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Renewable Energy Sources in Austria – Current Legislative Developments and their Background

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The Austrian electricity market is defined by a higher-than-average public ownership ratio (and a correspondingly powerful lobby), a heterogeneous structure with regard to generation and transmission costs, a high percentage of renewable energy in general (and large hydropower plants in particular) and the predominance of partly unbundled undertakings. Not surprisingly, the growth of renewable energy has been strongly influenced by these factors. After some years of debate, the federal legislator started to tighten legislative measures in late 2004 in order to ensure an efficient support of electricity from renewable energy sources (RES-E). In this article, the authors give a short overview on the current situation and outline the envisaged changes.[1]

Austrian electricity market – a short overview

As a general rule, the predominant players on the Austrian electricity market act on three levels: the federal level, where the Verbund (and its subsidiaries),

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1 While editing this article, the full extent and the exact wording of the amendments to the Austrian Green Energy Act, which is at the core of RES-E support, could not be foreseen. However, the main ideas of the first draft as issued by the Austrian Minister of Economics and Labour Affairs are outlined and evaluated below.

which is 51 per cent owned by the state, and owns the high-voltage transmission grid and the majority of large-scale hydro stations to cover baseload, but has very few end consumers; the provincial level, comprising nine utilities engaged in generation, distribution and supply, which predominantly generate electricity in thermal power stations and account for the majority of industrial customers (and households); and (in particular in eastern Austria) the regional level, where public and private undertakings are concerned with the supply of end consumers. In total, around 130 grid operators can be found. The ten largest operators – nine provincial utilities and APG – own 98.5 per cent of the transmission system (380 kV, 220 kV, 110 kV lines). Even though new entrants compete for consumers, supply is still almost exclusively undertaken by the provincial and local enterprises.[2]

By promulgating the Act on the Energy Industry and Organisation 1998 (ElWOG 1998),[3] Austria opted for a system of regulated third-party access (r-TPA). In 2000, the process of liberalisation was accelerated by the Energy Liberalisation Act 2000 (ELG 2000),[4] which basically provided for a market opening as of 1 October 2001 for all end consumers. It is notable that this liberalisation was not preceded by any major privatisation.[5]

One of the most outstanding peculiarities is the high level of grid tariffs, which significantly hampers competition. The Austrian regulator has repeatedly tried to bring these tariffs down to levels where effective competition on the supply side would become possible[6]; however, there is still room for improvement. In the first days of 2005, the regulator has pressed several utilities to lower their grid tariffs.

Renewable energy – current legal framework

Before the Green Electricity Act 2002[7] (GEA 2002), the ELG 2000 contained specific collateral provisions on renewable energy and provided for a variety of regulatory models[8]: first of all, small hydropower (SHP) plants with a

2 For a short overview compare E-Control, *Electricity Market Liberalization in Austria – The First Experience*, Working Paper No 2 (2002).

3 *Official Gazette* I 143/1998.

4 *Official Gazette* I 121/2000.

5 For more detailed information on the legal framework see Pauger, 'Die Neuordnung der Elektrizitätswirtschaft in Österreich – Auf dem Weg von der Stromversorgung zum Strommarkt' (1998) ÖZW 97 (in German).

6 It is estimated that the past reductions of grid tariffs amount to a total of €250 million (*Die Presse*, 18 September 2004).

7 *Official Gazette* I 149/2002.

8 See Lausegger and Pichler, 'Nationale Umweltschutzmaßnahmen im liberalisierten europäischen Strommarkt – Die Berücksichtigung ökologischer Aspekte im ElWOG' (2001) Recht der Umwelt 43 (in German).

maximum installed capacity of 10 MW were entitled to issue and sell green certificates. Every supplier and/or consumer had to purchase green certificates, showing the production of electricity in SHPs equivalent to eight per cent of its total consumption. Therefore, a derivative market was deemed to evolve. If the purchase obligation was not met, a penalty (*Ausgleichsabgabe*) had to be paid into a fund, resources from which were devoted to the (co)-financing of new projects in the field of renewable energy sources (RES). All other eligible RES were supported by a purchase obligation imposed on the respective distribution system operator. The grid operator was then compensated by means that were raised from the public by imposing a mark-up on grid tariffs. The feed-in tariffs and the imposed mark-ups notably differed in each province, as the competence to determine them remained with the provincial government.

The main shortcomings of the system were: a differing intensity of RES-E support in the nine provinces of Austria; market distortions in the case of green certificates, which were tradeable country-wide, while the exact amount of the collateral penalty differed across the Austrian regions; a long period of implementation of the scheme (in the case of Styria, the provincial by-law necessary for the functioning of the system passed the local government only in early 2000, shortly before the first reform of the ElWOG 1998 by the ELG 2000); and strong participation by local governments. The last aspect turned out to be particularly harmful as provincial, vertically integrated undertakings ran a high proportion of RES-E plants (especially SHP) and largely belonged to the respective provinces.

In late 2001, the trend of supporting RES-E gained momentum with the adoption of Directive 2001/77/EC.[9] This act obligated Austria to contribute to the Kyoto target of the European Union by accomplishing a share of RES-E of 78.1 per cent. The then-valid provisions of the ELG were not in line with European requirements, and the GEA 2002 took advantage of the large political consensus on the topic, enabling the state government to base the law on a qualified majority in the Austrian Parliament. This made it possible to make use of constitutional provisions, transferring the competencies of the provincial governments as enshrined in the Austrian constitution to the federal parliament. However, it was enacted shortly before the Austrian's coalition collapse in early autumn 2002, and was therefore pushed through at a fast pace resulting in some unclear provisions. It introduced a simplification of the system, eliminating the certificate system concerning

9 Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ 2001 L 283/33.

