REIDLINGER SCHATZMANN

[redacted]

In Kooperation mit

[redacted]

Registered Letter

To the
Provincial Governor of Styria
Provincial Government Office
Department 13 Environment and Regional Planning
Stempfergasse 7
8010 Graz

[redacted]

(Submission also via web-form)

No: ABT13-32.00 L 23/2018
Vienna, 26 September 2019

Complainant: [redacted]

Represented by: Reidlinger Schatzmann Rechtsanwälte GmbH
Tuchlauben 17, 1010 Vienna
Power of attorney granted pursuant to sec. 8 RAO and sec. 17 PACA in conjunction with sec. 10 GAPA

Respondent Authority: Provincial Governor of Styria

Concerning: Decision of 22 August 2019, ABT13-32.00 L 23/2018-27, received on 3 September 2019, concerning application for the renewal of water utilization rights pursuant to sec. 21(3) AWA in conjunction with Art. 9, 10 and 12 Services Directive

Complaint against Decision

Pursuant to Art. 130(1) no. 1 FCA

Single
No enclosures
1 payment confirmation for the filing fee of EUR 30 (original)

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Against the decision of the Provincial Governor of Styria dated 22 August 2019, ABT13-32.00 L 23/2018, served on 3 September 2019, [redacted] through its attorney within the stipulated period a

Complaint

with the Administrative Court of Styria and states: The contested decision is challenged with regard to award points I. These award points violate Complainant's subjective rights.

The respondent authority did not only breach its duty to reach a timely decision as it has not made a decision on the matter within six months as set forth under sec. 73 of the General Administrative Procedure Act (*GAPA*) and sec. 8 of the Proceedings of Administrative Courts Act (*PACA*) since it exceeded this period by more than four months, but also rejected Complainant's applications of 4 October 2018 and written statements of 15 March 2019 and 24 July 2019 by refusing to grant the applicant, [redacted] party status under national as well as EU law. Therefore, the respondent authority infringed EU law and fundamental rights.

Against the background that this decision contains gross violations of

(i) EU law – namely the Services Directive 2006/123/EC (*Services Directive*),[1] fundamental freedoms and rights enshrined under primary EU law, specifically Art. 49 and Art. 106 TFEU, Art. 16 and Art. 20 of the Charter of Fundamental Rights of the EU (*CFR*) as well as Directive 2009/72/EC[2] – and

(Ii) corresponding fundamental rights safeguarded under the Federal Constitution of Austria (*FCA*) and Basic Law on the General Rights of Nationals (*BLGRN*), specifically Art. 7 FCA and Art. 2 and Art. 6 BLGRN,

Complainant challenges the contested decision with regard to the rejection of granting Complainant party status and not awarding it with the water utilization right for the operation of the hydropower plant *Laufnitzdorf* for an appropriate limited period in a competitive, fair, transparent, non-discriminatory and objective re-issuance procedure.

[1] Directive2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27.12.2006, pp 36-68.

[2] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC OJ L 211, 17.8.2009, pp. 55-93.

I. Facts of the case and course of the proceedings

(1) On 4 October 2018, after having already sent a notification in accordance with sec. 55(4) AWA, [redacted] submitted the application that the provincial governor of Styria, as competent authority, shall grant [redacted] water book code 6/741, pursuant to sec. 21(3) AWA in conjunction with Art. 49 TFEU. The respondent authority received the application on 11 October 2018.

(2) [redacted] highlighted that sec. 21(3) AWA not only constitutes an unjust violation EU primary law, specifically Art. 49 and Art. 106 TFEU as well as Art. 16 and Art. 20 CFR, and EU secondary law, namely Directive 2009/72/EC, but also of fundamental rights guaranteed under the Austrian Constitution, specifically Art. 2 and Art. 6 BLGRN and Art. 7 FCA, due to the facts that authorizations may be granted up to 90 years and that the renewal procedure stipulated in sec. 21(3) AWA grants current right holders a privileged status which cannot be legally challenged under AWA. The consequence is the perpetuation of the current right holders' monopoly-like positions in the Austrian hydropower sector.

(3) On 13 November 2018 the respondent authority forwarded the application to the current right holder, Verbund Hydro Power GmbH (***Verbund***), and granted it the possibility to respond to the Complainant's application until 12 December 2018. This deadline was extended upon Verbund's request until 31 January 2019.

(4) Although Verbund used the whole two and half months to prepare its statement, i.e. the statement was submitted on the last day, it merely raised points that had in fact been already comprehensively and diligently addressed by the Complainant in its application. Additionally, Verbund claimed that it should be entitled to reimbursement of costs pursuant to sec. 123 AWA.

(5) By letter of 13 February 2019 the respondent authority brought Verbund's statement to Complainant's attention and granted it one month from the date of receipt to prepare its response.

(6) In [redacted] timely submitted response of 15 March 2019 to Verbund's statement it additionally and primarily based its claim for a competitive, fair, transparent, non-discriminatory and objective authorisation scheme for the re-issuance of expiring water utilization rights on the interpretation of sec. 21(3) AWA in light of Art. 9, 10 and 12 of the Services Directive and otherwise based its claim directly on Art. 9, 10 and 12 of the Services Directive under the doctrine of direct effect. [redacted] also highlighted that it upholds *in eventu* all claims already made.

(7) Furthermore, Complainant not only stressed the fact that re-issuance of water utilization rights unquestionably constitutes an "application proceeding", since the Supreme Administrative Court had already held that it is not a "prolongation or 'living on' of the old right" but in fact the "issuance of a new right instead of the expired right".[3] Although the respondent authority incorrectly concluded that Complainant does not have party status in the re-issuance proce-

[3] See Supreme Administrative Court VwGH 25.04.2002 98/07/0023.

dure pursuant to sec. 21(3) AWA by ignoring main principles of EU law, it was at least consistent in so far as it assented to [redacted] opinion that the application is neither "careless" nor "wilful" and thus correctly dismissed Verbund's claim for reimbursement of costs (although based on incorrect premises).

(8) It took the respondent authority again nearly a month to decide to bring Complainant's response to Verbund's attention. In fact, the respondent was already in breach of its duty to reach a timely decision at the time it forwarded the statement on 11 April 2019, since the 6-month decision period had already expired. Furthermore, it granted Verbund again three weeks to respond, until 2 May 2019.

(9) Again, the respondent authority – unnecessarily and in breach of sec. 73 GAPA – prolonged this period for Verbund until 1 July 2019.

(10) Verbund's second statement was submitted on 1 July 2019. Yet, Verbund merely reiterated its former reasoning, not adding any new arguments of substantive legal or factual value but rather displaying a clear misconception of fundamental principles of EU law such as the principle of interpreting national law in conformity with EU law,[4] the doctrine of direct effect[5] and the primacy of EU law.[6]

(11) The respondent authority forwarded Verbund's second statement surprisingly quick, as Complainant's representative received it on 3 July 2019.

(12) Although Complainant was granted until 15 August 2019 to respond to Verbund's second statement, it submitted its second response on 24 July 2019. To limit its response to the necessary points, Complainant merely referred to its application and previous response, reiterated its claims and stressed again that there is no legal leeway under the AWA to reimburse Verbund for its costs (as it was already more than questionable which costs Verbund was referring to). Furthermore, it highlighted that the respondent authority remained in violation of its duty to reach a timely decision within six months.

(13) On 22 August 2019 the respondent authority rejected [redacted] application and dismissed Verbund's claim for reimbursement of costs. The following complaint is directed against this decision.

II. Timely complaint

(14) The contested decision was served to Complainant's representative on 3 September 2019. The contested decision had been already informally send via e-mail upon request on 29 August 2019.

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[4] See CJEU 24.4.2008 C-555/07 (*Kücükdeveci*) ECLI:EU:C:2010:21 para 48; CJEU 21.10.2010 C-227/09 (*Accardo et al*) ECLI:EU:C:2010:624 para 49; *Raschauer* Allgemeines Verwaltungsrecht[5] (2016) para 479.

[5] See already CJEU 5.2.1963 C-26/62 (*Van Gend en Loos*) ECLI:EU:C:1963:1, and e.g. *Öhlinger/Potacs* EU-Recht und staatliches Recht[6] (2017) pp. 71 et seq.; *Raschauer* Allgemeines Verwaltungsrecht[5] (2016) para 480.

[6] See CJEU 15.7.1964 C-6/64 (*Costa v E.N.E.L.*) ECLI:EU:C:1964:66 and CJEU 9.3.1978 C-106/77 (*Simmenthal*) ECLI:EU:C:1978:49.

(15) The period for filing a complaint against a decision is four weeks pursuant to sec. 7(4) PACA. Therefore, the complaint is submitted in due time in any case.

