

Update Energy

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German Federal Cabinet: New liability regime for interrupted or delayed grid connection of offshore wind farms

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On August 29, 2012 the German Federal Cabinet (*Bundeskabinet*) has passed a draft “Third Bill regarding new Energy Law Regulations” (*Drittes Gesetz zur Neuordnung energierechtlicher Vorschriften*). Such draft bill shall accelerate the further development of German offshore wind energy. The new rules to be introduced in particular comprise a system change (*Systemwechsel*) within the legal framework for the grid connection of offshore installations by introducing demand planning (*Bedarfsplanung*) and a new binding Offshore Grid Development Plan (*Offshore-Netzentwicklungsplan*). The draft bill furthermore grants wind farm operators (“Operators”) damage claims against the transmission system operators (*Übertragungsnetzbetreiber*, “TSO”) which are responsible for the grid connection, in particular in case of any delayed or interrupted grid connection. Damages on the grounds of the foreseeable or apprehended delay of the grid connection of present offshore wind farm projects shall be subject to the new compensation rules as well. The costs incurred by TSOs under the new compensation scheme shall be allocated to the end consumers depending on the level of fault of the liable TSO. The bill shall be passed this year and come into force on January 1, 2013.

Pursuant to the energy concept of the German Federal Government, until the year 2020 35% of the German energy demand shall be covered by regenerative energy sources. By then 25 gigawatt shall be produced by offshore wind farms. The latest difficulties in the context of grid connection of offshore wind farms could possibly be regarded as to question

Introduction

Das Update Energie beinhaltet keinen Rechtsrat. Die enthaltenen Informationen sind sorgfältig recherchiert, geben die Rechtsprechung und Rechtsentwicklung jedoch nur auszugsweise wieder und können eine den Besonderheiten des einzelnen Sachverhaltes gerecht werdende individuelle Beratung nicht ersetzen.

that this goal can be achieved in time. Thus, the public now focuses in particular on such TSOs which are responsible for connecting the respective offshore wind farms to the electricity grid ("socket in the sea"). In particular TenneT TSO GmbH, which is responsible for the grid connection of the German North Sea offshore wind farms, has declared on November 7, 2011 vis-à-vis the Federal Government that because of technological and financial difficulties it cannot guarantee the timely grid connection of the offshore wind farms being located within its zone. Also investors nowadays seem to be more reluctant. This was said to be mainly due to the so far unresolved issue of who will be liable and has to bear the costs for a delayed grid connection of an offshore wind farm. The present draft bill shall overcome such legal obstacles.

The bill will introduce a system change in the law of grid connection for offshore wind farms. So far, the Operators have an individual and unlimited legal claim against the competent TSO to have their operational offshore wind installations connected to the grid (Sec. 17 para. 2a Energy Act (*Energiewirtschaftsgesetz, EnWG*). In future such claim shall only exist according to the provisions of the new Offshore Grid Development Plan pursuant to Sec. 17a et seqq. EnWG (draft). According to Sec. 17b EnWG (draft), by March 3 (on March 3, 2013 for the first time) of each year the TSOs shall develop an Offshore Grid Development Plan (*Offshore-Netzentwicklungsplan*) – together with the Grid Development Plan (*Netzentwicklungsplan*) pursuant to Sec. 12b EnWG – and submit such plan to the Federal Network Agency (*Bundesnetzagentur, "FNA"*) for approval. The Offshore Grid Development Plan shall include binding requirements for the coordinated and efficient development of the offshore grid. In particular such plan shall specify the time when the construction of the grid connection shall begin as well as by when the grid connection can be expected to be completed. Criteria for the chronological order of the construction of the respective power lines can in particular be the proximity to the coast as well as the planned commissioning (*Inbetriebnahme*) of the converter station and the onshore network contact point (*Netzanknüpfungspunkt*).

