

Update Energy

No. 2 • 5 December 2012

Federal Parliament passes new liability regime for interrupted or delayed grid connection of off-shore wind farms – new rules for power plant shutdowns

Dr. Günther M. Bredow / Daniel Klofat

On 29 November 2012 the Federal Parliament (*Bundes-tag*) has passed the “Third Bill regarding new Energy Law Regulations“ (*Drittes Gesetz zur Neuregelung energierechtlicher Vorschriften*). The Federal Government (*Bundesregierung*) had submitted a corresponding draft bill at the end of August 2012 (please cf. Update Energy No. 1 as of 31 August 2012). The draft bill has still to be adopted by the Federal Council (*Bundesrat*); if possible, the amendments shall come into force on 1 January 2013. The new rules will introduce the principle of demand planning (*Bedarfsplanung*) to the legal framework for the grid connection of offshore wind farms. Furthermore, wind farm operators (“Operators”) in future will be entitled to claim damages against the transmission system operators (*Übertragungsnetzbetreiber*, “TSO”) which are responsible for the grid connection, if the grid connection has been delayed or if an existing grid connection is interrupted for some time. The transitional rules for existing offshore projects which were already part of the government draft of the bill have been adopted without changes, so that the new rules on damages may apply to such projects as well. Additional amendments comprise inter alia rules for the security of the energy supply.

Since the Federal Government (*Bundesregierung*) presented its draft bill at the end of August 2012, the concept of the respective TSOs being liable for damages and the introduction of a deductible (*Selbstbehalt*) depending on the level of fault of the TSO as well as the allocation of the exceeding costs to the end consumers, was subject of a highly controversial de-

Introduction

This Update Energy does not constitute legal advice. While the information contained in this Newsletter has been carefully researched, it only offers a partial reflection of the law and its developments. It can be no substitute for individual advice appropriate to the facts of an individual case.

bate. Whilst consumer protectors rejected any allocation of costs to the end consumers and argued instead for a government liability, the TSOs regarded the very concept of liability and the amount of the deductible (*Selbstbehalt*) of up to EUR 100m partially as the “death of offshore-wind energy” in Germany. Investors feared that the suggested rules would only insufficiently increase the attractiveness of investments in offshore grid connections (TenneT TSO GmbH, 50Hertz Transmission GmbH, etc.). This criticism has been taken up in the legislative process. Whilst the general liability concept of the government draft remained unchanged, the deductibles (*Selbstbehalt*) of the TSOs were reduced.

The new concept of demand planning (*Bedarfsplanung*) for the grid connection of offshore wind farms (which was already part of the government draft) shall become law; the hitherto existing individual legal claim for the grid connection pursuant to Sec. 17 para. 2a Energy Act (*Energiewirtschaftsgesetz, EnWG*) shall be replaced by a claim to have the wind farm connected only pursuant to the conditions of the newly introduced Offshore Grid Development Plan (*Offshore-Netzentwicklungsplan*) (please cf. Update Energy No. 1 as of 31 August 2012 which can be downloaded at our website under <http://www.heuking.de/en/about-us/newsletter.html>).

The annual Offshore Grid Development Plan (*Offshore-Netzentwicklungsplan*) will govern the point in time when the construction of connection lines shall commence and by when the grid connection shall be completed. In addition to the proximity to the coast and the planned commissioning of the onshore network contact points (*Netzanknüpfungspunkte*), new criteria for the chronological order for the grid connection shall be established, like the progress in realization of the offshore wind installations to be connected and the efficient use of the grid connection capacity to be build (*effiziente Nutzung der zu errichtenden Anbindungskapazität*). Such amendments shall ensure that the existing connection capacity will be used in the most efficient manner. If the connection of an offshore installation to a free power line is possible, such connection shall have priority. As already provided for in the government draft, the final completion date (*verbindlicher Fertigstellungstermin*) for the grid connection will be decisive for the point in time after which compensation for financial loss incurred on the grounds of a delayed grid connection will have to be paid.

