

# Permit granting process for PCIs in Austria

Tyrolean Energy Provider's water management framework  
plan in the light of European competition law

Case Study

*Justice and Environment 2013*

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##### **Introduction**

In the context of the identification of European energy infrastructure projects of common interest (PCIs) Justice and Environment conducted a case study on the permit granting process for PCIs in Austria. Projects of common interest receive priority status and the national permitting procedures for these projects shall be much quicker. The first list of projects of common interest will be most probably adopted in October 2013. The proposed lists include some projects that are controversial to energy policy and environmental law.

The draft PCI lists currently include the project of extension of the Austrian pump-storage power plant Kaunertal. The Kaunertal project does not contribute to the security of supply to market integration due to the project's little capacity. The project - located in a Natura 2000 area - in its current form is likely to breach the provisions of the Birds and Habitats and the Water Framework Directives as well as principles on sustainable hydropower development in the Danube Basin, as confirmed by the preliminary environmental impact assessment study.

##### **1. Facts**

The Austrian public enterprise and Tyrolean Energy Provider Tiroler Wasserkraft AG (TIWAG) submitted a water management framework plan for approval by the Federal Ministry of Agriculture, Forestry, Environment and Water Management (Ministry) according to Section 53 of the Water Act. This framework contains a possible water management system for the "Tyrolean highlands" (Tiroler Oberland). The objective of TIWAG's water management system is to reveal the potential for expansion of hydropower in the river basin of the Inn. Thus, the presented water management system includes the construction of new hydropower plants which connect with TIWAG's existing infrastructure and depend thereupon. According to TIWAG, the water management framework shall conclusively determine the utilization of hydropower potential in this area, leading to the fact that no further project – except those already submitted by TIWAG – can be realized.

##### **2. Procedure for the approval of a water management framework plan**

Water management framework plans were introduced in 1947 to guarantee the high quality of Austrian water resources in the long term and to avoid sustained adverse effects caused by construction projects. According to Section 53 para. 1 of the Water Act, anyone who has an interest in the realization of water resource objectives may submit a water management framework plan. If the system presented in the framework plan is in the "public interest", it may be approved by the Ministry as part of a program of measures or in a separate ordinance.

Subsequently, the fulfillment of an approved framework is to be considered a public interest (Section 105 Water Act) in any water management measure (Section 53 para. 2 Water Act). As laid down in Section 55n Water Act, a strategic environmental assessment must be conducted before the Ministry can approve the framework plan. Moreover, the hydropower plants are to be authorized in the course of a permit granting process under water law.<sup>1</sup>

Hydropower plants which have adverse effects on the ecological water status may only be authorized under Section 104a Water Act if a balancing of public interests speaks favorably for the realization of the project. According to Section 105 Water Act, the public interest of the utilization of hydropower is to be taken into consideration. However, by including hydropower projects in a water management framework plan, their realization already becomes a public interest in advance. The public authorities are bound by this consideration in their balancing of interests and cannot determine anymore that such a hydropower project is not in the public interest.

Even though the approval of TIWAG's framework plan does not contain any specific authorization of hydropower projects, the possibility of granting these projects is highly probable. Furthermore, as the framework plan intends to conclusively determine the utilization of hydropower in the region, other energy operators cannot construct any projects in the area.

### **3. Assessment with regard to competition law**

a) The internal market in electricity is subject to EU competition law. Within the internal market of the EU, it shall be ensured that competition is not distorted.<sup>2</sup> Competition law is primarily directed at undertakings. However, member states should also not introduce or maintain in force any measure which may render ineffective the competition rules.<sup>3</sup> Art. 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits any abuse of a dominant position within the internal market in so far as it may affect trade between member states.

A dominant position is given if an undertaking is in the position to impede effective competition on a significant part of the market regarding the goods and services in question.<sup>4</sup> The dominant position is to be determined with regard to the specific product market as well as the relevant geographic market.<sup>5</sup> Trade is deemed to be affected if it is "possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realization of the

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<sup>1</sup> In addition, authorization procedures might also be required under the EIA Act, the Nature Protection Acts by the individual federal states, or the Electricity Industry Acts by the individual federal states.

