

GLI GLOBAL
LEGAL
INSIGHTS

Energy

2023

11th Edition

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glg global legal group

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Austria

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Overview of the current energy mix, and the place in the market of different energy sources

The Austrian internal energy supply is based on a balanced mix of energy sources.

An estimated one-third of Austria's energy needs are supplied by domestic production and the remainder is imported from abroad. Due to Austria's topography and other factors, 85 per cent of national primary energy production is derived from renewable sources, most notably from hydropower and biomass. Hydrocarbons make up the majority of imports. Therefore, the primary energy sources used to cover Austria's energy consumption are diverse: in 2021, approximately 34.5 per cent oil, 22.7 per cent gas, 31.4 per cent renewable energies, 7.6 per cent coal, and 1.9 per cent combustible waste were used. Imports account for the remaining 1.9 per cent. As a result of the federal law for a non-nuclear Austria, the production of nuclear energy has been banned in the country since 1978.

According to this, hydrocarbons (oil and gas) still dominate Austria's energy mix. Austria produces oil and gas in economically relevant quantities, the amounts produced covering approximately 10 per cent of the domestic demand annually, while the remainder is imported. The security of supply can be ensured by diversifying the sources of supply. As of 2021, oil imports come from 12 different countries, of which Kazakhstan, Libya, and Iraq are the most important. There have been no oil imports from Russia since February 2022.

In 2021, the consumption of heating oil increased by 6.8 per cent compared to the previous year. As a consequence of the COVID-19 pandemic, fuel consumption decreased in 2020 and 2021 in comparison to previous years. The consumption of fuel has recently recovered to a normal level as a result of the discontinuity of pandemic-induced curfews.

Austria imports approximately 80 per cent of its gas from Russia. This dependency, which has grown over decades, cannot be changed either immediately or within a short period of time. Moreover, this situation is considered extremely critical, given the fact that the gas flow from Russia has been significantly reduced since mid-2022 as a result of the Russian-Ukrainian war. Therefore, efforts have been intensified to diversify the supply portfolio of gas and to secure gas in storage units for the cold winter period. This war-related circumstance and Austria's dependency on Russian gas prompted the Austrian Parliament to pass the Gas Diversification Act (*Gasdiversifizierungsgesetz 2022*, "GDG") as well as an amendment to the Austrian Gas Act (*Gaswirtschaftsgesetz 2011*, "GWG") introducing a strategic gas reserve (please refer to the "Developments in legislation or regulation" section below for more information).

Almost 85 per cent of Austria's domestic primary energy production is based on renewables, putting Austria at the forefront of this sector. With the government's efforts in promoting

renewable energy, several other renewable energy sources have gained importance over the past few years, including wind energy, geothermal energy, and solar energy. However, the share of renewables in Austria's gross final energy consumption accounts for only approximately 31.4 per cent.

When analysing the Austrian energy market, it is clear that it has become noticeably more competitive: in 2021, 332,985 households and businesses changed their electricity or gas supplier, almost as many as in the record-breaking year of 2019 (354,200). During the first quarter of 2022, 132,433 electricity and gas consumers changed their electricity or gas provider. In 2021, the switching rates for electricity were 4.2 per cent, and 5.6 per cent for gas.

Changes in the energy situation in the last 12 months that are likely to have an impact on future direction or policy

As a consequence of the onset of the Russian-Ukrainian war in February 2022, Austria's energy situation has changed dramatically. High prices for all kinds of energy sources (gas and electricity as well as biomass and pellets) have triggered political appeals for restrictions on energy consumption and the preparation of emergency measures. For example, the Austrian Gas Price Index (*Österreichische Gaspreisindex*, "ÖGPI") rose by 36.4 per cent in September 2022 compared to the previous month. Compared to September 2021, the ÖGPI is 376.5 per cent higher. Generally, Austria's dependency on Russian gas, and the increase in gas and electricity prices triggered by the gas shortage and the price-building mechanism in the European wholesale electricity market, strengthened the political movement to reduce the dependency on hydrocarbons and promote renewable energy sources.

On 31 March 2022, the crisis cabinet of the Austrian federal government declared the so-called "early warning level" (*Frühwarnstufe*) of the emergency plan concerning Austrian gas supply. This stage was declared at a time when there were concrete indications pointing to a deterioration in gas supply. The early warning level primarily involves even more detailed monitoring of the gas market in consultation with market participants (e.g., large consumers) by E-Control, the Austrian regulatory authority for the electricity and gas market.

