

# Gas Regulation

*Contributing editors*  
**David Tennant and Torquil Law**



2016

GETTING THE  
DEAL THROUGH

GETTING THE  
DEAL THROUGH 

# Gas Regulation 2016

*Contributing editors*

David Tennant and Torquil Law

Dentons UKMEA LLP

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Business development managers  
Alan Lee  
alan.lee@gettingthedealthrough.com

Adam Sargent  
adam.sargent@gettingthedealthrough.com

Dan White  
dan.white@gettingthedealthrough.com

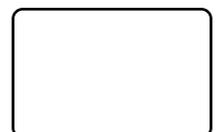


Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016  
No photocopying without a CLA licence.  
First published 2003  
Fourteenth edition  
ISSN 1740-7826

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of March 2016, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

|   |           |   |            |
|---|-----------|---|------------|
| <b>Global Overview</b>  | <b>5</b>  | <b>Italy</b>  | <b>94</b>  |
| David Tennant and Torquil Law<br>Dentons UKMEA LLP  |           | Pietro Cavasola and Matteo Ciminelli<br>CMS Adonnino Ascoli & Cavasola Scamoni                                |            |
| <b>Albania</b>  | <b>7</b>  | <b>Korea</b>  | <b>100</b> |
| Renata Leka and Besa Velaj (Tauzi)<br>Boga & Associates                                   |           | Joonki Yi and Chinpyo Park<br>Bae, Kim & Lee LLC  |            |
| <b>Austria</b>  | <b>12</b> | <b>Malaysia</b>   | <b>105</b> |
| Peter Polak<br>Fiebinger Polak Leon Rechtsanwälte GmbH                                    |           | Mohamed Ridza Abdullah<br>Mohamed Ridza & Co  |            |
| <b>Brazil</b>   | <b>18</b> | <b>Mexico</b>   | <b>112</b> |
| Giovani Loss and Felipe Feres<br>Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados |           | Rogelio López-Velarde and Amanda Valdez<br>López Velarde, Heftye y Soria SC                                   |            |
| <b>Chile</b>  | <b>26</b> | <b>Myanmar</b>  | <b>119</b> |
| Felipe Bahamondez<br>Bahamondez, Alvarez & Zegers   |           | Khin Cho Kyi and Thaw Dar Sein<br>Myanmar Legal Services Limited  |            |
| <b>Croatia</b>  | <b>34</b> | <b>Nigeria</b>  | <b>124</b> |
| Miran Maćešić, Ivana Manovelo and Matea Gospić<br>Law Offices Maćešić & Partners          |           | Olusina Sipasi and Mutiat Adeyemo<br>ÆLEX   |            |
| <b>Denmark</b>  | <b>41</b> | <b>Norway</b>   | <b>129</b> |
| Per Hemmer, Johan Weihe and Rania Kassis<br>Bech-Bruun                                    |           | Yngve Bustnesli<br>Kvale Advokatfirma DA  |            |
| <b>European Union</b>   | <b>47</b> | <b>Portugal</b>   | <b>136</b> |
| Christian Filippitsch, Maria de Lasala Lobera and Max Seuster<br>Norton Rose Fulbright    |           | Mónica Carneiro Pacheco and Bernardo Cunha Ferreira<br>CMS Rui Pena & Arnaut                                  |            |
| <b>Faroe Islands</b>  | <b>55</b> | <b>South Africa</b>   | <b>141</b> |
| Per Hemmer, Johan Weihe and Rania Kassis<br>Bech-Bruun                                    |           | Megan Rodgers and Giovanni Cloete<br>Cliffe Dekker Hofmeyr  |            |
| <b>France</b>   | <b>60</b> | <b>Sweden</b>   | <b>147</b> |
| Christophe Barthelemy<br>CMS Bureau Francis Lefebvre                                      |           | Torbjörn Claeson<br>Ramberg Advokater KB  |            |
| <b>Ghana</b>  | <b>70</b> | <b>Thailand</b>   | <b>152</b> |
| Emmanuel Sekor and Winifred Odoi-Quarshie<br>REM Law Consultancy                          |           | Albert T Chandler<br>Chandler & Thong-ek Law Offices Limited  |            |
| <b>Greenland</b>  | <b>75</b> | <b>Turkey</b>   | <b>157</b> |
| Per Hemmer, Johan Weihe and Rania Kassis<br>Bech-Bruun                                    |           | Şafak Herdem<br>Herdem Attorneys at Law   |            |
| <b>Hungary</b>  | <b>81</b> | <b>United Kingdom</b>   | <b>162</b> |
| Eszter Zádori, Dániel Arányi and Eszter Katona<br>Weil, Gotshal & Manges LLP              |           | David Tennant, Sam Boileau, Rebecca Owen-Howes and<br>Torquil Law<br>Dentons UKMEA LLP                        |            |
| <b>Ireland</b>  | <b>88</b> | <b>United States</b>  | <b>175</b> |
| Alex McLean, Patrick McGovern and Nicole Ridge<br>Arthur Cox                              |           | Robert A James, Michael S Hindus, Stella Pulman and<br>Zeeshan H Malik<br>Pillsbury Winthrop Shaw Pittman LLP |            |

# Austria

Peter Polak

Fiebinger Polak Leon Rechtsanwälte GmbH

---

## Description of domestic sector

### 1 Describe the domestic natural gas sector, including the natural gas production, liquefied natural gas (LNG) storage, pipeline transportation, distribution, commodity sales and trading segments and retail sales and usage.

