

proposed for:
Committee on Building and Conservation

Bill

**the Upper Austrian provincial government
regarding the State Act
amending the Upper Austrian Construction Technology Act 2013 and the Upper Austrian EU
Accompanying Regulation and Implementation Act
(Upper Austrian Construction Technology Act Amendment 2023)**

[Verf-2013-8208/168]

A. General part

I. Objective and content of the draft Act

The objective of this State Act is as follows:

- Implementation of the provisions relevant to national law (in particular Art. 10 (1, 2, 3) letters e and f, Art. 11 (1) and Art. 17 (2) letter b) of Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption, OJ No. L 435/1 of 23.12.2020 [hereinafter: Directive (EU) 2020/2184].

The present amendment serves the sole purpose of avoiding infringement proceedings and the associated threat of fines due to non-implementation or poor implementation of Directive (EU) 2020/2184. In order to achieve this, the draft law would have to enter into force as soon as possible, especially since the transposition deadline expired on 12 January 2023.

II. Basis of legislative competence

The competence of the state legislature to enact this state act results from Art. 15 (1) B-VG and § 8 (1) F-VG 1948.

According to the determination of competence in Art. 15 (1) B-VG, a matter remains within the independent sphere of action of the federal states, unless it is expressly assigned to legislation or

the execution of the federal government by the federal constitution.

The federal government has competence in the area of construction law only in those cases in which there is an inseparable connection between the matter falling within the legislative competence of the federal government and the relevant construction law regulations, as is the case, for example, in the area of mining with regard to technical mining systems, the railway system, shipping and aviation.

Regarding the provisions to be implemented, considerations relating to jurisdiction are explained in detail in the special section.

The tax regulation of § 16 Upper Austria EU Accompanying Regulations and Implementation Act is based on the determination of competences in § 8 (1) F-VG 1948.

III. Financial impact on local authorities

This amendment to the law will probably result in minor additional costs for both the state and the municipalities compared with the current legal situation. It can be assumed that, due to the requirements of Directive (EU) 2020/2184 for the risk assessment of domestic installations, the Austrian Institute for Building Technology (OIB), which is entrusted with this, will incur expenses in the sense of expert activities (cf. newly-inserted § 73). Since additional costs incurred by the OIB are to be shared among the federal states, certain additional costs for the federal state are to be expected, but these costs cannot yet be estimated. The budget estimate is subject to the approval of the state of Upper Austria as a member of the OIB General Assembly. On the other hand, in cases in which the risk analysis or the monitoring of the house installations shows that there are specific risks for the water quality and human health in relation to certain locations and measures must therefore be taken, the municipalities, as the enforcement bodies of the building authorities, will be able to intervene to a manageable extent with demands on what should be covered by the current personnel expenses (cf. newly-inserted § 73).

IV. Financial impact on citizens and businesses, including the impact on the economic standing of Upper Austria

The regulations contained in this State Act do not in principle entail any financial burden on citizens in general and for businesses in particular.

As part of the risk assessment of domestic installations, owners of the priority location affected by the specific risks are obliged under certain conditions by the OIB to monitor compliance with the parameters according to Annex I Part D of Directive (EU) 2020/2184 (cf. newly-added § 73 (3)). The costs incurred in this connection are to be borne by the owners themselves.

The newly-added § 18 (5) also creates the obligation, if necessary - under strict conditions - to replace lead-made components of existing house installations. The costs incurred in this connection must also be borne by the owners of the affected buildings themselves.

Due to the information obligations for operators of water supply systems, they too have to reckon with certain additional costs - if the information is not already made available anyway (cf. newly-added § 16 Upper Austrian EU Accompanying Regulations and Implementation Act).

V. Relationship with European Union legislation

This State Act does not – as far as can be seen – conflict with any mandatory provisions of European Union Law. With the present legislative proposal, only provisions of Directive (EU) 2020/2184 that are relevant under state law are implemented. This state act only provides for measures that the state is obliged to take on the basis of mandatory provisions of Union law; no requirements or standards beyond that Directive shall be established.

VI. Impact on different social groups, particularly on men and women

The envisaged regulations have no direct or indirect different impact on the different groups in society, in particular on women and men. The texts of the present draft act have been formulated in a gender-appropriate manner.