Developments in government policy/strategy/approach

Clean energy

Austria must fulfil both the European energy policy-related objectives as well as its own energy strategy objectives. In June 2019, the EU enacted a comprehensive update of its energy policy framework to facilitate the transition away from fossil fuels towards "cleaner energy" and to deliver on the EU's Paris Agreement commitments for reducing greenhouse gas emissions. The completion of this new energy rulebook – the Clean Energy for all Europeans Package – marks a significant step towards the implementation of the energy union strategy, adopted in 2015. The programme aims to promote energy efficiency, security of supply, renewable energy development, and emissions reduction at the same time.

To act in line with the new EU energy package, the Austrian government initiated a climate and energy strategy called "#mission2030" in June 2018, setting out strategies to cope with the ambitious 2030 targets. Furthermore, the Austrian federal government aims to achieve a climate-neutral Austria by 2040. Building on this, the current government programme includes the topics of enhancement of renewable energies in Austria's total energy consumption, mobility services, infrastructure measures, and fleet decarbonisation in road transport. It should be noted, however, that this government programme did not include concrete steps for achieving many of these objectives.

In December 2018, Austria submitted its integrated national energy and climate plan to the EU Commission, in accordance with the Regulation (EU 2018/1999) on the Governance of the Energy Union and Climate Action. In June 2019, the EU Commission criticised this plan and thus Austria for insufficient efforts to reduce climate change. Austria's strategies on how to participate in the goal of achieving a reduction of 40 per cent of CO₂ by 2030 were deemed not enough. EU Commissioner Miguel Arias Cañete criticised the lack of concrete information and measures on how Austria intends to reduce its greenhouse gas emissions. Brussels also complained about a lack of information on the necessary investments and their financing, which are needed to improve the climate balance. Other criticisms pertain to non-concrete energy efficiency plans and the lack of integration of agriculture.

Taking into consideration the prior criticism, the Austrian federal government submitted its clear and comprehensive plan to Brussels at the end of 2019, which outlines the measures that Austria will take to achieve its 2030 climate targets.

In order to minimise oil consumption, the Austrian government launched an initiative called "away from oil" to support households, municipalities, and businesses in switching from oil-fired heating systems to renewable alternatives. Approximately 14 per cent of Austria's heating systems are oil-fired, amounting to approximately 600,000 installations. As part of the restructuring offensive for private individuals and companies, €650 million was made available in 2021/2022 for this campaign. This total includes €400 million in funding for boiler replacement and the "away from oil" campaign. In addition to the federal subsidy, the Austrian provinces support the switch to environmentally friendly heating systems with their own subsidy programmes.

By 2 August 2021, 6,657 applications for subsidies had been submitted and due to its great success, this initiative was continued. This project, together with the ban on the use of heating oil in newly built homes under provincial building laws, will lead to an effective reduction of oil-fired heating systems in Austria.

Developments due to the Russian-Ukrainian war

Due to the Russian-Ukrainian war, the Federal Ministry for Climate Protection, Environment, Energy, Mobility, Innovation, and Technology ("BMK") commissioned the Austrian Energy Agency in 2022 to conduct an analysis on Austria's phase-out from Russian natural gas. The aim of this study was to point out strategic options for action that Austria would have to adopt in order to cease its dependency on Russian gas by a certain point in time. The analysis concluded that Austria's phase-out of Russian gas would be theoretically possible by 2027 if: (i) gas consumption was reduced by 29 TWh by 2030 (this would require a drastic reduction in the popular method of gas-powered heating in Austria, resulting in half of all gas-powered heating systems being switched to "green alternatives" by 2030. In addition, the industry would have to rely heavily on renewable energy sources and take drastic measures to increase energy efficiency); (ii) gas production from biogas and green hydrogen was increased by 14 TWh by 2030 (by expanding biomethane production in Austria and feeding these volumes into the gas grid, dependency on gas imports can be reduced); and (iii) gas imports from other countries were increased by 20 TWh by 2030, especially gas imports from Norway or imports of liquefied natural gas. However, this analysis is described as a "nice calculation" by representatives of the energy industry as well as by the opposition, since it is merely theoretical and the Austrian Energy Agency is not really independent but reports to the Federal Minister for Climate, who is part of the presidium of this association.

Moreover, the BMK launched the so-called "mission 11" initiative in September 2022 in order to reduce Austria's energy consumption by 11 per cent. "Mission 11" focuses on the "little

things in everyday life” and therefore includes numerous tips for households to get into the desired “energy-saving mode”. In addition, the Austrian federal government introduced the so-called “climate bonus” (*Klimabonus*) in 2022 to deal with the rising prices of electricity and gas more effectively. With this bonus, every adult receives €500 from federal funds, regardless of income. This measure has also been strongly criticised by the public.