SHP and bundling the price-fixing responsibilities with the Minister for Economic and Labour Affairs. Therefore, a uniform countrywide feed-in tariff support mechanism was achieved for all kinds of RES-E. The details are as follows.[10]

Targets to be met

Meeting the targets set within the ELG 2000 (four per cent 'new' RES[11] in 2007, eight per cent SHP) caused inefficiencies within the support scheme, as Austria has different potentials for various RES. Hence, only the provinces (*Länder*) with high wind power potentials reached the target, whereas others were to a large extent required to finance expensive technologies, such as photovoltaics and biogas. In order to create a more cost-efficient support scheme, the following targets, among others, were set within the GEA 2002:

- raise the proportion of RES-E to such an extent as to achieve the national target of 78.1 per cent, as specified as the reference value in the Directive[13] by 2010;
- increase the share of 'new' RES to at least four per cent by 2008;
- make efficient use of the means for the dissemination of RES;
- focus on technology policies with a view to achieving market maturity for new technologies;[12]
- raise the proportion of electricity produced in SHP to at least nine per cent by 2008;
- ensure a secure investment climate for existing and future power plants; and
- provide for a nationwide sharing of the burden associated with the promotion of RES-E and combined heat and power (CHP).[14]

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10 For a detailed analysis see Korinek, 'Das neue Ökostromgesetz' (2002) ecolex 730 (in German).

11 Photovoltaic power plants, wind power plants, geothermal power plants, solid biomass and waste with large biogenic fraction power plants, fuels including biogenic wastes power plants, liquid biomass power plants, biogas power plants sewage and landfill gas power plants.

12 Unlike all other RES-E, energy produced by photovoltaic plants is only supported up to a nationwide installed capacity of 15 MW. This threshold was met on 27 March 2003.

13 See n 9 above.

14 The authors have refrained from laying down the regulations of GEA 2002 concerning the promotion of CHP plants, as the current proposal does not deal with this issue. The current promotion strategy for CHP mainly consists in the granting of a premium per injected kWh genuinely produced by CHP generation.

Establishment of 'Ökobilanzgruppen' (Eco-Balance Groups)

These virtual Eco-Balance Groups are similar to the ones encountered within the overall market structure of the electricity sector, where the responsibility for coordinating supply and demand lies with an authorised undertaking settling the market. The Eco-Balance Groups are administered by three Eco-Balance Group Representatives (*Ökobilanzgruppenverantwortliche*) (currently the three transmission system operators, namely Verbund Austrian Power Grid (APG), Tiroler Regelzone (TIRAG) and Vorarlberger Kraftwerke (VKW)). These undertakings are obliged to buy RES-E according to regulated prices. They also have to settle RES-E among themselves, since there should be an equal amount of RES-E consumption (and the associated costs to consumers) all over Austria. Furthermore, they have to pass on this energy to traders (who have to buy it at the transfer price (*Verrechnungspreis*)[15] of 4.5 € cent per kWh, a price well above the current market price) in accordance with their relative supply in the control area. As a consequence, each trader is allocated an equal share of RES-E based on its supply to end customers.[16]

Feed-in tariffs

The purchase prices for RES-E to be paid to the producers by the Eco-Balance Group Representatives were fixed by Ministerial By-Law 508/2002,[17] which came into force on 1 January 2003. The tariffs must reflect the 'average production costs of RES-E in cost efficient plants',[18] and therefore differ significantly across the specific technologies: in the case of photovoltaic, the price was set at 60 € cents per kWh, whereas SHP producers may in certain cases only be entitled to obtain a meagre 3.15 € cents per kWh. The remaining feed-in tariffs are:

- 7.8 € cents per kWh for wind plants;
- 7.0 € cents per kWh for geothermal plants;
- 6.5-16 € cents per kWh for solid biomass and waste with large biogenic fraction plants;
- 4-12.8 € cents per kWh for fuels including biogenic wastes power plants;
- 10-13 € cents per kWh for liquid biomass power plants;
- 10.3-16.5 € cents per kWh for biogas power plants; and
- 3-6 € cents per kWh for sewage and landfill gas power plants.

In any case, the construction of the respective plant had to be authorised

15 GEA 2002, s 19(1).

16 From the authors' point of view the appointment of the three transmission system operators as Eco-Balance Group Representatives is widely incomprehensible as this appointment is at odds with the core principle of the liberalisation process – the unbundling principle.

17 *Official Gazette* II 508/2002.

18 GEA 2002, s 11(2).

prior to 1 January 2005. The tariffs for new power plants are guaranteed for 13 years after the respective plant has started operating. The by-law mentioned above has introduced some incentives to improve existing plants, as it provides for higher tariffs in the case of restructured or 'revitalised' plants (especially in the case of SHP).