Compared with the previous year, in 2014, the natural gas supply to end users decreased by 9.4 per cent to a total amount of 78.7 TWh. Domestic production went down by 9.3 per cent to an amount of 1.318 TWh. Domestic production was covered by two companies: OMV Exploration & Production Austria GmbH and Rohöl-Aufsuchungs AG. The transportation system in Austria is divided into three market areas: East, Tyrol and Vorarlberg. The market areas of Tyrol and Vorarlberg are only connected to the German transportation system, having no connection within Austria, and do not include any domestic production or storage sites. Within Market Area East, in addition to the domestic distribution system, major transit pipelines exist, connecting the import station Baumgarten at the Austrian-Slovakian border near Vienna with Italy (Trans Austria Gasline (TAG)), Germany (West Austria Gasline (WAG)), Hungary (Hungary-Austria Gasline) and Slovenia (Croatia) via the Trans Austria Gasline and the South East Gasline, which have the capacity to transport about 100 billion m<sup>3</sup> a year of mainly Russian gas dedicated to other western European states. There are two transmission system operators (TSOs) in Austria: TAG is operated by Trans Austria Gasleitung GmbH, WAG and the remaining transmission pipelines by Gas Connect Austria GmbH. Both Trans Austria Gasleitung GmbH and Gas Connect Austria GmbH have been certified as independent transmission system operators (ITOs) in accordance with Directive 2009/73/EC.

The domestic natural gas sector was fully opened to competition from 1 October 2002, even before Directive 2003/55/EC was passed. In November 2011, major changes to the Austrian Gas Act were enacted, implementing Directive 2009/73/EC and introducing the legal basis for a new market model in Austria, as from 1 January 2013, replacing the division between transit and domestic supply within the respective control areas by integrated market areas. Within the new entry/exit model, Market Area East forms a single entry/exit zone, and a virtual trading point (VTP) was established within this market area. The VTP is the central hub for all gas flows in Market Area East. Settlement at the VTP is carried out by Central European Gas Hub GmbH (CEGH).

In 2014, the main focus in the gas sector was the second incentive regulation for gas and a new market model for gas. The second incentive regulation started on 1 January 2013. Only the scope of the regulation was slightly changed, so that the fees for 2014 could be determined according to the adapted systematics. The new market model was successfully introduced in East Austria and led to a significant stimulation of competition in Austria. The market area manager is responsible for coordinating the smooth functioning of the transmission system, including the organisation of the online platform for capacity allocation. The distribution area manager (AGGM Austrian Gas Grid Management AG) administers capacity of the level one distribution pipelines and steers the gas flow therein for domestic consumption, giving instructions to the respective distribution system operators (DSOs). The balance group coordinator (AGCS Clearing and Settlement AG) provides a settlement of balancing energy for domestic consumption.

On the market for supply of end consumers, the price differentiation due to alternative suppliers by way of discount campaigns is maintained. However the rate of discount campaigns has significantly increased.

In 2014, 58,514 households changed their supplier. This amounts to a rise of 88.4 per cent compared with 2013. At the beginning of 'gas year' 2013/2014, almost the entire capacity of the Austrian Gas storage facilities was used. This constitutes an increase compared with 2012/2013. The most important suppliers are EconGas (a joint venture between OMV Gas & Power (directly 50 per cent, indirectly via EGBV Beteiligungsverwaltung GmbH, an additional 14.25 per cent) and various former gas utilities (EVN, Wien Energie, Energie Burgenland)), Steirische Gas & Wärme, Salzburg AG, KELAG (a joint venture between RWE, Austria and the province of Carinthia), GdFSuez, Wingas, Montana and goldgas, a subsidiary of Verbundnetz Gas AG.

E-Control, the Austrian energy regulator, is quite active in the fields of public information and consumer protection, as well as with respect to tariff regulation. As of 1 January 2013, the tariff setting at the transmission level was changed to comply with article 13 Regulation (EC) 715/2009, changing from tariffs according to contract paths to an entry/exit model (see question 10).

Regarding network access, capacity management and balancing detailed rules have been set by way of the Gas Market Model Ordinance 2012 (GMMO-VO 2012).

LNG is not directly available in Austria.

