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Alternative Energy & Power 2022

Austria: Law & Practice
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Law and Practice

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CONTENTS

1. General Structure and Ownership of the Power Industry	p.3	4. Generation	p.12
1.1 Principal Laws Governing the Structure and Ownership of the Power Industry	p.3	4.1 Principal Laws Governing the Construction and Operation of Generation Facilities	p.12
1.2 Principal State-Owned or Investor-Owned Entities	p.4	4.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Generation Facilities	p.12
1.3 Foreign Investment Review Process	p.5	4.3 Terms and Conditions Imposed in Approvals to Construct and Operate Generation Facilities	p.13
1.4 Principal Laws Governing the Sale of Power Industry Assets	p.5	4.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights	p.14
1.5 Central Planning Authority	p.6	4.5 Requirements for Decommissioning	p.14
1.6 Recent Material Changes in Law or Regulation	p.6	5. Transmission	p.14
1.7 Announcements Regarding New Policies	p.7	5.1 Regulation of Construction and Operation of Transmission Lines and Associated Facilities	p.14
1.8 Unique Aspects of the Power Industry	p.8	5.2 Regulation of Transmission Service, Charges and Terms of Service	p.17
2. Market Structure, Supply and Pricing	p.8	6. Distribution	p.18
2.1 Structure of the Wholesale Electricity Market	p.8	6.1 Regulation of Construction and Operation of Electricity Distribution Facilities	p.18
2.2 Imports and Exports of Electricity	p.9	6.2 Regulation of Distribution Service, Charges and Terms of Service	p.19
2.3 Supply Mix for the Entire Market	p.9		
2.4 Principal Laws Governing Market Concentration Limits	p.9		
2.5 Agency Conducting Surveillance to Detect Anti-competitive Behaviour	p.9		
3. Climate Change Laws and Alternative Energy	p.10		
3.1 Principal Climate Change Laws and/or Policies	p.10		
3.2 Principal Laws and/or Policies Relating to the Early Retirement of Carbon-Based Generation	p.11		
3.3 Principal Laws and/or Policies to Encourage the Development of Alternative Energy Sources	p.11		

1. GENERAL STRUCTURE AND OWNERSHIP OF THE POWER INDUSTRY

1.1 Principal Laws Governing the Structure and Ownership of the Power Industry

Austria is a federal state (*Bund*) with certain legislative competences retained by the federal legislator, and others delegated to the nine states (*Länder*), which comprise Burgenland, Carinthia (*Kärnten*), Lower Austria (*Niederösterreich*), Salzburg, Styria (*Steiermark*), Tyrol (*Tirol*), Upper Austria (*Oberösterreich*), Vienna (*Wien*) and Vorarlberg.

The principal law governing the ownership and structure of the power industry is the federal state-level Electricity Management and Organisation Act (*Elektrizitätswirtschafts-und-organisationsgesetz* 2010, or EIWOG).

The EIWOG implements the third energy package of the EU, which is designed to liberalise the electricity markets of individual EU member states. The EIWOG sets out provisions on:

- the operation of electricity networks;
- the rights and obligations of network operators, specifically third-party network access;
- the unbundling of transmission system operators;
- the operation of transmission networks and the conditions for concessions to operate distribution networks; and
- the determination of system usage tariffs.

While the EIWOG is a federal act, some of the EIWOG provisions delegate authority to the state parliaments to enact state-specific legislation regarding certain aspects of the electricity sector. The main state-level acts are:

- the Burgenland Electricity Act (*Burgenländisches Elek-trizitätswesengesetz* 2006);
- the Carinthian Electricity Management and Organisation Act (*Kärntner Elek-trizitätswirtschafts-und-organisationsgesetz* 2011);
- the Lower Austrian Electricity Act (*Niederösterreichisches Elektrizitätswesengesetz* 2005);
- the Salzburg State Electricity Act (*Salzburger Landeselek-trizitätsgesetz* 1999);
- the Styrian Electricity Management and Organisation Act (*Steiermärkisches Elek-trizitätswirtschafts-und-organisationsgesetz* 2005);
- the Tyrolean Electricity Act (*Tiroler Elek-trizitätsgesetz* 2012);
- the Upper Austrian Electricity Management and Organisation Act (*Oberösterreichisches Elektrizitätswirtschafts-und-organisationsge-setz* 2006);
- the Viennese Electricity Management Act (*Wiener Elektrizitätswirtschaftsgesetz* 2005); and
- the Vorarlberg Electricity Management Act (*Vorarlberger Elektrizitätswirtschaftsgesetz* 2014).

As there are certain state-specific variations, for simplicity this chapter focuses in particular on the state of Lower Austria as one of the most populous states and one of the most relevant from an electricity infrastructure perspective. In Lower Austria, therefore, both the EIWOG and the Lower Austrian Electricity Act 2005 (*Niederösterreichisches Elektrizitätswesengesetz* 2005, or NÖ EIWG) apply.

The Federal Constitutional Law that regulates ownership in Austrian Electricity Market Companies (*Bundesverfassungsgesetz, mit dem die Eigentumsverhältnisse an den Unternehmen der österreichischen Elektrizitätswirtschaft geregelt werden*, or the Constitutional Law on Ownership) sets out the minimum state ownership of listed

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energy companies. This adopts provisions from the second Electricity Market Nationalisation Law (*Bundesgesetzes über die Verstaatlichung der Elektrizitätswirtschaft*), which originated in 1947 as a basic law with non-constitutional status. As such, these nationalisation provisions are afforded constitutional status.

Annex 1 of the Constitutional Law on Ownership sets out that the following companies must be at least 51% in the ownership of either the federal state or Austria's biggest electricity provider, Verbund AG, which itself has to be state-owned to at least 51%:

- Österreichische Donaukraftwerke AG (Vienna);
- Österreichische Draukraftwerke AG (Klagenfurt);
- Osttiroler Kraftwerke GmbH (Innsbruck);
- Tauernkraftwerke AG (Salzburg); and
- Verbundkraft Elektrizitätswerke GmbH (Vienna).