Balancing the system – balance charges

One crucial task of liberalising electricity markets is to maintain the system's stability within an environment where many players act independently. Usually, producers, suppliers and consumers have to report their predicted supply/demand to a third party (grid operator, independent regulator, specialised agency or simply a branch of an existing entity) responsible for neutralising the balancing risk by providing for sufficient potential reserves. The required balance energy is rather expensive, as the prices reflect the generator's risk. The challenge is the creation of a balance system that avoids barriers to entry for potential competitors. Given this background, the GEA 2002 provides for some advantages for RES:

- the balance charge is not borne by the individual deviant producer, but by the Eco-Balance Group Representative, which gets reimbursed[19];
- there is no clearing fee to be paid by RES-E producers.[20]

However, the costs of balancing energy are high, and renewable energy (eg wind) is especially prone to generating electricity that differs from the envisaged output. As the Eco-Balance Group Representative is solely responsible for the payment of the balance energy, the individual producer, who profits from the feed-in tariff, has no incentive to take into account the stability of the system and adapt its injection accordingly. This resulted in balancing costs of about €9 million in 2003 in the control area of APG, which is handling some 80 per cent of all Austrian RES-E production. In 2003, the overall costs for invoicing imbalance energy for the three Eco-Balance Groups were around €10 million.[21] Figure 1 shows that the Eco-Balance Group Representative APG had a huge share of the total balancing costs in 2003.

The high proportion of the costs of RES-E balance energy is also due to the fact that the Eco-Balance Group Representatives may not – unlike other market participants – react to any changes to predicted outputs as they are not in a position to steer RES-E generation.

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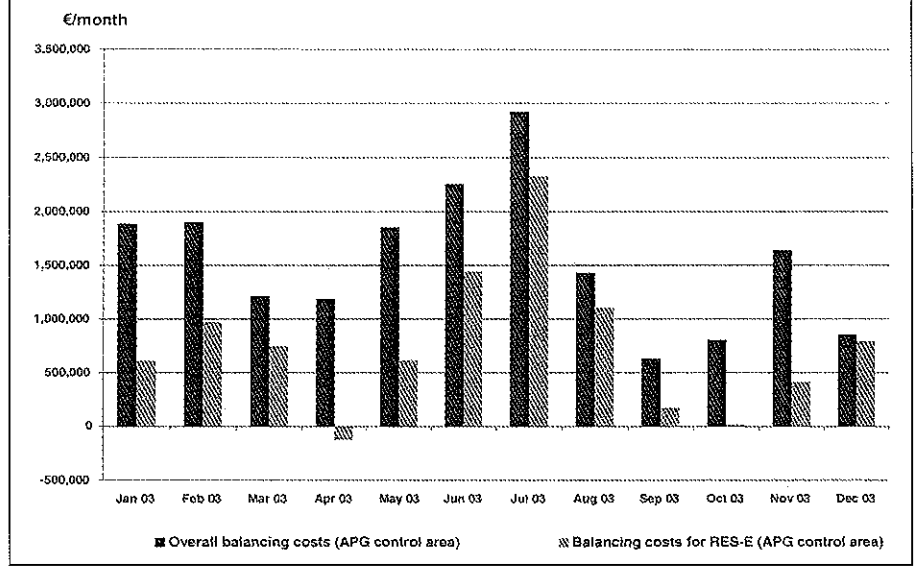
19 GEA 2002, s 21(1).
20 GEA 2002, s 16(2).
21 E-Control, *Annual Green Energy Report* (2004), p 81.

Figure 1: Balancing Costs in the APG Control Area in 2003



SOURCE: E-CONTROL

Financial burden and overall budget

Under the regulations of the ELG 2000 the financial burden differed between the provinces of Austria owing to the different RES potentials. The components of financing the current support scheme of the GEA 2002 are the fixed transfer price of 4.5 € cents per (RES) kWh to be paid by energy suppliers. As this price is higher than the market price, which was on average 2.699 € cents per kWh in 2003,[22] part of the system is financed through these means. The remaining part is covered by a uniform nationwide support fee (only differentiated by grid levels) to be paid by end consumers; overall, the maximum financial burden for end consumers across all grid levels is limited to 0.22 € cent per (consumed) kWh. Currently, the support fees for RES-E and SHP are laid down in the Ministerial By-Law Defining the Contributions for the Compensation for Additional Expenditures Borne by the Eco-Balance Group Representative for the Year 2004 (Ministerial By-Law 135/2004).[23] These support fees are as follows:

- RES: 0.143-0.204 € cent per kWh (the support fees differ according to the grid-level of the end consumer);

22 E-Control, 'Official expert opinion on the support fees for SHP and "new" RES in 2004' (2004) 18 (in German).

23 Verordnung des Bundesministers für Wirtschaft und Arbeit, mit der Förderbeiträge zur Abgeltung von Mehraufwendungen der Ökobilanzgruppenverantwortlichen für das Jahr 2004 bestimmt werden, *Official Gazette* II 135/2004.

- SHP: 0.005 € cent per kWh[24]; and
- CHP: 0.15 € cent per kWh.[25]

In 2003, the budget to be administered by the Eco-Balance Group Representatives as raised above amounted to around €200 million. RES-E was supported with a total of €53.035 million, SHP with €149.157 million.[26]

However, from a regulatory point of view, the decision-making process in order to promulgate the ministerial by-law setting up these support fees as provided for in section 11(1) of the GEA 2002 gives rise to some criticisms: the responsible Minister of Economics and Labour Affairs has to coordinate his concepts with the Minister of Rural Affairs (representing the agricultural industry traditionally strongly involved in RES-E (biomass, biogas, etc)) and the Minister of Justice. Furthermore, the proposal requires the affirmation of a group of experts nominated by the governors of the nine provinces. Only if an agreement cannot be reached within six months may the ministers adopt the by-law independently.[27] However, this procedure nicely reflects the Austrian political and constitutional landscape, where all the players involved attempt to secure for themselves some decision-making power (especially in the case of SHP).[28]

Guarantees of origin

According to section 8 of the GEA 2002, guarantees of origin are to be issued by the grid operator that connects the RES-E generator to the grid. All eligible RES-E generators (including large hydropower stations) fall under this provision. However, the law does not set up any specific support scheme associated with this instrument. They may be used by voluntary supply schemes, such as the Renewable Energy Certificate System (RECS), but as things stand now, they merely inform consumers on the share of different primary energy sources in the electricity delivered by their individual supplier in the previous (calendar) year.