III. Admissibility of complaint

(16) Under Art. 132(1) no.1 FCA someone who alleges infringement of his rights may raise a complaint against the decision of an administrative authority in accordance with Art. 130(1) no.1 FCA.

(17) [redacted]. The Complainant had applied to be granted the renewed water utilization rights of the hydropower plant *Laufnitzdorf* and related facilities and properties that are necessary to operate this hydropower plant pursuant to the reissuance procedure under sec. 21(3) AWA which, interpreted in conformity which Art. 12 in conjunction with Art. 9 and 10 of the Services Directive, must be organised as a competitive, fair, transparent, non-discriminatory and objective authorisation scheme.

(18) However, in case respondent authority would not interpret sec. 21(3) AWA in conformity with EU law, [redacted] had based its claim also on Art. 9, 10 and 12 of the Service Directive as they are directly effective and confer rights to individuals in accordance with settled case law of the European Court of Justice (***CJEU***). Due to the primacy of EU law[7], the renewal procedure set forth in sec. 21(3) AWA must not be invoked. Therefore, Complainant had *in eventu* applied to be granted the renewed water utilization rights of hydropower plant *Laufnitzdorf* and related facilities and properties that are necessary to operate this hydropower plant in a competitive, fair, transparent, non-discriminatory and objective authorisation scheme pursuant to the directly applicable Art. 9, 10 and 12 of the Services-Directive.

(19) Furthermore, in case the respondent authority was not prepared to follow the above reasoning, Complainant *in eventu* based its claim to be granted the renewed water utilization rights of hydropower plant *Laufnitzdorf* and related facilities and properties that are necessary to operate this hydropower plant in a competitive, fair, transparent, non-discriminatory and objective authorisation scheme on interpreting sec. 21(3) AWA in conformity with EU law and fundamental rights, specifically Art. 49 and Art. 106 TFEU, Art. 16 and 20 CFR and Directive 2009/72/EC as well as Art. 2 and Art. 6 BLGRN and Art. 7 FCA.

(20) Moreover, Complainant *in eventu* based its claim to be granted the renewed water utilization rights of hydropower plant *Laufnitzdorf* and related facilities and properties that are necessary to operate this hydropower plant in a competitive, fair, transparent, non-discriminatory and objective authorisation scheme on sec. 9 and sec 11 AWA in conjunction with Art. 49 and Art. 106 TFEU, Art. 16 and 20 CFR and Directive 2009/72/EC as well as Art. 2 and Art. 6 BLGRN and Art. 7 FCA, since sec. 21(3) AWA constitutes an unjustified restriction or violation of these provisions and hence must be pronounced inapplicable.

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[7] See CJEU C-6/64 (*Costa v E.N.E.L.*) ECLI:EU:C:1964:66 and CJEU C-106/77 (*Simmenthal*) ECLI:EU:C:1978:49.

(21) *In eventu*, Complainant based its claim to be granted party status in the re-issuance procedure set forth in sec. 21(3) AWA on fundamental rights, namely Art. 16 and 20 CFR, Art. 2 and 6 BLGNR and Art. 7 FCA, and requested to be granted the renewed water utilization rights of hydropower plant *Loufnitzdorf* and related facilities and properties that are necessary to operate this hydropower plant in a competitive, fair, transparent, non-discriminatory and objective authorisation scheme.

(22) Thus, Complainant is entitled to raise a complaint against the decision of the respondent authority in accordance with Art. 132(1) no. 1 FCA, since the contested decision actually decides on Complainant's subjective rights and adversely affects the party's legal sphere.[8]

IV. Declaration on scope of complaint

(23) The contested decision is challenged with regard to award points I. These award points violate Complainant's subjective rights as follows:

a. Not granting party status and thus not awarding the renewed water right in the re-issuance procedure organised as competitive, fair, transparent, non-discriminatory and objective authorisation scheme pursuant to sec. 21(3) AWA interpreted in conformity with EU law;

b. Not granting party status and thus not awarding the renewed water right in the re-issuance procedure organised as a competitive, fair, transparent, non-discriminatory and objective authorisation scheme by not invoking sec. 21(3) AWA due to the primacy of EU law and relying on directly applicable EU law;

c. Not granting party status and thus not awarding the renewed water right in the re-issuance procedure organ organised as competitive, fair, transparent, non-discriminatory and objective authorisation scheme pursuant to sec. 21(3) AWA under national law.

(24) With regard to award point II, Complainant agrees with the conclusion of respondent authority that no costs are reimbursed. Due to the fact that Complainant is in so far not burdened it does not complain against this award point II. However, Complainant limits itself to a reference to its responses of 15 March and 24 July 2019 in which Complainant specifically elaborated that the re-issuance procedure applied in conformity with EU law constitutes an application procedure in accordance with sec. 123(1) AWA and therefore a party cannot be reimbursed. Therefore, given the case the honourable Administrative Court agrees with Complainant and grants its claims set out below, sec. 123(1) AWA would in fact apply.[9]

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[8] *Hengstschläger/Leeb* Verwaltungsverfahrensrecht[5] (2018) para 1027.

[9] See complainant's comprehensive responses of 15 March 2019 and 24 July 2019.

V. Grounds of complaint

Illegality of content

(25) Award point I has serious deficiencies as regards their content. Therefore, the contested decision is in so far unlawful on the substance and thus must be repealed.

A. Ad award point I: Unlawfulness due not granting party status

(26) The award point I of the contested decision is unlawful due to the fact that the respondent authority did not grant party status to Complainant by incorrectly opining

a. that Sec. 21(3) AWA does not grant party status to any other person than the current right holder; and

b. that EU law is not applicable, specifically the Services Directive, Art. 49 TFEU and the Directive 2009/72/EC.

1. Party status pursuant to EU law

(27) In its settled case the CJEU repeatedly upholds the crucial principle of interpreting national law in conformity with EU law. This principle constitutes one of the most important obligations which authorities of Member States have to adhere to in order to guarantee the effectiveness of EU law, in fact the functioning of the EU itself. The CJEU specifically and unequivocally stressed that *"[t]he requirement for national law to be interpreted in conformity with European Union law is inherent in the system of the Treaty, since it permits the national court, within the limits of its jurisdiction, to ensure the full effectiveness of European law when it determines the dispute before it"*.[10] Therefore, all authorities of Member States are required to interpret national law *"so far as possible, in the light of the wording and purpose"* of EU law.[11]

(28) This principle is also undisputedly acknowledged by the Supreme Constitutional and Administrative Courts of Austria and constitutes long-standing settled case law.[12]

(29) However, even if one were to conclude that sec. 21(3) AWA is not to be interpreted in the light of EU law (*quod non*), the principle of primacy of EU law must be respected with regard to directly applicable EU law, rendering any contradictory national provisions inapplicable. Thus, – as will be shown – sec. 21(3) AWA may not be invoked as EU law prevails.

(30) The respondent authority, with its decision that Art. 49 TFEU is not infringed, that there is "no connection between the current re-issuance procedure as well as no contradiction between

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[10] CJEU C-55/07 (*Kücükdeveci*) ECLI:E:C:2010:21 para 48.

[11] See for example, CJEU C-55/07 (*Kücükdeveci*) ECLI:E:C:2010:21 para 48 and CJEU C-227/09 (*Accardo et al*) ECLI:EU:C:2010:624 para 49.

[12] See among many VfGH 28.09.2017 GZ E 2666/2016-16; VwGH 28.06.2016 GZ Ra 2015/17/0082; 30.09.2015 GZ 2013/10/0261; 18.02.2015 GZ 2012/03/0108; 27.03.2014 GZ 2013/10/0029.

the AWA 1959 (specifically its sec. 21) and Directive 2009/72/EC", that the Services Directive is not relevant in the current subject matter, and by therefore not granting Complainant party status as well as not awarding the renewed water right in the re-issuance procedure organised as a competitive, fair, transparent, non-discriminatory and objective authorisation scheme, not only displayed a clear misconception of fundamental principles of EU law as such as the principle of interpreting national law in conformity with EU law,[13] the doctrine of direct effect[14] and the primacy of EU law,[15] but simply misinterpreted the Services Directive.

(31) Against the background of the European Commission's infringement procedure Complainant aligned its claims with the Commission's convincing legal point of view, thus predominantly basing its claims on the Services Directive. For the sake of clarity, Complainant points out that it is fully aware that provisions relating to services are subordinate to those on the right of establishment, meaning the former are not applicable if the latter provisions are applied.[16] Nevertheless, Complainant is of the view that due to the particular circumstances of the case emerging from the infringement procedure as well as relevant case law of the CJEU and the specific requirements under Art. 9 et seq. of the Services Directive, the latter must be examined first and if deemed subordinate, they unquestionably set forth the cornerstones to be applied for the re-issuance procedure required under the freedom of establishment.

