

AVOSETTA MEETING Vienna 2018 – QUESTIONNAIRE

AUSTRIA

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FLEXIBILITIES WITH REGARD TO MEETING EU REGULATORY OBJECTIVES AND REQUIREMENTS

I. Policies of prioritising economy and ecology

1. Are you aware of similar initiatives, current or planned, in policy- and/or decision-making in your country which result in prioritising economic activities over environmental interests? If so, please provide examples.

Update on a state objective of ‘preserving Austria as a business location’, and the Business Location Ombudsman

Coinciding with (and presumably as a consequence of) the refusal of an EIA permit for Vienna airport’s third runway due to climate change considerations,¹ several legislative and policy initiatives were discussed in Austria to strengthen the economy.

One of these initiatives is seeking to introduce a constitutional provision (state objective) acknowledging the importance of economic growth, employment and representing a competitive business location in order to ensure prosperity;² the same law in which this provision is planned to be introduced to already contains a state objective requiring comprehensive environmental protection. The legislative initiative is currently discussed in parliament. While many statements submitted during the public consultation period were dissuasive or at least doubting the benefits of such a provision,³ it is expected that the initiative will become law in the next few months.

A second initiative was requested by the Austrian Economic Chambers, the (mandatory) representative body for business owners in Austria. They have claimed that ‘just as much as’ for environmental interests there is a need for a representative of business interests in permitting procedures in order to ensure the competitiveness of Austria as a business location. A so-called ‘Business Location Ombudsman’ (*Standortanwalt*) should thus be party to such proceedings. The new coalition government, in effect since December 2017, has included this initiative in its government manifesto.⁴ While a legislative initiative has not been passed yet, we still expect the ‘Business Location Ombudsman’ to be implemented under the current coalition government.

Speeding up proceedings for infrastructure projects

The Federal Ministry for Digital and Economic Affairs (*Bundesministerium für Digitalisierung und Wirtschaftsstandort*, further BMDW) proposed the introduction of a new law aiming to make Austria more attractive as a business location.⁵ The envisaged law would allow to identify projects which have a significant positive effect on the Austrian economy. Project developers would be required to submit their project to the BMDW, which subsequently decides on the relevance of this project for the Austrian economy taking into account the recommendations of an expert panel. For projects, which were considered being in the interest of the Austrian economy, permitting proceedings should be accelerated by ordinance. How this ‘speeding up’ of procedures is to be achieved has not been

¹ See below and, for a more detailed account, the report on recent developments in Austria submitted for the 2017 Avosetta meeting, available at <http://avosetta.jura.uni-bremen.de/madner2017.pdf>.

² The parliamentary material is available at <https://www.parlament.gv.at/PAKT/VHG/XXVI/I/00110/index.shtml#tab-Uebersicht>.

³ The submitted statements are available at https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00025/index.shtml#tab-Stellungnahmen.

⁴ Government manifesto available at <https://www.oevp.at/download/Regierungsprogramm.pdf>.

⁵ Report of Minister for Digital and Economic Affairs Margarete Schramböck, BMDW-10.70/0010-IM/a/2018.

specified. The government ministers agreed in April 2018 to bring the proposal before the parliament;⁶ a draft law is yet to be expected.

Deregulation Agenda, including no goldplating of EU law

Already in 2017, the federal legislator adopted a law on the General Principles of Deregulation (*Deregulierungsgrundsätze*):⁷ When proposing new legislation it has to be ensured that the administrative burden and financial impact of legislation on businesses are reasonable and proportionate. Furthermore, following the principle of ‘one in, one out’, new burdensome legislation, if possible, shall be compensated by the removal of existing ‘burdensome’ legislation. In transposing EU law, implementing more stringent measures (‘gold-plating’) shall only be possible in exceptional cases (§ 1 (4) *Deregulierungsgrundsätze*).

The new coalition government, in effect since December 2017, also puts an emphasis on deregulation. In particular, it seeks to identify legislative provisions, which can be considered as gold plating.⁸ An emphasis lies on labour and environmental law. A legislative initiative in this regard is yet to be expected.

The Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice has suggested a legislative initiative with the aim of annulling laws and ordinances in Austria, which have become redundant and/or irrelevant over time. All such federal laws, which have been introduced before 1 January 2000 and are still in force should be annulled by 31 December 2018. The Ministry estimates that with this law about 2500 legal provisions can be annulled.⁹ A ministerial draft law has been passed which is currently available for commenting during the public consultation period.¹⁰

II. Techniques aiming at introducing more flexibility to or even diluting regulation

1. Offsetting regulatory directions

a) EU-ETS

1. (How) was the possibility of using international credits transposed into national legislation?