Such legal rule will introduce the principle of demand planning (*Bedarfsplanung*) to the legal framework of the grid

**System change in grid connection
Offshore Grid Development Plan
(*Offshore Netzentwicklungsplan*)**

**Demand planning
(*Bedarfsplanung*)**

connection of offshore installations. Whereas until now the technical operational availability (*technische Betriebsbereitschaft*) of the offshore wind generators was decisive for the time by which the grid connection had to be established, such rule now shall be reversed. The new approach shall result in a better synchronisation of the expansion of the grid and the expanded development of offshore wind farms.

Pursuant to Sec. 17d para. 1 EnWG (draft) the TSO will remain under the legal obligation to build the grid connection between the offshore wind farm and the transmission grid. However, in contrast to the current legal situation, such claim shall in future only exist subject to the provisions of the Offshore Grid Development Plan (i.e. only claim for a specific grid connection and the allocated capacity). In order to provide Operators and investors with the required planning reliability, the TSO pursuant to Sec. 17d para. 2 EnWG (draft) has to inform the Operator on the expected completion date (*voraussichtlicher Fertigstellungstermin*) of the grid connection at the latest at the time when the corresponding contract for its construction has been awarded; such date has to be published on the TSO's website as well. In case of difficulties which could result in a delay of the completion of the grid connection, such expected completion date may be postponed, however only after review and approval by the FNA. In addition, 30 months before the announced expected completion date such date will become binding; from this time on such completion date cannot be postponed anymore. Such final completion date (*verbindlicher Fertigstellungstermin*) will be decisive for the point in time after which the TSO pursuant to Sec. 17e para. 2 EnWG (draft) will be liable for financial loss incurred on the grounds of a delayed grid connection.

In case the Operator does not commence constructing the wind farm at the latest twelve months before the final completion date, and if the availability of operation (*Betriebsbereitschaft*) cannot be achieved at the latest twelve months after the grid connection has been duly established, the FNA has the right to award the respective grid capacity (*Anbindungskapazität*) to a third party after consultation of the German Federal Maritime and Hydrographic Agency (*Bundesamt für Seeschifffahrt und Hydrographie, BSH*) ("use it or lose it").

Claim for grid connection

"Use it or lose it"

The draft bill furthermore codifies the Operator's right to claim compensation for financial loss (*Ersatz von Vermögensschäden*) from the relevant TSO in three constellations:

- Interruption of an existing grid connection (*Störung der Netzanbindung*) (Sec. 17e para. 1 EnWG (draft)),
- Delayed grid connection (*verspätete Errichtung der Netzanbindung*) (Sec. 17e para. 2 EnWG (draft)), and
- Disruption of grid connection on the ground of maintenance works (Sec. 17e para. 3 EnWG (draft)).

The nature of such new rules is conclusive. Thus, the Operator has no right to claim any further compensation payments for financial loss from the TSO. In particular, within its scope, the new legislation will prevail over the general rule of Sec. 32 para. 3 and 4 EnWG. However, the obligation to compensate property damage does not fall within the scope of the new legislation and thus property damage will be compensated pursuant to the generally applicable rules. Sec. 17g EnWG (draft) in this respect merely limits the liability of TSOs vis-à-vis the Operators for unintentionally caused property damage and any resulting damages to offshore installations to a maximum of EUR 100 million (liability cap) per event.

According to Sec. 17e para. 1 EnWG (draft) the Operator is granted a claim against the responsible TSO for compensation of its financial loss, if the Operator cannot feed-in power generated by offshore installations which are available for operation for more than 10 consecutive days due to an interruption of the grid connection. Such claim is granted irrespective of whether the TSO was responsible for such interruption or not. The compensation will be granted as of the 11th day of such consecutive interruption and shall comprise 90% of the feed-in tariff to which the Operator would have been entitled according to Sec. 16, 31 of the German Renewable Energy Sources Act (*Erneuerbare Energien Gesetz, EEG*). However, if the TSO caused such interruption by wilful misconduct, 100% of the lost feed-in tariff shall be compensated as of the first day of the corresponding interruption of the grid connection. In case the grid connection was interrupted on more than 18 days in a calendar year, the Operator may claim compensation as of the 19th day of such