Annex 2 of the Constitutional Law on Ownership sets out that the following companies must be at least 50% in the ownership of either the federal state or Verbund AG:

- Donaukraftwerk Jochenstein AG (Passau);
- Die Ennskraftwerke AG (Steyr); and
- Die Österreichisch-Bayerische Kraftwerke AG (Simbach/Inn).

Annex 3 of the Constitutional Law on Ownership sets out that the following state companies (*Landesgesellschaften*) must be at least 51% in the ownership of one of the nine relevant states or an entity that is at least 51% in the ownership of one of the nine relevant states:

- Burgenländische Elektrizitätswirtschafts AG (Burgenland);

- Kärntner Elektrizitäts-Aktiengesellschaft (Carinthia);
- EVN Energieversorgung Niederösterreich AG (Lower Austria);
- Oberösterreichische Kraftwerke AG (Upper Austria);
- Salzburger Aktiengesellschaft für Energiewirtschaft (Salzburg);
- Steirische Wasserkraft- und Elektrizitäts-Aktiengesellschaft (Styria);
- Tiroler Wasserkraftwerke AG (Tyrol);
- Vorarlberger Kraftwerke AG (Vorarlberg); and
- Wiener Stadtwerke Elektrizitätswerke Wienstrom (Vienna).

1.2 Principal State-Owned or Investor-Owned Entities

Generation

The main generation companies in Austria are Verbund AG (51% state-owned), EVN AG (51% owned by the state of Lower Austria) and Wien Energie GmbH (indirectly owned by the City of Vienna).

Transmission

The main transmission system operator in Austria is Austrian Power Grid AG (APG), which is responsible for the transmission system across eight of the nine Austrian states. APG is a 100% subsidiary of Verbund AG; however, APG is functionally unbundled from Verbund as an independent transmission system operator (ITO). Key requirements of this unbundling are the complete separation of the personnel, information technology and communication sectors, a ban on shared services and the strict regulation of the relationship of APG management with respect to Verbund AG.

The transmission system in the western-most state, Vorarlberg, is operated by Vorarlberger Übertragungsnetz GmbH (indirectly owned by the state of Vorarlberg).

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Distribution

The main distribution system operators in Austria are the provincial electricity companies – eg, Wiener Netze, Netz Niederösterreich, Netz Oberösterreich, Netz Burgenland, Salzburg Netz and Energienetze Steiermark – which are mostly directly or indirectly owned by the respective states.

Supply

There are over 100 suppliers in Austria. The main suppliers include Verbund AG (as above, 51% state-owned) and individual state companies, which are constitutionally at least 51% owned by local authorities or companies in which local authorities hold at least 51% ownership (see **1.1 Principal Laws Governing the Structure and Ownership of the Power Industry**).

1.3 Foreign Investment Review Process

The control of the acquisition of certain shareholdings in Austrian companies, which are considered as being of general interest and of interest to the defence goods industry, has been imposed by the Foreign Investment Screening Act (*Investitionskontrollgesetz*). The Foreign Investment Screening Act was passed in order to fulfil the requirements set out in the EU Foreign Investment Screening Regulation (Regulation (EU) 2019/452) which entered into force on 11 October 2020 and replaced the provisions of the Foreign Trade Act (*Außenwirtschaftsgesetz* 2011).

As the energy sector is deemed as being of general interest, any potential acquisitions that fall within the scope of the Foreign Investment Screening Act require the approval of the Federal Ministry of Digital and Economic Affairs (*Bundesministerium für Digitalisierung und Wirtschaftsstandort*).

Authorisation is required if a foreign direct investment is made by an individual who is not

a citizen of an EU member state, an EEA state or Switzerland, or is a company with its seat in a country outside the EU, EEA or Switzerland. Foreign direct investment according to the Foreign Investment Screening Act is defined as the direct or indirect acquisition of:

- an Austrian business as defined in Section 1(2) of the Austrian Commercial Code (UGB), with its registered office or place of head office in Austria and active in a sector listed in the Annex;
- voting shares in such a business (10%, 25% or 50%);
- a controlling influence over such a business; or
- essential assets of such an entity.

The acquisition of 10% or more of the voting rights in the target is only relevant in sensitive areas, such as operating critical energy infrastructure. The Foreign Investment Screening Act obliges not only the acquirer of a company but also the company itself to report changes in its ownership structure. However, authorisation is not required for foreign direct investments where the target is a micro-enterprise, including start-up companies, with fewer than ten employees and annual sales or an annual balance sheet total of less than EUR2 million.

1.4 Principal Laws Governing the Sale of Power Industry Assets

Except those of the Foreign Investment Screening Act, there are no specific restrictions regarding the sale of power industry assets or businesses, or other transactions such as amalgamations and mergers. In Austria, the commercial law (*Unternehmensgesetzbuch*, or UGB), the civil code (*Allgemeines bürgerliches Gesetzbuch*, or ABGB), the Limited Liability Company Act (*Gesetz über Gesellschaften mit beschränkter Haftung*, or GmbHG) and the Stock Corporation Act (*Aktiengesetz*, or AktG) govern the establish-

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ment of companies, as well as the process of mergers and acquisitions.

In addition, every business operating in Austria is bound by competition rules in the exercise of their economic activity. On the one hand, these arise directly from European Competition Law (Articles 101 and 102 of the Treaty on the Functioning of the European Union, or TFEU) and on the other hand from domestic legislation, in particular the Cartel Act (*Kartellgesetz 2005*, or KartG) and the Competition Act (*Wettbewerbsgesetz*, or WettG). To prevent a concentrated market structure from leading to a reduction in competition, anticipatory control is provided for mergers based on their turnover. Mergers that exceed specified turnover thresholds must register with the relevant competition authority (either the EU Commission in cases with EU relevance or the Federal Competition Authority for Austrian matters).

1.5 Central Planning Authority

The main regulatory authority for the electricity sector is Energie Control Austria (E-Control), established by the Energie Control Act (*Energie-Control-Gesetz 2010*). E-Control is a public law institution with its own legal personality.