(32) In the following section, Complainant will highlight again that

(i) EU law is not only applicable, but by denying Complainant party status the respondent authority violated fundamental principles of the CJEU's settled case law and – if sec. 21(3) AWA is not interpreted in light of EU law – that

(ii) sec. 21(3) AWA constitutes an unjust violation of EU law, consequently highlighting the fact that Austria unquestionably infringes EU law, if that provision is applied. This circumstance is supported by the infringement procedure the EC has already initiated (although to Complainant's best knowledge the EC's claim has not yet been lodged with the CJEU).

1.1 The respondent authority's point of view

(33) In summary, respondent authority stated that a "water law permit does not constitute an award of contract by the authority" but is awarded upon application if the approval requirements are met.[17] Thus, respondent authority held that this does not constitute a "contractually agreed exchange of services between a contracting authority and a service provider in form of a service concession" in accordance with Art. 5(1) lit(b) Directive 2014/23/EU.[18] Furthermore,

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[13] See CJEU C-555/07 (*Kücükdeveci*) ECLI:EU:C:2010:21 para 48; CJEU C-227/09 (*Accordo et al*) ECLI:EU:C:2010:624 para 49; *Raschauer* Allgemeines Verwaltungsrecht[5] (2016) para 479.

[14] See already CJEU C-26/62 (*Van Gend en Loos*) ECLI:EU:C:1963:1, and e.g. *Öhlinger/Potacs* EU-Recht und staatliches Recht[5] (2017) pp. 71 et seq., *Raschauer* Allgemeines Verwaltungsrecht[5] (2016) para 480.

[15] See CJEU C-6/64 (*Costa v E.N.E.L.*) ECLI:EU:C:1964:66 and CJEU C-106/77 (*Simmenthal*) ECLI:EU:C:1978:49.

[16] See CJEU 30.11.1995C-55/94 (*Gebhard*) ECLI:EU:C:1559:411 para 22.

[17] Decision 22.8.2019, No: ABT13-32.00 L 23/2018-27, p 7.

[18] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts OJ L 94, 28.3.2014, pp 1-64; Decision, p. 7.

respondent authority stressed that the right holder "is also not commissioned with the construction and operation of a hydropower plant, nor does it receive any payment from any authority for this". Additionally, the rights holder is not obligated to exercise its awarded right and the awarding authority has "no direct economic benefit" and cannot enforce that "service".[19]

(34) As regards to the Services Directive, respondent authority reiterated that the utilization of water in accordance with AWA does not constitute a service in the meaning of the Services Directive. This is supported by reference to the EC's handbook concerning the implementation of the Services Directive.[20] Furthermore, respondent authority added that "the production of energy is seen as a commodity".[21]

(35) The respondent authority further elaborates that even if "the construction and operation of a hydropower plant falls within the scope of the term service" the permit under the AWA "is merely a general administrative requirement to be met" but not an "authorisation scheme" pursuant to Art. 4 no. 6 of the Services Directive.[22]

(36) Concerning Art. 12 of the Services Directive, respondent authority pointed out that in the current subject matter no "selection of candidates" takes place – "the applicant submits an application for implementing a specific project". The respondent authority references sec. 17 AWA which stipulates that if various applications are in conflict the one that better serves the public interest shall prevail. Hence, respondent authority concludes that this is "not an 'opening' of the procedure in the sense that a selection from among several competitors takes place".[23]

(37) Against the background of these arguments, the respondent authority denied Complainant party status under EU law as sec. 21(3) AWA only entitles the current right holder to apply for the re-issuance of the water utilization right.

1.2 The Service Directive

a) Applicability of the Services Directive

(38) The scope of applicability of the Services Directive is stipulated in Art. 2(1) *leg cit.* This provision sets forth that the "Directive shall apply to services supplied by providers established in a Member State". "Services" are defined as "any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty [now Art. 58 TFEU]"[24] and the "provider" is any natural or legal person "who offers or provides a service".[25]

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[19] Decision, p. 7.
[20] Decision, p. 8.
[21] Decision, p 8.
[22] Decision, p. 8.
[23] Decision, pp. 8 et seq.
[24] Art 4 no1 Services Directive.
[25] Art 4 no2 Services Directive.

(39) The respondent authority pointed out that the utilization of water cannot be considered a service and that the typical remuneration, meaning an exchange between the service of the provider and the payment of the recipient, is lacking when water utilization rights for certain purposes (including the necessary facilities) are awarded.[26]

(40) Thus, according to respondent authority, the operation of a hydropower plant is lacking the characteristic exchange relationship. Additionally, (with regard to Art. 4 no. 6 of the Services Directive) respondent authority stressed the point that a water permit does not constitute "a formal decision, or an implied decision [from a competent authority], concerning access to a service activity or the exercise thereof", but is merely "a 'general' rule for utilizing a water body". Moreover, the respondent authority stated that the Services Directive is anyway inapplicable as "the production of electricity is considered a good and thus does not constitute a service. In this regard, the respondent authority refers to a decision of the CJEU.[27] Also a recent article of *Raschauer/Ortner* comes to the same conclusion.[28]

(41) With regard to the latter article by *Raschauer/Ortner*, it needs to be highlighted – irrespective of the principle "*de mortuis nihil nisi bene*"[29] – that the author *Raschauer* advised Verbund in this very same matter in the first half of 2019; although this was only informally communicated to Complainant's representatives, this fact can be well understood in the structure of the article which follows exactly the arguments of Complainant's application of 4 October 2018 and its response of 15 March 2019. Thus, the views presented in this article can by no means be qualified as objective or neutral, and it would have been good academic practice for the two authors to disclose their advisory role in the article.

(42) That electricity constitutes a good if traded is not contested by Complainant. Yet it is apparent that the CJEU case law, which is also cited in the article, more or less dealt with various kinds of import restrictions or taxes imposed.[30] As the current case does not deal with similar restrictions, the case law referred to should be disregarded in its entirety in this regard as it does not shed any light on the current case.

(43) The absence claimed by respondent authority of the characteristic exchange between remuneration and activity seems rather odd, as it claims that "through the awarding of the water utilization permit no service for a recipient is provided for remuneration, but a permit is awarded for a specific purpose including the necessary facilities".[31] That no service is provided through the awarding of a water utilization permit itself is self-evident (in this regard the authority would be the service provider!) and by pointing out that the applicant is granted the

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[26] Decision, p. 8.
[27] Decision, p. 8; CJEU C-393/9292 *(Gemeente Almelo et al)* ECLI:EU:C:1994:171.
[28] *Raschauer/Ortner*, Wasserkraftwerke im Binnenmarkt, RdU 2019/80, pp. 137 et seq.
[29] Mr Prof Raschauer died a few weeks ago, apparently shortly after the completion of the article.
[30] CJEU 6.12.2018 C-305/17 *(FENS)* ECLI:EU:C:2018:986 para 34, CJEU 1.7.2014 C-573/12 ECLI:EU:C:2014:2037 paras 65 et seq.
[31] Decision, p. 8.

right to utilize the water through the construction and/or operation of the required facilities rather displays a misconception of the Service Directive, specifically of the term "service".

(44) Before addressing the specific service at hand, it must be highlighted that the term "services" is defined broadly in Art. 4 of the Services Directive[32] and that "whereas the manufacturing of goods is not a service activity, there are many activities ancillary to them (for example retail, installation and maintenance, after-sale services) that constitute a service activity".[33]

(45) Furthermore, the EC highlighted the fact that *"for example, road traffic rules, rules concerning the development or use of land, town and country planning as well as building standards will generally not be affected by the Services Directive. However, it is clear that the mere fact that rules are labelled in a specific way, for example as town planning rules, or that requirements are formulated in a general way, i.e. are not specifically addressed to service providers, is not sufficient to determine that they are outside of the scope of the Services Directive. In fact, the actual effect of the requirements in question needs to be assessed to determine whether they are of a general nature or not. Thus, when implementing the Directive, Member States need to take account of the fact that legislation labelled as "town planning" or "building standards" may contain requirements which specifically regulate service activities and are thus covered by the Services Directive. For instance, rules on the maximum surface of certain commercial establishments, even when contained in general urban planning laws, would come under the Services Directive and, as a result, will be covered by the obligations in the establishment chapter of the Directive."*[34]

(46) The permit to construct and/or the permit operate a hydropower plant for electricity production (i.e. the utilization of water for this purpose) enables Complainant to provide the following services: Hydropower plants provide services – technically called "ancillary services" – to system operators that are fundamental to guarantee the grid voltage and the grid frequency regulation, such as the so-called primary, secondary and tertiary reserve (i.e. frequency containment reserve service, frequency restoration reserve service and replacement reserve service). (These considerations highlight the fact that the reference to electricity as a good is not decisive in the case at hand).