Compensation claims

Financial loss – property damage

Conclusive specific rule

(*abschließende Spezialregelung*)

Compensation on the grounds of interruption of the grid connection

(*Störung der Netzanbindung*)

interruptions due to which the feeding-in of power was impossible. The compensation shall not be calculated on the basis of the lost feed-in tariff of the specific offshore installations, but on the basis of the average power which would have been fed-in by a similar installation during the corresponding time. Therefore no compensation claim can be raised if on the days in question the feeding-in of power was impossible anyway, e.g. on the grounds of unfavourable wind, defects of the corresponding installations or because of maintenance works on the offshore installations by the Operator. Pursuant to the conclusive nature of the new rules, no further compensation for financial loss can be claimed on the grounds of an interruption of the grid connection. In addition the Operator has no compensation claim, if and insofar the Operator was responsible for the interruption.

In case the feeding-in by an offshore installation which is available for operation is impossible because no grid connection has been provided until the final completion date (*verbindlicher Fertigstellungstermin*), the Operator pursuant to Sec. 17d para. 2 sent. 2 EnWG (draft) has the right to claim from the TSO compensation for the financial loss incurred by such delay. Such claim is granted irrespective of whether the TSO was responsible for such interruption or not. It will come into existence only as of the date of the availability for operation (*Betriebsbereitschaft*) of the corresponding offshore installation, however at the earliest as of the 11th day after the final completion date for the grid connection. Corresponding to the principles governing the compensation claim for an interruption of the grid connection, in general 90% of the lost feed-in tariff has to be compensated. Only if the delay was caused by wilful misconduct of the TSO, 100% of the lost feed-in tariffs can be claimed as of the first day after the final completion date. Again, the compensation shall be calculated on the basis of the average power which would have been fed-in by a similar installation during the corresponding time. Such rule is conclusive as well, so no additional claims for financial loss of the Operator are admissible against the TSO (e.g. for compensation of maintenance costs or costs for an emergency operation of the wind farm).

Practical Advice: By way of retroactive effect (*unechte Rückwirkung*) the new bill will include as well offshore installations which already have been granted an

**Compensation on the grounds of delay of the grid connection
(*Verzögerung der Netzanbindung*)**

Transitional rules for offshore wind installations with unconditional grid connection approval

unconditional grid connection approval (*unbedingte Netzanbindungszusage*) pursuant to the law as currently in force. Such rule therefore would apply to offshore wind farms like Global Tech I, MEG I or Deutsche Bucht, which have already been granted unconditional grid connection approvals some time ago. In order to achieve this purpose, pursuant to Sec. 17e para. 2 sent. 6 EnWG (draft) the date set forth in an unconditional grid connection approval shall be regarded as the final completion date for the grid connection pursuant Sec. 17d para. 2 sent. 3 EnWG (draft), if such unconditional grid connection approval was granted on August 29, 2012 the latest. Furthermore, in order to protect the legitimate economic interests of Operators (*Vertrauensschutz*) who have been granted a conditional grid connection approval (*bedingte Netzanbindungszusage*) before August 29, 2012 only, such Operators shall have the right to prove the missing criterion for an unconditional grid connection approval until September 1, 2012 and thus may acquire an unconditional grid connection approval. Such approval then will be decisive for the final completion date for the grid connection and any damage claims under the new law. The Federal Government expects possible damage claims for such cases with a total value of approximately EUR 1 billion.

In case the feeding-in from an operational offshore installation is impossible for more than 10 days within a calendar year because of operational maintenance works (*betriebsbedingte Wartungsarbeiten*) on the grid connection, the Operator may claim damages from the TSO as of the 11th day pursuant to Sec. 17e para. 3 EnWG (draft) in accordance with the rules that apply to the compensation of financial loss on the grounds of an interruption of the grid connection. However, in contrast to these rules, such maintenance days do not necessarily have to lead to a consecutive 10 day interruption of the grid connection.