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24 It is essential not to mistake these support tariffs (*Unterstützungstarife*) paid by every consumer to the Eco-Balance Group Representatives for the feed-in tariffs paid out by the latter to RES-E producers.

25 The support fee for CHP is fixed within the GEA, GEA 2002, s 22(3).

26 E-Control, *Annual Green Energy Report* (2004), p 9 (in German).

27 This decision-making process has to be seen against the background of the genesis of the GEA 2002: the provinces were only willing to transfer their constitutional responsibilities in the area of RES-E promotion to the federal legislator if a suspensive veto were to be retained in this crucial issue.

28 This decision-making process has also been criticised from a constitutional law perspective; the result of this procedure is that provincial governors may influence or at least delay the decision of the Austrian Minister of Economics and Labour Affairs. Compare Mayer, 'Das Ökostromgesetz', in Mayer (ed), *Hauptfragen des Österreichischen Elektrizitätsrechts* (2003), p 49 at 59.

Terms of business

The details of contracts that have to be concluded between all enterprises involved are laid down in general terms of business that were separately approved by the regulator in late 2002 in accordance with section 18(1) of the GEA 2002. These apply to all activities of the Eco-Balance Group Representatives, notably their contractual relations with other market players (producers, suppliers, grid operators, etc) and specify the exchange of necessary data, the terms of payment, the details of the reimbursement, etc.

Provisional regulations

The framework described above came into force on 1 January 2003. However, the 'old' provisions of the ELG 2000 continue to apply to RES-E plants authorised before this date, as the respective undertakings are entitled to receive the benefits of the law as it stood on 31 December 2002.[29] As a consequence, there are now two different regimes applying to RES, the heterogeneous system based on the ELG 2000 and the harmonised system based on the GEA 2002. This 'duplication' of support schemes damages acceptability in the public eye, as market participants are being confronted with a multitude of fees determined by different authorities. Last but not least, it will be difficult to evaluate the effects of the GEA 2002, because there is a need to interpolate the effects of the old system.

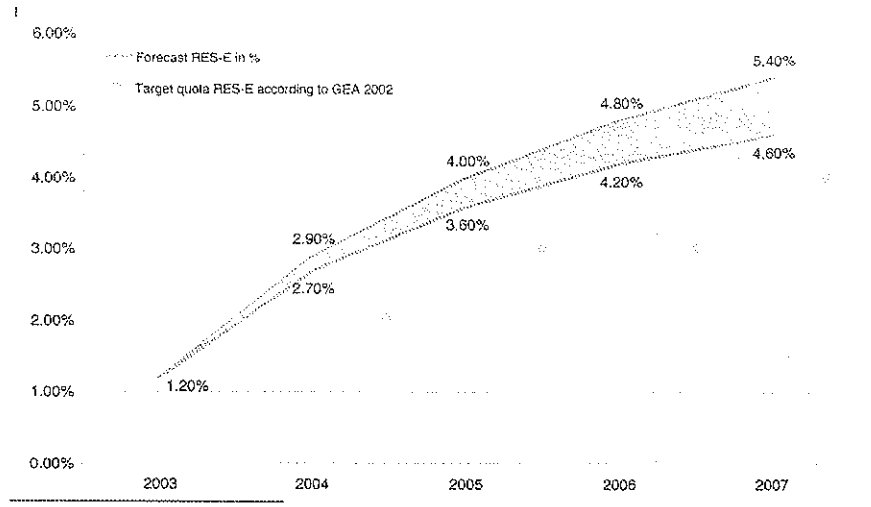
Status quo and criticisms raised

Current situation

So far, the Austrian support scheme has proven to be effective without being particularly efficient. There are several reasons for the responsiveness of the market to the new legislation and the increase in RES-E over recent years. First, Austria has several influential potential stakeholders for RES-E production, the foremost group being the public utilities, which, beyond merely acting as market participants, managed to get their interests supported in the political arena. The farmers, who for historical reasons are strongly supported by the now-governing conservative party, have been another powerful group. Secondly, the (theoretically) stable feed-in tariffs have led to the involvement of business people, who were able to draw up promising business plans based entirely on outside capital. Thirdly, the provinces have

29 With the exception of SHP, as the certificate system ceases to exist and generators had to bring their contracts in line with the actual support scheme (GEA 2002, s 30(8)).

Figure 2: Achievement of National RES Targets (excl SHP) 2003-2007



Source: E-Control.

some (minor) support programmes for RES-E,[30] and there is a certain suspicion that this might have led to overcompensation in the past.[31] As of July 2004, the results of the RES-E support scheme can be summarised as follows:

Considerable growth . . .

Whereas in 2002 only 0.84 per cent of the nationally generated electricity was generated by RES (*not* including small and large hydro), this figure rose to 1.18 per cent in 2003 (see Figure 2). However, in late 2004 it became evident that the target of four per cent had already been reached or will be accomplished in early 2005. This of course has been a core argument for restricting support for upcoming projects and introducing efficiency criteria into the promotion scheme.

. . . across all categories . . .

Virtually all sectors of RES-E have undergone a major increase over the past years. Wind power plants are undoubtedly leading this development: between December 2002 and August 2004, the authorised capacity rose from 201.34

30 We have not delineated these support schemes, which mainly consist in investment aids granted by provincial or regional public entities. However, these promotion initiatives do not play a major role in the assessment of the Austrian RES policy as a whole.