(47) Furthermore, this service is unquestionably remunerated. Generally speaking, the end-customer provides the remuneration as the price for electricity also covers the costs for this service. That the remuneration for the service and the costs for the good "electricity" might not be unbundled is not only negligible but irrelevant. Additionally, it needs to be pointed out that it is settled CJEU case law that it is equally irrelevant whether the remuneration is provided for by the client of the service or a third party.[35] Hence, the fact that not only the end customer, but in fact the transmission system operator (in Austria the "Austrian Power Grid AG", *APG*)

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[32] EC Handbook on the mplementation of the Services Directive (2007) p 10; retrieved from: https://publications.europa.eu/en/publication-detail/-/publication/a4987fe6-d74b-4f4f-8539-b80297d29715/language-de.

[33] EC Handbook, p. 13.

[34] EC Handbook, p.14.

[35] CJEU 15.12.1987 C-325/85 *(Ireland/Commission)* ECLI:EU:C:1987:546, CJEU 13.5.2003 C-385/99 *(V.G. Müller-Fauré) ECLI:EU:C:2003:270*, CJEU 12.7.2001 C-157/99 (B.S.M. Smits et al) ECLI:EU:C:2001:404.

pays for that service does not hinder the qualification as service pursuant to Art. 4 of the Services Directive. (It should be highlighted that the tender for control energy organized by the APG needs to be distinguished from the services addressed above that are inseparably linked to the "construction and/or operation of a hydropower plant for electricity production").

(48) Moreover, it is unquestionable that in light of the EC's understanding of town planning legislation or building standards the respondent authority's argument that a water permit (including sec. 21(3) AWA) is merely "a general rule for utilizing a water body" falls short. – On the contrary, sec. 21(3) AWA (and in fact any water utilization permit) falls within the scope of the Services Directive (specifically Chapter III "Freedom of establishment for providers"), because the requirements for the award – as explained in more detail below – specifically regulate services activities.

(49) Therefore, – generally speaking – the Services Directive is applicable.

b) Relationship of the Services Directive with other provisions of EU law

(50) Art. 3(1) of the Services Directive stipulates that "[i]f the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a services activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions". Art. 9(3) Services Directive similarly sets forth that Art. 9 through 13 of the Services Directive "shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments" (emphasis added).

(51) The respondent authority (without actually discussion the relationship) opined that Art. 11 WFWD 2000/60/EC (Water-Framework-Directive, ***WFWD***) stipulates an "authorisation obligation for the abstraction and impoundment of water and also sets forth the possibility to regularly review and update the authorisation".[36] It also seems to indicate that sec. 21(3) AWA has just been recently introduced as transposition of Art. 11 WFWD.[37] Furthermore, *Raschauer/Ortner* assume that Directive 2009/72/EC must be taken into account with regard to the construction and operation of hydropower plants.[38]

(52) First, the legal figure of re-issuance of water rights is by no means the result of transposing Art. 11 WFWD into national law, since it has already been part of the AWA of 1934, thus long before the WFWD was adopted.[39] Second, it is apparent that Art. 11 WFWD is by no means in conflict with any of the relevant provisions of the Services Directive nor does the WFWD constitute a Community instrument that directly or indirectly governs "the authorisation scheme"

[36] Cf Art 11(2) lit e WFWD.
[37] Decision, p. 6.
[38] See *Raschauer/Ortner* Wasserkraftwerke, p. 140.
[39] See in this regard also Raschauer/Ortner Wasserkraftwerke p.141 as they correctly point out that this legal figure had been already part of AWA 1934 and was amended in 1990.

of the re-issuance procedure pursuant to sec. 21(3) AWA. Thus, the application of Art. 9 et seq. of the Services Directive is not excluded in accordance with Art. 9(3) *leg cit*:

(i) Art. 11(3) lit e WFWD requires "controls over the abstraction of fresh surface water and groundwater, and impoundment of fresh water [...] and a requirement of prior authorisation for abstraction and impoundment". However, it should be stressed that authorisation requirement under Art. 11 WFWD does neither encompass the authorisation for the operation of the hydropower plant nor the production of electricity to provide the above services. For this reason alone, Art. 11(3) lit e WFWD does not refer to the re-issuance of water utilization rights. As explained in the next paragraph, Art. 11(3) lit e WFWD also does not require a review and update of the water utilization rights themselves.

(ii) According to the wording of Art. 11(3) lit(e) WFWD it is not required that the "authorisations for abstraction and impoundment" are regularly reviewed and updated. This review and update obligation explicitly applies only to the "controls over the abstraction of fresh surface water and groundwater". Thus, this obligation does not apply to the authorisations for abstraction and impoundment. Even if, contrary to the working, one assumed that this obligation concerning controls also includes "prior authorisations", Art. 11 WFWD would merely require that the provision which stipulates the prior authorisation is reviewed and updated, but not the authorisation itself. Even if one interpreted Art. 11 WFWD as meaning that the specific authorisation should be reviewed periodically and updated if necessary, this does not mean that all aspects of the authorisation scheme pursuant to Art. 9 through Art. 13 Services Directive are governed by it –the Services Directive only requires that the duration of scarce authorisations is limited, but not that the issued authorisation is reviewed and updated. Hence, the respondent authority's argument (although without any reference to Art. 9(3) of the Services Directive) as well as the opinion of *Raschauer/Ortner* that the Services Directive is indirectly governed by the WFWD[40] must be rejected as incorrect – this argument disregards Art. 9(3) of the Services Directive as well as the unequivocal wording of Art. 11 WFWD.

(53) Also the EC explicitly stressed that Member States "have to ensure that such authorisation schemes (and their procedures) comply with the rules provided for" in Art. 9 through 13 of the Services Directive if the other EU legislative act "does not deal with specific aspects, such as the conditions for granting the authorisation, its duration or the application procedure".[41]

(54) Against this background, it is apparent that these articles of the Services Directive must be also applied with regard to the Directive for the internal market in electricity (Directive

[40] *Raschauer/Ortner* Wasserkraftwerke, p. 140.
[41] EC Handbook, p. 24.

2009/72/EC), specifically its Art. 7 and Art. 8 *leg cit*. As Complainant has stressed in its application, the aspects of these provisions are relevant for the case at hand, in particular by determining the correct interpretation.

(55) Whereas the respondent authority states that there is no link between authorisation procedures set forth in Art. 7 and Art. 8 of Directive 2009/72/EC,[42] *Raschauer/Ortner* opine that these provisions govern the disputed authorisation procedure, and pursuant to Art. 9(3) Services Directive, Directive 2009/72/EC prevails.[43]

(56) Yet, both interpretations are subject to error. With regard to *Raschauer/Ortner*, the argument above applies – neither Art. 7 nor Art. 8 of Directive 2009/72/EC set forth any rules that specifically govern all aspects of the re-issuance procedure at hand. The respondent authority is correct in so far as the authorisation procedures under Directive 2009/72/EC govern the authorisation for "the construction of new generation capacity [....], which shall be conducted in accordance with objective, transparent and non-discriminatory criteria" (Art. 7) and ensures "the possibility [...] of providing for new capacity or energy efficient/demand-side management measures through a tendering procedure or any procedure equivalent in transparency and non-discrimination, on the basis of published criteria" (Art. 8), but not specifically the re-issuance procedure provided for under sec. 21(3) AWA. Therefore, it is apparent that neither Art. 9(3) of the Services Directive nor Art. 3 *leg cit* is applicable – i.e. Directive 2009/72/EC does not render Art. 9 through Art. 13 of the Services Directive inapplicable, and even if the provisions under Directive 2009/72/EC did in fact govern the re-issuance procedure under sec. 21(3) AWA it would only govern that the procedure must be "objective, transparent and non-discriminatory" – all other aspects of the authorisation scheme required in accordance with Art. 9 through Art. 13 of the Services Directive must be still applied. (*Raschauer/Ortner*'s arguments must be also qualified as incorrect in this regard.)

(57) Concerning the respondent authority's argument that there is neither a connection nor a contradiction between sec. 21(3) AWA and Directive 2009/72/EC, it needs to be remembered that Complainant did not solely base its claims *in eventu* on this Directive, but in conjunction with Art. 49 and Art. 106 TFEU as well as fundamental freedoms pursuant to Art. 16 and Art. 20 CFR. First and foremost, Art. 9 through Art. 12 of the Services Directive apply, but if found to be inapplicable (*quod non*) the aforementioned provisions undoubtedly apply. Then the authorisation procedures under Directive 2009/72/EC provide the explicit provisions setting forth some of the relevant aspects for interpreting sec. 21(3) AWA in conformity with EU law. This is also true if sec. 21(3) AWA is disregarded due to the primacy of EU law. Therefore, Art. 7 and Art. 9 of Directive 2009/72/EC do govern the interpretation of sec. 21(3) AWA (if the Services Directive is incorrectly found to be inapplicable).