VII. Impact on environmental policy, particularly climate protection

The regulations contained in this Provincial Act do not have any relevance in terms of environmental policy.

VIII. Specific aspects of the legislative process

The present draft Act does not contain any constitutional provisions. Collaboration between federal bodies within the meaning of Art. 97(2) of the Federal Constitutional Act is not envisaged. Since the draft law in Article II Subpara 3 deals with a municipal tax, it must be announced to the Federal Chancellery in accordance with § 9 (1) F-VG 1948 immediately after the resolution has been passed, prior to it being announced.

In accordance with § 3 of the 2017 Upper Austrian Notification Act, the present draft Act is to be notified to the Federal Government so that it is notified to the competent European bodies in order to comply with the Information Directive (EU) 2015/1535.

B. Special portion

Re Articles I and II (General):

For the implementation of Articles 10, 11, 16 and 17 of Directive (EU) 2020/2184 into national law, there is a competence report by the Federal Chancellery Constitutional Service of May 13, 2022, GZ: 2021-0.029.559, to which reference is made in the further explanations of the individual provisions (hereinafter: competence report).

Re Article I (Amendment of the Upper Austria Construction Technology Act 2013):

Re Article I Subpara 1 (Table of contents):

The table of contents is to be adapted in line with the changes in the amendment.

Re Article I Subpara 2 (§ 18(5)):

Implementation note:

The new paragraph 5 in § 18 serves to implement Article 10 (3) letter f of Directive (EU) 2020/2184. The non-observance of a corresponding construction contract according to § 18 (5) is sanctioned - against the background of Art. 23 of the specified guideline - through the application of the provision of § 57 (1) Subpara 11 of the Upper Austrian Building Code in 1994.

Jurisdictional considerations:

Art. 10 (3) of Directive (EU) 2020/2184 obliges the Member States to take certain measures with the aim of “reducing the risks associated with house installations in all house installations”. All measures referred to in the following letters a to f of the Directive must be considered, and the measures deemed relevant must be taken. In terms of jurisdiction, a distinction must be made here between the obligations pursuant to letters a to e on the one hand and those pursuant to letter f of the directive provision on the other. Article 10 (3) letters a to d do not fall within the competence of the state legislature with reference to the competence report. The expert opinion on competences provides for the allocation of the duties to act to the competences of the health care system (letters a to c) or trade law (letter d).

Article 10 (3) letter e of Directive (EU) 2020/2184 provides that effective risk control and management measures that are proportionate to the risks must be available with regard to legionella to prevent and manage possible outbreaks of the disease. Insofar as structural measures are required for house installations, the statements on Art. 10 (1) and (2) of Directive (EU) 2020/2184 apply *mutatis mutandis* (cf. B. I. Z 3). Accordingly, the regulation of these matters will be assigned to the general building law competence of the state legislature. However, other (management) measures to prevent disease outbreaks or to combat disease do not fall under its responsibility, but rather that of the federal government in the field of health care.

Article 10 (3) letter f of the directive provides for measures to replace components made of lead in existing house installations, provided this is economically and technically feasible. These are (structural) measures on existing buildings to which the statements on Art. 10 (1) and (2) of Directive (EU) 2020/2184 apply *mutatis mutandis* (cf. B. I. Z 3). Here, a corresponding legal regulation will therefore have to be assigned to the general building law competence of the state legislature.

Further remarks:

§ 18 (5) creates the obligation, if necessary, to replace components of existing house installations made of lead; however, this is not absolute, but only in the event that such a measure is economically and technically feasible. In addition, Art. 10 (3) introductory sentence of Directive (EU) 2020/2184 is also not absolute, but obliges such a measure to be considered and - if it proves to be relevant - also to be taken. In this sense, the obligation to replace only applies in the event of a significant health hazard, particularly with a view to significantly exceeding the parametric value for lead [cf. Annex I Part D of Directive (EU) 2020/2184], which corresponds to the principle of proportionality.

Re Article I Subpara 3 (7b. Section; §§ 71 to 73):

Implementation note:

§§ 71 to 73 (7b. section) serve in particular to implement Article 2, Article 7 (6), Article 10 (1) and (2), Article 10 (3) letter e and Article 11 (1) of Directive (EU) 2020/2184.

