

**CLIFFORD  
CHANCE**

Ref: Ares(2023)375970 - 19/01/2023  
**REIDLINGER SCHRITZMANN**

Privileged and confidential

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Rome/Vienna, 18 October 2019

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To: Mr. Timo Pesonen  
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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 letter dated 29 May 2019 (the "Letter") 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. Thank you for your replies of 1 [REDACTED]

[REDACTED] respectively acknowledging the receipt of our submission.

The information provided herein might also be relevant in the context of the infringement procedures opened by the European Commission on 7 March 2019 and aimed at ensuring that public contracts in the hydroelectric power sector of eight Member States (including Austria) are awarded and renewed consistently with European law.

As explained in more detail in the Letter, [REDACTED]

[REDACTED]

The applications are essentially based on the grounds that sec. 21(3) of the Austrian Water Act ("AWA"), the provision 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, should be:

- i. interpreted in conformity with European law, namely Directive 2006/123/EC<sup>1</sup> ("Services Directive"), Art. 49 and 106 of the TFEU, fundamental rights and freedoms granted by the Charter of Fundamental Rights of the European Union and Directive 2009/72/EC<sup>2</sup>; or, *in eventu*
- ii. declared inapplicable both due to the principle of primacy of European law and directly applying provisions under EU law having the effect of conferring rights to an individual.

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<sup>1</sup> Directive 2006/123/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.

<sup>2</sup> 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.

Pursuant to sec. 73 of the Austrian General Administrative Procedure Act and sec. 8 of the Austrian Proceedings of Administrative Courts Act, the competent authorities must decide within six months from receipt of an application.

The Tyrolean and Styrian authorities (the "Austrian authorities") received the application on 9 October 2018 and, therefore, in light of the applicable law, they should have served the decision to [REDACTED] by 9 April 2019.

However, to date, the Tyrolean authority, as far as we are aware, has not yet formally closed the proceedings with a decision. No such decision has been sent to EGP's legal representatives so far, i.e. more than six months after the statutory deadline under Austrian procedural law.

The water utilisation right of *Kraftwerk Bösdornau* will expire on 31 December 2019 and, in accordance with sec. 21(3) AWA, EGP is neither entitled to apply for the (re-)issuance of that right nor would its application prevail over a later application by the current water right holder (VERBUND Hydro Power).

As a consequence of the legal situation under the AWA and the dilatory approaches by the Austrian authorities, [REDACTED] not the only entity to suffer heavy damages, because it is prevented from participating in (and therefore, from winning) a competitive, open, transparent and well-regulated authorisation procedure for the re-issuance of any Austrian water utilisation right, but ultimately so are all other potential competitors as a whole, both on the Austrian and the European Single Market. In fact, the Austrian hydropower regime forecloses any other European player from participating in the process of awarding expiring water utilisation rights.

The Styrian authority, instead, adopted its final decision with more than four months of delay, on 22 August 2019 and served it to [REDACTED] on 3 September 2019. With the decision, the Styrian authority formally rejected [REDACTED] application of 4 October 2018 by refusing to grant the applicant a party status under both Austrian and EU law.

In [REDACTED] opinion, by adopting this decision, the Styrian authority 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.

For these reasons, on 26 September 2019, [REDACTED] challenged the unfavourable decision issued by the Styrian authority before the Administrative Court of Styria (the "Complaint").

More specifically, [REDACTED] contested the decision because it:

- i. refused to grant the applicant a party status; and
- ii. denied the right of [REDACTED]  
[REDACTED]  
[REDACTED]

The latter reason, raised by [REDACTED] in the Complaint, is exactly the same reason that underpins the European Commission's decision to open the infringement procedure, *i.e.* the request that the award or re-issuance of water utilisation rights be carried out through a competitive, open, transparent and well-regulated tender procedure in compliance with the Services Directive and the freedom of establishment as well as the whole of European law and decision-making practice of the European Commission and European Court of Justice.

This is to underscore not only the unity of purpose of the interests in a fair and correct application of the EU law that the European Commission and [REDACTED] have, but also the significant and substantial contribution that the Company could give in the context of the infringement procedure by offering a material example of incorrect conduct by the Austrian federal government and the competent provincial authorities, should the European Commission deem it appropriate to involve [REDACTED] in its scope.

Moreover, in the Complaint [REDACTED] pointed out that the provision on which the decision is based, *i.e.* the above-mentioned sec. 21(3) of the AWA, infringes Art. 107 TFEU. In fact, the re-awarding of the water utilisation right without any competitive procedure provides a selective economic advantage which it would not be available under normal market conditions to the beneficiary, distorting competition by favouring certain undertakings and affecting trade between Member States in the European market of energy generation and ancillary services, since Austria is a relevant part of this market and is strictly interconnected with other Member States.

Finally and in the alternative, in case the seized Administrative Court deemed itself not capable of granting any of the applications submitted, [REDACTED] requested it to refer some questions related to the proper application and the uniform interpretation of the relevant EU fundamental principles and law to the Court of Justice of the European Union.

For a more detailed description of the grounds of the Complaint, see the attached English courtesy translation as well as a copy of the German-language original of the Complaint submitted to the Administrative Court of Styria under Annex 3 and Annex 4.

Therefore, this letter ultimately aims to update the European Commission that, in spite of the ongoing infringement procedure, the Austrian authorities are still acting against and thereby infringing 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. Consequently, 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,



C L I F F O R D  
C H A N C E

REIDLINGER SCHATZMANN

TABLE OF ANNEXES

3. English courtesy translation of the [REDACTED]  
[REDACTED]
4. Copy of the original German-language version of the [REDACTED]  
[REDACTED]  
[REDACTED]