The main aims of E-Control are:

- the promotion of a competitive, secure and environmentally sustainable internal market in electricity and natural gas;
- the effective opening up of the market to all EU customers and suppliers;
- ensuring the conditions are right for the effective and reliable operation of electricity and gas networks, taking into account the long-term objectives;
- the development of competitive and functioning regional markets in the EU;
- the lifting of existing restrictions on electricity and gas trade between EU member states;

- ensuring that network operators and network users have appropriate incentives, both short and long term, to increase network efficiency and promote market integration;
- to implement measures that ensure customers benefit from the efficient functioning of the national market, promote effective competition and contribute to consumer protection; and
- to ensure the integrity and transparency of the wholesale energy market.

1.6 Recent Material Changes in Law or Regulation

In June 2019, the EU co-legislator passed the final acts of the Clean Energy for All Europeans Package. This is designed to develop the Third Energy Package for electricity to cover the period from 2021 until 2030.

The Clean Energy for All Europeans Package has recently been implemented into federal law by the Renewable-Expansion-Legislative-Package adopted in July 2021. This package comprises the new Renewable Expansion Act (*Erneuerbaren-Ausbau-Gesetz* or EAG) replacing the Green Electricity Act and implementing a new support scheme for renewable energy (for more details see **3.3 Principal Laws and/or Policies to Encourage the Development of Alternative Energy Sources**) as well as amendments to several federal laws. As far as the implementation of parts of the Clean Energy for All Europeans Package falls into the competence of the states, the states have passed the relevant legislative amendments.

The relevant EU acts and the implementing Austrian legislative acts are:

- Directive (EU) 2018/844 amending Directive 2010/31/EU on the energy performance of buildings transposed into state law such as the Lower Austrian building code (*NÖ*

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Bauordnung 2014) and the Lower Austrian building technology order (*NÖ Bautechnikverordnung* 2014);

- Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (RED II) primarily transposed by the newly passed Renewable Expansion Act (*Erneuerbaren-Ausbau-Gesetz*) as well as amendments to the Electricity Act (EiWOG);
- Directive (EU) 2018/2002, amending Directive 2012/27/EU on energy efficiency transposed by the amendments of several federal and state laws – eg, the Federal Energy Efficiency Act (*Bundes-Energieeffizienzgesetz*) and the Heating and Cooling Costs Compensation Act (*Heiz- und Kältekostenabrechnungsgesetz*);
- Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action implemented by the amendment of EiWOG and the Integrated National Energy and Climate Plan for Austria 2021–2030;
- Regulation (EU) 2019/943 on the internal market for electricity implemented by some minor amendments to EiWOG;
- Directive (EU) 2019/944 on common rules for the internal market for electricity transposed into EiWOG and the states' Electricity Acts;
- Regulation (EU) 2019/941 on risk-preparedness in the electricity sector implemented by the Energy Emergency Powers Act (*Energielenkungsgesetz* 2012);
- Regulation (EU) 2019/942, establishing an EU agency for the co-operation of energy regulators which has not been specifically implemented.

1.7 Announcements Regarding New Policies

The current Austrian government is composed of a coalition between the conservative Austrian People's Party (*Österreichische Volkspartei*) and the Green Party (*Die Grünen*), which was sworn in on 7 January 2020. The government, currently

led by Chancellor Karl Nehammer from the conservative party, has focused on tackling climate change.

A new policy agenda (*Regierungsprogramm* 2020-2024) was presented on 2 January 2020 that has committed Austria to achieve carbon neutrality by 2040 and source 100% of Austria's total national electricity consumption from renewable sources by 2030, with plans for photovoltaic (PV) generation capacity to hit 11 TWh by that year. This policy includes the aim of installing solar panels on one million Austrian homes. The adoption of the Renewable Expansion Act (*Erneuerbaren-Ausbau-Gesetz* or EAG) in July 2021 is considered one of the milestones in the implementation of the new policy agenda (for more details regarding the EAG see **3.3 Principal Laws and/or Policies to Encourage the Development of Alternative Energy Sources**).

Austria has generally been progressive in promoting the development of renewable energy generation, the use of biofuels and e-mobility, and has one of the highest renewable percentages in the gross final consumption of energy within the EU.

Most recently, against the backdrop of the war in Ukraine which started on 24 February 2022, the EU as well as Austria have started to develop policy programmes for the phase-out of natural gas imports from Russia. In May 2022, the European Commission presented the REPowerEU Plan proposing several measures in order to end EU dependency on Russian gas, as well as tackling climate change at the same time. Even before that, in April 2022, the Austrian Federal Ministry for Climate Action commissioned an analysis of the Austrian Energy Agency which sets out the possibility to end Austrian dependence on Russian gas imports by 2027. In June 2022, the Austrian Federal Minister for Climate Action, Leonore Gewessler, presented the new

Austrian Hydrogen Strategy which shall enhance the production as well as the use of hydrogen, hydrogen being one of the possible substitutes for (Russian) natural gas. Follow-up legislative measures are to be expected.

1.8 Unique Aspects of the Power Industry

In Austria, currently more than 75% of electricity generated originates from renewable sources. Due to its topographic location, water (both run-of-the-river and pumped storage) and wind are the two main renewable energy sources in Austria.

Historically, Austria has not directly relied on nuclear power. In 1978, shortly after the completion of construction of the first Austrian nuclear power plant in Zwentendorf an der Donau in Lower Austria, a referendum initiated by then-Chancellor Bruno Kreisky on the use of nuclear power was held. This was the first national referendum in the Austrian Second Republic. With an outcome of 50.5% against the use of nuclear power, the Zwentendorf power plant never became operational. Subsequently, the prohibition of nuclear power generation in Austria was enacted into law in 1978, and as of 1999 this prohibition was given constitutional status.

Nevertheless, there are a number of nuclear power plants located close to Austria's borders, such as Temelín in the Czech Republic, which is 60 km from the border. As such, despite its anti-nuclear standpoint, through the import of electricity from other EU member states, Austria does consume electricity from nuclear power.

