

Austria

Report

**on the results of the analysis and evaluations carried out in accordance with
Article 9 of Directive 2004/8/EC – Cogeneration Directive**

Administrative procedures

Under Article 9(1) and (2) and Article 10(1) of the Cogeneration Directive, Austria is required to send the European Commission a report containing the results of the analysis and evaluations of its administrative procedures. The statements below provide a certain amount of information on this subject, although this can be no more than a short overview since nearly all the legal material in question – from construction ordinances and air pollution legislation to tax legislation – would otherwise need to be examined.

Summary

Installations for the combined production of heat and power in Austria require a number of different authorisations. These are dealt with either in a so-called ‘concentrated’ manner during an environmental impact assessment procedure or as individual administrative procedures. Since a plant may have an adverse impact on the environment and the local population, the administrative procedures have become increasingly complex in recent decades. The rights of local residents, rights of petition, etc. have increased considerably. This makes the authorisation procedures very long. They may take several years to complete and are often referred to the highest courts for a ruling. On current estimates, this situation is unlikely to change – or to be able to be changed – in view of social policy considerations and other factors.

Report

Article 9(3) [*sic*] of the Cogeneration Directive reads as follows:

‘Administrative procedures

1. Member States or the competent bodies appointed by the Member States shall evaluate the existing legislative and regulatory framework with regard to authorisation procedures or the other procedures laid down in Article 6 of Directive 2003/54/EC, which are applicable to high-efficiency cogeneration units.

Such evaluation shall be made with a view to:

- (a) encouraging the design of cogeneration units to match economically justifiable demands for useful heat output and avoiding production of more heat than useful heat;
- (b) reducing the regulatory and non-regulatory barriers to an increase in cogeneration;
- (c) streamlining and expediting procedures at the appropriate administrative level; and
- (d) ensuring that the rules are objective, transparent and non-discriminatory, and take fully into account the particularities of the various cogeneration technologies.

2. Member States shall - where this is appropriate in the context of national legislation - provide an indication of the stage reached specifically in:

- (a) coordination between the different administrative bodies as regards deadlines, reception and treatment of applications for authorisations;
- (b) the drawing up of possible guidelines for the activities referred to in paragraph 1, and the feasibility of a fast-track planning procedure for cogeneration producers; and
- (c) the designation of authorities to act as mediators in disputes between authorities responsible for issuing authorisations and applicants for authorisations.'

Directive 2004/8/EC has been transposed into Austrian law in the Green Electricity Act (Ökostromgesetz, BGBl. I No 149/2002) and the Cogeneration Act (KWKG Gesetz BGBl. I No 111/2008), the Electricity Management and Organisation Act (Elektrizitätswirtschafts- und Organisationsgesetz BGBl. I No 143/1998) and the relevant implementing legislation for the provinces.

Overview of authorisation requirements for cogeneration plants

The current legal situation as regards authorisations for thermal electricity-generating plants and cogeneration plants is summarised below:

Authorisation procedures for electricity-generating plants

The authorisations required and the authorisation procedures for cogeneration plants are summarised below:

Electricity-generating plants (Cogeneration/Gas turbines and CCGS)	Authorisation	Limiting of emissions
	Electricity Management and Organisation Act	Compliance with 'good neighbour' legislation

Cogeneration plants (if the nature of these plants as electricity generating plants is not maintained, section 47(5) of the Commercial Code)	(EIWOG)	
	Construction Ordinance (9 different Construction Ordinances in Austria since these are the responsibility of the governments of the provinces), Clean Air Act for Boilers (LRG-K), water legislation, if necessary, railway legislation, if necessary, aviation legislation, if necessary (flue chimney height) occupational health and safety, Nature Conservation Acts of the provinces, if necessary	Pollution control, compliance with ‘good neighbour’ legislation
	Commercial Code (GewO)	applies to gas turbine plants with a waste heat boiler
		Pursuant to section 77(3): in accordance with the state of the art and the Air Pollution Control Act (IG-L)
	Construction Ordinances of the Provinces	Pollution control, compliance with ‘good neighbour’ legislation
	Clean Air Act for Boilers (LRG-K), water legislation, if necessary, railway legislation, if necessary, aviation legislation, if necessary (flue chimney height) Nature Conservation Acts of the provinces, if necessary	applies to gas turbine plants with a waste heat boiler

There is provision for public participation for installations with a fuel thermal output of more than 100 MW; installations with a fuel thermal output of more than 200 MW fall under the system governed by the Environmental Impact Assessment Act.