31 It has recently been reported that the European Commission directed an (informal) enquiry to The Ministry of Economics and Labour Affairs, see *Die Presse*, 6 October 2004.

MW to 553 MW. It is assumed that the authorised capacity of wind power plants currently stands at 650 MW. In the same period, solid biomass including waste rose from 38.02 MW to 109 MW, hybrid power plants from 18.62 MW to 58 MW, biogas from 12.36 MW to 34 MW, solar power plants from 9.81 MW to 25 MW, landfill gas from 7.42 MW to 14 MW, liquid biomass from 1.23 MW to 47 MW and sewage gas from 9.40 MW to 10 MW. The total number of authorised plants as of March 2004 was 2,916, with an increase in installed capacity from 299.12 MW to 852 MW within only 20 months.[32]

. . . for the benefit of producers . . .

It has been noted repeatedly that producers are being overcompensated, as the feed-in tariffs do not properly reflect the costs of production and do not take into account any technical improvements of newly built plants. Furthermore, the law has enabled producers deliberately to downgrade SHP plants below the maximum bottleneck capacity threshold of 10 MW and some (public) utilities have taken advantage of this opportunity. Under such circumstances, E-Control may notify the competent provincial governor,[33] who officially recognises a plant as being entitled to participate in the support scheme according to the GEA 2002. E-Control has taken this step in several cases. Not surprisingly, the governors dealing with such cases have been apparently unwilling to withdraw any such recognition previously awarded to the provincial utility.[34]

. . . at the expense of end consumers

As outlined above, the costs of the support scheme are borne directly by private and industrial end consumers by way of the price to be paid by traders, which is passed on to end consumers, on one hand, and the support fees associated with the grid tariffs, on the other. According to recent research, the average cost for an Austrian household amounted to €10 in 2003 for 'new' RES. Furthermore, Austrian industry has repeatedly expressed its reluctance to accept a further increase in electricity costs. According to section 22(3) of the GEA 2002, the support fees as currently defined by Ministerial By-Law 135/2004 may surpass the amount of 0.22 € cents per kWh only from 1 January 2005 onwards. During 2004, it became clear that the current financing mechanism was not going to cope with the present expansion of RES-E plants, which significantly surpassed initial expectations. In the first quarter of 2004, the remuneration of RES-E totalled €32.949 million, thereby

32 E-Control, *Annual Green Energy Report* (June 2004), p 93, www.e-control.at.
33 GEA 2002, s 7(6).
34 E-Control, *Annual Green Energy Report* (2004), p 64 (in German).

Furthermore, they were in theory also obliged to enter into contractual relationships with new producers. A remarkable proposal to solve the issue came from a leading academic, who suggested the publicly owned Eco-Balance Group Representatives should keep paying the feed-in tariffs and sue the Republic of Austria. The Eco-Balance Group Representative APG (owned by the Republic of Austria) decided to take a more pragmatic approach and stopped awarding any feed-in contracts for new RES-E plants. The situation was eventually settled in April 2004 (incidentally shortly after the provincial elections on 7 March 2004), and the group of experts nominated by the local governors refrained from further obstructing the passing of Ministerial By-Law 135/2004.[37]

Proposal of July 2004

On 30 July 2004, the Minister for Economy and Labour Affairs published a proposal for a major amendment to the support mechanisms that have only been in force for two years ('Proposal I'). Proposal I is a move towards creating a more market-based regime and sets fixed caps for the surcharges in order to stabilise the financial burden for end consumers without foregoing a relatively secure investment climate.

Targets to be met

The amendment presents no changes to the targets; however a clear focus towards efficiency and minimisation of cost has been set down in the framework of these changes.

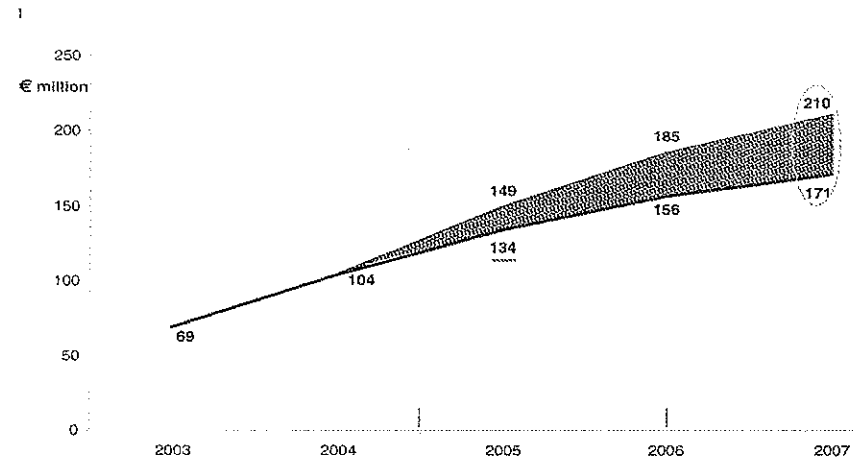
Establishment of 'Ökoenergie AG'

The decision of the Eco-Balance Group Representative APG to stop awarding any feed-in contracts for new RES-E plants in early 2004 caused a high level of insecurity among potential investors. Although there was a legal obligation to purchase the offered RES-E at fixed feed-in tariffs there was no guarantee that new RES plants were going to benefit from these tariffs, and numerous projects were stopped.