From the 1990s until 1 October 2018, Austria and Germany shared a single electricity market with a common price zone, whereby electricity was traded freely between the two countries.

In an effort to ease grid congestion caused by poor interconnectedness between the two countries, as of 1 October 2018, an upper limit of 4,900 MW was placed on the amount of electricity that could be traded between Austria and Germany. This, however, prevented the physical delivery of power being traded and caused surges of electricity destined for Bavaria and Austria, through neighbouring countries such as the Czech Republic and Poland. A complaint was lodged with the Agency for the Cooperation of Energy Regulators (ACER), which, in its binding decision in 2016, decided that the common price zone be split.

As Austria depends on electricity imports from Germany, Austrian wholesale electricity prices have increased as a result of this decision. Germany is currently promoting the development of further north-south electricity interconnectors that should alleviate the grid congestion. The construction of these will, however, likely take a number of years.

2. MARKET STRUCTURE, SUPPLY AND PRICING

2.1 Structure of the Wholesale Electricity Market

Austria's electricity market is based on a balancing group model, whereby suppliers and customers are consolidated into a number of virtual groups in which the supply and demand are balanced. Each market participant is obliged to be a member of a balancing group.

Each market participant therefore delivers or removes energy from its respective balance group, so that the compensation for generation and demand fluctuates for each individual group. Each group is also obliged to balance energy consumption and generation. If unforeseen fluctuations in production or demand occur,

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the energy balance in the grid must be regulated by switching generating units on the grid on or off. The cost of these compensatory measures is offset against the balance group that caused the respective deviation. The deviations and the offsetting are calculated by an independent balance group co-ordinator.

Wholesale trading is mainly conducted through bilateral contracts between suppliers and producers over the counter (OTC). However, trading also occurs via the Austrian power exchange EXAA.

2.2 Imports and Exports of Electricity

Imports and exports of electricity to and from other jurisdictions are permitted, and Austria is highly dependent on the importation of electricity.

As part of the EU, the Austrian electricity market is subject to EU laws on the internal energy market that enforce the principle of free movement of electricity across the EU. In addition to Directive (EU) 2019/944 on common rules for the internal market for electricity, as implemented in the EIWOG and state laws, and Regulation (EU) 2019/943 on the internal market for electricity, subsidiary network codes include:

- Commission Regulation (EU) 2015/1222, establishing a guideline on capacity allocation and congestion management;
- Commission Regulation (EU) 2016/1447, establishing a network code on the requirements for grid connection of a high-voltage direct current system and direct current-connected power park modules;
- Commission Regulation (EU) 2016/1719, establishing a guideline on forward capacity allocation;
- Commission Regulation (EU) 2017/1485, which establishes a guideline on electricity transmission system operation and sets

out the regulatory framework for electricity imports, exports and co-operation between Austrian transmission system operators and those of neighbouring countries;

- Commission Regulation (EU) 2017/2195, establishing a guideline on electricity balancing; and
- Commission Regulation (EU) 2017/2196, establishing a network code on emergency and restoration.

Regarding the splitting of the bidding zone between Austria and Germany in 2018 and its consequences for German-Austrian electricity trade, see **1.8 Unique Aspects of the Power Industry**.

2.3 Supply Mix for the Entire Market

The Austrian supply mix (gross domestic consumption) in 2020 was as follows.

- Biomass: 17.4%.
- Geothermal: 1.9%.
- Hydro: 11.2%.
- Wind: 1.8%.
- Solar: 0.5%.
- Biofuel: 2.2%.
- Gas: 22.%.
- Coal: 7.6%.
- Oil: 34.1%.
- Net imports: 0.6%.

2.4 Principal Laws Governing Market Concentration Limits

Subject to **1.4 Principal Laws Governing the Sale of Power Industry Assets**, there are no concentration limits in Austria.

2.5 Agency Conducting Surveillance to Detect Anti-competitive Behaviour

In accordance with the Competition Act, the Federal Competition Authority (*Bundeszweitswettbewerb-behörde*) is responsible for ensuring effective competition and for responding to distortions or

restrictions of competition within the meaning of the Cartel Act, or European competition rules in individual cases, and for ensuring compatibility with EU law.

The Federal Competition Authority must work towards compatibility with the decisions of E-Control as regulator when applying antitrust law, and it is empowered to provide E-Control with the information required for the performance of its duties in accordance with the principles of data protection. The Federal Competition Authority may also request E-Control to provide information and opinions, and, for this purpose, to bring all the information to the attention of the parties and to provide any documentation that they need.

Without prejudice to the competence of the Federal Competition Authority, for the duration of the proceedings E-Control is entitled to provisionally prohibit the performance of the relevant activity by the party under investigation.

The Regulation (EU) No 1227/2011 on Wholesale Energy Market Integrity and Transparency (REMIT) sets out the monitoring of wholesale energy trading in Europe, and prohibits insider trading and market manipulation. E-Control is responsible for collecting data from Austrian market participants and for national monitoring compliance with REMIT.

3. CLIMATE CHANGE LAWS AND ALTERNATIVE ENERGY

3.1 Principal Climate Change Laws and/or Policies

The main climate change laws or policies for Austria are:

- the Climate Protection Act (*Klimaschutzgesetz*, or KSG), which sets out the national framework for compliance with emission caps and provides for emission caps per sector until 2020, but no amendments for the period after 2020 have been adopted so far;
- the Renewable Expansion Act (*Erneuerbaren-Ausbau-Gesetz* or EAG) replacing the Green Electricity Act 2012 (*Ökostromgesetz* 2012, or ÖSG) and the Federal Biomass Promotion Act which continue to be applicable only to subsidy agreements concluded before the entering into force of the EAG;
- the Emission Certificate Act (*Emissionszertifikatengesetz* 2011, or EZG), which implements the EU Emissions Trading System Directive 2003/87/EC (as amended);
- the National Emission Certificate Trading Act (*Nationales Emissionszertifikatehandelsgesetz* 2022 – NEHG) which implements a national Emissions Trading System for the sectors not covered by the EU Emissions Trading System (eg, traffic and buildings);
- Regulation (EC) No 219/2009, adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC, with regard to the regulatory procedure with scrutiny (as amended);
- Commission Regulation (EU) No 389/2013, establishing a Union Registry pursuant to Directive 2003/87/EC and Decisions No 280/2004/EC and No 406/2009/EC; and
- Regulation (EU) No 421/2014, amending Directive 2003/87/EC for establishing a scheme for greenhouse gas emission allowance trading within the community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions.

