

**CLIFFORD
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REIDLINGER SCHATZMANN

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Rome/Wien, 30 July 2020

To: Ms. Ditte Juul-Jørgensen
Director-General of
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[REDACTED]
Directorate E: Modernisation of the Single Market
Directorate-General for Internal Market,
Industry, Entrepreneurship and SMEs
European Commission
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To: Ms Kerstin Jorna
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[REDACTED]
Energy and Environment
Directorate-General for Competition
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To: Mr Hubert Gambs
Deputy Director-General
of Directorate-General
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European Commission
1049 Bruxelles
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[REDACTED]
Water Logistics and Water Economy
Stubenring 1
1010 Vienna
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To: Mr. Olivier Guersent
Director-General
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European Commission
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[REDACTED]
Provincial Governor of Styria
Hofgasse 15
8011 Graz-Burg
Austria

To: Mr. Carles Esteve Mosso
Deputy Director-General State aid
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Place Madou/Madouplein 1
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[REDACTED]
Provincial Governor of Tyrol
Eduard-Wallnöfer-Platz 3
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Re: Incompatibility of the Austrian hydropower regime with European law

Dear Madam or Sir,

Reference is made to our letters dated 29 May, 18 October 2019 and 2 December 2019 (the "Letters") to inform you on further developments in connection with two cases of incompatibility of the current Austrian hydropower regime with fundamental principles set forth in the Treaty on the Functioning of the European Union ("TFEU") and other provisions of European law.

As explained in our Letters, the competent Austrian provincial governors had formally rejected the applications submitted by [REDACTED] (" [REDACTED] [REDACTED]

[REDACTED]
[REDACTED]

[REDACTED] based on the grounds that sec. 21(3) of the Austrian Water Act ("AWA") does not infringe European Union law.

[REDACTED] had challenged both these decisions before the respective Administrative Courts of Styria and Tyrol arguing that the decisions by the provincial governors infringed both:

- i. EU 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, as well as Directive 2009/72/EC; and
- ii. Articles 9, 10 and 12 of the Services Directive

Against the background of the European Commission's doubts raised 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.* in the state aid case SA.35429-2017/C (ex 2013/NN), [REDACTED] additionally highlighted that savings generated due to the fact that water power can be utilized in Austria – in comparison to various other Member States – without any cost recovery allows Austrian energy companies to use this economic advantages to unfairly compete in the internal market, arising to a violation of Art. 107 TFEU.

Nevertheless, both Administrative Courts upheld the rejection decisions of the competent authorities

In the judgment received on 8 June 2020, the Tyrolean Administrative Court did not even take European Union law into account as it based its judgment on formalistic grounds: It ordered [REDACTED] to provide further documents within merely two weeks (e.g. plans of the “new” project, or listing and confirming that the owner of water, fishery and forestry rights affected had been able to recognize the project) – information [REDACTED] had unsuccessfully requested from Verbund in April 2019. Due to the fact that the fulfilment of such a request was unreasonable from the outset, the Tyrolean Administrative Court was able to reject the [REDACTED] appeal based on the grounds that the order had not been fulfilled. Concerning the request to refer the European law questions to the Court of Justice of the European Union (“CJEU”) for a preliminary ruling, the Tyrolean Administrative Court explicitly stated that *“in light of the outcome of the proceedings it must be held that the questions of European law have not yet arisen in the current case”*. By declaring European law irrelevant in the specific procedural situation, coupled with the formalistic approach ([REDACTED] chances of submitting the full set of documents within the two-week deadline set by the court were practically zero) the Tyrolean Administrative Court made it de facto impossible for [REDACTED] to bring the European law question before the Austrian Supreme Administrative Court when challenging that judgment. [REDACTED] has therefore decided not to appeal that judgment.