The decision of the management of APG, which is listed in the stock exchange, can easily be understood. Being bound by the Stock Corporation Act, APG cannot take the liberty of paying for new RES plants without having the security of being fully financed by transfer prices and a support fee.

37 This decision was also obviously influenced by the fact that the local utilities own a large part of the supported RES-E plants.

Figure 3: Costs for Supporting RES (excl SHP) in Austria 2003-2007



Source: E-Control.

already surpassing the support of SHP in the amount of €31.847 million (see Figure 3).[35] An opinion delivered by the regulator indicated that under the current legal framework, the weighted median support fee will have to be set between 0.298 and 0.304 € cents per kWh in 2005 to cover the costs (see Figure 3), well above the current threshold of 0.22 € cents per kWh.[36]

Criticisms

As mentioned above, some shortcomings of the system have become evident. Besides legal restraints emerging from the involvement of stakeholders in the legislative process, lack of efficiency has been stressed as a major disadvantage of the current system. The inefficient allocation of competencies led to continuous disagreements between stakeholders. An example became public at the beginning of 2004: the by-law setting up the additional remuneration to be paid by end consumers had to be re-promulgated, and (higher) tariffs were envisaged to be established by the Austrian Minister for Economy and Labour Affairs. Unexpectedly, the experts nominated by the governors blocked the new regulation on rather specious grounds. As a consequence, the Eco-Balance Group Representatives were in the awkward predicament of being contractually bound to pay out the fixed feed-in tariffs to RES-E producers without being reimbursed by end consumers.

35 *Ibid*, at 97.

36 E-Control, 'Zur Bestimmung der Förderbeiträge für Kleinwasserkraft und sonstige Ökoanlagen für 2005' (2004) (in German).

In order to defuse this question of personal commitment, Proposal I's regulations establish a stock corporation – Ökoenergie AG – with an authorised capital of €1 million, with 51.4 per cent owned by the Republic of Austria.[38] Ökoenergie AG will be acting as the universal legal successor of the three Eco-Balance Group Representatives and will in particular have all existing contracts with RES plant operators assigned to it by law.[39] In addition, the new company has to take all possible organisational precautions in order to be able to fulfil its tasks. This will, in particular, include the duty to form at least one balance group that pools all RES plants obtaining financial support through the national support scheme.[40]

Compared to the duties currently to be carried out by the existing Eco-Balance Groups, the duties of Ökoenergie AG will remain essentially the same, but Ökoenergie AG is obliged to minimise the costs for balancing energy. To this end it will, in particular, be entitled to take all measures necessary for compliance with the predicted forecasts, which will also include the sale and purchase of electricity and the operation of plants for its own account. Finally, Ökoenergie AG will be obliged to transmit the necessary data, which will serve as a basis for the guarantees of origin generated automatically within the database (*Herkunftsnachweisdatenbank*) administered by E-Control.

A hybrid support scheme

Feed-in tariffs

Without changing the support scheme for SHP, Proposal I introduces a hybrid support model for 'new' RES, such as wind power, biomass and photovoltaics. All power plants that obtained the permits necessary for construction prior to 1 January 2005 and are 'in operation'[41] by the end of June 2006 at the latest, will receive the fixed feed-in tariffs as regulated in Ministerial By-Law 135/2004.

Tendering for new RES plants

For power plants that received their permits after 31 December 2004, or are 'in operation' after the end of June 2006, a tendering system has been introduced.[42] The means raised from transfer price and support fees, less

38 Proposal I, s 14.

39 Proposal I, s 14(8).

40 Proposal I, s 14(7).

41 The German term *Inbetriebnahme* merely means a putting into operation. However, it is not clear whether a partial activation of the plant will suffice.

42 Proposal I, ss 25a-25h.

expenses for the plant supported via the ELG 2000 and GEA 2002, and less administrative expenses will be released for the tender process.[43] Of the total amount available, 40 per cent will be used for plants that use solid biomass, 30 per cent for biogas, 20 per cent for wind power plants and ten per cent for all other kinds of RES plants.[44]

Two months before the tendering date, E-Control will have to publish the details for the tendering process. Information to be revealed prior to tendering the cap has to include the primary energy source, necessary documents to be submitted, envisaged date of putting into operation, etc.[45]

Proposal I also sets price caps for the tender offers. These caps correspond to the feed-in tariffs stipulated by Ministerial By-Law 508/2002 as outlined above.[46] As the support within the tendering system is guaranteed for ten years, whereas the support within the feed-in tariff model is guaranteed for 13 years, there will be a considerable reduction of revenues for the RES-E producer in the medium and long run. In addition, these price caps are reduced by five per cent each year, beginning in 2005.[47]

After tendering, the bids will be ranked starting with the lowest offered price; and the tenders will be accepted as long as they fall within the budget for financing annual production, which will be calculated on the basis of the price offered and the announced average full load hours. To avoid the participation of unrealistic projects, a security deposit of €200 per projected kW will have to be made which will be refunded after completion of the construction of the plant.

. . . and again feed-in tariffs . . .

However, some new RES plants will continue to be supported via feed-in tariffs. Small biogas (up to 200 kW installed capacity) and biomass (up to 500 kW installed capacity) plants will receive fixed tariffs ranging from 10.66 to 13.78 € cent per kWh for biogas and 11.76-15.20 € cent per kWh for biomass depending on the grant of the necessary authorisations and the putting into operation of the respective plant.