3.2 Principal Laws and/or Policies Relating to the Early Retirement of Carbon-Based Generation

In April 2020, the Austrian power provider Verbund shut down the last coal-fired district heating plant as planned. Legislation related to the construction of generation facilities, detailed in **4.1 Principal Laws Governing the Construction and Operation of Generation Facilities**, generally covers the conditions and process of retiring power plants.

3.3 Principal Laws and/or Policies to Encourage the Development of Alternative Energy Sources

In July 2021 the Renewable Expansion Act (*Erneuerbaren-Ausbau-Gesetz* or EAG) was enacted, transposing Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (RED II) and replacing the Green Electricity Act 2012 (*Ökostromgesetz* 2012, or ÖSG) and the Federal Biomass Promotion Act which continue to be applicable only to subsidy agreements concluded before the entering into force of the EAG. The support scheme under the EAG has been notified to the EU Commission which has granted approval of the support scheme under EU state aid law in December 2021.

The EAG sets up a new renewable energy support scheme with a statutory funding of in total EUR1 billion per annum:

Before the ÖSG provided for the purchase of electricity from renewable energy sources at fixed feed-in tariffs and the payment to participating generators was provided by the Clearing and Settlement Agency (*Ökostromabwicklungsstelle*, or ÖMAG), which was obligated to contract with eligible new generators (provided that the statutory funding of EUR50 million per annum had not been exhausted).

Under the EAG support scheme generators of electricity from renewable sources including hydro, wind, solar, biomass and biogas receive a market premium. The market premium shall compensate the difference between the production costs of electricity from renewable sources and, generally speaking, the average market price for electricity. The market premium is granted for electricity directly sold to market participants and fed into the grid, which means that, unlike before under the ÖSG-regime, the generators are themselves responsible for the marketing of their electricity (with certain exemptions for operators of small plants below 500 kW).

There are two different tender procedures for the calculation and granting of a market premium; their applicability depends on certain criteria (technology used, capacity of the plant, new-build or existing plant). Within the standard market-based tender procedure the basis for the calculation of the market premium as well as the generators entitled to receive a market premium are determined through a bidding process amongst generators. The bidding process is carried through by the yet-to-be-established EAG Funding Settlement Agency (*EAG-Förderabwicklungsstelle*).

The second tender procedure provides for a non-market-based determination of the basis of the calculation of the market premium by order of the Federal Minister for Climate Action Environment, Energy, Mobility, Innovation and Technology. Generators have then to file an application with the EAG Funding Settlement Agency, which grants support on a first-come, first-served principle. The duration of support is in general 20 years, for existing biomass and biogas plants up to the 30th year of operation.

In addition to the market premium, the EAG provides for investment grants not only for the construction of solar plants and wind farms, but also

for the production and refining of renewable gas and for the production of renewable hydrogen.

The funding system of the support scheme remains basically the same as under the ÖSG: The funds are mainly raised via a renewable support flat rate and renewable support subsidy. The renewable support flat rate is a lump sum levied from all end-consumers connected to the national grid. The renewable support subsidy – set annually by the Federal Minister for Climate Action, Environment, Energy, Mobility, Innovation and Technology – is collected from all end-consumers proportionate to their respective network usage and network loss charges paid. Additionally to the renewable flat rate and the subsidy, the EAG introduces a green gas support subsidy designed for the funding of the investment subsidy for green gas. End-consumers with low income may be exempt from the payment obligations.

Apart from setting up a new support scheme the EAG also provides for a framework for Renewable Energy Communities (*Erneuerbare-Energie-Gemeinschaften*) which have been introduced on a European level with Directive (EU) 2018/2001 (RED II). In line with the framework set out in RED II, renewable energy communities are entitled to produce, consume, store, sell as well as share and aggregate the renewable energy within the renewable energy community. Renewable energy communities are also eligible for support under the EAG support scheme.

4. GENERATION

4.1 Principal Laws Governing the Construction and Operation of Generation Facilities

The principal laws governing the construction and operation of generation facilities are:

- the EIWOG and delegated state electricity laws, such as the NÖ EIWG, which governs general aspects of the power industry, including the granting of permits for the construction and operation of power stations;
- the regional planning acts and building regulations of the respective state, such as the Lower Austrian Regional Planning Act (*Niederösterreichisches Raumordnungsgesetz*, or NÖ ROG) and the Lower Austrian Building Code (NÖ Bauordnung 2014, or NÖ BO);
- the Federal Environmental Audit Act (*Umweltverträglichkeitsprüfungsgesetz 2000*, or UVP/G), which governs the process for obtaining a federal environmental impact authorisation granted by the respective state government, its applicability being subject to certain thresholds;
- the Water Act (*Wasserrechtsgesetz 1959*, or WRG) is applicable when using water for energy production, or when using groundwater, or when groundwater balance is affected;
- the Forestry Act (*Forstgesetz 1975*) is applicable if wooded areas are to be cleared for construction;
- the Waste Management Act (*Abfallwirtschaftsgesetz 2002*, or AWG) which governs an approval requirement for certain waste; and
- the relevant nature conservation legislation for the relevant federal state – eg, the Lower Austria Nature Protection Act (*Niederösterreichisches Naturschutzgesetz 2000*), which is applicable in specially protected areas (usually in all areas outside the local area).

4.2 Regulatory Process for Obtaining All Approvals to Construct and Operate Generation Facilities

The regulatory process and the factors that are taken into account in the decision to approve a generation project differ according to the type of generation facility, the impact on the environ-

ment, and also the state in which authorisation is to be obtained.