§ 71 standardises the definitions that result from Art. 2 of the quoted directive.

In particular, the concept of 'priority locations' provided for in Article 2 Subpara 4 of Directive (EU) 2020/2184 leaves Member States a margin of manoeuvre (arg. "as determined by the Member States"). This is used in § 71 Subpara 5 in such a way that although the basic definition of the term is taken from the guideline, it is supplemented by a demonstrative list of specific locations that can be considered. This list is based on Recital 19 of Directive (EU) 2020/2184.

In § 72, additional provisions are laid down regarding the use of construction products that come into contact with water for human consumption. This provision implements Article 11 (1) of Directive (EU) 2020/2184.

Jurisdictional considerations:

Article 11 of Directive (EU) 2020/2184 provides minimum requirements for materials that come into contact with water intended for human consumption. Paragraph 1 of this Directive provision regulates the requirements for the relevant materials and materials in a general form. In accordance with paragraphs 2 to 6 of this Directive, the detailed design of these requirements is incumbent upon the implementing legislation of the European Commission; The same applies to determining the appropriate conformity assessment procedure (paragraph 8) and specific labelling regulations (paragraph 11). Insofar as corresponding implementing acts are still to be enacted, there is no need for any implementation regulations at national level for the time being. On the contrary, Art. 11 (9) of Directive (EU) 2020/2184 provides that until the implementing acts referred to in (2) are adopted, the Member States may maintain or adopt national measures with regard to specific minimum hygiene requirements for the materials or raw materials in question, provided that these measures do not contradict the provisions of the TFEU.

In this situation, only Art. 11 (1) of Directive (EU) 2020/2184 on general product requirements is currently to be implemented. The distribution system from the transfer point is subject to the building law competence of the state legislature; this will regularly involve house installations. The term house installation is defined in Art. 2 Subpara 2 of Directive (EU) 2020/2184 (cf. § 71).

Further remarks:

According to the applicable § 2 Subpara 2 Upper Austrian Construction Technology Act 2013, a construction product is defined as follows:

“Building materials, including chemicals used in construction, components and types of construction that are manufactured to be installed permanently in building construction and civil engineering structures, such as prefabricated ceilings, prefabricated lintels, chimneys and flues, load-bearing wall blocks, ready-made mortar, ready-made plaster, thermal insulation systems (consisting of insulating material, adhesive, glass fibre fabric and plaster), reinforcing steel, prefabricated houses, prefabricated parts (e.g. made of concrete, reinforced concrete, pre-stressed concrete or wood) and load-bearing structures made from them for predominantly static loads”. § 72 includes all building products for house installations, provided they come into contact with water for human consumption; this is regardless of whether they are listed in the building materials lists ÖA or ÖE (§§ 59 and 65) or whether they are other construction products (§ 67).

§ 73 regulates the risk assessment of domestic installations and serves in particular to implement Article 10 (1) and (2) of Directive (EU) 2020/2184.

Jurisdictional considerations:

In the Competence Report, for the assessment of the national competence to regulate the implementation of Art. 10 (1) and (2) of Directive (EU) 2020/2184 on the risk assessment of house installations after an analysis of the relevant competences based on the historically-found fossil material, it is carried out as follows:

“As an interim result, it can be stated that for the risk assessment of domestic installations and the associated products, materials and materials and for taking measures to eliminate and prevent identified risks from a sanitary or health law point of view, the federal legislation on the basis of Art. 10 (1) Subpara 12 B-VG (“Healthcare”), from a building law point of view, but also the state legislation based on Art. 15 B-VG (“Construction Act”) is called upon to regulate, insofar as the building in question is not in an indissoluble connection with a federal matter.

This means that a clear assignment of competences is not easily possible. The present draft deals with Art. 10 (1) and (2) of Directive (EU) 2020/2184 exclusively from the point of view of building law. House installations and the products, materials and materials used for them are construction products that are installed in buildings or other structural systems. Since building products can pose risks to the quality of drinking water, a material-specific hazard situation can also be argued, the defence of which does not (any longer) fall under the federal competence in the field of health care, which relates to general hazard prevention. House installations, unlike water supply systems, are not subject to federal water law competence.