. . . with a limited budget

Proposal I plans to support fees to refinance Ökoenergie AG until 2010. As the tendering volume directly depends on these funds, there is only a limited

43 Proposal I, s 21a.
44 Proposal I, s 21b.
45 Proposal I, 25a (2).
46 Except for wind power with a price cap of 6.9 € cent per kWh.
47 Proposal I, s 25a(4). This means that the (maximum) feed-in tariffs will be reduced from the outset, as it is rather unlikely that there will be any tender procedures in 2004.

risk that the required amount of money is not disposed of. However, the financial burden to be borne by end consumers will increase steadily over the next years. For households and other minor customers, the support fee will more than double from 0.134 € cent per kWh in 2003 to 0.422 € cent per kWh in 2010. On the basis of an average energy consumption of 4,000 kWh per year every household paid an average of €5.36 in 2003 and will pay €16.88 per year in 2010 in support fees for 'new' RES only. Furthermore, the end consumer will be charged with higher energy prices *per se* as the energy supplier will pass on the costs arising from the transfer price to the customer.

Stakeholders' points of view

Naturally, the reactions of the individual stakeholders differed strongly, and all sorts of criticism were raised. The issues were in particular focused on economic, legal and efficiency criteria.[48]

Economic criticisms

Above all, several consultants felt that the burden on private consumers was unproportionally high, as Proposal I provides for support fees in the amount of 0.067 € cents per kWh to be paid by large industrial undertakings, whereas consumers will have to pay 0.334 € cents per kWh in 2005.[49]

Another point of criticism was aimed at the introduction of the tender procedure as such. The majority of stakeholders have pointed out that only large RES plants were *de facto* eligible for the tender, and that the security deposit in the amount of €200 per kWh served as a barrier, preventing small producers from participating in the tender. Furthermore, such stakeholders claimed that in terms of price caps for feed-in tariffs, no mandatory distinction was drawn between large and small plants. As pointed out by the Association of Farmers, it would have been advisable to draw such a distinction in order to reflect the different cost structures of small and large plants. The fixed partition of the tendered capacities has been criticised for its rigidity in this context.

Legal criticisms

One of the major criticisms (raised in particular by the Constitutional Service of the Federal Chancellery) is that section 25a(1) of Proposal I explicitly excludes the application of the Austrian Public Procurement Act 2002 in the framework of the tendering process. In particular, an appeal against the

48 All statements can be found on the Parliament's website: www.parlament.gv.at/pls/portal/url/page/PG/DE/XXII/ME/ME_00184 (in German).

49 Proposal I, s 22a(1) 1.

decision of E-Control identifying the successful bidder was not arranged for.

From a purely national point of view, it can be stressed that the denial of the right to appeal against a decision of a public authority may violate the Austrian Constitution. Even though the Austrian Constitutional Court has repeatedly held that the legislative authority is free to determine the stages of appeal, and that in principle a final decision that may not be appealed against is admissible, a recent decision of the Austrian Constitutional Court says that the exclusion of an appeal to the High Administrative Court violates the Austrian Constitution. As Proposal I does not specify the nature of the decision to be taken by E-Control, it can furthermore be assumed that the decision will have to be taken by an individual decision (*Bescheid*). In this respect, the constitutional provision of section 16(2) of the Act on Regulators will have to be taken into account, which provides for a general right to appeal against E-Control's decisions, the appellate body being the E-Control Commission. As a synopsis, it can be inferred that it is very likely that the acceptance of a bid by E-Control might be successfully appealed against before the E-Control Commission. It is also likely that the entire bidding process might – on the invocation of the Austrian Constitutional Court – be declared unconstitutional.

From a Community law perspective, strong doubts remain whether the exclusion of the Austrian Act on Public Procurement is admissible. The tendering of eco-energy by public bodies such as E-Control and Ökoenergie AG can be qualified as a delivery of goods, albeit possibly subject to Council Directive 93/38/EEC.[50] These issues may result in lengthy proceedings, significantly delaying the operation of new RES-E plants. In combination with economic deliberations (see below) containing a series of arguments against a tender procedure, the rigid Austrian legal system may serve as a further obstacle, which may significantly limit the dissemination of RES in the near future.

Efficiency criticisms

The official statements of individual stakeholders regarding efficiency can be divided into two groups. The first group sets the focus on cost efficiency. In the viewpoint of these stakeholders, eg the Ministry of Justice, Proposal I does not provide for sufficient incentives to create an efficient and effective

50 Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1993 L 199/84 (Austria is still in the process of transposing Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 L 134/1, into national law.

system, as the current feed-in tariffs result in massive overcompensation, and the proposed adaptation is perceived as being inefficient as the envisaged tariffs are still considered too high. However, in general the amendment is well received as it was necessary to limit the financial burden and reduce market distortions.

A majority of the stakeholders, especially the *Länder*, considers the establishment of Ökoenergie AG as unnecessary and cost intensive. Furthermore, the existing know-how of the Eco-Balance Group Representatives will disappear and the administrative costs will therefore be higher than under the existing system.

The second group of critical voices sets the focus on energy efficiency in connection with effectiveness. The introduction of efficiency criteria for biomass and biogas power plants is welcomed in general. However, some stakeholders point out that the degree of efficiency and the mentioned full load hours are too high (and out of touch with reality) for small power plants and that the extension of new (small) power plants will be restricted by these regulations. In addition, the proposed framework for the tendering process favours larger power plants as the maximum price is limited by law. In commenting on Proposal I, the Provincial Government of Styria stated that there would be a maximum of seven plants, which would be awarded fixed feed-in tariffs in the framework of a tender procedure. It has also been pointed out that the tender procedure would lead to high outputs being predicted, which cannot be achieved subsequently, and that it would disregard potential subsequent planning problems, a statement confirmed by the experience of Great Britain.[51] Fearing that the considerable progress regarding the increase of RES-E in Austria might come to a standstill, most of the stakeholders completely reject the proposed tendering scheme pointing out that most of the tendering schemes in Europe had turned out to be ineffective and had partly been abandoned for bureaucratic and administrative reasons. For solving the obvious problems, the adaptation of the Ministerial By-Law has been proposed as all necessary improvements could be achieved by correctly designing the feed-in tariffs.