The Operators are not strictly bound to claim from the respective TSO compensation of financial loss. Instead, the Operator may choose between such compensation pursuant to Sec. 17e EnWG (draft) and a prolongation of the period for which the Operator is entitled to the feed-in tariffs under the EEG corresponding to the time of the interruption of the grid connection.

Compensation on the grounds of maintenance works on the grid connection

(*Störung wegen Wartungsarbeiten*)

Right to choose: Compensation or prolongation of EEG-remuneration

Sec. 17g EnWG (draft) recommends the TSOs to cover possible claims for financial loss and property damage by corresponding insurance policies. Thus, in contrast to the original intentions, the TSOs now shall be free to conclude corresponding insurance policies or not; thus, insurance cover will not be mandatory.

The costs incurred by the responsible TSO as a result of damage claims pursuant to Sec. 17e EnWG (draft) shall not be borne by the liable TSO alone but – depending on the level of fault (*Verschuldensgrad*) incurred by the respective TSO – be shared pursuant to the provisions of Sec. 17f EnWG (draft) under a cost sharing scheme (*Belastungsausgleich*) between all TSOs. In case the liable TSO has caused the respective loss by wilful misconduct, the corresponding compensation payments will not be eligible for the cost sharing scheme but will have to be borne by the responsible TSO alone and in full. If such losses however have been caused by negligence only, the respective costs incurred by the TSO are eligible to the cost sharing scheme, but only after taking into account a deductible (*Selbstbehalt*) of maximum EUR 100 million depending on the amount of damages incurred. Any TSO however will only be entitled to the cost sharing scheme, if it has taken any possible and reasonable measures to mitigate such damage.

Pursuant to Sec. 17f para. 5 EnWG (draft) the TSOs shall be entitled to allocate the costs they incurred under the cost sharing scheme, in particular compensation payments made, to the end consumers (*Letztverbraucher*) by way of charging an additional fee to the grid fees (*Netzentgelte*). However, such additional fee is subject to a cap: End consumers which consume less than 1 million kWh a year shall be charged a maximal additional fee of 0.25 ct/kWh; the extra fee for end consumers whose power consumption exceeds 1 million kWh per year shall be capped at 0.05 ct/kWh. Pursuant to such cap however the total additional fees collected might be insufficient to cover all claims which are subject to the cost sharing scheme in a calendar year. In such a case, the exceeding costs shall be included in the calculation and determination of the additional fee for the following year. Such carry-forward will ensure that all allowable costs will be included in the additional fee and be fully allocated to the end consumers.

No mandatory insurance cover

Cost sharing scheme (*Belastungsausgleich*) depending on the level of fault

Cost allocation to end consumers

In accordance with the Federal Department for Environment, Nature Conservation and Nuclear Safety (*Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit*) as well as with the Federal Department of Food, Agriculture and Consumer Protection (*Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz*), the Federal Department of Economy and Technology (*Bundesministerium für Wirtschaft und Technologie*) is entitled to enact an ordinance (*Verordnung*) which is not subject to the approval of the Federal Council (*Bundesrat*) in order to specify the details of the methods under the cost sharing scheme and the allocation of cost to the end consumers.

The new draft bill, in particular by introducing the new liability scheme for delayed grid connection, creates more legal certainty for Operators and investors, and by such new reliable legal framework for the respective TSOs as well. Thus, the draft bill has been welcomed by representatives of the offshore-wind industry.

Ordinance

Assessment



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Bredow/Klofat, „Die Energiewende in Deutschland“, three articles, published in: Deutscher AnwaltSpiegel 15/2011, page 8 et seqq.; 16/2011, page 14 et seqq. and 18/2011, page 9 et seqq.

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