Further remarks:

According to **paragraph 1**, house installations must be subjected to a general risk analysis. The implementation of the risk analysis is transferred to the OIB, which is a joint institution of all countries and whose task, among other things, is to prepare technical reports in the field of construction and construction products. The risk analysis is also a specific type of (structural) technical report. The OIB can also outsource the preparation of the general risk analysis to third parties, taking into account public procurement regulations. The obligation to carry out the risk analysis for the first time by 12 January 2029 and to evaluate it at six-year intervals follows from Article 7 (6) of Directive (EU) 2020/2184.

Paragraphs 2 and 3 of this provision implement Article 10 (1) letter b in conjunction with Annex I Part D of Directive (EU) 2020/2184.

Paragraph 2 stipulates that the risk assessment also includes the monitoring of the parameters listed in Annex I Part D of Directive (EU) 2020/2184 in locations in which, in the course of the general analysis pursuant to paragraph 1, specific risks for water quality and human health were determined. Monitoring should be focused on priority locations when it comes to legionella and lead. The concentration of monitoring with regard to legionella and lead on the priority locations results from Art. 10 (1), last sentence of Directive (EU) 2020/2184. For the concept of priority location, see § 71 Subpara 5. In addition, paragraph 2 regulates the modalities of the monitoring, which result in particular from Art. 13 of the aforementioned directive in connection with Annex II

Part D and paragraph 4 in connection with the corresponding specifications according to Annex III.

If the risk analysis according to paragraph 1 shows that there are specific risks in relation to lead or legionella in certain locations based on the house installations and the building products, materials and raw materials used for them, **paragraph 3**, based on paragraph 2, determines that the OIB has to oblige the owners of the priority location affected by the specific risks to monitor compliance with the parameters according to Annex I Part D of Directive (EU) 2020/2184 and to transmit the results of the monitoring to the OIB.

Paragraph 4 stipulates that the OIB is obliged to submit this to the state government.

The obligation laid down in Article 10 (2) of Directive (EU) 2020/2184 is implemented by **paragraph 5** of this provision. If the building authority becomes aware that there are risks to human health in relation to certain locations on the basis of the general analysis pursuant to paragraph 1, or the monitoring pursuant to paragraph 2 shows that the parameters specified in Annex I Part D of the Directive (EU) 2020/2184 are not complied with and this is due to structural deficiencies, the owner of the property must be given suitable building inspection measures within a reasonable period of time in order to eliminate or reduce the risk of non-compliance with the parameter values.

Paragraph 6 implements Article 10 (3) letter e; for the explanations of jurisdiction, see B. I. Z. 2.

Re Article II (amendment to the Upper Austrian EU Accompanying

Regulations and Implementation Act):

Re Article II Subpara 1 and 2 (Table of Contents):

The table of contents is to be adapted in line with the changes in the amendment.

Re Article II Subpara 3 (§§ 16 and 17):

Implementation note:

Directive (EU) 2020/2184 Art. 17 provides for various (recurring) information obligations of the public. § 16 serves to implement Article 17 (1) (Annex IV Subpara 7 letter c) and (2) letter b of Directive (EU) 2020/2184. Against the background of Art. 23 of the aforementioned directive, reference is made to the provision of the newly-added § 17 with regard to criminal liability in the event of non-compliance with the information obligations pursuant to § 16.

Jurisdictional considerations:

In the competence report, for the assessment of the national competence to regulate the information obligations according to Art. 17 of Directive (EU) 2020/2184, based on the perspective underlying the Federal Environmental Information Act, an annex-referenced link to the substantive legislative competence is proposed. Accordingly, various competence facts come into play here, whereby the following is stated in the competence report:

“Duty to provide information on the actual and average water consumption, information about the respective water supplier and its ownership structure fall under the competence of 'water law', since this is information in connection with the operation of a water supply system (cf. already under point 2.1., esp. VfSlg. 4883/1964).

Information regarding the water price follows that legislative competence, on the basis of which the municipalities were authorised to charge fees for, among other things, to collect the provision of the water supply and the purchase of the water (§ 17 (3) Subpara 4 of the Financial Equalization Act 2017; cf. VfSlg. 3550/1959, 10947/1986 mwN on the history of the origin).

