways. More specifically, according to ComCO, third parties selling natural gas would be prevented from procuring the gas for supplying end customers in the department's network area at the most cost-effective price conditions possible via alternative procurement channels. The department would be able to continue the de facto supply monopoly towards its end customers and to secure most of the margin. As the sellers would be obliged to purchase the natural gas from the department based on the pre-defined tariffs, there would hardly be sufficient incentives for these end customers to conclude a contract with such third party because the price reduction for the gas supply in such case would likely be insignificant.

As regards market definitions in the Swiss gas sector, ComCo's legal practice generally follows the EU Commission's practice with a division into infrastructure-related markets (ie, markets for natural gas transportation and distribution) and markets for the sale of natural gas (ie, market for natural gas supply to resellers and to end customers). However, certain questions remain unaddressed by ComCo. In particular, ComCo has not yet determined how trading activities with the purpose of generating trading profits should be treated (ie, as a separate market or as part of other markets) and whether the market for natural gas supply to resellers should be subdivided according to trading levels.

Financial markets laws

Gas trading may involve creating and trading derivatives. According to the Financial Market Infrastructure Act (FinMIA), a "derivative transaction" or "derivative" means a bilateral financial contract or security whose value depends on the value of one or several underlying assets (including gas), and which does not qualify as a cash or spot transaction. This definition includes forwards, futures, options and swaps, irrespective of whether these derivative transactions or derivatives:

- are traded over the counter (OTC);
- are traded on a trading venue; or
- whether they qualify as a security.

A derivative qualifies as a security if it is standardised and suitable for mass trading (ie, if it is publicly offered for sale in the same structure and denomination or placed with more than twenty clients, provided that it has not been created specifically for individual counterparties). Furthermore, this definition does not require parties to a derivative transaction to operate in the financial market or as financial intermediaries, pursuant to the Swiss anti-money laundering legislation. Further, it follows that contracts having solely a commercial purpose do not qualify as a derivative or derivative transaction. As this definition is broad, the implementing ordinance to the FinMIA (FinMIO) clarifies which transactions and/or instruments do not qualify as derivatives pursuant to the FinMIA. This is to avoid regulatory overlaps or a situation where a regulation is deemed inappropriate and, as such, transactions and/or instruments cannot be attributed to the financial market or do not pose a systemic risk. Such instruments and/or transactions include:

- spot transactions, which are:
    - transactions that are physically settled either immediately or following expiry of the deferred settlement period within two business days;
    - purchases or sales of securities that are settled within periods prescribed by regulations or periods that are customary in the respective market; or
    - transactions that are continuously extended without a legal obligation to do so or without such extension being usual; and
- transactions or instruments with gas as their underlying which:
    - are traded on an organised trading facility;
    - must be physically delivered; and
    - cannot be settled in cash at a party's discretion because such products belong to the energy market and not the financial market.

An organised trading facility means a facility for:

- multilateral trading in securities or other financial instruments whose purpose is the exchange of bids and the conclusion of contracts based on discretionary rules;
- multilateral trading in financial instruments other than securities whose purpose is the exchange of bids and the conclusion of contracts based on non-discretionary rules; or
- bilateral trading in securities or other financial instruments whose purpose is the exchange of bids.

If a derivative or derivative transaction falls within the scope of the FinMIA, the following rules and requirements are generally applicable.

Market conduct rules

The FinMIA contains various market conduct rules specifically related to the trading of derivatives that fall within the scope of the FinMIA (in addition to general rules applicable to the trading of securities). These rules

relate to:

- clearing via a central counterparty;
- reporting to a trade repository;
- risk mitigation;
- trading via trading venues and organised trading facilities; and
- auditing.

The extent to which these rules apply depends on the type of parties (ie, whether a party is a financial counterparty or non-financial counterparty) and on the type of the derivative.

Swiss licensing requirements

Swiss licensing requirements do only apply to entities incorporated under the laws of Switzerland or to a permanent Swiss presence of a non-Swiss financial institution. A non-Swiss person/entity is deemed to have a local presence in Switzerland if it has:

- a Swiss branch or representative office;
- employees; or
- agents or introducing brokers acting on an exclusive basis, each located in Switzerland and acting in a professional capacity in or from Switzerland for such institution or on its behalf.

Thus, non-Swiss gas traders are not subject to licensing requirements under Swiss financial markets laws if they do not have such a Swiss presence. On the other hand, Swiss-based gas traders may require a license as a securities firm (*Wertpapierhaus*) pursuant to the Swiss Financial Institutions Act. A securities firm is an entity that, on a professional basis:

- trades securities in its own name but for the account of its clients;
- trades securities for its own account on a short-term basis and publicly quotes prices for specific securities upon request or on an ongoing basis (so-called market maker); or
- trades securities for its own account on a short-term basis, operates primarily on the financial market and:
    - could thereby jeopardise the proper functioning of the financial market;
    - is a member of a trading venue; or
    - operates an organised trading facility pursuant to the FinMIA.

Hence, no licence as a securities firm is required if the derivatives do not qualify as securities.

Provision of financial services

The Financial Services Act (FinSA) provides for rules governing the provision of financial services to clients located in Switzerland (irrespective of whether these financial services are provided in Switzerland or on a pure cross-border basis). The term "financial service" includes the:

- acquisition or disposal of financial instruments;
- receipt and transmission of orders in relation to financial instruments;
- management of financial instruments (portfolio management); and
- provision of personal recommendations on transactions with financial instruments (investment advice).

While OTC derivatives typically do not satisfy the requirement of suitability for mass trading and thus do not qualify as securities, these derivatives are nevertheless covered by the notion of financial instruments. As long as the parties only trade in these securities or financial instruments as counterparties for their own account, without providing a financial service to a client located in Switzerland, they do not qualify as financial service providers.

Thus, they are not subject to the FinSA. However, anyone who provides personal recommendations to gas traders located in Switzerland on transactions with energy derivatives that qualify as a financial instrument would fall in scope of the FinSA.

Comment

The Federal Council considered that there is no standard legal framework to ensure effective competition in Switzerland. As a result, different conditions for the gas supply by third parties have emerged within the various regions of the gas network. Access to the gas transport network is still decided on a case-by-case basis, and four separate accounting zones continue to exist in Switzerland. Therefore, it proposed a new GSA that aims to provide for clear rules to facilitate the development of an efficient Swiss gas market. The new GSA underwent a consultation process from October 2019 until February 2020. Next, the Federal Council will refer the respective dispatch to the Swiss Parliament.

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