<sup>2</sup> ECJ, C-78/70, *deutsche Grammophon/Metro*, Slg 1971, 487ff, marg. no. 17; *Schweitzer/Hummer/Obwexer*, *Europarecht* (2007) 495.

<sup>3</sup> ECJ, C-66/86, *Ahmed Saeed Flugreisen ua/Zentrale zur Bekämpfung unlauteren Wettbewerbs*, Slg 1989, 803 ff, marg. no. 49; *Schweitzer/Hummer/Obwexer*, *Europarecht* 2007, 502.

<sup>4</sup> *Schweitzer/Hummer/Obwexer* 507.

<sup>5</sup> See Commission notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372, 5 ff.

aim of a single market in all the Member States.”<sup>6</sup> Thus, no actual impediment must have occurred.<sup>7</sup> According to the effect doctrine, the conduct must have as their object or effect the prevention, restriction or distortion of competition.<sup>8</sup>

TIWAG is the largest energy operator in Tirol. As a consequence it therefore has very good knowledge of Tirol’s water management system. Due to its knowledge, TIWAG was able to present the water management system in the Tyrolean highlands in its draft for a water management framework plan. In the course of this draft, TIWAG also included an analysis on the expansion potential of hydropower as well as specific project proposals for hydropower plants which would connect with TIWAG’s existing infrastructure and depend thereupon.

If this framework – which was drafted by a dominant undertaking – is approved by the Ministry, this would result in an early attachment of public interest considerations to TIWAG’s proposed projects in the water management framework plan. Hereby, TIWAG already ensures the realization of certain projects on specific locations.

In addition, as the framework plan attempts to conclusively regulate the expansion of hydropower, it will become impossible for other energy operators to construct hydropower plants on other locations. Thus, they would neither have the opportunity to apply for the possibility of a project on such a location, nor submit a framework on their own, as they do not have the necessary knowledge for an area-wide plan. In our opinion, this clearly constitutes an abuse of a dominant market position.

b) It should be noted that certain measures can be justified, *e.g.* by environmental protection concerns. For such a justification, it is however necessary that the measure (granting of a monopoly to TIWAG) must be the most suitable to achieve the objective (environmental protection). This is not the case here, however, as the selection of sites and the determination of mandated conditions could occur independently from the specific project applicant. The mere fact that the water management framework was suggested by TIWAG does not speak in favor of the necessity of such measure. On the one hand, the Ministry could regulate the relevant environmental issues on its own, and on the other hand, it must be considered that TIWAG will not conduct elaborate planning for other energy operators or locations which might be environmentally most appropriate.

c) The production of electricity is a service in the general public interest and thus falls under the regulations contained in Art. 106 para. 2 TFEU. According to this article, undertakings entrusted with such a service (in this case energy operators) shall only be subject to the competition rules in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Thus, an energy operator may in exceptional cases breach competition law it could only then fulfill its exclusive rights in economically acceptable conditions.<sup>9</sup> The development of trade must not be affected to such an extent as would be contrary to the interests of the Union, though (Art. 106 para. 2 TFEU).

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<sup>6</sup> ECJ, C-42/84, *Remi aua/Kommission*, Slg 1985, 2545, marg. no. 22; *Schweitzer/Hummer/Obwexer* 499.

<sup>7</sup> ECJ, C-219/95 P, *Ferriere Nord/Kommission*, Slg 1997, I-4411 ff, marg. no. 19.

<sup>8</sup> *Schweitzer/Hummer/Obwexer* 500.

<sup>9</sup> *Craig/de Burca*, EU Law, text, cases and materials, 1081.

As TIWAG could fulfill its tasks of energy production also if its projects were not to be approved in the context of the water management framework by the Ministry, but by merely following the normally foreseen authorization process, an exception from the competition laws is not justified in this case. Additionally, due to the liberalization of the internal market in electricity, such a provision would be contrary to the interests of the Union. Hence, for these reasons TIWAG is not exempted Ministry approves the water management framework – which was drafted by TIWAG –, resulting in TIWAG receiving the exclusive right to construct hydropower plants in this region, this would in certain circumstances constitute a breach of Art. 106 para. 1 TFEU in connection with Art. 102 TFEU (abuse of a dominant position).

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