The 2011 Emissions Allowance Trading Act (*Emissionszertifikatengesetz 2011*, further EZG),¹¹ a federal law, transposes the obligations of the EU-ETS Directive. In the current trading period, more than 200 installations are subject to the EZG regime.¹²

In the previous trading period 2008-2012, the national allocation plan, adopted by the Minister for the Environment in accordance with the Minister of Economy and the Minister of Finance, had to indicate the total amount of international credits Austria intended to use in order to fulfil its obligations resulting from the Kyoto Protocol. The national allocation plan set this target for 9 mt CO₂e per year which amounts to 45 mt CO₂e for the whole trading period.¹³ Installation operators subject to the EZG had the right to use international credits up to an equivalent of 10% of their allocated emission

⁶ Beschlussprotokoll des 15. Ministerrates vom 25. April 2018, available at <https://www.bundeskanzleramt.gv.at/-/beschlussprotokoll-des-15-ministerrates-vom-25-april-2018>.

⁷ Bundesgesetz über die Grundsätze der Deregulierung (Deregulierungsgrundsätze), Federal Law Gazette I 45/2017.

⁸ Government manifesto available at <https://www.oevp.at/download/Regierungsprogramm.pdf>.

⁹ Report of Minister of Constitutional Affairs, Reforms, Deregulation and Justice Josef Moser, BMVRDJ-601.121/0032-V 1/2018.

¹⁰ Ministerial draft law available at https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00042/index.shtml#tab-Stellungnahmen.

¹¹ Federal Law Gazette I 118/2011, as amended by Federal Law Gazette I 128/2015.

¹² Environment Agency Austria, *GHG Projections and Assessment of Policies and Measures in Austria* [2015] 93. However, data from 2016 suggest that meanwhile the number of installations has fallen slightly below 200, Questionnaire of 29 June 2017 on the Implementation of the EU-ETS Directive submitted by Austria, available at <http://cdr.eionet.europa.eu/at/eu/emt/envwuprta/>.

¹³ This target was subsequently, in April 2012, increased to 80 million CO₂ equivalents, Environment Agency Austria, *Klimaschutzbericht 2014* [2015] 9.

allowances to comply with their allocations (§ 15(6) EZG, National Allocation Plan for Austria for the Trading Period 2008-2012). For aviation operators, the maximum percentage was set at 15% (§ 36 EZG).

For the ongoing trading period 2013-2020, §§ 37 et seq EZG transpose the requirements of Article 11a of the EU-ETS Directive: Installation and aircraft operators alike are allowed to continue using international credits to comply with their obligations under the EZG. These international credits can stem from projects with certified emission reductions achieved until 31 December 2012, from projects registered before 1 January 2013 for the emission reductions achieved after this date and new projects deployed as of 1 January 2013 in so-called least developed countries (§ 37 EZG).

The legislator, however, has set quantitative and qualitative limitations in this context (§§ 38 et seqq EZG). In this implementing provision, Austria opted for the minimum percentages set in Article 11a(8) of the EU-ETS Directive: During the period from 2008 to 2020 all operators are allowed to use international credits amounting up to 11 % of their allocation during the period from 2008 to 2012. New entrants, including new entrants in the period from 2008 to 2012 which received neither free allocation nor an entitlement to use CERs and ERUs in the period from 2008-2012, and new sectors are allowed to use international credits up to 4.5 % of their verified emissions during the period from 2013 to 2020 (§ 38(2) EZG). Aircraft operators are given the right to use international credits up to 1.5 % of their verified emissions during the period from 2013 to 2020 (§ 38(3) EZG).

Regarding qualitative limitations to the use of international credits, the EZG establishes that certified emission reductions and reduction units achieved through nuclear power installations or so-called LULUCF-project measures (afforestation and reforestation projects) cannot be used within the EZG (§ 39 (1) EZG).¹⁴

2. [Has your country used the possibility of using international credits to comply with EU-ETS requirements? If so, to what extent? Are you aware of the reasons for relying on this possibility?](#)

Austria as a party to the Kyoto Protocol has used the possibility of international credits to comply with its obligations. A contract within the DCF Fund (Clean Development Mechanism) was signed in 2003 with a duration until 2017.¹⁵

For the trading period 2008-2012, available data demonstrate that Austrian operators have indeed used international credits to comply with their obligations under the EZG. The number of credits from CERs and ERUs together amounted to approx 14 mt CO_{2e},¹⁶ which compares to a total of verified emissions of approx 150 mt CO_{2e} and amounts to about 10% of verified emissions.¹⁷ Data on Austria for the current trading period are unfortunately not publically available.