### 2 What percentage of the country's energy needs is met directly or indirectly with natural gas and LNG? What percentage of the country's natural gas needs is met through domestic production and imported production?

Natural gas met about 19 per cent of Austria's total energy needs in 2014. The domestic production of natural gas covered around 14 per cent of the total natural gas consumption in 2014. The rest of the natural gas needs (86 per cent) were covered with imports from CIS countries and other countries such as Norway. The main production areas were in the ownership of OMV AG and RAG, situated in the Vienna Basin area, which covered 74.1 per cent of domestic production, and the Upper Austrian Molasse Zone, which covered the remaining 25.9 per cent of the domestic production.

---

## Government policy

### 3 What is the government's policy for the domestic natural gas sector and which bodies set it?

Government policy is set by the Minister of Science, Research and Economy (BMWFV), laws are passed by Parliament and E-Control is very active in pursuing the goals of the regulator and monitoring the gas market.

With regard to the Third Energy Package, which was enacted by the European Union in August 2009, the Austrian government successfully joined forces with seven other EU member states, including France and Germany, to propose a third option with regard to the issue of effective unbundling, protecting the economic interests of vertically integrated energy undertakings. On 22 November 2011, the Austrian Gas Act 2011 came into force, implementing the Third Energy Package into Austrian gas law. With regard to unbundling, all options possible under Directive 2009/73/EC are included. The Austrian market model was changed substantially due to the introduction of an obligatory entry/exit model in accordance with article 13 Regulation (EC) 715/2009 for the transmission system. This has been realised by the setting up of market areas, including the transmission and distribution grid, as per 1 January 2013.

Tariffs for the use of the pipeline system are set by E-Control. In addition, the general terms and conditions for shippers must be approved by E-Control. E-Control constantly monitors the entire gas market and has far-reaching enforcement powers. E-Control also handles the certification procedure of the TSOs.

No special legal framework for unconventional exploration has been introduced in Austria.

### Regulation of natural gas production

#### 4 What is the ownership and organisational structure for production of natural gas (other than LNG)? How does the government derive value from natural gas production?

There are two companies exploring and producing natural gas in Austria. The first is OMV Austria Exploration & Production GmbH, which is indirectly owned by OMV AG. The shares of OMV AG itself are quoted on the Austrian stock exchange with two major shareholders (31.5 per cent are held by ÖIAG, the Austrian state-owned holding company, and about 25 per cent by IPIC, the state-owned holding company of Abu Dhabi). The second company is Rohöl Aufsuchungs AG, an independent company indirectly owned by EVN, E.ON, ESTAG and Salzburg AG. Both companies are also operators of underground storage sites in depleted gas fields.

Entities producing natural gas have to pay royalties to the federal government, and earnings are subject to income or corporate tax.

#### 5 Describe the statutory and regulatory framework and any relevant authorisations applicable to natural gas exploration and production.

Under the Mineral Resources Act, ownership of hydrocarbons not yet produced lies with the federal government. The federal government, represented by the BMWWF, may conclude exploration, production and storage agreements with entities having the technical and financial expertise for that kind of mining business, thereby transferring the right to the hydrocarbons produced in a given area to such entity. In exchange for such right, the entity must commit itself to a certain amount of agreed exploration activity, and to the payment of lease rentals and royalties in the case of production. In addition to this contract under civil law, the entity undertaking such activities must obtain certain permits in advance for operation, construction, etc, from the mining authority (the BMWWF).

The BMWWF determines the regulatory policies governing the production of natural gas in accordance with and within the framework of the Mineral Resources Act. There is no separate regulatory agency established for the activities governed by the Mineral Resources Act, including the mining aspects of exploration for, and production and underground storage of, natural gas.

Administrative decisions of the BMWWF may only be challenged before the administrative courts or the Constitutional Court of Austria. There is no difference between the unconventional and conventional sectors of natural gas exploration in Austria.

#### 6 Are participants required to provide security or any guarantees to be issued with a licence to explore for or to store gas?

Under the exploration, production and storage agreement that is to be concluded, the BMWWF may require the provision of securities or guarantees, depending on the financial standing of the contract partner.

### Regulation of natural gas pipeline transportation and storage

#### 7 Describe in general the ownership of natural gas pipeline transportation, and storage infrastructure.

In Market Area East, Gas Connect Austria GmbH (formerly OMV Gas GmbH) and Trans Austria Gasleitung GmbH are the owners and operators of the transmission lines used mainly for the transit of natural gas to other European states. In 2014, Gas Connect Austria GmbH became a 100 per cent shareholder of the former project company Baumgarten-Oberkappel Gasleitungs GmbH for the operation of the WAG running from Baumgarten at the Slovakian-Austrian border to the German-Austrian border near Oberkappel, which afterwards was merged into Gas Connect Austria GmbH. Again in 2014, the ownership and operations of Trans Austria Gasleitung, the transmission line running from Baumgarten to the Austrian-Italian border near Arnoldstein, was transferred from Gas Connect Austria GmbH to Trans Austria Gasleitung GmbH. Three other