(58) With regard to Directive 2014/23[44] it is sufficient to point out that Complainant never based its claims on this legal basis, particularly due to the fact that the water permit applied for does

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[42] Decision, p. 7.

[43] *Raschauer/Ortner* Wasserkraftwerke, p. 140.

[44] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts OJ L 94, 28.3.2014, pp 1-64; Decision, p. 7.

not constitute a service concession, meaning a right to operate a particular service transferred by the contracting authority to the concessionaire. The situation at hand concerns the authorisation to exercise an economic activity with regard to scarce resources.

c) Aspects of the authorisation scheme pursuant to Art. 9 through Art. 13 of the Services Directive

(59) As has been already stated, respondent authority referred to the definition of authorisation scheme under Art. 4 no. 6 of Services Directive and held that a permit to utilize water is only "a 'general rule for utilizing water" and thus the Services Directive should not be applied. Furthermore, it stated that sec. 21(3) AWA does not provide for a "selection between applicants" but only sec. 17 AWA governs the conflict between two planned projects whereby the one prevails that serves public interest best. It upheld that this does not lead to an "opening" of the procedure which provides for the selection between these applicants.[45]

(60) In this regard the respondent authority simply misses the point – it is exactly the fact that these provisions do not specifically provide for an "opening" of the procedure in accordance with the criteria set forth in Art. 9 through Art. 13 of the Services Directive that requires the respondent authority – as any other authority of a Member State – to respect the principle of interpreting national law in accordance with EU law (or, if deemed inapplicable, *quod non*, to disregard sec. 21(3) AWA but directly apply relevant provisions of EU law that have direct effect; see below). Complainant did not contest that sec. 21(3) AWA (as well as sec. 16 AWA) is lacking such an "opening" of the procedure allowing any applicant to apply for expiring water utilization rights, because it is specifically this absence of the "opening", meaning a procedure that meets the criteria of the Services Directive, which is criticised by Complainant.

(61) Authorisation scheme: Art. 4 no.6 of the Services Directive defines the term "authorisation scheme" as "any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof". This definition must be understood broadly, as Recital 39 of the Services Directive unequivocally elaborates that "***[t]he concept of 'authorisation scheme' should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions***, *and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a cord attesting to membership of a particular profession. Authorisation may be granted not only by a formal decision but also by an implicit decision arising, for example, from the silence of the competent authority or from the fact that the interested party must await acknowledgement of receipt of a declaration in order to commence the activity in question or for the latter to become lawful*" (emphasis added). Therefore, already solely against these considerations, it is obvious that permits to utilize water are covered by this definition.

[45] Decision, pp. 8 et seq.

(62) Additionally, it cannot be disputed that this permit is required before "the service provider can lawfully exercise the activity".[46] Also *Raschauer/Ortner*'s reference to Recital 9 of the Services Directive, concerning the "requirement of permits pursuant to sec. 9 and sec. 32 AWA to utilize water" which "must be respected by operators of hydropower plants and other private persons alike", that "*rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity*" must be – also already stated above – correspondingly differentiated as it is merely a "label" (as the EC points out correctly).[47]

(63) Sec. 21(3) AWA does only refer to the current right holder and explicitly not to everybody – this point itself is stressed by both the respondent authority as well as *Raschauer/Ortner*. Although sec. 21(3) AWA (superficially viewed) may be equally applicable to any current right holder, but one may not view sec. 21(3) AWA detached from other provisions under the AWA, specifically from sec. 103 AWA.

(64) Sec. 103 AWA must be applied in the re-issuance procedure pursuant to sec. 21(3) AWA too. It contains a non-exhaustive list of documents and information that must be provided. *Prima facie*, sec. 21(3) AWA in conjunction with sec. 103 AWA seem to be applicable to everybody alike. However, sec. 103 itself already explicitly determines that not all documents or information must be provided in the course of any application, "if the nature of the project does not render various documents superfluous". Therefore, it is apparent that "the actual effect of the requirements in question" are not of "general nature" (as claimed by *Raschauer/Ortner*[48]), but contain requirements that specifically regulate service activities. Thus, they fall within the scope of application of the Services Directive.

(65) That this statement is correct may clearly be shown and supported by a simple example: on the one hand a private person applies for the supply drinking water from a river (sec. 9 AWA) that goes beyond the common use pursuant to sec. 8 AWA, or to drain rain water on its parking space (sec. 32 AWA)[49] and on the other hand a company applies for the right to construct and operate a hydropower plant. Although both activities require a permit to utilize the water, nobody would argue that the former activity requires information on "stability and safe discharge of floods concerning dams" or "engine output, annual work capacity and planned residual water quantities". Thus, it is unquestionably apparent that these provisions are not of "general nature", but specifically stipulate requirements addressing the activity of service providers such as claimant.

(66) Requirements in accordance with Art. 9, 10 and 12 as well as Art. 13 Services Directive: Art. 12 of the Services Directive sets forth that:

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[46] EC Handbook, p. 25.
[47] EC Handbook, p. 14.
[48] *Raschauer/Ortner* Wasserkraftwerke, p. 140.
[49] See *Bachler* in Oberleitner/Berger (eds) Kommentar zum Wasserrechtsgesetz[4] § 9 WRG para 2 and *Lindner* in Oberleiter/Berger (eds) Kommentar zum Wasserrechtsgesetz[4] § 32 WRG para 5.

1. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity, Member States shall apply a selection procedure to potential candidates which provides full guaran-tees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.

2. In the cases referred to in paragraph 1, authorisation shall be granted for an appropriate limited period and may not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider. (emphasis added)

(67) Against the background that suitable places to utilize hydropower in an economically viable way are rare in Austria due to the longstanding importance of producing electricity via hydropower plants, water can be described as scarce natural resource demanding special "treatment" with regard to its exploitation. The degree of development of hydropower is more than 70%, i.e. the potential to build new hydropower plants is already low and further decreasing as in the year 2017 211 hydropower plant projects were planned (meaning just a project; applications submitted to the authority or already authorized, but not yet built) and 148 plants were being built or only recently being operated.[50]

(68) Therefore, water constitutes a scarce natural resource pursuant to Art. 12 of the Services Directive. When applying Art. 12 of the Services Directive, Art. 9 and 10 of the Services Directive must be taken into account. These provisions stipulate the conditions of the authorisation schemes.

(69) Pursuant to Art. 10 of the Services Directive, the authorisation scheme must be based on criteria that are non-discriminatory, justified by an overriding reason relating to the public interest, proportionate to that public interest objective, clear and unambiguous, objective, made public in advance, transparent and accessible. Furthermore, with regard to scarce natural resources the authorisation scheme requires even additional criteria that must be taken into consideration. Because of the limitation of authorisations due to the scarcity of natural resources "a procedure for selection from among several potential candidates should be adopted with the aim of developing through open competition the quality and conditions for supply of services available to users" (emphasis added).[51]

(70) It is acknowledged by the respondent authority that sec. 21(3) AWA is not an "open competition", but in fact the renewal procedure set forth in sec. 21(3) AWA does not meet any of the above criteria.

(71) Art. 12(2) of the Services Directive contains also explicit provisions concerning the duration and renewal of such authorisations. It stipulates that "authorisations shall be granted for an appropriate limited period and may not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or any person having any particular links with that provider" (emphasis added). Sec. 21(3) AWA contradicts this provision

[50] See https://www.umweltdachverband.at/themen/wasser/wasserkraft/wk-planungen/ (accessed on 26.09.2019).
[51] See Recital 62 of the Services Directive.

as it confers a clear advantage to the current right holder as it privileges it in the renewal procedures. Furthermore, the design of the renewal procedure already amounts to an "automatic renewal" which is unambiguously prohibited under Art. 12(2) of the Services Directive.