¹⁴ Commission Regulation (EU) No 550/2011 regarding restrictions applicable to the use of international credits from projects involving trifluoromethane (HFC-23) and nitrous oxide (N₂O) from adipic acid production was not transposed into national law.

¹⁵ Questionnaire on Art 13(1)(e) of 15 March 2017 submitted by Austria under the Greenhouse Gas Monitoring Mechanism Regulation, available at http://cdr.eionet.europa.eu/at/eu/mmr/art04-13-14_lcds_pams_projections/pams/envwmz6pq/AT_Art.13-1e-Questionnaire-Instruments_20170315.pdf/manage_document. Data from 31 December 2016 demonstrate that Austria has received 75,396 CERs while 37,698 CERs have been subtracted, European Environment Agency, Annual European Union greenhouse gas inventory 1990–2015 and inventory report 2017. Submission to the UNFCCC Secretariat [2017] 883.

¹⁶ CERs and ERUs surrendered under EU-ETS [2012] https://ec.europa.eu/clima/policies/ets/registry_en.

¹⁷ Verified Emissions data 2008 to 2012 [2014] https://ec.europa.eu/clima/policies/ets/registry_en.

3. How is the change to a domestic emissions reduction target received in your country? Is this change expected to affect your country's abilities to comply with EU-ETS requirements? Are you aware that other possibilities are discussed to compensate the loss of the flexibility through international credits?

In the past, Austrian operators indeed relied on international credits to fulfil their obligations; those credits amounted to about 10% of verified emissions.¹⁸ The change to a domestic reduction target would thus mean a potential 10% gap to be filled by other measures. However, we are not aware of particular concerns from businesses in view of this change to a domestic reduction target. Businesses, represented by the Austrian Economic Chambers through mandatory membership, appear to be more concerned with the now-agreed more stringent approach to carbon leakage measures under the EU-ETS Directive which they understand as a 'threat' to the business location.¹⁹

b) Effort Sharing (Non-ETS)

1. (How) were the flexibility mechanisms of the ESD transposed into national law?

The Austrian Climate Protection Act (*Klimaschutzgesetz*, further KSG),²⁰ a federal law, implements the ESD insofar as it sets annual sector-specific emission ceilings based on the annual emission allocations established by the ESD. For 2017, for example, the ESD sets Austria's annual emission allocation at approx 51 mt CO₂e. Based on this allocation, the Climate Protection Act establishes an annual emission ceiling for the following sectors:

- waste and waste management (6,9 mt CO₂e),
- energy and industry outside the EU-ETS (6,7 mt CO₂ equivalents),
- fluorinated gases (2,1 mt CO₂e),
- buildings (8,8 mt CO₂e),
- agriculture (7,9 mt CO₂e) and
- transport (22,1 mt CO₂e).

The flexibility mechanisms of the ESD were not transposed into national law. § 3 KSG explicitly states that as of 2013 the sector-specific emission ceilings are calculated based on domestic reduction measures only. Overall, the Climate Protection Act aims to facilitate the coordination of implementation measures between the federal government and federal state governments (*Länder*). However the Climate Protection Act does neither specify measures nor does it change the fragmented competences in climate policy matters.

2. Has your country used any of the flexibility mechanisms yet in order to comply with ESD requirements? If so, to what extent?

Austria has not used the flexibility mechanism described above nor has it relied on the possibility of purchasing emission allocations ('borrowing'); it has thus managed to limit its emissions falling under the ESD domestically.

3. How is this proposal on further flexibility mechanisms received in your country? If the proposal becomes law, would you expect your country to rely on those flexibility mechanisms in the future?

While so far Austria has managed to comply with its annual emission allocations under the ESD, the recent EU progress report suggests that this will change in the future should Austria not implement

¹⁸ However, as stated above, due to the lack of available data it is unclear whether operators are still, or to which extent, relying on international credits to fulfil their obligations.

