

Developments in the Swiss Gas Market

Introduction

According to Art. 13 of the Swiss Pipeline Act of October 4, 1963 ("**RLG**"), Swiss natural gas grid operators are obliged to undertake natural gas transports for third parties provided that this is technically possible, economically feasible and adequately compensated. However, in practice, obtaining access to the grid is proving to be difficult. In an agreement on grid access for third parties supplying major industrial consumers which was entered into by the gas industry and major industrial clients, grid access has been regulated on the basis of private law since October 1, 2012. The Federal Competition Commission ("**WEKO**") verified this agreement and reserved the right to undertake individual assessments in case of infringements of cartel law. At present, this is causing legal uncertainty, particularly with regard to possible sanctions. Therefore, the Swiss Federal Office of Energy ("**BFE**") is currently working on new legislation which is to be passed for consultation in 2017. For this purpose, four fundamental surveys were conducted on behalf of the BFE on the subjects of market liberalisation, grid access, accounting and grid costs and tariffs.

Legal bases

The RLG applies to pipeline systems serving the transport of crude oil, natural gas or other liquid or gaseous fuels as designated by the Swiss Federal Council (Art. 1 RLG). The relevant transport obligation is regulated by Art. 13 RLG. According to this provision, grid operators are obliged to undertake transport for third parties on a contractual basis if this is technically possible and economically feasible and if the third party provides appropriate compensation. This implies that access to the grid must be given for an appropriate remuneration. Disputes in connection with

the obligations under the agreement and in connection with terms of the agreement are decided by the BFE according to Art. 13 para. 2 RLG. In civil matters, on the other hand, civil courts have jurisdiction (Art. 13 para. 3 RLG).

Art. 13 RLG (in connection with Art. 2 para. 1 lit. a of the Swiss Pipeline Ordinance of February 2, 2000) only regulates the access to power pipes with an operating pressure of >5 bar (high pressure grid). In view of the fact that the majority of Swiss consumers are connected to the low pressure grid, it is questionable whether an obligation to undertake transport applies with respect to the low pressure range (pressure of <5 bar) as well, e.g. under the Cartels Act.

Within the framework of a preliminary investigation¹, WEKO has put on record that the Cartels Act shall be applied to pipeline systems for natural gas, i.e. in the high pressure as well as in the low pressure range. In this connection, parallels were drawn to the power supply grid, and the natural gas piping grid was described as a natural monopoly. The consequence is that, with regard to the natural gas transport grid, WEKO has seen the operators concerned as dominant companies in terms of Art. 4 para. 2 of the Cartels Act ("**KG**"). An unfounded refusal, unjustified by objective reasons to grant either access to the system or transit, must therefore be perceived as an undue refusal of business relations in terms of Art. 7 para. 2 and Art. 7 para. 1 KG.

As a result of WEKO's decision, in the event that a third party is refused access to the grid, it must apply to both the BFE and WEKO. Therefore, (as normally access to both the high and also the low pressure grid is necessary) it must conduct two separate proceedings. Apart from increased costs

¹ Final Report ("Schlussbericht") WEKO of December 16, 2013 / Preliminary Investigation No. 32-0251.

and delays, this can also bring about a situation where these authorities make different decisions about grid access.

The Associations Agreement

On October 1, 2012, a so-called Associations Agreement (*Verbändevereinbarung*) between the Federation of the Swiss Gas Industry and 350 industrial clients came into force which, in the form of a private law policy document, regulates the granting of grid access and the pertinent conditions. The aims of the Agreement are, on the one hand, the progressive liberalisation of the Swiss gas market and, on the other hand, the prevention of lengthy procedures.

In its respective preliminary investigation, WEKO has reserved the option of conducting individual assessments in the event of a violation of the Cartels Act. In spite of the Associations Agreement, here, too, a certain degree of legal uncertainty exists.

Consultation proposal of the BFE

In order to counteract these legal uncertainties in the gas market, a gas supply bill is to be passed. For this purpose, the BFE is to develop a consultation proposal by the end of 2017. In this context, the BFE published four fundamental studies in January 2016.

Four fundamental studies

The four fundamental studies relate to the areas of market liberalisation, grid access, accounting and grid-related costs and tariffs.

The study about a possible course of action in the liberalisation of the Swiss gas market analyses various market liberalisation options, from total liberalisation to time-staggered variants or liberalisation according to various customer characteristics. The question of whether basic supply is really necessary was also investigated. Finally, the study assesses the economic, social and environmental effects of continuing market liberalisation.

The study entitled "Netzzugang Schweiz" (grid access Switzerland) investigates which fundamental conditions the gas access model should fulfil, for instance, with regard to the process of estab-

lishing and assigning capacities or how a liquid competitive trade in Switzerland can be ensured.

The study on fundamental questions relating to a future gas accounting model investigates possible options for structuring gas accounting. Specifically, it analyses the feasibility of a day balancing system.

Finally, the study relating to grid costs and grid tariffs deals with the question of which regulatory principles could apply to determining the gas grid costs and the subsequent setting of tariffs.

Outlook

Although, in view of the above-mentioned private law Associations Agreement, major clients in fact already have access to the gas market, there still exists an element of legal uncertainty as has been shown. By contrast, the Associations Agreement does not ensure market liberalisation for smaller clients. However, corresponding liberalisation can be expected through the BFE's pending legislative plans.

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