(72) Furthermore, Art. 13 of the Services Directive demands that the "[a]uhorisation procedures and formalities shall be clear, made public in advance and be such as to prove the applicants with guarantee that their application will be dealt with objectively and impartially".

d) Principle of interpreting national law in conformity with Union law

(73) With regard to the principle to interpret national law in conformity with Union law,[52] (as well as with regard to the primacy of Union law[53]) it must be pointed out that this principle demands even "the application of law in an imaginative and innovative manner that goes far beyond the traditional Austrian understanding of the application of law as enforcement of statues".[54] Taking into account the elaborations above, it is apparent that sec. 21(3) AWA must be interpreted in the light of Art. 12 in conjunction with Art. 9 and 10 of the Services Directive which would have required that the phrase "any interested third party" was added after "the current right holder" and that the respondent authority to provide for a competitive, fair, transparent, non-discriminatory and objective authorisation scheme for the re-issuance of expiring water utilization rights by either interpreting sec. 21(3) AWA or sec. 16 or sec. 17 AWA in this light. Furthermore, the authorisation must be granted for an appropriate limited period without being automatically renewed.

e) Direct effect of Art. 12 in conjunction with Art. 9 and 10 Services Directive

(74) However, if the competent authority (or the Administrative Court) does not interpret sec. 21(3) AWA in light of Art. 12 in conjunction with Art. 9 and 10 of the Services Directive, it is clear that Art. 9, 10 and 12 of the Services Directive must be directly applied as they are directly effective.

(75) According to settled case law of the CJEU, a Directive has direct effect conferring rights to an individual, if the following requirements are met:

(i) the time limit given for the implementation of the Directive has expired,

(ii) the national law does not at all or not properly implement the Directive,

(iii) the provisions of the Directive must be sufficiently precise and unconditional, and

(iv) the provisions confer rights to the individual.[55]

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[52] See CJEU C-555/07 (*Kücükdeveci*) ECLI:EU:C:2010:21 para 48; CJEU C-227/09 (*Accardo et al*) E-CLI:EU:C:2010:624 para 49; *Raschauer* Allgemeines Verwaltungsrecht[5] (2016) para 479.

[53] CJEU 15.7.1964 C-6/64 (*Costa v E.N.E.L.*) ECLI:EU:C:1964:66 and CJEU 9.3.1978 C-106/77 (*Simmenthal*) ECLI:EU:C:1978:49.

[54] *Öhlinger/Potacs* EU-Recht und staatliches Recht[4], p. 102.

[55] See e.g. *Öhlinger/Potacs* EU-Recht und staatliches Recht[6] (2017) p. 71 et seq., *Raschauer* Allgemeines Verwal-tungsrecht5 (2016) para 480.

(76) Pursuant to Art. 44(1) of the Services Directive, the Member States had to transpose this Directive into national law before 28 December 2009. In this regard, Austria merely adopted the Federal Services Act[56] which does not implement Art. 9, 10 and 12 of the Services Directive. Consequently, the Austrian legislator also did not transpose said provisions into the AWA.

(77) Art. 12 of the Services Directive as well as Articles 9 and 10 *leg cit* are unquestionably sufficiently precise and unconditional. These provisions also confer rights to the individual that can be relied upon in front of national authorities. Due to lacking correct and timely transposition of provisions of the Services Directive Austria violates its obligations under EU law.

(78) Thus, all requirements for direct effect of provisions of a Directive are met. Therefore, specifically Art. 12 of the Services Directive has direct effect as well as Art. 9 and Art. 10 *leg cit*, and Complainant relied on the individual right conferred by these provisions. However, respondent authority should have to directly applied Art. 9, 10 and Art. 12 of the Services Directive with regard to the re-issuance of water utilization rights. Thereby, the renewal procedure under sec. 21(3) AWA may not have been invoked, due to the primacy of Union law.[57] Thus, the respondent authority should have provided for a competitive, fair, transparent, non-discriminatory and objective authorisation or tendering process for the re-issuance of expiring water utilization rights. Furthermore, the authorisation must be granted for an appropriate limited period without being automatically renewed.

(f) Relationship between the Services Directive and Art. 49 TFEU

(79) Concerning the issue of limited authorisations due to the scarcity of available natural resources, the CJEU has already held in the joined cases C-458/14 and C-67/15[58] with regard to concessions or authorisations to exercise an economic activity on state-owned maritime and lakeside property that **Art. 12 of the Services Directive precludes national measures that permit the automatic extension of existing authorisations without any selection procedure for potential candidates** (emphasis added).[59] Art. 12 of the Services Directive requires a selection procedure "which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure".[60] The CJEU furthermore stated that "the concessions at issue in the main proceedings concern a right of establishment on state-owned land with a view to conducting tourist and leisure-oriented business activities so that the situations at issue in the cases in the main proceedings fall, by

[56] Federal Law Gazette BGBl I No. 100/2001 as amended by BGBl No. 32/2018.
[57] *Raschauer* Allgemeines Verwaltungsrecht[5] (2016) para 481.
[58] CJEU 14.7.2016 C-458/14 and C-67/15 ECLI:EU:C:2016:558.
[59] CJEU C-458/14 and C-67/15 para 57.
[60] One should remember that Art. 10 of the Services Directive sets forth the criteria that an authorisation scheme shall be based on. The criteria shall be non-discriminatory, justified by an overriding reason relating to the public interest, proportionate to that public interest objective, clear and unambiguous, objective, made public in advance, transparent and accessible.

their very nature, within the scope of Article 49 TFEU" (emphasis added).[61] It should be recalled that the term "authorisation schemes" covers "the administrative procedures for granting authorisations, licences, approvals and concessions"[62] and hence the renewal procedure pursuant to sec. 21(3) AWA falls within the scope of this definition.

(80) The CJEU unambiguously stated that *"since such a concession is of certain cross-border interest, its award, without any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession and which are located in other Member States. Such a difference in treatment is, in principle, prohibited by Article 49 TFEU".*[63] (emphasis added)

(81) Against the background of this CJEU case law, it seems unquestionable from an EU law perspective that water and properties necessary to build and operate a hydro power plant constitute scarce natural resources. For this determination it is virtually irrelevant that the CJEU's case dealt with concessions regarding the use of state-owned land.[64] Since [redacted] applied for the renewal of the water utilization right, it is also undisputable that the required cross-border interest is given. Hence, this case law supports Complainant's view that the difference in treatment under sec. 21(3) stipulates a violation of Art. 12 of the Services Directive and – if Art. 12 *leg cit* would not be applicable (*quod none*) – of Art. 49 TFEU.

(82) In this regard it is worthwhile to highlight that the crucial connection between Art. 12 of the Services Directive and Art. 49 TFEU was simply ignored by *Raschauer/Ortner* when citing this CJEU decision (as it would have obviously made their argumentative line rather invalid).

1.3 Art. 49 in conjunction with Art. 106 TFEU and Art. 16 and 20 CFR as well as Directive 2009/72/EC

(83) Against the background of the above, it is clear that, since respondent authority deemed Art. 12 of the Services Directive not applicable, it should have acknowledged that Complainant derives its right to submit an application for the renewal of the water utilization right from sec. 21(3) AWA that is interpreted in conformity with EU law and fundamental rights, particularly Art. 49 TFEU.

(84) Art. 49 TFEU sets forth that:

"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

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[61] CJEU C-458/14 and C-67/15 *(Promoimpresa srl et al)* ECLI:EU:C:2016:558 para 63.
[62] See Recital 39 of the Services Directive.
[63] CJEU C-458/14 and C-67/15 *(Promoimpresa srl et al)* ECLI:EU:C:2016:558 para 65.
[64] See *Raschauer/Ortner* Wasserkraftwerke, p. 140.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular compa-nies or firms within the meaning of the second paragraph of Article 54, under the con-ditions laid down for its own nationals by the law of the country where such establish-ment is effected, subject to the provisions of the Chapter relating to capital." (emphasis added).

(85) It is settled case law of the CJEU that Art. 49 TFEU is directly applicable in the Member States[65] and confers rights on individuals.[66] Hence, individuals can directly rely on Art. 49 TFEU in front of national authorities. Yet, also other provisions that - at least - safeguard interest of individuals concerned (whereby this does not mean "sufficiently individualized" interest) confer individual rights that can be relied upon in front of national authorities.[67]

(86) Neither the respondent authority nor *Raschauer/Ortner* denied that Art. 49 TFEU is applicable, i.e. it is uncontested that the construction and operation of a hydropower plant fall within the scope of the freedom of establishment.[68]

(87) According to settled case law of the CJEU "any national measure which, albeit applicable without discrimination of nationality, is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the Treaty constitutes a restriction within the meaning of Article 49 TFEU".[69]

(88) As already stressed by Complainant, the current provisions under AWA that exclude anybody but the current right holder to apply for a re-issuance of an expiring water utilization right and that such rights may be issued for a fixed period of up to 90 years leads to an exclusive, privileged position of the current right holder allowing it to utilize water for an indefinite number of consecutive periods, as long as the application is timely, the utilization is in line with public interest and corresponds to the state of the art. Therefore, it is more than obvious that the re-issuance procedure envisaged under sec. 21(3) AWA has the undeniable effect of hindering and rendering less attractive the operation of hydropower plants by nationals from other Member States. That this is in fact the case can even be supported by the respondent authority's as well as *Raschauer/Ortner*'s elaborations.