¹⁹ <https://news.wko.at/news/oesterreich/WKOe-zur-Einigung-auf-Reform-des-EU-Emissionshandels:-Kom.html>.

²⁰ Federal Law Gazette I 106/2011, as amended by Federal Law Gazette I 58/2017.

further policy measures. According to the report, Austria is expected to miss its 2020 target for emission reductions outside the EU-ETS by a margin of less than 3 percentage points.²¹

The recently published preliminary version of the Austrian Climate and Energy Strategy²² does not suggest a strengthening of the policy measure outside the EU-ETS in Austria. Thus, although there is no specific debate on this topic, it is expected that Austria would consider relying on the new ESD flexibility mechanisms in the future. In any case, the position of Austrian businesses, represented by the Austrian Economic Chambers through mandatory membership, during the ESD revision negotiations was to keep and develop/extend the flexibility mechanisms as far as possible.²³

The preliminary version of the Austrian Climate and Energy Strategy²⁴ has been criticized by NGOs and by climate researchers for not being ambitious enough both in view of the Paris Agreement and with regard to the EU 2030 goals.²⁵

2. Exemptions from regulatory directives

a) *Water Framework Directive: Establishing less stringent environmental objectives*

1. (How) was the possibility of establishing less stringent environmental objectives transposed into national law? Is the transposing legislation stricter than Art 4.5 by, e.g., adding further requirements for deviating from the environmental objectives?

Art 4(5) WFD was implemented in § 30e(2) and (3) of the *Water Management Act* (*Wasserrechtsgesetz*, further WRG).²⁶ When establishing such less stringent environmental objectives for a water body, the competent authority is required to include in the river basin management plan

- a summary of those measures deemed necessary to achieve good chemical status in case a surface water body is concerned, or;
- a summary of those measures deemed necessary to ensure the least possible deterioration of good status in case a ground water body is concerned.²⁷

According to § 30e(4) WRG, establishing less stringent environmental objectives for a water body must not impact or even rule out achieving the environmental objectives for other water bodies within the respective river basin district.

2. Have national authorities relied on the option of establishing less stringent environmental objectives in their river management plans? If so, to what extent and for what reasons? If not, why?

The 2015 Austrian River Basin Management Plan (*Gewässerbewirtschaftungsplan, NGP*) sets less stringent environmental objectives for 18 water bodies. All these water bodies have a status falling short of a ‘good status’ regarding heavy metals (lead, cadmium, copper, zinc) which results from former mining activities.

²¹ COM(2017) 646 fin 9.

²² Bundesministerium für Nachhaltigkeit und Tourismus and Bundesministerium für Verkehr, Innovation und Technologie (eds), #mission 2030. Die Klima- und Energiestrategie der österreichischen Bundesregierung [2018], available at https://mission2030.info/wp-content/uploads/2018/04/mission2030_Klima-und-Energiestrategie.pdf.

²³ Wirtschaftskammer Österreich – EU-Büro Brüssel, eu | panorama. Die EU-Woche im Überblick, dated 20 October 2017, available at <https://news.wko.at/news/oesterreich/EU-Panorama-vom-20.-Oktober-2017.pdf>.

²⁴ Bundesministerium für Nachhaltigkeit und Tourismus and Bundesministerium für Verkehr, Innovation und Technologie (eds), #mission 2030. Die Klima- und Energiestrategie der österreichischen Bundesregierung [2018], available at https://mission2030.info/wp-content/uploads/2018/04/mission2030_Klima-und-Energiestrategie.pdf.

²⁵ Statement of the Climate Change Centre Austria – CCCA, https://www.ccca.ac.at/fileadmin/00_DokumenteHauptmenue/07_News/CCCA_Stellungnahme_zur_KES.pdf

²⁶ Federal Law Gazette 215/1959, as amended by Federal Law Gazette I 58/2017.

²⁷ § 30e(4)(2) WRG.