Developments in legislation or regulation

Clean energy

Based on Commission proposals published in November 2016, the Clean Energy for all Europeans Package consists of eight legislative acts. All new rules have been enacted since mid-2019; EU countries, including Austria, have between one and two years to transpose the new directives into national law.

The changes will bring considerable benefits from a consumer, environmental, and economic perspective. They also underline EU leadership in tackling global warming and provide an important contribution to the long-term strategy of achieving carbon neutrality by 2050 proposed by the EU.

After the EU Commission presented its climate and energy policy in November 2016, under which all EU Member States would be required to further reduce greenhouse gas emissions and increase energy efficiency by 2030, Austria passed a minor green electricity amendment package, which included several amendments in various Austrian laws. This package simplified administrative procedures and increased their efficiency. It also focused on the promotion of solar systems by adjusting rules and regulations enabling the joint construction and operation of solar system plants at apartment housing that provides an independent electricity power plant for multiple households living in such buildings. Moreover, additional funds were made available for wind power plants, solar system plants, small hydropower plants and biomass plants.

This amendment package, however, did not aim at an overall adjustment of the Austrian renewable funding regime to the EU Commission’s guidelines of environmental state protection and energy aid, nor at responding to other structural problems.

To implement the goals of the above-mentioned #mission2030 and to achieve the planned climate neutrality of Austria in 2040, the Austrian Parliament – after a six-month delay – passed the Renewable Energy Expansion Act (*Erneuerbaren-Ausbau-Gesetz*, “**EAG**”) on 7 July 2021, with the necessary two-thirds majority. This law was published in Federal Law Gazette 150/2021 on 27 July 2021. Pursuant to constitutional article 103 (1) EAG, most of the provisions contained in the EAG became effective on the day following the date of promulgation. Since the second part of the first main section of this Act contains rules on granting a market premium for the generation of electricity from renewable sources (subsidies), this part is subject to the approval of the EU Commission according to article 108 (3) Treaty on the Functioning of the European Union. The EU Commission approved this part of the EAG at the end of 2021. However, the approval was only granted on the condition that strict requirements are met. Therefore, the EAG had to be amended again in the National Parliament.

The EAG is one of the central instruments for the further evolution of the renewable energy sector. The EAG pursues the goal of increasing electricity production through renewable energy by 27 TWh by 2030 (11 TWh photovoltaics, 10 TWh wind power, 5 TWh hydro-power, 1 TWh biomass). This corresponds to an increase of 50 per cent of the existing renewable power capacity in Austria. To ensure that this increase can be implemented, the

EAG provides a suitable subsidy system. Until 2030, €1 billion shall be annually invested in the expansion of renewable energy. Furthermore, the EAG introduces the model of so-called “energy communities”. The idea is to have two different systems so that as many people as possible can benefit from it; namely, “renewable energy communities”, which enable the joint use of locally produced renewable energy, for example, in the neighbourhood, in the settlement, etc., and “citizen energy communities”, which realise the joint use of renewable energy on a supra-regional level by several users joining together to form a virtual community. Moreover, the EAG follows the approach of social justice. Not only are low-income households exempt from green electricity charges, but even households with a low income that do not fall into this category will pay a maximum of €75 a year. More than 550,000 households should benefit from these measures. Further, the EAG provides investment grants to intensify the expansion of green hydrogen and green gas. This is intended to make a significant contribution to the decarbonisation of the industry. In addition, the EAG supports the domestic industry with €500 million to remain competitive and to provide the basis for the “green transformation” of the domestic industry.

The Renewable Heat Act (*Erneuerbaren-Wärme-Gesetz*, “EWG”), which is part of the Austrian Heat Strategy, was submitted for appraisal on 14 June 2022 and its entry into force is now eagerly awaited. This law aims to ban central or decentralised heating systems in new buildings that can be operated with fossil fuels from 2023. By 2035, all coal and oil heating systems are to be decommissioned. From 2040, Austria aims to achieve complete climate neutrality. This law therefore serves the decarbonisation of “space heating”. Likewise, all fossil-powered gas heating systems are to be decommissioned by this date.