(89) The respondent authority opined that the re-issuance procedure set forth under sec. 21(3) AWA "is not disadvantageous to another interested bidder and thus it does not constitute a violation of Art. 49 TFEU".[70] (One might already question why the term "bidder" was even used if one would like to argue, like the respondent authority did, that no "selection from among several competitors" takes place.[71]) It elaborated further that "the existence of a water utilization facility can never be a disadvantage for another interested bidder particularly as the

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[65] See among many CJEU 23.2.2006 C-253/03 (*CLT-UFA*), ECLI:EU:2006:129 para 12.
[66] See e.g. already CJEU 21.7.1974 C-2/74 (*Reyners*), ECLI:EU:C:1974:68 para 25.
[67] *Öhlinger/Potacs* EU-Recht und staatliches Recht6 (2017), p. 63 et seq.
[68] Decision, pp. 6 et seq. and *Raschauer/Ortner* Wasserkraftwerke, p. 138.
[69] CJEU 1.6.2010 C-570/07 and C-571/07 (*Blanco Pérez*) ECLI:EU:C:201:30 para 53 with further references.
[70] Decision, p. 6 et seq.
[71] Decision, p. 9.

facility cannot be used by the other interested applicant to utilize water".[72] Given the fact that a water utilization facility must be removed if a water right expires without being renewed, the respondent authority stated that "another interested applicant could not in any case (except for purchasing) use the facility of the current water right holder, however, has naturally the right to apply for a water utilization right under the same requirements as any other undertaking and submission of a project".[73]

(90) Like the respondent authority (which negated the violation), *Raschauer/Ortner* also expressly admitted that sec. 21(3) AWA constitutes a restriction of the freedom of establishment. In their view the provision is not discriminatory as everybody must meet the same requirements to obtain the water right for constructing and operating a hydropower plant.

(91) Interestingly, they argue that "even the circumstance that suitable locations are getting rare does not have a discriminatory effect, as the scarcity affects foreign and domestic investors alike". Therefore, they conclude that "the (initial) construction of hydropower plants [...] in Austria's authorisation schemes serves imperative interest of general good and meets the transparency and non-discriminatory requirements under primary EU law".[74]

(92) Also with regard to the temporary water right they admit that "specific circumstances, as for example due to particular short periods, investments may be viewed as less attractive by citizens of EEA-countries which might lead one to consider an indirect discrimination under Union law".[75] However, they argue that the re-issuance procedure is merely a "two-tier update of water utilization rights", consisting of (i) applying for the permit to adapt the water utilization to the latest state of the Art. and (ii) re-issuance of the "updated" water right. This shall constitute the "functional equivalent of "procedures for subsequent imposition of additional or different conditions" pursuant to sec. 21(a) AWA (as well as under other legal acts).[76]

(93) Despite the obvious incongruity to call sec. 21(3) AWA the "functional equivalent" of sec. 21a AWA – for the current case it seems sufficient to bring to the Court's attention one striking distinction, namely that conditions pursuant to sec. 21a AWA may only be imposed if they are proportional whereas under sec. 21(3) AWA any measure must be taken to safeguard public interests – it is important to highlight that *Raschauer/Ortner* in fact highlight the (indirect) discrimination in the following section in a rather explanatory way.

(94) First, they point out that anyone could apply for the construction of a hydropower plant at the same spot as the existing. This would also require the application for the expropriation of the existing hydropower plant including the necessary ground pursuant to sec. 63 lit c AWA. However, they stress the point that an application for expropriation would be unsuccessful anyways since it requires as purpose a general interests, *"in concreto* the promotion of the beneficial use of water", and that the economic interest of operating a hydropower plant does not

[72] Decision, p. 7.
[73] Decision, pp. 6 et seq.
[74] *Raschauer/Ortner* Wasserkraftwerke, pp. 138 et seq.
[75] *Raschauer/Ortner* Wasserkraftwerke, pp. 140 et seq.
[76] *Raschauer/Ortner* Wasserkraftwerke, pp. 141 et seq.

constitute such a general interest. Additionally, they state that the general interest of "promoting the beneficial use of water" would only be given, if the current hydropower plant would not meet the public interest set forth in sec. 105(1) lit i AWA (the undertaking exploiting the motoric power of the public water does not correspond to the fullest possible economic exploitation of hydropower). Howbeit, they mention in a footnote that this circumstance may only occur in cases where the competent water authority failed to act in accordance with sec. 21a AWA.[77]

(95) Second, *Raschauer/Ortner* state that the constitutionally enshrined principle of equal treatment is not violated by the fact that sec. 21(3) AWA entitles the current right holder only to apply for the renewal of the water right.

(96) Third, they elaborate further that even if the term "current right holder" would be not applied under sec. 21(3) AWA and a third party would apply for the renewal of water utilization right, the "Widerstreit"- (opposition) procedure in accordance with sec. 16 or sec. 17 AWA in conjunction with an expropriation application would never lead to the outcome that the third-party-application prevails as its "plan" cannot serve the public interest to a greater extent in the sense necessary for expropriation. In the words of *Raschauer/Ortner* this would be "denkunmöglich" (unthinkable) because the current water utilization right meets the state of the Art. already at the time of submitting the application pursuant to sec. 21(3) AWA.[78]

(97) As *Raschauer/Ortner* point out correctly – although most likely intended differently –**the re-issuance procedure set forth in sec. 21(3) AWA does not allow anybody other than the current right holder to apply for the renewal of the water right under any circumstances; and thus constitutes an unjustified indirect discrimination of Art. 49 TFEU.**

(98) As this violation of Art. 49 TFEU is raised by Complainant since the very first application, it actually agrees with authors in this regard: (i) the "expropriation option" is not a viable one for the current case – the re-issuance of a water utilization right authorising the operation of a hydropower plant does not constitute the necessary general interest required for expropriation. Merely in the case that the applicant wants to build a new hydropower plant and given that the competent authority failed to impose subsequent conditions as set forth under sec. 21a AWA it might be possible to meet the general interest required under sec. 63 lit c AWA; (Ii) also in the EU law conform – for *Raschauer/Ortner* hypothetical – case that a third party is also entitled to apply for the re-issuance water utilization rights of a hydropower plant, they sophisticatedly make the point that even then the third-party application cannot prevail, meaning the current right holder "keeps" its right; (iii) taking said into account, it is more than apparent that they prove their own argument that the constitutionally enshrined principle of equal treatment is self-justified incorrect – the third party is treated differently in this regard and this different treatment is by no means justified.

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[77] *Raschauer/Ortner* Wasserkraftwerke, p. 142.
[78] *Raschauer/Ortner* Wasserkraftwerke, p. 143.

(99) According to settled CJEU case law, "restrictions on freedom of establishment which are applicable without discrimination on grounds of nationality may be justified by overriding reasons relating to the general interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective".[79]

(100) As Complainant has already pointed out, the requirements set forth in sec. 21(3) AWA, meaning timely application, safeguarding of public interest, and correspondence to the state of the Art. ("update obligation") are appropriate for securing the attainment of the objectives of general interest (public interest stipulated in sec. 105 AWA) and by themselves are not going beyond what is necessary to obtain these objectives.

(101) However, the fact that only the current right holder is entitled to apply for re-issuance of the water utilization right does not even serve a general interest, but merely the economic interest of the right holder, hence private interest. It is apparent that also any third party that applies for the re-issuance of the water right may meet the three requirements of sec. 21(3) AWA and thus serve the public interest (or not be awarded with the renewed water utilization right).

(102) In this regard it must be stressed again that limiting the party status to the current right holder constitutes an unjustified indirect discrimination of EU citizens that does not serve an imperative interest of general good in itself, and is also neither capable of satisfying the general interest stated above nor would it be necessary for the fulfilment of these general goods. As Complainant stressed, any third party that would meet these three requirements under sec. 21(3) – timely application, safeguarding of public interest, and correspondence to the state of the Art. – serve the imperative interest of general good equally well.

(103) Furthermore, Art. 106 TFEU is infringed as it stipulates with regard to "special or exclusive rights" that are granted to undertakings by Member States that latter are obligated to not "maintain in force any measure contrary to the rules contained in the Treaties, in particularly to those rules provided for in Article 18 and Articles 101 to 109 [TFEU]". As show, the current re-issuance procedure is a measure maintained although discriminatory and thus in violation of Art. 18 TFEU as well as 102 TFEU if the beneficiary of the non-competitive re-issuance of the water utilisation right is dominant in the Austrian generation market as well as Art. 107 TFEU (see below).