Water body identification number	Federal state	River	River-km (from)	River-km (bis)	Less stringent environmental objective for
901850002	Ktn	Gailitz (Nebeng.)	0,00	1,50	Zink
901850005	Ktn	Gailitz	0,00	2,50	Zink, Cadmium
901850009	Ktn	Gailitz	2,50	6,00	Zink
901850012	Ktn	Gailitz	6,00	7,61	Zink
900980003	Ktn	Hochalmbach	0,00	1,50	Kupfer
900980004	Ktn	Hochalmbach	1,50	2,99	Kupfer
901870006	Ktn	Moosgraben	0,00	3,35	Zink
901820001	Ktn	Nötschbach	0,00	1,00	Cadmium, Zink, Blei
901820009	Ktn	Nötschbach	1,00	2,50	Cadmium, Zink, Blei
901820010	Ktn	Nötschbach	2,50	4,00	Cadmium, Zink, Blei
901820011	Ktn	Nötschbach	4,00	9,00	Cadmium, Zink, Blei
901820006	Ktn	Nötschbach	9,00	10,59	Cadmium, Zink, Blei
901540015	Ktn	Weißbach [Drau, bei Villach]	0,00	3,00	Zink, Blei
901540017	Ktn	Weißbach [Drau, bei Villach]	3,00	5,00	Zink, Blei
901540018	Ktn	Weißbach [Drau, bei Villach]	5,00	8,00	Zink, Blei
901540011	Ktn	Weißbach [Drau, bei Villach]	8,00	9,50	Zink, Blei
901540012	Ktn	Weißbach [Drau, bei Villach]	9,50	10,19	Zink, Blei
901540007	Ktn	Weißbach [Drau, bei Villach] (Nebeng.)	0,00	0,14	Blei, Zink

Extract from Tabelle FG-Abgeminderte Ziele: Fließgewässer – abgeminderte Güteziele (headings translated) available at https://www.bmnt.gv.at/wasser/wisa/fachinformation/ngp/ngp-2015/tabellen/OW/ow_tabellen.html.

The measures necessary to achieve good chemical status for surface water bodies and to ensure the least possible deterioration of good status for ground water bodies is also included in the *NGP*.²⁸

3. If national authorities have established less stringent environmental objectives in their river management plans, are these objectives regularly reviewed? Have such less stringent environmental objectives been adapted or even lifted?

The setting of less stringent environmental objectives is reviewed every six years in the context of the river basin management plan.²⁹

In the previous Austrian River Basin Management Plan (*Gewässerbewirtschaftungsplan, NGP*), which was published in 2010,³⁰ less stringent environmental objectives were set for only five water bodies.³¹ However, three of those appear to have been lifted in the context of the 2015 NGP while for one water body the 2015 NGP now also sets less stringent environmental objectives with regard to cadmium.

4. Are there possibilities for the public to challenge the establishment of less stringent environmental objectives in river management plans? If so, please describe those possibilities briefly.

In preparing the river basin management plan, the public is consulted on the draft plan and can submit statements, also regarding the setting of less stringent environmental objectives for certain water bodies.³² However, while the competent authority is required to consider those statements, it is not required to act upon them, and the public has no legal remedies in that regard: A mere right to submit a statement does not entitle members of the public to have the river basin management plan reviewed.

In Austria, the river basin management plan is adopted by an ordinance of the Federal Minister for Sustainability and Tourism. In order to challenge the legality of ordinances, an individual must be directly affected by the ordinance, which may be the case when the ordinance is the legal basis in a permit procedure. Environmental NGOs have so far not been considered to be directly affected by an ordinance and have hence been denied the right to challenge ordinances, such as the river basin

²⁸ BMLFUW (ed), *Nationaler Gewässerbewirtschaftungsplan 2015* (2017) 120.

²⁹ § 55c(5) WRG. BMLFUW (ed), *Nationaler Gewässerbewirtschaftungsplan 2015* (2017) 120.

³⁰ BMLFUW (ed), *Nationaler Gewässerbewirtschaftungsplan 2009* (2010).

³¹ BMLFUW (ed), *Nationaler Gewässerbewirtschaftungsplan 2009* (2010) 69. The table is available at <https://www.bmnt.gv.at/wasser/wisa/fachinformation/ngp/ngp-2009/wasserkoerpertabellen/fluesse/anh-wkt-fw.html>.

³² Those statements are made available online at https://www.bmnt.gv.at/wasser/wisa/fachinformation/ngp/ngp-2015/oeffbet_ngp2015/stellungnahmen_2015.html.

management plan. It remains to be seen whether this case law will be upheld in the light of recent decisions of the CJEU.³³

b) Industrial Emissions Directive: Setting less strict emission limit values

1. (How) was the option of setting less strict emission limit values as permit conditions transposed into national law? Is the transposing legislation stricter than Art 15.4 by, e.g., adding further requirements for deviating from the emission limit values?