Under the Environmental Impact Assessment Act (UVP-G (BGBl 1993/697)), installations which fall under the Clean Air Act for Boilers are subject to an environmental impact assessment with a so-called ‘concentrated’ authorisation procedure culminating in the issue of a single permit if they have a fuel thermal output of at least 200 MW. The information required under the special administrative laws (EIWOG, Commercial Code, etc.) must be set out as shown in the environmental impact assessment application.

There is provision for public participation for installations with a fuel thermal output of at least 100 MW. This procedure is managed by a coordinating authority. The project applicant must submit documentation summarising the project’s environmental impact and a public discussion has to be held. Separate submissions are made regarding compliance with each piece of legislation and sectoral authorisations are issued.

Authorisation procedures for own production installations (electricity generation; cogeneration plants) in industrial and commercial companies

The authorisations required and the authorisation procedures for own production installations (electricity generation, cogeneration) in industrial and commercial companies are summarised below:

Gas turbines, CCGS and cogeneration	Authorisation	Limiting of emissions
	Commercial Code (GewO) Construction Ordinance (BauO), Clean Air Act for Boilers (LRG-K) water legislation, railway legislation, if necessary, aviation legislation, if necessary (flue chimney height), Nature Conservation Act, by way of subsidiarity EIWOG (Electricity Management and Organisation Act)	Pursuant to section 77(3): in accordance with the state of the art and the Air Pollution Control Act Pollution control, compliance with ‘good neighbour’ legislation applies to gas turbine installations with a waste heat boiler

There is provision for public participation for installations with a fuel thermal output of more than 100 MW. Installations with a fuel thermal output of more than 200 MW are subject to an environmental impact assessment. The second sentence of section 12(2) of the Electricity Management and Organisation Act explicitly states that the authorisation requirement under the Act for installations which must be authorised or notified under the Commercial Code applies on a secondary level only.

Authorisation of combined heat and power plants (CHP plants)

The following table shows which authorisation procedures may be relevant to each of the individual plant types, which are mostly small CHP plants.

	Authorisation under	Consideration of emissions from engines:
Commercial installations	Commercial code (BauO) Clean Air Act for Boilers (LRG-K)	Section 77(3) Only indirectly via pollution control in respect of

¹ Translator's note: it is not clear to what this refers.

² Ditto

	Clean Air Act for Boilers (LRG-K) (in GewO-Verf. mitangew. ¹⁾ EI(W)Ge* ² of the provinces	neighbours Only for waste heat boilers Partly on a secondary level to the Commercial Code, partly via the protection of neighbours' rights
Public buildings, residential properties	Construction Ordinance (BauO) Commercial Code (GewO) if commercial (see section 74(5) EI(W)Ge* Clean Air Act for Boilers (LRG-K) Construction Ordinance (BauO)	Only indirectly via pollution control in respect of neighbours Section 77(3) Partly on a secondary level to the Commercial Code, partly via the protection of neighbours' rights Only with waste heat boilers Only indirectly via pollution control in respect of neighbours
Hospitals	Hospitals Act (KAG)	No emissions requirements
Residential care homes	Construction Ordinance (BauO)	Only indirectly via pollution control in respect of neighbours
Landfill sites	Commercial Code (GewO) Waste Management Act (AWG) Landfill Ordinance (DeponieVO)	Section 77(3) Application of Commercial Code, Landfill Ordinance Regulates the state of the art

	Water Act (WRG)	for deposits On a secondary level to the Landfill Ordinance, lays down rules for the adaptation of existing installations to the Landfill Ordinance
Sewage gas installations	Water Act (WRG)	Waste Act lays down rules for sewage emissions only
Agricultural holdings	Construction Ordinance (BauO)	Only indirectly via pollution control in respect of neighbours

In the case of commercial installations, the Commercial Code requires the authorities to set pollution emission limits in accordance with the state of the art during the authorisation procedure. Installations which are not tied to a particular location do not need to be authorised. Attention is also drawn to the Air Pollution Control Act IG-L (IG-L). Subject to the restrictions of the IG-L, the limitation of air pollutant emissions in accordance with the state of the art is an additional authorisation requirement for installations which require authorisation under the relevant federal provisions. There is also a subsidiary authorisation requirement under the IG-L for installations which are not subject to a federal authorisation requirement but are likely to emit considerable levels of air pollutants.