Finally, as far as the information on the water quality is concerned, it should be pointed out that the LMSVG in its current version already contains an obligation with § 44, according to which an annual report on the quality of the water intended for human consumption must be submitted to inform consumers. § 6 of the current Drinking Water Ordinance also stipulates that the operator of a water supply system must inform the customer about the current quality of the water”.

According to the competence report, the state legislature is only responsible for implementing the information obligations in question within the framework of Article 17 (1) in conjunction with Annex IV Subpara 7 letter c (breakdown of fees for larger water suppliers) and Article 17 (2) letter b of Directive (EU) 2020/2184 (“Price of water for human consumption per litre and cubic meter”), to the extent that user fees are charged for the provision of the water supply and the purchase of the water. The competence of the state legislature to enact the provision in question can be argued on the basis of Section 8 Para. 1 F-VG 1948 in conjunction with § 17 (3) Subpara 4 FAG 2017.

Insofar as municipalities do not charge user fees for the water supply, but fees on a contractual basis, these have their legal basis in civil law. The same applies in those cases in which the water supply is provided by outsourced legal entities of the municipalities, which in turn charge contractual fees. According to the view presented, on which the competence report is based, it is assumed that the regulation of the information obligations in question is incumbent on the federal government as civil law legislator. Furthermore, the state legislature has no competence in those cases in which the water supply is provided by water cooperatives. These have their legal basis in WRG 1959. In relation to its members, the determination of the benchmark for the distribution of the costs, the determination of the membership fees and their collection is a matter for the statutes (§ 77 (2) letter d leg. cit.). Insofar as persons who are not members of the respective water cooperative are also supplied with water, their supply takes place on a contractual and thus civil law basis,

Further remarks:

§ 16 regulates information about the water price. Operators of water supply systems who prescribe fees in connection with the use of water supply systems within the meaning of the financial equalisation regulations (§ 17 (3) Subpara 4 FAG 2017) must inform the fee-payers at least once a year about the water price per litre and cubic meter.

On the other hand, the extended information obligation according to **paragraph 2** applies to operators of water supply systems according to paragraph 1 that provide at least 10,000 m³ of water per day or supply at least 50,000 people with water. This corresponds to the requirement of Annex IV Subpara 7 of Directive (EU) 2020/2184. In Upper Austria, there are currently (only) four water supply facilities that deliver more than 10,000 m³ of water per day, or supply more than 50,000 people; these water supply facilities are: 1. Water supply of the state capital Linz (operator: Linz Service GmbH), 2.: Water supply of the city of Wels by eww AG (operator: EWW AG), 3.: Water supply of the WDL for the Wels area (operator: WDL Wasserdienstleistungs GmbH), 4.: Water supply of the Fernwasserversorgung Mühlviertel water association (operator: Wasserverband Fernwasserversorgung Mühlviertel). These are not subject to the draft act as they do not prescribe any fees within the meaning of the financial equalisation regulations (see considerations relating to jurisdiction).

Paragraph 3 regulates the manner in which the information is to be provided, in accordance with Art. 17 (2) of Directive (EU) 2020/2184. Art. 17 (1) of Directive (EU) 2020/2184 (relevant in the present case, as explained above, only with regard to Annex IV Subpara 7 letter c leg. cit.) only provides for “appropriate and up-to-date” information in a more general form. This requirement is also met by the more specific provision of paragraph 3.

The implementation of the obligation to provide information about the water price requires an accompanying authorisation to process the personal data required for this in the sense of the General Data Protection Regulation. **Paragraph 4** provides for the authorisation under data protection law to process personal data that is required for the purpose of fulfilling the information obligations. These are exclusively identification and accessibility data.

Re Article III (Entry into force and transitional provision):

Paragraphs 1 and 2 contain the entry into force or transitional provision for the present amendment.

C. Text comparison

See the sub-attachment.

The Upper Austrian state government is requesting that the Upper Austrian state parliament adopt the state act amending the Upper Austrian Construction Technology Act 2013 and the Upper Austrian EU Accompanying Regulation and Implementation Act (Upper Austrian Construction Technology Act Amendment 2023). The Committee for Building and Nature Conservation can be considered for the preliminary consultation.

Linz, 22 May 2023

On behalf of the State Government of Upper Austria:

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