In Austria, due to the fragmented legislative competences relating to industrial installations, Art 15.4 IED had to be implemented in several sectoral laws, both at federal and at federal state level. We focus here on the federal level.

In the *Industrial Code (Gewerbeordnung, further GewO)*,³⁴ a federal law which applies to all industrial installations unless there exist separate rules for specific types of installations,³⁵ Art 15.4 IED was implemented via § 77b(3) *GewO*. This implementing provision uses the wording of the Directive without adding further requirements for deviating from the emission limit values. In order to assess whether achieving the BAT emission limits (ie the more strict emission limit values) would indeed lead to disproportionately higher costs compared to the environmental benefits, the competent authority relies on expert witness reports which are commissioned as part of each individual permitting procedure.

Similar implementing provisions exist for waste management installations in the *Waste Management Act (AWG)*³⁶ and for boiler plants in the *Boiler Plant Emissions Act (EK-G)*.³⁷

With regard to wastewater discharges from IPPC installations, Art 15.4 IED was implemented in the *Austrian Water Management Act (Wasserrechtsgesetz, further WRG)*³⁸. The implementing provision in this federal law uses a different wording than the IED: Less strict limit values can be set in case achieving the BAT emission limits is not ‘economically reasonable’ due to the circumstances of the specific case, if the public interest in the industrial activity outweighs the interest in water pollution control or, if exceeding the BAT emission limits can be accepted temporarily³⁹ due to the specific circumstances of the water managing situation (§ 33b(10) *WRG*). If the competent authority sets a less stringent emission limit than has been set in a BAT-conclusion this information and the reasons have to be made available online to the public. We understand that the competent authority conducts a cost-benefit analysis and assesses whether achieving the BAT emission limits (ie the more strict emission limit values) would indeed lead to disproportionately higher costs compared to the environmental benefits on a case-by-case basis when relying on this implementing provision.⁴⁰ Commentators argue that when applying this provision, ‘conflicting EU law obligations have to be observed’.⁴¹

³³ See the Report on recent developments in Austria submitted for the 2018 Avosetta meeting.

³⁴ *Gewerbeordnung 1994*, Federal Law Gazette 194/1994, as amended by Federal Law Gazette I 107/2017.

³⁵ Separate rules most importantly apply to waste management installations (see below) and – at the Länder-level – to intensive livestock farming.

³⁶ § 47a(3) *AWG*, *Abfallwirtschaftsgesetz*, Federal Law Gazette I 102/2002, as amended by Federal Law Gazette I 70/2017.

³⁷ § 10(2)-(5) *EG-K*, *Emissionsgesetz Kesselanlagen*, Federal Law Gazette I 127/2013, as amended by Federal Law Gazette I 81/2015.

³⁸ Federal Law Gazette 215/1959, as amended by Federal Law Gazette I 58/2017.

³⁹ ‘Temporarily’ is understood as referring to a duration of about two year, according to case law on similar provisions, see Erlacher/Lindner, in Altenburger/Raschauer (eds), *Kommentar zum Umweltrecht* (2014) *WRG* § 33b, para 7.

⁴⁰ See the IED Annex I questionnaire submitted by Austria on 17 October 2014 under the requirements of the IED, available at http://cdr.eionet.europa.eu/at/eu/ied/annex1/envu9_awq/IED_Annex_I_questionnaire_1.xml/manage_document, Question 3.5.

⁴¹ Oberleitner/Berger, *WRG. Wasserrechtsgesetz* (3rd edn, 2011) § 33b, para 10; Erlacher/Lindner, in Altenburger/Raschauer (eds), *Kommentar zum Umweltrecht* (2014) *WRG* § 33b, para 7.

2. Have national authorities relied on the option of setting less strict emission limit values in permitting industrial installations? If so, to what extent, for what reasons and for which types of industrial installations? If not, why?

Reports from 2014 suggest that until then, permitting authorities had not relied on the possibility of setting less strict emission limit values in permitting industrial installations.⁴² We understand that this situation has not changed since then. However, data will only be available after the official EU reporting which was postponed to the end of June 2018.

3. If national authorities have set less strict emission limit values in permitting industrial installations, is there a requirement to review these permit conditions regularly?