Developments due to the Russian-Ukrainian war

In March 2022, the Austrian Parliament passed an amendment to the GWG introducing a strategic gas reserve (*strategische Gasreserve*) aiming to secure gas in storage units for the cold winter period. The procurement and management of the strategic gas reserve have been entrusted to the Austrian Market and Distribution Area Manager (*AGGM Austrian Gas Grid Management AG*, “AGGM”). AGGM has founded a subsidiary (i.e., *ASGM Austrian Strategic Gas Storage Management GmbH*, “ASGM”) for the exclusive purpose of procuring the strategic gas reserve. The strategic gas reserve was procured via two tenders and has a volume of 20 TWh, since natural gas is still very popular in household heating and is also used to a considerable extent for district heating. Thermal power generation based on natural gas is also necessary as a backup for power shortages and the stabilisation of the network. As of 1 November 2022, the entire 20 TWh of gas of the strategic gas reserve will be available.

In addition, big gas consumers (industry) are allowed to store 50 per cent of their yearly gas consumption, whereby this quantity does not fall under gas-related emergency measures but is reserved for a specific company. In addition, a further amendment to the GWG (i.e., section 104/4 GWG) made it possible for gas storage undertakings to administer the storage users fully or partially systematically unused and booked gas storage capacities (“use-it-or-lose-it” principle). Subsequently, storage undertakings must market the withdrawn capacities. This amendment to the law aims to ensure that these capacities are used for security or supply reasons. Moreover, this amendment introduced the possibility that storage undertakings lose their rights as storage undertakings if they violate certain obligations provided for in section 104a/1 GWG (e.g., if they do not withdraw the systematic unused and booked capacity from the storage user according to the process described above or do not market this withdrawn capacity immediately). For example, this was executed against storage undertakings of the gas storage facility Haidach (“**UGS Haidach**”), which is situated in Austria. UGS Haidach

is one of the largest natural gas storage facilities in Central Europe and can store up to 2.9 billion cubic metres of natural gas. Furthermore, it is now prescribed that each storage facility located in Austria shall be connected to the Austrian gas grid until the end of 2022. This also applies to UGS Haidach, which has so far only been connected to the German gas grid.

Furthermore, in June 2022, the National Parliament passed the GDG with the objective of facilitating the phase-out of Russian natural gas. This law aims to ensure natural gas diversification and the retrofitting of plants to alternatives using other energy sources. Therefore, a total of €100 million will be made available each year from 2022 to 2025 as compensation for the additional costs incurred. According to the explanatory notes of this law, this solely concerns costs incurred by companies, for example, for pipeline rights when transporting natural gas of non-Russian origin to Austria or when non-Russian natural gas is used, unless climate-friendly, renewable energy sources or district heating are replaced. In addition, this law promotes the retrofitting of energy production plants in the industrial and energy sector that enables alternative operations with energy sources other than natural gas. Details for the use of the funds, the procedure, etc., are to be laid down in guidelines yet to be issued.

Other developments

On 1 January 2021, by way of an amendment to the Austrian Electricity Sector Act (*Elektrizitätswirtschafts- und organisationsgesetz 2010*, “**EIWOG**”), the legal basis for the provision of grid reserves (capacity mechanisms) was extended with a view to full compliance with EU State aid rules. The grid reserve introduced is intended to ensure that sufficient generation and consumption capacities are available at all times in order to remove bottlenecks in the transmission grid. Grid reserves are reserves for additional generation capacity or reducible consumption capacity, which can be activated for congestion management. The demand for grid reserves is determined in an annual system analysis by the control area manager in accordance with section 23a EIWOG. It shall be determined until 31 December of each calendar year for a two-year period starting on 1 October of the following calendar year. The grid reserve identified as necessary is to be procured in a transparent, non-discriminatory, and market-oriented tendering process in compliance with section 23b *et seq.* EIWOG, by the control area manager. Upon approval by the regulatory authority, grid reserve contracts shall subsequently be concluded between the control area manager and the successful bidders. In return for the availability of the reserve capacity, the contracted market parties receive a remuneration corresponding to their bidding price. Activations of the units in the grid reserve are remunerated separately. On 28 June 2021, the EU Commission approved Austria’s plans to establish a network reserve for the Austrian electricity market under EU State aid rules. The temporary measure will be in force until the end of 2025 and will contribute to safeguarding a secure network operation and a sufficient electricity supply in Austria, without unduly distorting competition in the Single Market.