(104) Additionally, that this situation not only violates the constitutionally enshrined principle of equal treatment[80] but also the freedom to conduct a business pursuant to Art. 16 CFR and Art. 6 BLGNR is apparent as the impossibility to even apply for the necessary water utilization rights by anyone else than the current right holder manifestly restricts these freedoms without any justification.

(105) Moreover, Complainant would like highlight that a competitive, fair, transparent, non-discriminatory and objective authorisation or tendering process is by no means something new in the

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[79] CJEU C-570/07 und C-571/07 (*Blanco Pérez*) ECLI:EU:C:2010:30 para 61.
[80] Art. 20 CFR as well as Art. 2 BLGRN and Art. 7 FCA.

internal electricity market. The reference to Directive 2009/72/EC, particularly Art. 7 and Art. 8 *leg cit*, clearly indicated that the re-issuance procedure must meet the criteria set forth in this Directive.

(106) If sec. 21(3) AWA is viewed in the light of unquestionably applicable EU primary law, specifically Art. 49 and Art. 106 in conjunction with Art. 18 (and Art. 107) TFEU and the right guaranteed under Art. 16 CFR as well as the principle of equal treatment,[81] and EU secondary law, namely Directive 2009/72/EC, it must be interpreted as providing for a competitive, fair, transparent, non-discriminatory and objective authorisation or tendering process for the re-issuance of expiring water utilization rights.

(107) Although the respondent authority did not interpret sec. 21(3) AWA in the light of the provisions listed in the former paragraph, it should have not applied sec. 21(3) AWA due to the principle of primacy of EU law, but rather dealt with the claimant's application for the (re-)issuance of the water right in accordance with sec. 9 in conjunction with sec. 11 AWA that should have been nonetheless a competitive, fair, transparent, non-discriminatory and objective authorization or tendering procedure.

2. Conclusion on Party status and obligations in accordance with EU law

(108) As presented above, to conform to EU law sec. 21(3) AWA has to be interpreted in the light of Union law or cannot be applied due to the primacy of EU law.

(109) In any case, the competent authority has to decide the re-issuance of expiring water utilization rights in a competitive, fair, transparent, non-discriminatory and objective authorisation or tendering process.

B. Violation of Art. 107 TFEU

(110) Art. 107(1) TFEU sets forth that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".

(111) Art. 2 no. 38 lit a WFWD defines water services *inter alia* as "all services which provide, for households, public institutions or any economic activity: abstraction, impoundment, storage, treatment and distribution of surface water or groundwater".

(112) The CJEU opined with regard to the concept of "water services" under WFWD that "measures for the recovery of costs for water services are one of the instruments available to the Member States for qualitative management of water in order to achieve rational water use" and it pointed out that this does not mean that Art. 2 no. 38 lit a WFWD "must be interpreted as

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[81] Art. 20 CFR, Art. 7 FCA and Art. 2 BGLNR.

meaning that they all subject all activities to which they refer to the principle of recovery of costs".[82]

(113) The savings generated due to the fact that no obligation of cost recovery is implemented in Austria and that their position is unchallengeable under the AWA – they will not lose their current rights to utilize water for electricity production - allows Austrian hydropower undertakings to gain an advantage in the internal market as other Member States implemented the obligation to pay for these services.

(114) Although the AWA is in line with the case law of the CJEU it seems important to stress that this situation gives them a *de facto* advantage in the internal market of the EU. The lack of obligation to pay for this water service might thus constitute state aid that "distorts or threatens to distort competition" on the internal market.

(115) In the Case SA.35429-2017/C (ex 2013/NN) in relation to the extension of use of public water resources for hydro-electricity generation granted by Portugal to the national operator Energias de Portugal, S.A. (***EDP***), the Commission raised doubts on the possible State aid to EDP in the implementation of the regime of use of water resources. The Commission preliminarily concluded in its opening decision that the possibly low amount paid by EDP for the extension of the right to use public water resources in implementation of Decree-Law No 226-A/2007, if confirmed, would appear as having entailed a selective economic advantage to EDP.[83]

(116) Only after a detailed assessment on the methodologies applied to determine the amount of money paid by EDP to the State the Commission concluded that the transaction was in line with market conditions on the basis of a generally-accepted, standard assessment methodology and therefore the renewal of the right to use water was not a State aid.[84] Please note that the authorisation expressly did not cover the eventual infringement of other provision of the TFEU such as the violation of article 49 TFEU on the freedom of establishment.[85]

(117) In the current case, the Austrian players receiving the economic advantage of the re-issuance of water utilisation right cannot only maintain or reinforce their dominant position in the Austrian market but use the economic advantage received by the Austrian national authorities to unfairly compete in other markets e.g. participating in competitive procedures for hydroelectric water utilisation rights in other Member States, possibly overbidding to obtain the water right.

VI. Applications

For the aforementioned reasons, Complainant makes following

Applications,

and thus calls on the Administrative Court of Styria

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[82] CJEU 11.9.2014 C-525/12 (*Commission/Germany*) ECLI:EU:C:2014:2202 paras 55 and 58.
[83] EC Decision (EU) 2017/1592 of 15. May 2017 on the measure SA.35429 – 2017/C (ec 2013/NN) OJ L 243/5 paras 22 et seq.
[84] EC Decision (EU) 2017/1592 paras 54 et seq.
[85] See EC Decision (EU) 2017/1592 para 9.

(i) to hold a public oral hearing in accordance with sec. 24 PACA;

(ii) to decide on the merits of the case and modify award point I the decision of the Provincial Governor of Styria dated 22 August 2019, ABT13-32.00 L 23/2018, in so far as to grand Complainant party status and to award it with the water utilization right for an appropriate limited period in a competitive, fair, transparent, non-discriminatory and objective re-issuance procedure;

in eventu

(iii) to quash award point I of the decision of the Provincial Governor of Styria dated 22 August 2019, ABT13-32.00 L 23/2018, due to the party status of Complainant and to refer the proceedings back to the respondent authority for awarding the water utilization right for an appropriate limited period in a competitive, fair, transparent, non-discriminatory and objective re-issuance procedure.

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Furthermore, in case the Administrative Court of Styria does not feel capable of granting any of the applications submitted above, Complainant respectfully

requests

that the Court should refer the following questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling in accordance with Art. 267 TFEU:

1) *Do the Articles 9, 10 and 12 of the Services Directive 2006/123/EC require that the re-issuance of a water utilization rights pursuant to sec. 21(3) AWA must be interpreted as that the re-issued water utilization right is awarded in a competitive, fair, transparent, non-discriminatory and objective re-issuance procedure in which any interested person shall have party status, and that such water utilization right be granted only for an appropriate limited period?*

If the answer to Question 1 is in the negative:

2) *Are the Articles 9, 10 and 12 of the Services Directive 2006/123/EC directly applicable with regard to the re-issuance of a water utilization right, because these provisions have direct effect due to Austria's failure to transpose these provisions into national law, and thus sec. 21(3) AWA is inapplicable due to the primacy of Union law, as that the re-issued water utilization right is awarded in a competitive, fair, transparent, non-discriminatory and objective re-issuance procedure in which any interested person shall have party status, and that such water utilization right be granted only for an appropriate limited period?*

If the answer to Question 2 is in the negative:

3) *Do the Articles 49 and Art. 160 TFEU and fundamental rights pursuant to Art. 16 and 20 CFR as well as secondary EU law, namely Directive 2009/72/EC Union law require that the re-issuance of a water utilization rights pursuant to sec. 21(3) AWA must be interpreted as that the re-issued water utilization right is awarded in a competitive, fair, transparent, non-discriminatory and objective re-issuance procedure in which any interested person shall have party status, and that such water utilization right be granted only for an appropriate limited period?*

If the answer to Question 3 is in the negative:

4) *Do the Articles 49 and Art. 106 TFEU in conjunction with fundamental rights pursuant to Art. 16 and Art. 20 CFR as well as secondary EU law, namely Directive 2009/72/EC law require that sec. 21(3) AWA is inapplicable due to the primacy of Union law, and that the re-issuance of a*

water utilization rights pursuant to sec. 9 and sec. 10 AWA must be interpreted as that the re-issued water utilization right is awarded in a competitive, fair, transparent, non-discriminatory and objective re-issuance procedure in which any interested person shall have party status, and that such water utilization right be granted only for an appropriate limited period?

If the answer to Question 4 is in the negative:

5) *Do the Service Directive 2006/123/EC and the fundamental principles of freedom of establishment, non-discrimination and safeguarding competition, respectively laid down in Articles 49, 56 and 106 TFEU, and the precept of reasonableness implicit therein, require an interpretation that precludes national legislation under which the re-issuance to use a scarce resource - as water is - to carrying out an economic activity without any competitive, fair, transparent, non-discriminatory and objective procedure in which any interested person shall have party status?*

Vienna, 26 September 2019 [redacted]