For installations falling within the scope of the *Industrial Code*, permit holders are required as part of the permit conditions to submit information including on emissions from their industrial installation on a regular basis to the competent authority, which can review the less strict emission limit values on that basis.⁴³ Periodic environmental inspections also provide an opportunity to review the less strict emission limit values and adapt them if necessary.⁴⁴

Similar provisions exist in the other sectoral laws, some are more stringent than others.⁴⁵ In the *Boiler Plant Emissions Act* (EK-G) for example, permit holders are required to have their installation inspected by a certified expert once a year, who then submits his/her report to the permitting authority.⁴⁶ In addition, the permit holder submits an annual report on emissions from the installation to the permitting authority.⁴⁷ The authority checks this submission for plausibility and can act if necessary.⁴⁸

4. Are there possibilities for the public to challenge the setting of less strict emission limit values as part of permit conditions, the lack of review of such less strict emission limit values respectively? If so, please describe those possibilities briefly.

Due to the Austrian administrative law system, which is a right-based system, the possibility of a legal remedy to challenge the permit conditions of an IPPC installation is limited. Neighbours can challenge the permit conditions only insofar, as they assert a possible negative impact of less strict emission limit values on their subjective rights, ie a negative impact on their health or property, which are both subjective-public rights.

However, as EU law requires the participation of environmental NGOs in the permitting procedure of IPPC installations, those organisations also have a right to a legal remedy. They can challenge the setting of less strict emission limit values on the basis that the conditions laid down in the law are not fulfilled.

In the context of the *Water Management Act* (*Wasserrechtsgesetz*, further WRG), the Minister for Sustainability and Tourism is accorded a right to challenge permits in which, less strict emission limit values were set before the administrative court of first instance (§ 33b(10) WRG; *Amtsbeschwerde*).⁴⁹

⁴² See the IED Annex I questionnaire submitted by Austria on 17 October 2014 under the requirements of the IED, available at http://cdr.eionet.europa.eu/at/eu/ied/annex1/envu9_awq/IED_Annex_I_questionnaire_1.xml/manage_document, Question 3.5.

⁴³ §§ 79c, 84h GewO.

⁴⁴ § 82a GewO.

⁴⁵ § 47a(2); § 57 AWG.

⁴⁶ § 33 EK-G.

⁴⁷ § 38 EK-G.

⁴⁸ See the IED Annex I questionnaire submitted by Austria on 17 October 2014 under the requirements of the IED, available at http://cdr.eionet.europa.eu/at/eu/ied/annex1/envu9_awq/IED_Annex_I_questionnaire_1.xml/manage_document, Question 7.

⁴⁹ § 116(1)(2) WRG.

3. Exemptions and offsetting combined: the case of NATURA 2000

1. How was the obligation to take compensatory measures in view of the coherence of the network as part of the appropriate assessment transposed into national law? Do the national rules go beyond the requirements of the Directive by, e.g. adding further requirements for compensatory measures?

In Austria, nature protection is considered a matter, which falls within the legislative and administrative competence of the federal states. Hence, we find a separate implementation of the Habitats Directive in all nine federal states. For this reason, we will provide an overview of the implementation but will only focus on selected federal states for more details.

The federal states implemented the requirements of the Habitats Directive (predominantly) in their respective nature protection laws. The provisions implementing the obligations in the context of the appropriate assessment are mainly copying the wording of the Directive; this is also true for the obligation to take compensatory measures in view of the coherence of the network as part of the appropriate assessment,⁵⁰ with one federal state even referring explicitly to compensatory measures ‘according to Art 6(4) Habitats Directive’.⁵¹

Both the Carinthian⁵² and the Viennese⁵³ federal legislator included in their respective laws that in addition to compensatory measures to ensure the coherence of the Natura 2000 networks also measure designed to minimise the negative impacts on the site are to be included in the permit conditions.

Furthermore, e.g. in Vienna, most of the Natura 2000 sites are also protected as either national parks or nature protection areas. The regimes for those types of protection areas are much stricter than for Natura 2000 sites inasmuch as they do not allow a ‘significant’ negative impact on the site at all.⁵⁴ Even for such measures, the laws require measures to reduce the impact in view of the protective purpose of the sites.⁵⁵ In case a Natura 2000 site is also protected under one of those regimes, this stricter regime prevails⁵⁶ and hence, a measure which could have received a permit under the Natura 2000 regime, with compensatory measures if necessary, might not receive a permit.

2. Does your national law allow for ‘mitigating measures’ or ‘protective measures’ to be considered under the rules transposing the appropriate assessment of the Habitats Directive? If so, to what effect? Can such ‘mitigating measures’ or ‘protective measures’ allow a developer not to undergo the test set out in Art 6(4) Habitats Directive?