Judicial decisions, court judgments, results of public enquiries

Decisions of the Austrian regulatory authority E-Control can be challenged with the Federal Administrative Court (“**BVwG**”) and an ongoing appeal to the Constitutional Court (“**VfGH**”), the Supreme Administrative Court (“**VwGH**”) or both, depending on the issues raised. Fines due to an infringement of energy laws are imposed by the competent district general administrative authority. Such decisions can be challenged in front of the competent Provincial Administrative Court, with subsequent appeal possibilities again to either the VfGH or VwGH.

In the last 12 months, there has been no decision by the BVwG, VfGH or VwGH that has led to serious changes in the field of energy law.

A decision that did not lead to any legislative changes but had an impact on energy law practice is decision OGH 3.3.2022, 5 Ob 114/21g of the Austrian Supreme Court of Justice. The case concerned a wind farm operator who had to reduce the amount of electricity fed into the grid by his wind turbines due to an order of the Austrian control area manager (*Austrian Power Grid AG*, “**APG**”) under section 23 (9) ElWOG. The reason for this was that, at certain points, too much electricity was fed into the grid, creating the risk of a blackout due to grid overload. Therefore, APG ordered a reduction in the amount of electricity fed into the grid for the next few hours. As a result, the generator suffered a loss of €12,400 and sued APG for payment. Section 23 (9) ElWOG provides that APG is entitled to issue an order restricting the amount of electricity fed into the grid and thus must pay an appropriate fee for the loss. However, section 23 (9) ElWOG does not explicitly stipulate to whom this order must be issued. In the case at hand, the generator was not directly informed by APG to reduce the quantity of electricity. Instead, the order was received by the responsible distribution system operator. APG argued that a claim for reasonable compensation within the meaning of section 23 (9) ElWOG only exists if the generator is directly ordered to reduce the quantity of electricity. In the end, APG was not successful with this argumentation and the generator received the compensation. The Supreme Court of Justice ruled that the applicability of section 23 (9) ElWOG does not necessarily require that the control area manager address the order directly to the generator. The communication of the content of the order and its simultaneous specification by the distribution system operator also constitutes an order by the control area manager within the meaning of section 23 (9) ElWOG.

One measure that arose due to the massive increase in energy prices and the accompanying public pressure on politicians is the so-called “electricity-cost-brake” (*Stromkostenbremse*). At the beginning of September 2022, the Council of Ministers (the body of all government members and state secretaries) passed this measure to curb the massive increase in costs for household customers and low-income households. The electricity-cost-brake relieves a household by an average of about €500 per year. The Austrian federal government provides around €3–4 billion, depending on the development of energy prices. The electricity-cost-brake is expected to take effect on 1 December 2022 and will remain in place until 30 June 2024. Up to a basic consumption of 2,900 kWh of electricity per year, the energy price is to be set at a maximum of 10 cents/kWh (net), regardless of the number of household members. This means that households will only pay an energy price of about 10 cents/kWh (net) for annual electricity consumption of up to 2,900 kWh. The difference will be compensated as a subsidy. Electricity consumption exceeding 2,900 kWh will be charged to households at the contractually agreed price and must thus be paid in full by the households.

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Thomas Starlinger advises and represents domestic and foreign companies in all facets of energy law. In addition to regulatory and energy issues, these include, in particular, arbitration proceedings, price revisions and proceedings before national regulatory authorities and the EU Commission. Further focal points of his work include public and real estate law.

After his legal education at the University of Vienna, Thomas Starlinger began his career as a law clerk with the Austrian Supreme Administrative Court before joining the General State Attorney's Office. He then spent 20 years with the OMV Group, initially in the central legal department, where he provided legal advice to all corporate divisions both at national and international level (e.g., in Canada and Pakistan). In the course of establishing a holding structure in the OMV Group, he became head of the legal department of OMV Erdgas GmbH. From 2003 to 2007, he was Chief Executive Officer of AGGM Austrian Gas Grid Management AG, the independent distribution system operator of most of Austria's high-pressure gas distribution grid, and from 2004 until 2007, he chaired the committee on legal affairs of the Association of Gas and District Heating Supply Companies (*Fachverband der Gas- und Wärmeversorgungsunternehmen*). When moving into private practice, Thomas became head of the energy law team at a leading Austrian law firm specialised in business and commercial law and subsequently became a partner at Starlinger Mayer Attorneys at Law.

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Laurenz Götzinger completed his legal education at the Faculty of Law of the University of Vienna. During his law studies, he was part of the paralegal team at Schima Mayer Starlinger Attorneys at Law. After graduation, he completed his clerkship in the jurisdictional district of the Higher Regional Court of Vienna and is now working at Schima Mayer Starlinger Attorneys at Law once again.

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