

## The 2014 Austrian Energy Efficiency Act: New challenges for suppliers in Austria

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### **1. Legal Framework**

The 2012 EU Energy Efficiency Directive aims at establishing a common framework for the promotion of energy efficiency measures against the background of the European Union's 2020 target of reducing energy usage by 20%. In July 2014, the Austrian legislator passed the new Energy Efficiency Act (*Bundes-Energieeffizienzgesetz*, hereinafter: "EEA") to transpose the directive into national law. This paper will first provide a brief overview of the general scope of the law and then focus on specific duties and challenges for energy suppliers in Austria.

### **2. General Obligations**

Under the new law, the public sector will act as a role model for energy efficiency: The central government will, for example, between 1 January 2014 and 31 December 2020 be required to achieve an annual renovation quota of 3% of buildings in its ownership or use by applying measures of energy saving contracting, energy management and thermal rehabilitation. Furthermore, it will have to appoint energy experts for energy management, energy accounting and energy controlling; federal energy consultants will be in charge of energy statistics and consumption accounting. When acquiring or renting new properties, government bodies will be under an express obligation to consider energy efficiency and to give preference to energy-efficient objects to the extent technically and economically feasible.

Obligations imposed on all undertakings under the EEA will vary according to the size of the undertakings: Companies incorporated in Austria with more than 249 employees and a turnover of more than 50 Mio or total assets of more than 43 Mio will have to conduct an external energy audit every four years or, in the alternative, to set up a (certified) energy or environmental management system. Smaller companies may conduct energy audits and document and/or report the results thereof.

### **3. Specific obligations for energy suppliers**

Most of the provisions of the EEA applicable to energy suppliers will enter into force on 1 January 2015. Since, pursuant to section 5 EEA, "energy suppliers" are defined as legal or

natural persons supplying energy to end consumers in Austria against payment irrespective of their place of incorporation, also foreign energy companies will have to comply with the new law.

### ***3.1 Energy efficiency measures***

Pursuant to section 10 EEA, energy suppliers are obliged to effect and/or provide proof of the realization of energy efficiency measures annually in the amount of 0.6 per cent of their total energy supply to end consumers in Austria in the previous year. Thereby, at least 40% of the realized efficiency measures have to be implemented at the household level, irrespective of the customer structure of the energy supplier. For energy suppliers in the mobility sector however the latter requirement may also be fulfilled in the mobility or public transportation sector. Suppliers that delivered less than 25 GWh of energy to end consumers in Austria in the previous business year are exempted from the obligation pursuant to section 10 EEA.

The respective measures will have to be documented and reported to a national monitoring body by the supplier together with a notification of the total amount of energy supplied in Austria by such supplier. The monitoring body will be competent to decide if and to what extent the reported measures are taken into account. Measures can either be taken by the suppliers themselves, be transferred from third parties up to three times per year or be contracted via tenders. Tender procedures will have to be initiated within three months as of the beginning of the respective commitment period. The monitoring body will have to be informed of the tender and be granted access to the file at all times. Joint tenders will be admissible; public funding for energy efficiency measures will be provided in the form of investment grants.

As an additional obligation, energy suppliers with more than 49 employees and a turnover or total assets of more than EUR 10 Mio will need to set up an advice and counselling centre in order to inform their customers about energy efficiency, energy consumption, energy cost and energy poverty.

### ***3.2 Compensation payments and administrative fines***

If energy suppliers fail to provide proof for the required energy efficiency measures compensation payments in the amount of 20 cEUR per kWh become payable. The Austrian regulator E-Control will be competent to adjust the exact amount of the compensation

payments each year on the basis of this minimum amount (which may not be reduced), thereby taking into account the average marginal costs.

Furthermore, depending on the nature of an offence committed by an energy supplier, EEA provides for administrative fines ranging from EUR 10.000 to EUR 100.000: Fines of up to EUR 10.000 may for instance be imposed if an energy supplier does not comply with its reporting obligations vis-à-vis the monitoring body or fails to provide the Federal Ministry for Science, Research and Economy with required statistical data. Fines of up to EUR 20.000 may become due for the provision of false information to the monitoring body. The failure to set up an advice and counselling centre for customers may trigger a fine of up to EUR 50.000. Most importantly, fines in the amount of up to EUR 100.000 may be imposed on suppliers that fail to fulfil their individual energy saving obligation or either do not initiate tender proceedings or make compensation payments in time.

### ***3.3 Specific challenges for international suppliers***

The activities of international energy suppliers in Austria are often confined to industrial and commercial customers. As most international players are not active in the household sector in Austria, they will probably struggle to achieve 40% of their 0.6% savings obligation at this level by their own efforts. While they can be expected to focus on tenders and the acquisition of measures set by third parties at the household level, it is uncertain whether this will suffice to avoid compensation payments, in particular for companies with a large industrial portfolio in Austria and a correspondingly high savings obligation. The customer portfolio of international suppliers in Austria will therefore arguably constitute a disadvantage in this respect as compared to local suppliers with a traditionally strong presence in the small and household customer sector.

Obviously, compliance with the requirements of the new law will trigger additional costs for energy suppliers: The EEA however does not provide for any transitional and/or amendment provisions with respect to existing supply contracts. Purpose and wording of the law as well as the respective explanatory remarks indicate that energy suppliers should bear the costs and that a passing on to end customers should be avoided. An amendment of existing contracts will thus only be possible where such contracts provide for price adjustment clauses or other general provisions on the transfer of all sorts of taxes and other cost arising out of or in connection with the fulfilment of the supply contract. It is however conceivable that the margins of the suppliers are lower than the cost for compliance with the EEA, in particular in highly competitive (industrial segments). When introducing respective

adjustment clauses in new contracts, suppliers should be aware that the exact cost of compliance with EEA (which depends on numerous factors) will only be known after the evaluation by the monitoring body which might be completed more than a year after delivery.

As mentioned before, energy suppliers will be subject to a number of reporting duties. They will for instance be obliged to report volumes supplied to end consumers to the monitoring body that will be in charge of evaluating their compliance with the obligations under section 10 EEA. Under the existing Austrian market rules in the natural gas sector however delivery in the market area east takes place at a virtual trading point (VTP) that can be used for both trading and sourcing. Suppliers therefore often do not know whether their customers consume or trade the contracted energy. If all volumes supplied to potential end consumers and thus also volumes traded (and not consumed) by such customers are reported to the monitoring body, double counting can hardly be avoided and thus the total individual and total energy efficiency target will significantly be increased.

Finally, industrial customers often have more than one supplier. Under the applicable Austrian market rules, the metering point of a balancing group may however only be assigned to the (one) supplier responsible for the balancing group management. It would be an unjustifiable burden if the whole energy assigned to the metering point of the balance group were taken as basis for the calculation of the required amount of energy efficiency measures to be effected or proven by such supplier.

#### **4. Outlook**

In order to reach the 20% reduction target set by the EU Directive, Austria has chosen a highly sophisticated and complex regulatory system, including the establishment of a new monitoring agency, which will lead – as far as can be judged by now – to numerous legal and administrative issues. It remains to be seen whether or not an ordinance announced by the responsible ministry will clarify all of them.