We are not aware that in Austria ‘mitigating measures’, which reduce the significant negative effect of a plan or project on the Natura 2000 site, can be considered in a way that allows a developer to skip the test set out in Art 6(4) Habitats Directive. Developers, however, appear to regularly take into account ‘protective measures’, which avoid or minimise negative effects on the Natura 2000 sites, when designing their project. According to national case law, however, those protective measures must be implemented before the plan or project is put into effect (ie construction work starts etc) so that their protective effects can be considered.⁵⁷

One of Austria’s leading environmental law firms focusing on representing project developers has criticised the CJEU’s position on ‘protective measures’, which the Court has recently confirmed in C-323/17. The view of the Court that these ‘protective measures’ cannot be considered when assessing

⁵⁰ Burgenland: § 22d(2)(c) Burgenländisches Naturschutz- und Landschaftspflegegesetz; Lower Austria: §10(7) NÖ Naturschutzgesetz 2000; Salzburg: § 3a(5) Salzburger Naturschutzgesetz 1999; Styria: § 28(6) Steiermärkisches Naturschutzgesetz 2017; the Tyrol: § 14(6) Tiroler Naturschutzgesetzes 1997; Vorarlberg: § 15(6)(d) Verordnung der Landesregierung zur Durchführung des Gesetzes über Naturschutz und Landschaftsentwicklung.

⁵¹ Upper Austria: § 24(6) Oö. Natur- und Landschaftsschutzgesetz 2001.

⁵² Carinthia: § 24b(2) Kärntner Naturschutzgesetz 2002.

⁵³ Vienna: § 22(7) Wiener Naturschutzgesetz.

⁵⁴ § 7(3) Wr Nationalparkgesetz; 23(4) Wiener Naturschutzgesetz.

⁵⁵ § 7(4) Wr Nationalparkgesetz; 23(4) Wr Naturschutzgesetz.

⁵⁶ § 27(9) Wr Naturschutzgesetz.

⁵⁷ BVwG, 4 April 2018, W225 2014492-1/128E, in the context of CEF measures.

whether a plan or project is likely to have a significant effect but only within the appropriate assessment set out in Art 6(3) Habitats Directive would create an additional burden for project developers who have implemented ‘green measures’ in their project. Those developers would have to strip their project off those ‘green measures’ for the application process only to propose those measures to be considered within the appropriate assessment.⁵⁸

Overall, the discussion on ‘mitigating measures’ and ‘protective measures’ is ongoing in the Natura 2000 context and beyond. While this discussion is mostly initiated by practitioners, what is most apparent is that a clear distinction both in terminology and in the actual contents of the measures referred to is lacking.⁵⁹

3. Are you aware of any other options, in law or in court practice, that allow for the offsetting of negative environmental impacts within the context of the Natura 2000 framework? If so, please describe these options. If not, are you aware of discussions on this subject pushing for a change of the law?

It is an additional requirement e.g. in Salzburg that the permitting authority includes in the permit conditions (general) compensatory measures in view of the significant negative impact of a plan or project⁶⁰ Alternatively the permitting authority can oblige the permit holder to cover the costs for such measures.⁶¹

Apart from this, in particular when a project or plan significantly affects a Natura 2000 site, we are not aware that there are any further options for the offsetting of negative environmental impacts within the context of the Natura 2000 framework.

4. Does ecological economics provide an answer? Is there any debate in your country suggesting that we should better factor in the socio-economic services of natural resources?

We are not aware of a political debate on this issue.

⁵⁸ NHP News Alert from April 2018, available at <http://www.nhp.eu/de/news/newsletter/archiv-2018/nhp-news-alert-april-2018.pdf>.

⁵⁹ See Mauerhofer, ‘Vorhabensprüfung und Maßnahmen für Besondere Schutzgebiete (Natura 2000) (Teil I)’ [2015] *Recht der Umwelt* 151, at 156; Bergthaler, ‘Eingriff und Ausgleich im Naturschutz- und Umweltrecht – Einleitungsstatement’, in IUR (ed), *Jahrbuch des österreichischen und europäischen Umweltrechts* (2016) 203.

⁶⁰ § 3a(4) Salzburger Naturschutzgesetz 1999.

⁶¹ § 3a(4a) Salzburger Naturschutzgesetz 1999.