The individual points in Article 9

Para. 1 a) Useful heat demand

Under the Cogeneration Act (BGBI I N 111/2008), which entered into force in February 2009 following approval by the European Commission, operating aid and investment aid are awarded only to highly-efficient installations that meet criteria even stricter than those of the Cogeneration Directive. While these provisions are not binding, practical experience shows that it is almost impossible to obtain authorisation for thermal power stations which do not have heat recovery. Heat extraction is currently being added to existing power plants, often at enormous expense of effort and cost. A promotion scheme for district heating and refrigeration pipelines has been developed (Heating and Refrigeration Pipeline Extension Act, BGBI I/No 113/2008), which at the time of writing this report still had to be approved by the European Commission.

Abs. 1 b) Barriers

The legal and other barriers to the development of cogeneration plants were analysed in detail in the report on the potential of cogeneration (Article 5 of the Cogeneration Directive) and taken into consideration at national level when drawing up the promotion schemes for the development of district heating/district refrigeration and the investment schemes for new cogeneration plants. However, as indicated above, the authorisation of a project itself is a very complex and time-consuming business which covers a plethora of legal material. The legislation concerned is expected to be re-examined as part of the programmes of administrative simplification due to be carried out over the next few years.

Para. 1 c) Streamlining of administrative procedures

The General Administrative Procedures Act (AVG 1991), the primary legislation applicable in Austria, is essentially a modern Act which very clearly regulates how administrative procedures are to be carried out and specifies the deadlines and periods within which they must be completed. However, in practice the procedures often take much longer for a number of different reasons. Many authorities are short-staffed, experts are not always adequately available, and opponents of a project have many different ways of dragging the procedures out and delaying them for years or even decades by pursuing a challenge through all the courts. Not only for power stations, etc. is a solution needed. However, at the moment there is little prospect of restricting the rights of neighbours and environmental protection groups or the right to petition, etc. Such a change in social policy would be difficult to achieve, if not impossible.

Para. 1 d) Transparency

When transposing the Cogeneration Directive, the relevant legal provisions (Cogeneration Act, Green Electricity Act, Electricity Management and Organisation Act and other relevant provisions) were drafted in an objective and transparent manner. There is no reason for assuming that plant operators and project planners are treated in different ways. Installations which feed into public grids are subject to the same rules, whether the installations are constructed and operated by private, municipal or commercial/industrial bodies. For cogeneration plants at least a minimum level of efficiency can be seen from the aid which is granted.

Para. 2 a) Coordination between administrative authorities

Austria's special administrative laws and the General Administrative Procedures Act are sufficiently clear on how authorisation procedures should be carried out and on the deadlines to be met. They specify the documents and reports which must be submitted when an application is made. For large-scale projects, there is a so-called 'concentrated' procedure: the environmental impact assessment procedure which has helped to bring about considerable improvements in recent years, including as regards the length of the procedure. In the case of authorisation procedures which have to be carried out separately, the project planner often has to inform the relevant authorities about other procedures which are pending.

Para. 2 b) Guidelines – swift planning procedures

There is no dedicated provision in Austrian law requiring guidelines on authorisation procedure to be drawn up for project planners. Guidelines (which have to be approved by the European Commission) only have to be drawn up for certain support schemes, not for authorisation procedures. However, non-binding instructions do exist in some areas on how to submit applications and documents in the most efficient manner, these being mainly for small installations and short procedures. As far as project planners are concerned, it is up to them to keep the planning procedures as short and as cost-effective as possible. For major projects, companies are normally able to do this themselves or they avail themselves of the services of consultancies and lawyers' firms.

Para. 2 c) Settlement of disputes between authorisation bodies and applicants

There is no provision in Austrian law for placing mediators between authorising authorities and applicants during administrative procedures. As far as technical infrastructure is concerned, there is the well-known instrument of the European Coordinator. This instrument has proved to be very successful in recent years, including in the field of electricity and gas pipeline construction. There is currently no provision for the settlement of disputes between authorising authorities and applicants in Austria since, under the Austrian legal system, the duty during the administrative procedure is to seek the objective truth. Unlike in Anglo-Saxon legal orders, agreements cannot be concluded between authorities and authorisation seekers since such agreements would represent civil-law instruments.