Although the Styrian Administrative Court also rejected [REDACTED] appeal in its judgment received on 22 June 2020 by concluding that **European law is not infringed**, it at least showed awareness of the principle of interpreting national law in conformity with European Union law – even though ultimately arriving, in [REDACTED] view, at the wrong conclusion. The Styrian Administrative Court explicitly held that sec. 21(3) of the AWA, which entitles exclusively the current holder of a water right to seek reissuance of the rights in the absence of any tender or competitive authorisation procedure, **does not constitute a discrimination, hence not amount to a violation of EU law**. It argued that any third party might apply for a new project – even at the same spot as the existing power plant – since it is possible to conclude a contractual agreement with the current owner (e.g. to buy the hydropower plant) or to apply for the expropriation of property rights under the AWA. In light of the CJEU’s recent judgment of 28

May 2020 C-727/17 *Eco-Wind Construction*, the Styrian court rejected the relevance and application of the Services Directive.

Ultimately, the Styrian Administrative Court concluded that [REDACTED] cannot apply for the re-issuance of a water right pursuant to sec. 21(3) AWA and that this provision is not discriminatory under European law, particularly Art. 49 TFEU. Irrespective of acknowledging European law, the Styrian Administrative Court declared that an ordinary appeal to the Supreme Administrative Court is inadmissible, since no question of fundamental importance within the meaning of Art. 133(4) of the Austrian Federal Constitution was to be assessed in its view, as its decision neither deviated from the previous case law of the Supreme Administrative Court nor was there any lack of relevant case law. Furthermore, it stated that the case law of the Supreme Administrative Court in this regard was not inconsistent nor were there any other indications of a fundamental significance of the legal issue to be resolved.

In light of the apparent non-conformity of the Austrian re-issuance procedure for water utilization rights set forth in sec. 21(3) AWA with European law, particularly Art. 49 TFEU in conjunction with Art. 106 TFEU as well as fundamental rights guaranteed by the CFR, it is astonishing that the Styrian Administrative Court reached that conclusion, since there is no settled case law of the Supreme Administrative Court in this regard. Furthermore, it must be pointed out that the Styrian Administrative Court did not acknowledge the crucial fact of the scarcity of the resource of water and/or suitable places to build and/or operate a hydropower plant in an economically viable way.

Also the argument that it is possible to purchase a hydropower plant is by no means a justification for discrimination under European law. The same is true of the “expropriation-option”. In order for a third party applicant to prevail with a new plant against an existing hydropower plant, it would have to prove that a new hydropower project yields overriding advantages in the public interest or is undoubtedly of greater importance than the water right to be expropriated (sec. 60 et. seq. AWA). Due to the facts that (i) the existing hydropower plant must already meet the current state of the art when applying for the re-issuance of this right and that (ii) the competent water authorities are obligated to ensure that public interest (e.g. no waste of water, the utilization of the kinetic energy of water to its fullest possible economic potential, or no substantial impact of the ecological status of the water body)

are adequately protected even if the operator complies with the conditions stipulated in the awarded authorisation, it is virtually impossible that a new project prevails. Against this background, it is clear that expropriation is impossible and thus, the current water right holder is comprehensively and indefinitely protected against third party applications, which unquestionably has the effect of substantially impairing the chances of third parties from other member states such as [REDACTED] from entering the market.

[REDACTED] has therefore decided to submit an extraordinary appeal against this judgment to the Supreme Administrative Court of Austria, again with a suggestion to submit certain questions to the CJEU for a preliminary ruling under Art 267 TFEU.

This letter ultimately aims to update the European Commission and reiterate that, in spite of the ongoing infringement procedure, the Austrian provincial authorities and administrative courts infringed EU fundamental principles and laws; on one hand, by protecting the perpetuation of the current right holders' monopoly-like positions in the Austrian hydropower sector and, on the other hand, by preventing access in the market by [REDACTED] and any other potential European player. As a consequence, the reported actions are causing significant damages not only to [REDACTED] but also to the very functioning of the European Single Market in compliance to EU fundamental principles.

Should you need any further information or clarifications, please do not hesitate to contact us.

Yours faithfully,





Date/heure - Date/time - Datum/zeit:

04-08 '20 14:17

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COMMISSION EUROPÉENNE

04 AOUT 2020

LIE Djörn

Initiales & signature - Initials & signature - Initialen & Unterschrift