The NÖ EIWG provides for two procedures:

- a simplified procedure for power generation plants intended solely for emergency power supply or with a maximum capacity of 500 kW; and
- a regular procedure.

Under the simplified procedure, provided the application is complete, details of the project will be made public by posting a notice at the local community council and by submitting the project documentation to the municipality during a specified period. During this period, qualified neighbours can submit justified objections. The authority investigates by obtaining expert opinions and determining whether the conditions allow for approval. If necessary, approval is issued by a formal decision. Specific orders relating to the construction and operation of the plant may be issued.

For a regular procedure, a formal oral hearing is scheduled after the application has been deemed complete. The subject matter, time and place of the hearing are announced on the official noticeboard of the local community council, and, where appropriate, on the official noticeboard of neighbouring municipalities. Qualifying neighbouring landowners near the site of the prospective power generation plant are personally informed. The authority makes its investigations by obtaining expert opinions to determine whether the conditions allow for approval. If necessary, the approval is issued by a formal decision. Specific orders relating to the construction and operation of the plant may be issued.

Annex 1 of the UVPG lists 89 types of projects deemed to have significant environmental impact, for which an environmental impact

assessment is required. Regarding energy generation, this applies to a number of projects, including hydropower plants, thermal power plants with a minimum fuel heat output of 200 MW or overhead power lines with a rated voltage of at least 220 kV and a length of at least 15 km.

Pursuant to Annex 1, certain projects are subject to a simplified assessment procedure, including wind turbines with a total electrical output of at least 30 MW. A third class of projects is subject to the fulfilment of specific conditions, an investigation done on a case-by-case basis; where required, the project may be subject to a simplified assessment procedure.

If the project requires an environmental impact assessment, in addition to the above, the applicant must submit an environmental impact statement with the application. It must describe the project, the main alternatives reviewed, the environmental impact of the project and the measures designed to prevent or mitigate the impact. The public, including environmental organisations and citizen initiatives, is greatly involved in this procedure, and the assessment of the potential impact on the environment will be carried out by experts from a wide variety of disciplines, as appointed by the authority. These experts will be required to jointly prepare a comprehensive environmental impact report.

4.3 Terms and Conditions Imposed in Approvals to Construct and Operate Generation Facilities

Generation plants must be constructed, modified and operated in a manner that conforms with a variety of protection regulations, such as water protection regulations. State-of-the-art technology must be used to construct and operate the plant, as well as to store equipment or other materials. This is to ensure that the life or health of the plant operator, its staff and neighbours, the state of neighbouring properties and

other property rights are not endangered. Furthermore, neighbours must be protected against unreasonable levels of noise, smell, dust, fumes, vibrations and the absence of light (the latter most relevant in the case of wind turbines). The plant must be constructed and operated in an energy-efficient manner and in accordance with the relevant zoning plans.

4.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights

The implementation of the electricity acts of individual states, including the NÖ EIWG, permits the expropriation of land under certain conditions.

In Lower Austria, the NÖ EIWG provides that the public authority shall, upon application, impose necessary restrictions on rights with respect to the land or other property rights in rem. This includes the expropriation of property for reasonable compensation if the construction of a power plant is in the public interest, if the construction of a production facility is required for technical or economic reasons, and if the project developer and the landowner or party with affected property rights are not able to reach an agreement and no other legal remedy under the Act, apart from expropriation, is available.

Expropriation may include: granting an easement over the affected land; the assignment of ownership rights over the land; or the assignment, restriction or cancellation of other land rights or other rights linked to a specific property.

4.5 Requirements for Decommissioning

The construction and decommissioning of generating stations is delegated to the individual states. In Lower Austria, the Lower Austrian Electricity Act (NÖ EIWG) sets out that in decommissioning the generating station, the operator must take all necessary precautions to avoid danger or disturbance to the life or health of

it and its neighbours or to the property of its neighbours. Furthermore, the operator must take precautions to protect the townscape.

Prior to decommissioning, the operator must notify the local authority and submit planned decommissioning procedures for the authority's decision. If the procedures are deemed insufficient or if the operator has not taken necessary precautions, the authority must provide these.

The decommissioning of a power plant is additionally provided for as a safety measure. In Lower Austria, for example, the NÖ EIWG provides that the authority may require the decommissioning of a power plant (either in full or in part) in the case of danger to the life or health of people, damage to property or harm to the other property rights of qualifying neighbours caused by the power plant, or to stop the unreasonable disturbance to neighbours.

Should the authority have reason to believe that such emergency measures are immediately necessary, following agreement with the generating facility operator, it may take such action without undertaking a full administrative procedure.

5. TRANSMISSION

5.1 Regulation of Construction and Operation of Transmission Lines and Associated Facilities

5.1.1 Principal Laws Governing the Construction and Operation of Transmission Facilities

The principal laws that govern the construction and operation of transmission lines and associated facilities are:

- the EIWOG and the relevant acts of the states (eg, NÖ EIWG);

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- the Federal Electric Power Lines Act (*Starkstromweegegesetz* 1968), which is only applicable for power lines that extend to two or more states, and the states' Electric Power Lines Acts, such as the Lower Austrian Power Lines Act (*NÖ Starkstromweegegesetz*), which are applicable to power lines located within the respective state; and
- the Federal Environmental Audit Act (*Umweltverträglichkeitsprüfungsgesetz* 2000, or UVPG), although this is applicable only to overhead power lines with a rated voltage of at least 220 kV and a length of at least 15 km;
- depending on the location of the power line several permits under one or more of the following regulations may be required (non-exhaustive list):
 - (a) the relevant nature conservation legislation for the relevant federal state – eg, the Lower Austria Nature Protection Act (*Niederösterreichisches Naturschutzgesetz* 2000);
 - (b) the Forestry Act (*Forstgesetz* 1975);
 - (c) the Water Act (*Wasserrechtsgesetz* 1959, or WRG);
 - (d) the regional planning acts and building regulations of the respective state, such as the Lower Austrian Regional Planning Act (*Niederösterreichisches Raumordnungsgesetz*, or NÖ ROG) and the Lower Austrian Building Code (*NÖ Bauordnung* 2014, or NÖ BO); and/or
 - (e) the Federal Roads Act (*Bundesstraßengesetz* 1971, or BStG).