companies (EVN Netz GmbH, Oberösterreichische Ferngas Netz GmbH and Gasnetz Steiermark GmbH) own and operate level one distribution lines, used mainly for domestic consumption. In addition to these companies, there are about 20 distribution network operators. All TSOs and the major DSOs (with a threshold of 50,000 end-user connections) are legally unbundled. The transmission system operators have to be certified as effective and efficient unbundled TSOs in accordance with the respective unbundling provisions (sections 108 et seq of the Austrian Gas Act 2011). Both Gas Connect Austria GmbH and Trans Austria Gasleitung GmbH have been certified as ITOs.

The level-one distribution lines used for domestic consumption, and for transportation to and from storage and production sites, are administered by the distribution area manager, AGGM Austrian Gas Grid Management AG (third-party access and gas flow management, as well as physical balancing).

The entire storage infrastructure in Austria is owned by OMV AG and RAG, as well as by joint ventures between RAG and astora, Gazprom Export LLC and E.ON Gas Storage GmbH. Due to the geological conditions, most of the storage facilities are pore storages, since depleted natural gas fields are used for gas storage.

As of May 2015, the capacity of the storage infrastructure amounts to 8.25 billion Nm<sup>3</sup> in working gas; therefore, Austria is able to store more than its entire current natural gas consumption for one year.

The physical operation of gas storages in depleted gas fields is regulated in the Austrian Mineral Resources Act. Third-party access and legal unbundling of storage undertakings are regulated in the Austrian Gas Act 2011 in accordance with the requirements of the Third Energy Package. Austria chose to apply negotiated access to gas storages.

#### 8 Describe the statutory and regulatory framework and any relevant authorisations applicable to the construction, ownership, operation and interconnection of natural gas transportation pipelines, and storage.

With the Austrian Gas Act 2011, Austria implemented all of the strict unbundling options of the Third Energy Package applicable to natural gas transmission lines, including the ITO option. The major goal of such legislation is to separate the supply from the transportation interests in the natural gas sector. By implementing the ITO option, member states can allow undertakings to ensure the independence of their transmission operators instead of selling the transmission lines.

For the construction and operation of natural gas transportation pipelines, permits primarily in accordance with the Austrian Gas Act 2011 are required. The permits under the Austrian Gas Act are issued by the BMWWF as long as the respective pipeline does not require a permit under the Environmental Protection Act, under which the local province is the competent authority. The construction and operation of storage facilities require permits under the Mineral Resources Act. In addition, other permits under different administrative laws, such as the Water Rights Act, the Environmental Protection Acts of the provinces and the Environmental Assessment Act, may be necessary.

A licence issued by E-Control is required to act as a network operator. On 3 March 2011, E-Control was transformed into an institution under public law in accordance with the E-Control Act.

The three bodies of E-Control are the executive board, supervisory board and regulatory commission. The regulatory commission is established as a judicial body comprising five members, including a judge, who are appointed by the government for five-year terms. The main competence of the regulatory commission is tariff setting and making decisions in connection with the refusal of third-party access. Some decisions must be issued in the form of individual official decisions, some in the form of general regulations (ordinaries).

The main decision-making body within E-Control is the executive board, which must take most of the decisions of the regulatory authority. The executive board consists of two members appointed by the BMWWF for five-year terms. Normally, the decisions of the executive board are final and can only be challenged before the Administrative or the Constitutional Courts, while certain decisions may be challenged in front of the Regulatory Commission and some others in front of the BMWWF. Decisions of the Regulatory Commission in the form of individual official decrees may only be challenged before the administrative courts or the Constitutional Court of Austria. General regulations of the Regulatory Commission may only be challenged before the Constitutional Court on very limited grounds. Since tariffs are set by general regulation, such decisions by the Regulatory

Commission are, in effect, not examined in a material way, but only on formal grounds. The costs of the network operators that form the basis of such tariff regulations are now separately determined with decrees by the executive board of E-Control.

### **9 How does a company obtain the land rights to construct a natural gas transportation or storage facility?**

Generally, civil law contracts entailing the right of way or easement with the landowner are concluded. Subject to certain requirements, the Austrian Gas Act 2011, as well as the Mineral Resources Act, allow for expropriation if the project is in the public interest.

### **10 How is access to the natural gas transportation system and storage facilities arranged? How are tolls and tariffs established?**

Transit pipelines and storage facilities are only established within Market Area East. Within the market areas of Tyrol and Vorarlberg, only distribution pipeline systems exist. See question 16 regarding the distribution systems in the market areas of Tyrol and Vorarlberg.