System change in grid connection, demand planning (*Bedarfsplanung*)

Additional criteria for the chronological order for the grid connection

However, as a new rule the relevant TSO and the Operators will have to agree a realization plan (*Realisierungsfahrplan*) after the publication of the expected completion date (*voraussichtlicher Fertigstellungstermin*) for the grid connection which shall include the chronological order of the several steps for the completion of the offshore installation and the grid connection. Such plan however is non-binding and shall only serve for more transparency and coordination between the parties. In case there will be deviations from the realization plan (*Realisierungsfahrplan*) or delays, the parties shall inform each other without undue delay.

In case the Operator does not commence 12 months before the final completion date (*verbindlicher Fertigstellungstermin*) for the grid connection with the construction of the offshore wind farm, and if the availability for operation (*Betriebsbereitschaft*) of the corresponding offshore wind installations has not been achieved within 18 months after such date, the Federal Network Agency (*Bundesnetzagentur*, “FNA”) may after consultation with the German Federal Maritime and Hydrographic Agency (*Bundesamt für Seeschifffahrt und Hydrographie*, BSH) award the respective grid capacity (*Anschlusskapazität*) to a third party. Such principle (“use it or lose it”) was already part of the government draft bill. However, the period for the completion of the wind farm was extended from 12 to 18 months after the final completion date (*verbindlicher Fertigstellungstermin*) for the grid connection. Furthermore, such principle now shall apply to offshore installations which had been granted unconditional grid connection approvals before the coming into force of the new bill as well. For these projects the completion date as set out in the unconditional grid connection approval (*unbedingte Netzanbindungszusage*) shall be regarded as final completion date under the new law, as it will be in the context of the above mentioned damage claims.

Corresponding to the government draft, the existing draft bill codifies the right of the Operators of operable offshore wind farms to claim compensation for financial loss from the respective TSOs in case of (i) an interruption of an existing grid connection (Sec. 17e para. 1 EnWG (draft)), (ii) delayed grid connection (*verspätete Netzanbindung*) (Sec. 17e para. 2 EnWG (draft)), and (iii) disruption of grid connection on the ground of maintenance works (Sec. 17e para. 3 EnWG

Realization plan (*Realisierungsfahrplan*)

“Use it or lose it” as well for existing projects with unconditional grid connection approval (*unbedingte Netzanbindungszusage*)

Financial loss

(draft)). The nature of such rules is conclusive. In case the grid connection of an operable offshore installation is not established by the final completion date (*verbindlicher Fertigstellungstermin*) of the grid connection, in case of a delay lasting several days the Operator has the right to claim from the TSO 90% of the lost feed-in tariffs. Such claim will come into existence irrespective of any fault of the Operator. Furthermore, an offshore installation will be regarded as available for operation (*Betriebsbereitschaft*) if the foundations of the offshore installation as well as the substation have been erected, even though the effective operability has not been achieved in order to mitigate damages.

Even if the offshore installation cannot feed-in power due to an interruption of the grid connection for a period of several days the Operator can claim 90% of the lost feed-in tariffs from the TSO irrespective of any fault of such TSO. If the delay of the grid connection or the interruption was caused by willful misconduct of the TSO, 100% of the lost feed-in tariff has to be compensated. For more detail please refer to our Update Energy No. 1 as of 31 August 2012.

Practice: In practice in comparable cases a possible delay of the grid connection and possible financial losses were avoided/mitigated by constructing an interim grid connection by using already existing but non-used lines.

Corresponding to the government draft the Operators are not strictly bound to such compensation claim in case of a delay or interruption of the grid connection. Instead, they are entitled to choose between such compensation and a corresponding prolongation of the period for which feed-in tariffs under the Renewable Energy Act (*Erneuerbare-Energien-Gesetz, EEG*) will be paid.

Furthermore, the new compensation rules by way of retroactive effect (*unechte Rückwirkung*) will in particular apply as well to offshore installations which pursuant to the hitherto applicable law had already been granted an unconditional grid connection approval (*unbedingte Netzanbindungszusage*) until 29 August 2012. According to Sec. 17e para. 2 sent. 6 EnWG (draft) the date set forth in the unconditional grid connection approval (*unbedingte Netzanbindungszusage*) for this purpose shall be regarded as the final completion date (*verbindlicher Fertigstellungstermin*) under the new law. Such

Right of choice

Transitional rules for offshore installations which have been granted unconditional grid connection approval (*unbedingte Netzanbindungszusage*)

rule however was already contained in the government draft and remained unchanged. For ongoing projects this means a clear increase of financing and legal certainty.