5.1.2 Regulatory Process for Obtaining Approvals to Construct and Operate Transmission Facilities

The construction and operation of transmission lines requires a construction and operating licence under the Electric Power Lines Act of the applicable state or, in case the power line extends to two or more states, under the Federal Electric Power Lines Act.

Authorisation of transmission line construction is an administrative act that requires an application with the relevant authority (the state government or the Federal Minister for Climate Action) containing details of the planned route. Approval for the construction of a transmission line is conditional on its being in the public interest to supply the population with electrical energy. It must connect with other existing or approved energy supply facilities, and must conform with land culture, forestry, spatial planning, nature and monument protection requirements, water management and water law, public transport as well as other public supply infrastructure, national defence, airspace security and employee protection requirements. The authorities appointed to safeguard such interests and the relevant public bodies have the right to make submissions in the preliminary proceedings in so far as they are affected by the transmission line project.

Depending on the location of the transmission line it might also fall under the scope of one or more administrative acts, such as the Water Act, the Forestry Act or the Federal Roads Act (see non-exhaustive list of potentially relevant regulation above **5.1.1 Principal Laws Governing the Construction and Operation of Transmission Facilities**), requiring a relevant permit.

For transmission lines with a rated voltage of at least 220 kV and a length of at least 15 km, as well as transmission lines in protected areas with a rated voltage of at least 110 kV and a length of at least 20 km, an environmental impact assessment according to UVPG is required, as detailed in **4.1 Principal Laws Governing the Construction and Operation of Generation Facilities**.

The operation of transmission systems in Austria requires authorisation from E-Control. This requires the fulfilment of conditions set out in the EIWOG, which include, in particular, the mandatory unbundling of entities involved in the activi-

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ties of generation and supply, as well as compliance with provisions ensuring third-party access to transmission infrastructure, non-discriminatory pricing and conditions of usage. However, there is an unlimited statutory area monopoly for transmission services (see **5.1.5 Transmission Service Monopoly Rights**), which means that new market participants may not obtain a construction and operation licence for transmission lines.

Furthermore, each year the transmission system operators have to submit a ten-year network development plan for the transmission system to the regulatory authority, based on the current situation and supply-and-demand forecasts. The purpose of the network development plan is in particular to provide market participants with information on which key transmission infrastructures need to be built or developed over the next decade, to list all investments that have already been decided, to identify new investments to be made over the next three years, and to set a timetable for all investment projects.

5.1.3 Terms and Conditions Imposed in Approvals to Construct and Operate Transmission Facilities

The terms and conditions imposed on approvals for the construction of transmission facilities are provided in the EIWOG in conjunction with the states' Electricity Acts. This sets out that the transmission system operator is committed to meeting the criteria in Section 40 of the EIWOG. These criteria are extensive, and include:

- to operate and maintain the system safely, reliably, efficiently and with due regard to environmental protection;
- to ensure the technical conditions required to operate the system;
- to ensure the capacity of the network to meet a reasonable demand for transmission of electricity in the long term;

- to operate, maintain and develop, under economic conditions and with due respect for the environment, secure, reliable and efficient transmission networks;
- to ensure appropriate transmission capacity and reliability of the network to contribute to security of supply; and
- to refrain from any discrimination against network users or categories of network users, in particular for the benefit of its affiliates.

These conditions are in addition to the EU network codes relevant to transmission, as listed in **2.2 Imports and Exports of Electricity**.

5.1.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights

Expropriation for the construction of a transmission line is essentially governed the same way as expropriation regarding the construction of a production facility (regarding the latter, see **4.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights**).

Under certain circumstances, an expropriation may be carried out if the construction of a transmission line is deemed to be in the public interest. The Lower Austria Power Lines Act, for example, sets out that if there are compelling technical reasons for a specific routing in Lower Austria, where relocation would be at a disproportionate cost, the authority may impose the expropriation for transmission lines, including accessories such as substations, transformers and switchgear.

Expropriation may include: the granting of immovable property; the assignment of land rights; or the assignment, restriction or cancellation of other real rights in immovable property and rights, the exercise of which is linked to a specific place.

The quantum of the compensation is determined on the basis of the estimate of at least one sworn and judicially certified expert in the expropriation decision or in a separate decision. In the latter case, a provisional guarantee amount is to be determined without further enquiries in the expropriation decision.

In Austria, property rights are constitutionally protected, which means that expropriation is only permissible for the public good and in line with the proportionality principle.

5.1.5 Transmission Service Monopoly Rights

The EIWOG sets out an area monopoly for transmission services in Austria with three regional areas. The Vorarlberg area is legally covered by Vorarlberger Übertragungsnetz GmbH, and the rest of Austria's nine states are covered by the Austrian Power Grid (APG) AG. Since 2011, APG has taken over operation of the Tyrolean transmission lines and since 2012, Vorarlberger Übertragungsnetz GmbH has been co-operating with APG. As such, APG is the Austrian-wide control area manager.

5.2 Regulation of Transmission Service, Charges and Terms of Service

5.2.1 Principal Laws Governing the Provision of Transmission Service, Regulation of Transmission Charges and Terms of Service

The provision of transmission services is primarily governed by the EIWOG, whereby E-Control as regulator must determine the system usage charge ("tariff") according to the System Usage Charges Ordinance (*Systemnutzungsentgelte-Verordnung*).

The EIWOG requires the terms of service of transmission system operators to be approved by the regulator E-Control.

5.2.2 Establishment of Transmission Charges and Terms of Service

In line with Directive (EU) 2019/944 on common rules for the internal market for electricity, the EIWOG sets out the principles of non-discriminatory terms and tariffs for access and usage of the transmission network and of setting pre-approved tariffs. All network users connected to the transmission network are charged a fixed tariff for the transmission of electricity, set by E-Control, dependent on the voltage level.