In accordance with the Austrian Gas Act 2011, storage entities must provide third-party access to gas storage on the basis of non-discriminatory published general terms and conditions. Storage entities are obliged to agree with third parties on storage charges that comply with the general terms and conditions and the principles of equal treatment. If necessary, the BMFWF would be entitled to implement regulated access by way of ordinance. If the storage charges published by storage entities exceed the storage charges of comparable services in EU member states by more than 20 per cent, E-Control is entitled to determine the cost basis that underlines the charges.

With the introduction of the new model for third-party access in Austria, since 1 January 2013, only independent requests for entry and exit capacities in and out of Market Area East are needed. After entry, all gas volumes have access to the VTP established on the transmission level. For distribution of gas to end consumers within the market area, no additional separate booking of capacity into the distribution area with the distribution area manager is required. All shippers must register themselves as balancing groups with the market area manager in different categories for transit or supply, or both, to end consumers.

Under the GMMO-VO 2012, the rules of the ordinance on system charges (GWG) empower E-Control to set the market rules applicable to the gas sector. Regarding Market Area East, the GMMO-VO 2012 includes regulations for access to the distribution network and to the transit network, and rules for balance within Market Area East. Since the market areas of Tyrol and Vorarlberg have no direct interconnection to Market Area East, and also have no transit pipelines, but only connect to the German gas pipeline system, different rules were set for these market areas in view of their easy access to the NetConnect (NCG) market area in Germany.

In accordance with section 6 of the GMMO-VO 2012, since 1 April 2013, the allocation of entry/exit capacities is conducted by auction. At the auctions, the TSOs have to provide capacity products in accordance with the CAM Network Code. Gas Connect Austria GmbH and Trans Austria Gasleitung GmbH are involved in the newly founded European capacity platform, PRISMA, which opened on 1 April 2013, and offer their capacities over PRISMA.

The use-it-or-lose-it mechanism for day-ahead capacities came into force on 1 October 2013, while such mechanism came into force for long-term capacities on 1 January 2013. According to the respective provisions of the GMMO-VO 2012, network users shall offer unused capacities on the online platform as secondary capacity. If a network user does not provide its unused capacities on the online platform, such operator must revoke the unused capacities from the network user and provide this capacity as primary capacity. System users are entitled to sell their entry/exit capacity to other system users only over CEGH, the operator of the VTP in Market Area East.

Entry capacities must be booked by suppliers and traders, and entitle them to feed natural gas into the pipeline system of a market area and to transfer this natural gas to the VTP. Capacities at the exit point entitle the owner to transport from the VTP to the respective exit point, and to feed out the respective amount of natural gas. The VTP itself is no physical entry/exit point, but enables market participants to trade natural gas without booking transport capacity.

The GWG 2011 also obliges every market participant either to form its own balance group or to join an existing one. Therefore, the old system

of balance groups, which previously had only applied to the distribution area, now applies to the whole market area, including the transit network. Registration of balance groups and the management of these balance groups are the responsibility of the market area manager. The balance group coordinator handles the management of energy balancing. Balance group representatives must nominate the gas volumes to be transported within the scope of booked capacities.

While the market area manager is responsible for ex ante balancing of the nominated gas volumes and informing balance group representatives about imbalances, balancing on distribution level (ex post balancing) lies with the clearing and settlement agent. Balancing energy shall be primarily purchased at the VTP. If the balance group representatives fail to re-nominate, gas will be purchased at the VTP on behalf and for the account of the balance group representatives. Extra charges have to be paid for balancing energy purchased.

There is no longer a difference between cross-border transports and domestic transports on the transmission level. Costs of distribution network operators are determined by the regulatory authority by way of a formal decision, which might be separately appealed. The same applies to the approval of calculation methods for transmission operators. Tariffs for transportation customers and end consumers are set by the regulatory authority on the basis of the approved costs and methods by separate ordinance. In the Gas System Charges Ordinance 2013, tariffs on transmission and distribution levels effective as of 1 January 2013 have been set.

In Austria, natural gas from domestic production and from import is high calorific gas within a certain quality range set out by the provisions of the GMMO-VO 2012. An adjustment to different gas qualities is generally not necessary.

### **11 Can customers, other natural gas suppliers or an authority require a pipeline or storage facilities owner or operator to expand its facilities to accommodate new customers? If so, who bears the costs of interconnection or expansion?**

Under the Austrian Gas Act 2011 or the Mineral Resources Act, storage entities are not required to enlarge their facilities. Under the Austrian Gas Act 2011, network operators have the responsibility to expand their system, if needed, as specified in any approved long-term plan (distribution level) or network development plan (transmission level).

In addition, DSOs have the duty to expand the distribution network to physically connect a customer to the pipeline network, if economically feasible. The costs are to be paid by the customer. For domestic transportation, one of the tasks of the distribution area manager is to undertake long-term planning and propose a suitable adaptation to level-one distribution pipelines to ensure that enough transportation capacity is available. Suppliers and customers can file an application for the expansion of transportation capacity if their respective initial application for third-party access has been denied due to capacity constraints. If no network operator makes the necessary expansions, the regulatory authority can initiate a tender procedure for the proposed measures. The cost of the expansion has to be included by the regulatory authority in the calculation of the transportation tariff. This means that the investor is entitled to reimbursement of the necessary costs plus a reasonable margin as determined by the regulatory authority.