Property damage will be compensated pursuant to the generally applicable rules. Furthermore, Sec. 17g EnWG (draft) limits the liability of TSOs vis-à-vis the Operators for unintentionally caused property damage and consequential damage to offshore installations (e.g. damages due to excess voltages) to EUR 100m per event. Such principle was already contained in the government draft.

However, the cost sharing scheme (*Belastungsausgleich*) between the TSOs has been modified with regard to the amount of the deductible to be borne by the liable TSO. The new rules shall lead to a fair balance of the interests of the economy and of the consumers: The liable TSO will not have to bear the compensation payments to be made pursuant to Sec. 17e EnWG (draft) on his own. Instead, the costs will be shared between all TSOs pursuant to Sec. 17f EnWG (draft) depending on the level of fault of the responsible TSO. Furthermore, the law now expressly provides that contractual penalties, insurance payments or other payments from third parties which the liable TSO has received shall reduce the costs eligible for the cost sharing scheme (*Belastungsausgleich*).

If the TSO has caused the financial loss by willful misconduct, it will have to compensate the resulting damage in full; such damages will not be eligible to the cost sharing scheme (*Belastungsausgleich*) and no cost allocation to end consumers will take place with respect to such costs.

If the TSO has caused the damage only negligently, the respective costs will be subject to the cost sharing scheme (*Belastungsausgleich*), however, the liable TSO will have to bear himself between 5 and 20% of the costs to be compensated (*auszugleichende Kosten*). Furthermore, the financial basis of such deductible will be increased from hitherto up to EUR 800m to up to EUR 1bn of costs to be compensated (*auszugleichende Kosten*) (cf. table below). As a result the maximum amount of the TSO's deductible will be increased to EUR 110m (government draft: financial basis up to EUR 800m, deductible up to EUR 100m).

Property damage

Modifications regarding cost share to be borne by TSO

No cost sharing scheme in case of damages caused by willful misconduct

Distinction of deductible in case of simple and gross negligence

Costs to be compensated per calendar year pursuant to Sec. 17f para. 1 EnWG (draft)	Deductible	
	in %	in EUR
up to EUR 200m	20%	up to EUR 40m
and additionally for the amount exceeding EUR 200m and up to EUR 400m	15%	up to EUR 30m
and additionally for the amount exceeding EUR 400m and up to EUR 600m	10%	up to EUR 20m
and additionally for the amount exceeding EUR 600m and up to EUR 1bn	5%	up to EUR 20m
Sum of deductible		up to EUR 110m (max. EUR 17.5m in case of simple negligence)

The exceeding costs may be passed to the end consumers. However, most important, – concerning the amount of the deductible – the law distinguishes now between simple and gross negligence. In contrast to the government draft the deductible for simple negligence will be limited to EUR 17.5m per event, but in case of gross negligence the deductible may sum up to a total of up to EUR 110m.

Gross negligence will however be presumed, if the Operator suffers damage caused by delay respectively interruption of the grid connection (reversal of the burden of proof to the detriment of the TSO). In contrast, the government draft applied the presumption not only to gross negligence. Thus, under the current draft, if the TSO can prove that he is liable for simple negligence only, his deductible for financial loss will be reduced to EUR 17.5m only per event.

Such reduction of the deductible shall protect the relevant TSOs from insolvency. However, it will not limit the amount of damages to be paid to the Operator. The reduced deductible will only increase the costs that will be subject to the cost sharing scheme (*Belastungsausgleich*) and thus be allocated to the end consumers.

As already provided for by the government draft, the respective TSO is entitled to the cost sharing scheme (*Belastungsausgleich*) only if he has taken all possible and reasonable measures in order to mitigate the damage. Pursuant to a new amendment however, the TSO has to notify FNA on the respective occurrence of damage and has to submit a concept on the planned measures without undue delay in order to mit-

Presumption for gross negligence

Deductible and compensation

Mitigation of damages

igate the damage. Such concept shall be frequently updated until the damage has been eliminated.

