



St. Gallen, 23 February 2024

Press Release

regarding judgment A-1706/2023 of 19 February 2024

Preconditions for the Reserve Power Plant in Birr not satisfied

The Federal Council was not entitled to enact the regulations for the reserve power plant in Birr. This has been determined by the Federal Administrative Court.

In February 2022, there was an increasing risk for the Federal Council that sufficient electrical energy could not be imported into Switzerland at the end of winter 2022 and in spring 2023. To protect the electricity supply against extraordinary situations, the Federal Council decided to develop a winter reserve. Among other plans, this envisaged the provision of a temporary reserve power plant in Birr (Aargau).

Complaint by a local resident

The Federal Council relied on the National Economic Supply Act, which allows it to implement temporary economic intervention measures in the event of severe shortages. The aim of such measures is to guarantee the supply of vital goods. In December 2022, the Federal Council enacted the Ordinance on the Operation of Reserve Power Plants and Emergency Power Generators in the event of imminent or existing shortages. On the basis of this ordinance, the Federal Department of the Environment, Transport, Energy and Communications (DETEC) issued an operating permit for the reserve power plant in Birr at the end of December 2022. This remained in force until 31 May 2023. A local resident initially raised an objection to the operating permit and subsequently lodged a complaint with the Federal Administrative Court (FAC). In her opinion, there was no severe shortage with regard to the supply of electrical energy for the winter of 2022/2023. For this reason, neither the regulations should have been enacted nor should the operating permit have been issued.

No serious shortage

In its judgment, the FAC determined that the Federal Council is basically entitled to take economic intervention measures to ensure the supply of electrical energy. However, it cannot make its decision without due consideration. The Federal Council must exercise the considerable scope at its disposal prudently; intervention measures must be guided by the purpose of the law and must respect the basic principles of the Federal Constitution.

The Federal Administrative Court initially checked whether there was a severe shortage for the winter of 2022/2023. DETEC, the competent authority, was not

able to clarify the assumptions on which the Federal Council based its belief that the supply of electrical energy would be subject to severe shortages. The FAC therefore holds that no severe shortage can be said to have occurred. There was therefore no legal precondition for the operation of the reserve power plant in Birm. The FAC also states that economic intervention measures must be proportionate. This means that the interests affected must be considered. In this regard too, however, it is not evident which other intervention measures were considered with a view to mitigating the environmental impact of the reserve power plant in Birm. Given this, the FAC upholds the complaint and finds that the operating permit for the reserve power plant in Birm is not legally compliant.

This judgment is final and may not be appealed to the Federal Supreme Court.

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About the Federal Administrative Court

Located in St. Gallen, the Federal Administrative Court (FAC) was established in 2007. With its staff of 351 employees (296.1 FTE) and its 73 judges (65 FTE) it is the largest federal court in Switzerland. The Federal Administrative Court has jurisdiction to hear appeals against decisions rendered by Swiss federal administrative authorities. In specific matters, the FAC may grant review on decisions rendered by cantonal authorities. Recourse actions are also reviewed by the Court. The FAC is composed of six divisions. It renders an average of 6,500 judgments every year.