For the transmission level, a similar system was established with the Austrian Gas Act 2011, tasking the market area manager with coordinating a network development plan with the TSOs and the distribution area manager.

In the event that network operators do not comply with the investment requirements set out in such plan, the regulatory authority will have several possibilities to ensure that the investments are realised.

### **12 Describe any statutory and regulatory requirements applicable to the processing of natural gas to extract liquids and to prepare it for pipeline transportation.**

Any user of a transportation system in Austria must ensure that the gas delivered to the system operator for transportation complies with certain quality specifications. The general terms and conditions for pipeline access either refer to the relevant provisions for gas quality in the GMMO-VO 2012 and the respective ÖVGW Directive, or contain their own provisions regarding gas quality that the user of the transportation system must comply with. This applies to domestic production, stored gas and imported gas. Therefore, the processing of gas lies outside of the transportation service of the network operator. Nevertheless, network operators have facilities,

namely dehydration plants, for cases where off-specification gas is delivered. If off-specification gas is delivered, network operators have the right to refuse acceptance of this gas.

**13 Describe the contractual regime for transportation and storage.**

See question 10.

**Regulation of natural gas distribution**

**14 Describe in general the ownership of natural gas distribution networks.**

Gas distribution networks are operated by the utilities of municipalities and of regional distribution operators covering a part of or a whole province. These DSOs have to be legally and functionally unbundled if they supply more than 50,000 customers. Most of the DSOs are directly or indirectly under the control of the respective province or municipality. Some have, directly or indirectly, minority shareholdings of international gas companies (ie, GdFSuez, RWE and EnBW).

**15 Describe the statutory and regulatory structure and authorisations required to operate a distribution network. To what extent are gas distribution utilities subject to public service obligations?**

DSOs require a licence under the Austrian Gas Act 2011, which to date has always been granted for an indefinite period. This licence is granted by E-Control. DSOs are obliged to connect any customer to their system, if economically feasible. Other than that, the Austrian Gas Act 2011 does not stipulate any further specific public service obligations for DSOs.

Regarding questions concerning the regulator, see question 8.

**16 How is access to the natural gas distribution grid organised? Describe any regulation of the prices for distribution services. In which circumstances can a rate or term of service be changed?**

DSOs are obliged to grant system users access to the distribution system on the basis of the general terms and conditions and the GWG.

The provisions of the GWG oblige all users of the distribution system to either join a balance group or build their own balance group to gain access to the distribution system.

Since the market areas of Tyrol and Vorarlberg are not connected to Market Area East, but only to the NCG market area in Germany, there are different market rules for these two areas. The new Cross-Border Operating Strongly Integrated Market Area (COSIMA) became effective from 1 November 2013. This regulatory framework was integrated into the GMMO-VO to ensure the security of supply of the market areas of Tyrol and Vorarlberg through the German pipeline system. COSIMA provides a barrier-free interconnection between the market areas of Tyrol and Vorarlberg and the NCG. The delivery of natural gas for these market areas is conducted by nomination at the VTP in the market area of the NCG. Capacities booked at the VTP NCG are taken over by the distribution area manager, ensuring the transfer of the natural gas into the market areas of Tyrol and Vorarlberg. Therefore, natural gas handed over at the VTP NCG is deemed to be delivered in the respective market area.

Besides the network connection agreement for the physical connection, the customer must also apply to the DSO for third-party access. The DSO checks if transportation is possible within its distribution network. If possible, network access is granted for the applied hourly transportation capacity and the applied period of time. A similar procedure applies in the case of a change of supplier by the customer. The customer only has to conclude a contract with the DSO in accordance with the general terms and conditions of the DSO, which are subject to the approval of E-Control.

Prices for network distribution services are set by the Regulatory Commission in the Gas System Charges Ordinance (GSNE). The general terms and conditions of the DSO are also subject to the approval of E-Control. There is very little room for individual agreements between the DSO and its customers. The GSNE is regularly renewed by E-Control. To date, this has been done nearly every year. If the income deriving from the regulated tariff no longer covers the costs of a DSO, the DSO can apply for a change to the GSNE (this also applies to any TSO). Requests for network access must be processed within 14 days. Changes of supplier are to be processed by the network operators within three weeks.

The costs of the DSOs are determined separately by individual decree by the executive board of E-Control, and the ordinance setting the tariffs is to be based on these decrees.

**17 May the regulator require a distributor to expand its system to accommodate new customers? May the regulator require the distributor to limit service to existing customers so that new customers can be served?**

See question 11 regarding distributors expanding their systems to accommodate new customers.