Pursuant to Sec. 17f para. 5 EnWG (draft) the TSOs from 1 January 2013 on shall be entitled to include in the grid fees (*Netzentgelte*) paid by the end consumers the costs for the damages actually paid (as far as such are entitled to participate in the cost sharing scheme (*Belastungsausgleich*)) as well as the respective compensation payments. The law limits such extra fee to be imposed on the end consumers to a certain sum per kWh corresponding to respective power consumption of such end consumers.

Sec. 13a to Sec. 13c EnWG (draft) have been newly introduced to the draft bill. Such new rules contain provisions for the improvement of the security of energy supply. The growing share of renewables in the German energy mix as well as the principle of priority in favor of renewables (*Einspeisevorrang zugunsten der erneuerbaren Energien*) result in that some conventional power plants cannot be operated in a profitable manner anymore. Conventional power plants may even be subject to a shut down. In particular in winter (meaning high demand of electricity but low energy production by renewable energy resources) such shut downs could result in power shortages and imbalances of the grid (*Netzinstabilität*). The new legislation intends to balance these risks. Thus, if an operator of a power plant or power storage facility with a capacity exceeding 10 MW intends to partially or fully shut down such plant/facility, such intention must be notified to the competent TSO and the BNA with a period of at least one year pursuant to Sec. 13a para. 1 EnWG (draft). Before such one year period has lapsed, any shut down of such plant/facility will be illegal if a continued operation is technically and legally feasible. However, pursuant to the new Sec. 13a para. 2 EnWG (draft), even after such one year period has duly passed, TSO and FNA will be entitled to postpone any permanent shut down of any system relevant power plant with a capacity exceeding 50 MW against compensation payments to the operators. Such compensation payments will be financed by the end consumer by a corresponding contribution which shall be based on an ordinance of the Federal Government (such ordinance shall not require the consent of the Federal Parliament (*Bundestag*)). Special rules (Sec. 13c EnWG (draft)) shall apply for system relevant gas power

Allocation of costs to the end consumers

Security of energy supply and shut down of system relevant power plants

plants with a capacity exceeding 50 MW. Operators criticize the planned new rules as an unjustified infringement of their property rights.

The new draft bill comprises as well several other relevant amendments as e.g. the facilitation of the requirements for an exemption from grid fees for existing pumped storage hydro power plants (*Pumpspeicherkraftwerke*).

Exemption from grid fees for pumped storage hydro power plants (*Pumpspeicherkraftwerk*)



Rechtsanwalt
Dr. Günther M. Bredow
T +49 69 975 61-461
F +49 69 975 61-500
g.bredow@heuking.de



Rechtsanwalt
Daniel Klofat
T +49 69 975 61-461
F +49 69 975 61-500
d.klofat@heuking.de

Your contact persons for this issue

Bredow/Klofat, „German Federal Cabinet: New liability regime for interrupted or delayed grid connection of offshore wind farms“, Update Energy Nr. 1, 31. August 2012

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.

Our publications on this issue

Subscription Service: Update Energy

subscribe (for free, non-binding, may be cancelled at any time)

unsubscribe

Fax-answer to: +49 211 600 55 177

E-Mail-answer to: updateenergie@heuking.de

Subscription Service and Contact Details

Your name:

.....

Your email-address:

.....

Your postal address:

.....

This and any other issues of Update Energy can be downloaded in the internet under <http://www.heuking.de/en/about-us/newsletter.html>

Download

Berlin

Unter den Linden 10
10117 Berlin/Germany

Brussels

Avenue Louise 326
1050 Brussels/Belgium

Chemnitz

Weststrasse 16
09112 Chemnitz/Germany

Cologne

Magnusstrasse 13
50672 Cologne/Germany

Düsseldorf

Georg-Glock-Strasse 4
40474 Düsseldorf/Germany

Frankfurt

Grüneburgweg 102
60323 Frankfurt a. M./Germany

Hamburg

Neuer Wall 63
20354 Hamburg/Germany

Munich

Prinzregentenstrasse 48
80538 Munich/Germany

Zurich

Bahnhofstrasse 3
8001 Zurich/Switzerland

www.heuking.de