However, the Austrian Chamber of Commerce is not in agreement and feels that although the intention of the amendment was to support only the most efficient RES plants, small biomass and biogas plants, which normally have a very low degree of efficiency, are excepted from the tendering process. This exception foils the intention to design an efficient and effective support system.

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51 See, *inter alia*, Mitchell, 'The England and Wales Non-Fossil Fuel Obligation: History and Lessons' (2000) Annu Rev Energy Environment 285 (295f).

Latest developments

Approaching the editorial deadline for this article, developments regarding the amendment of the GEA 2002 have been highly dynamic. On 14 October 2004 an amended proposal ('Proposal II') was submitted to the Austrian Parliament. The evolution of the amending law can be summarised as follows:

- The introduction of the tendering system will be restricted to wind power, the industry with the highest increase rates. All other RES plants will be supported within a 'first come, first served' feed-in tariff scheme, as it was initially proposed for small biomass and small biogas power plants only. Notwithstanding the efforts undertaken to design a cost-efficient system also meeting the requirements for higher energy efficiency, it seems that the pressure from stakeholders was too high so that the current feed-in tariff system will be tightened by the introduction of a 'budget cap'. However, it will not be substituted for an ambitious, market-based tendering scheme.
- Feed-in tariffs will be determined in a ministerial by-law[52] and are not part of the amending law as was foreseen by Proposal I. The Minister of Economics and Labour Affairs will set the feed-in tariffs, in agreement with the Minister for Agriculture and Forestry, the Environment and Water Management and the Minister for Social Affairs. Approval by the federal provinces will not be necessary.[53] The E-Control Commission, in turn, will set the support fees.[54]
- The supporting period will be extended from 10 to 12 years whereby the feed-in tariff will be reduced by 25 per cent in the eleventh year and by 50 per cent in the twelfth year.[55]
- If the market price according to section 20 of the GEA 2002 is higher than the transfer price, the electricity suppliers will have to pay the market price.[56] This provision meets the concerns regarding an increasing price for electricity and the (theoretical) possibility that energy suppliers may possibly be entitled to buy 'green' electricity at prices lower than the market price.
- From 2005 onwards, the E-Control Commission will decide on the level of support fees.[57] At this point, the subject of the discussions will hence be shifted from the Minister to a tribunal, chaired by a judge. This decision

52 Proposal II, s 11(1).

53 It is unclear at this stage whether the Federal Chamber of the Austrian Parliament (Bundesrat) will accept this proposal.

54 Proposal II, s 22a.

55 Proposal II, Section 10.4, s 25g.

56 Proposal II, s 19(1).

57 Proposal II, s 22a.

reflects the efforts to create a secure investment environment and to reduce the possibility of political pressure being exerted on this sensitive topic. It is also an acknowledgment of the in-depth knowledge of the agency.

- As the deposit of €200 per projected kW was perceived to be too high, Proposal II states that five per cent of the yearly feed-in tariff volume has to be paid upfront in order to avoid unrealistic projects from taking part in the tendering process.[58]

Conclusion

The Austrian electricity market only entered a quasi-competitive stage some years ago. Its regulation of natural monopolies lags behind other European countries, most notably the United Kingdom and the Nordic countries, which is mainly because of the existence of a large number of public utilities. Nevertheless, the legislator has not refrained from trying differing promotional strategies: there have been tradeable green certificates in the case of SHP (a concept that did not work out at all), fixed feed-in tariffs on all categories of RES and investment aids on a provincial level. Now, Austria is trying to slow down the costly expansion process by introducing the tendering of capacities, in particular in the case of wind power. The authors acknowledge that the current support scheme has led to a massive expansion of RES based on a socialised overcompensation of costs. However, the tendering of capacities does not seem to be the right choice for various reasons: first, the overall Austrian-wide capacity is too small to be effectively tendered in a competitive process, and transaction costs will be unreasonably high. Secondly, the Austrian legal system is at odds with the requirements of a quick and efficient tender procedure. It would be surprising if there were no challenges to the law itself or appeals against the tender process. Thirdly, the third change to the regulatory system within only four years will render a serious assessment of the individual promotion schemes almost impossible. Finally, and most notably, the parallel operation of feed-in tariffs, tender procedures, investment aid and other dissemination instruments is very difficult to administer, and the competent authority will have to focus on specific issues without being able to take all necessary measures in order to ensure compliance with the law.

58 Proposal II, s 25c.

Concluding, it must be noted that the proposals as set out above may still be subject to material change. In autumn 2004, all stakeholders were trying to have their interests taken care of. The Social Democrats (whose consent is required given the need for constitutional provisions in the law) decided not to support the new law as described above in the Austrian Parliament in December 2004. Therefore, the final shape of the law is still open to change and plants authorised after 1 January 2005 are currently not entitled to receive any funds under the promotion scheme. Some plant operators have anticipated these developments – on 27 January 2005 the regulator announced that in December 2004 the construction of several hundreds of plants were authorised by the competent provincial governors. The resulting cost explosion is most likely to have serious repercussions on forthcoming negotiations on the new promotion scheme, which cannot yet be predicted.