In accordance with the Austrian Gas Act 2011, third-party access must be granted primarily on a first-come, first-served basis. Therefore, the regulator does not have the possibility of limiting service to existing customers in favour of new customers.

**18 Describe the contractual regime in relation to natural gas distribution.**

See question 16.

**Regulation of natural gas sales and trading**

**19 What is the ownership and organisational structure for the supply and trading of natural gas?**

In the Austrian domestic market, all former integrated gas companies are active as suppliers to customers. Most former local utilities still have a substantial market share in their home market (province or municipality). There are also some new suppliers active in the Austrian market, which are mostly subsidiaries of other European gas companies. The local suppliers active in the provinces of Tyrol and Vorarlberg receive natural gas from German wholesalers at the German-Austrian border. The suppliers active in Market Area East receive gas mainly from domestic production, Russia, Norway and Germany.

Since 2007, trading at CEGH increased substantially. As of 1 January 2013, trading activities in Market Area East are concentrated at the VTP, replacing the physical trading points at cross-border flanges.

**20 To what extent are natural gas supply and trading activities subject to government oversight?**

Gas traders and suppliers have to give notice to E-Control before starting business in Austria. E-Control has the power and duty to gather statistical data from traders and suppliers. Suppliers must notify E-Control of the conclusion of gas supply contracts with a term of more than one year and a volume of more than 250 million m<sup>3</sup>/a. Gas traders and suppliers have to notify E-Control of their general terms and conditions for the supply of customers whose consumption is allocated using load profiles. The Austrian Gas Act 2011 specifies the mandatory content of these general terms and conditions. E-Control can prohibit the use of the notified general terms and conditions if they are in contradiction with the law, especially consumer protection law.

In addition, E-Control may exercise market oversight and may itself instigate proceedings in accordance with competition law in front of the Cartel Court.

**21 How are physical and financial trades of natural gas typically completed?**

Physical and financial trades of natural gas are typically concluded as OTC contracts. Standard forms are used at CEGH, which are available on its website.

**22 Must wholesale and retail buyers of natural gas purchase a bundled product from a single provider? If not, describe the range of services and products that customers can procure from competing providers.**

There is no institutional single provider of gas and transportation. As of 1 January 2013, capacities are offered as decoupled entry/exit capacities at regulated tariffs.

Transportation from and to storage, and production as well as transit, can be booked separately. The entry and exit fees are paid by the storage undertakings and production undertakings.

**Regulation of LNG****23 What is the ownership and organisational structure for LNG, including liquefaction and export facilities, and receiving and regasification facilities?**

LNG is not directly available in Austria. Since Austria has no direct connection to the sea, Austria has not enacted any rules in this regard.

**24 Describe the regulatory framework and any relevant authorisations required to build and operate LNG facilities.**

Not applicable.

**25 Describe any regulation of the prices and terms of service in the LNG sector.**

Not applicable.

**Mergers and competition****26 Which government body may prevent or punish anticompetitive or manipulative practices in the natural gas sector?**

The governmental body in charge of the general supervision of competition in the natural gas sector, in particular with regard to the principle of non-discriminatory treatment of market participants, is E-Control. E-Control also cooperates with the Federal Competition Authority in prosecuting anticompetitive practices under the Cartel Act, such as abuse of market dominance and price-fixing. Since 2010, E-Control also has the right to monitor the market. Fines under the Cartel Act are imposed by the Cartel Court upon the request of E-Control or the Federal Competition Authority. Finally, the district administrative authorities are competent to prosecute violations of administrative law as set out in the Austrian Gas Act 2011 on the request of E-Control.

**27 What substantive standards does that government body apply to determine whether conduct is anticompetitive or manipulative?**

See question 26.

**28 What authority does the government body have to preclude or remedy anticompetitive or manipulative practices?**

E-Control can order market participants to comply with the regulatory framework. Further, fines of up to €150,000 can be imposed by the district administrative authority upon violation of the obligations under the Austrian Gas Act 2011. Moreover, the Cartel Court may order the market participants involved to refrain from anticompetitive conduct, and may also impose fines of up to 10 per cent of the sales revenues pursuant to the Cartel Act in the case of discrimination by a system operator, storage undertaking or operator of the VTP.

**29 Does any government body have authority to approve or disapprove mergers or other changes in control over businesses in the sector or acquisition of production, transportation or distribution assets?**

Under the exploration, production and storage agreement, the federal government regularly reserves the right to cancel an agreement if mergers or other changes of control of the contracting party take place without the prior approval of the federal government. There is no formal approval procedure in place, since this right derives from a contract under civil law. However, depending on the issue, the BMWFV has proven in the past that decisions can be obtained in a timely manner.