The tariff, called system usage charges (*Systemnutzungsentgelte*), is annually fixed by E-Control in the System Usage Charges Ordinance (*Systemnutzungsentgelte-Verordnung*) on the basis of the costs of the network operators.

Pursuant to the EIWOG, system usage charges consist of the following components: network usage charge, network loss charge, network access charge, network provision charge, system service charge, charges for metering services and other services and, where applicable, charges for international transactions and for contracts for the transport of energy.

In total, the system usage charges shall cover the costs incurred by a network operator for the construction, operation and maintenance of the network. The costs incurred by the transmission system operator are determined annually in an administrative proceeding before E-Control. The transmission system operator has a right to appeal E-Control's decision. On the contrary, the System Usage Charges Ordinance can only be contested before the Constitutional Court. Such an appeal must meet very high requirements which makes it in practice highly improbable to successfully contest the tariffs fixed in the System Usage Charges Ordinance.

Transmission system operators have to apply for approval of their terms of service with E-Control.

Once approved, E-Control publishes the terms of service on its website. In case E-Control does not approve the terms of service, the transmission system operator may lodge an appeal.

5.2.3 Open-Access Transmission Service

The EIWOG implements Directive (EU) 2019/944 on common rules for the internal market for electricity, which sets out the principle of non-discriminatory third-party access to transmission networks. Under the EIWOG, transmission system operators are obliged to grant network access to those entitled to network access according to the approved general conditions, subject to certain system user charges.

A network operator may refuse network access in whole or in part, only in the case of exceptional network conditions or in the case of a lack of network capacity.

6. DISTRIBUTION

6.1 Regulation of Construction and Operation of Electricity Distribution Facilities

6.1.1 Principal Laws Governing the Construction and Operation of Electricity Distribution Facilities

Relevant legislation includes:

- the EIWOG and effective state acts, such as NÖ EIWG;
- the Electric Power Lines Act 1968 (*Starkstromweegegesetz*), which is only applicable for distribution lines that extend to two or more federal states; and
- state acts such as the Lower Austria Power Lines Act.

6.1.2 Regulatory Process for Obtaining Approvals to Construct and Operate Distribution Facilities

The operation of a distribution network requires an electricity concession, which may be granted only if the concessionaire is able to ensure cost-effective, sufficient and secure distribution, and comply with regulatory obligations for the operation of electricity distribution, and provided that no concession has already been granted to operate a distribution network for the specified area.

The granting of the electricity concession also requires that the concessionaire (if this is an individual) should be self-employed, have reached the age of 24, have Austrian citizenship or be a citizen of another EU member state or EEA contracting state, have their principal place of residence in Austria or another EU member state or EEA contracting state, and should not be excluded from the exercise of the concession. If the concessionaire is a legal entity or a registered partnership, it should have its seat in Austria or another EU member state or EEA contracting state, and have appointed a manager or tenant for the exercise of the concession. In this case, the competent authority is the federal government.

Regarding the construction of distribution lines, the relevant legislation and processes are the same as for the construction of transmission lines as detailed in **5.1.2 Regulatory Process for Obtaining Approvals to Construct and Operate Transmission Facilities**.

6.1.3 Terms and Conditions Imposed in Approvals to Construct and Operate

The terms and conditions for the construction and operation of distribution networks are set out in the individual implementation acts of the states. In Lower Austria, for example, the Lower

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Austria Power Lines Act provides that network operators are obliged to:

- grant network access to third parties in a non-discriminatory manner, subject to approved general network conditions and tariffs;
- operate and maintain the network in a safe, reliable and efficient way, taking into account environmental protection and providing all essential services;
- expand the network they operate, in line with their needs, in order to ensure the long-term ability of the distribution network to meet the foreseeable demand for distribution; and
- ensure the necessary technical conditions for the operation of the network are met.

6.1.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights

Expropriation in the scenario of distribution networks is similar to that for transmission systems, as detailed in **5.1.4 Proponent's Eminent Domain, Condemnation or Expropriation Rights**.

6.1.5 Distribution Service Monopoly Rights

As with transmission systems, various area monopolies are set out across Austria. Lists of relevant areas are specified by the individual state laws. For example, the NÖ EIWG provides that a concession may only be granted if another concession has not already been granted for that particular area. Given these geographical restrictions, end customers cannot select a specific distribution system operation.

6.2 Regulation of Distribution Service, Charges and Terms of Service

6.2.1 Principal Laws Governing the Provision of Distribution Service, Regulation of Distribution Charges and Terms of Service

As for transmission systems, the provision of distribution services is primarily governed by the EIWOG, whereby E-Control as regulator fixes the distribution charges ("tariff") in the System Usage Charges Ordinance (*Systemnutzungsentgelte-Verordnung*).

The terms of service of distribution system operators have to be approved by E-Control.

6.2.2 Establishment of Distribution Charges and Terms of Service

As for transmission systems, pursuant to the EIWOG, distribution charges are fixed by E-Control on the basis of the costs incurred by the distribution system operators for the construction, operation and maintenance of the network. Network users connected to the distribution network are charged the fixed tariff for the distribution of electricity dependent on the voltage level. For details see **5.2.2 Establishment of Transmission Charges and Terms of Service**. Just like transmission system operators, distribution system operators have to offer their services on the basis of general terms of service which have to be approved by E-Control.

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DLA Piper Weiss-Tessbach Rechtsanwälte GmbH was founded in Vienna in 1878 and is the longest-established business law firm in Austria. It has been a fully integrated part of the global law firm DLA Piper since 2003 and provides its clients with legal and business solutions locally, regionally and internationally, using integrated teams of lawyers with experience that span a broad range of disciplines. DLA Piper Austria is widely recognised for its sector-specific approach to legal services, including a top-of-the-

market energy sector practice offering in-depth knowledge of all regulatory and operational, as well as transactional, legal aspects related to the energy sector in Austria and beyond. With a particular emphasis on renewables projects and electricity transmission and transport, the Austrian energy team regularly advises national and international players in the energy sector on all aspects of financing and operating energy infrastructure and energy transportation and distribution.

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