Besides this special contractual requirement, any merger (or other form of concentration within the scope of the Austrian Cartel Act) is subject to the general pre-merger notification requirement; such notification must be made to the Federal Competition Authority if the turnover thresholds under the Cartel Act (turnover in the year before the merger or concentration of undertakings involved exceeded €300 million on the worldwide market, €30 million on the Austrian market and, for at least two undertakings, €5 million on the worldwide market) are reached. The merger must not be implemented before the Federal Competition Authority and the Federal Cartel Prosecutor have abstained from initiating an in-depth investigation (within four weeks after notification) or – in the case of an in-depth investigation – the Cartel Court has approved the merger or concentration

(the merger or concentration can only be disapproved within five months from the beginning of the in-depth investigation procedure). A merger or concentration will not be approved if its implementation creates or intensifies a dominant market position.

**30 In the purchase of a regulated gas utility, are there any restrictions on the inclusion of the purchase cost in the price of services?**

Since the network tariff has to be set by the regulator on a cost-plus principle, there is no room for including the purchase price of the company operating as network operator in the tariff. With respect to the purchase of a supplier, there are no restrictions by law, since the prices of commodity gas are not regulated.

**31 Are there any restrictions on the acquisition of shares in gas utilities? Do any corporate governance regulations or rules regarding the transfer of assets apply to gas utilities?**

Apart from the applicable merger control rules, there are no special restrictions on the acquisition of shares in gas utilities, other than the special certification requirement implemented in accordance with the Third Energy Package in the case of acquisition of shares by a third party with its seat outside of the EU and EEA of transmission system operators. However, some gas businesses are part of companies of which, under federal or provincial law, at least the majority of the shares have to remain in public ownership.

There are no corporate governance regulations or rules regarding the transfer of the assets of gas utilities. In the case of a transfer of the assets of a network operator, however, the new owner will have to apply for a new licence to operate and will have to fulfil all the requirements to obtain such licence under the Gas Act, including the requirement of a seat in Austria or in another EU or EEA member state.

**International****32 Are there any special requirements or limitations on foreign companies acquiring interests in any part of the natural gas sector?**

At present, there are no such requirements, with the exception of that mentioned in question 31. However, with the implementation of the Third Energy Package in Austria, a third-country clause was introduced, stipulating that whenever a transmission system operator controlled by persons from a non-EU or EEA country requests a licence as described in question 31, such operator will have to fulfil more requirements than an operator controlled by persons from an EU or EEA member state. The operator will have to demonstrate to the regulatory authority and the European Commission that granting certification to it as a transmission system operator will not put at risk the security of supply of the EU. How such certification procedure will be implemented and carried out in practice remains to be seen.

**33 To what extent is regulatory policy affected by treaties or other multinational agreements?**

Regulatory policy is mainly affected by EU law, namely by directives and regulations.

**34 What rules apply to cross-border sales or deliveries of natural gas?**

Under the Austrian Gas Act 2011, access to the grid may be refused to a customer who would not be entitled to access in the country in which the gas supplier or a company controlling such supplier is domiciled, and where E-Control obtains knowledge of such fact (reciprocity rule). There are no other special rules in place for cross-border sales or deliveries of natural gas.

**Transactions between affiliates****35 What restrictions exist on transactions between a natural gas utility and its affiliates?**

Network operators (TSOs, DSOs and all system administrators such as the market area manager, operator of the VTP and the distribution area manager) must comply with the general non-discrimination and confidentiality rules. The annual accounts of natural gas undertakings shall indicate any transaction with affiliated undertakings exceeding a value of €1 million.

Chartered accountants have to monitor if the consideration is appropriate. Depending on the unbundling model chosen by any transmission system operator, additional stricter rules apply, in particular in the case of implementation of the ITO and ISO models.

**36 Who enforces the affiliate restrictions and what are the sanctions for non-compliance?**

Since the obligations mentioned in question 35 are part of the legal unbundling rules, it is E-Control that supervises the adherence to these rules.

**FIEBINGER POLAK LEON ATTORNEYS-AT-LAW ■**

**Peter Polak**

**[p.polak@fplp.at](mailto:p.polak@fplp.at)**

Am Getreidemarkt 1  
1060 Vienna  
Austria

Tel: +43 1 582 580  
Fax: +43 1 582 582  
[www.fplp.at](http://www.fplp.at)

## Getting the Deal Through

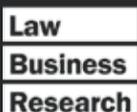
Acquisition Finance  
Advertising & Marketing  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Class Actions  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Energy Disputes  
Enforcement of Foreign Judgments  
Environment & Climate Regulation  
Executive Compensation & Employee Benefits  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
Private Client  
Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Securities Litigation  
Shareholder Activism & Engagement  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
Telecoms & Media  
Trade & Customs  
Trademarks  
Transfer Pricing  
Vertical Agreements

Also available digitally



# Online

[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



Gas Regulation  
ISSN 1740-7826



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Official Partner of the Latin American  
Corporate Counsel Association



Strategic Research Sponsor of the  
ABA Section of International Law