

ASSESSMENT OF THE LEGAL RISKS OF OFFSHORE WIND ENERGY : DISPUTES, DELAYS AND COMPENSATORY PAYMENTS

Jean-Nicolas Clément, Partner, Gide Loyrette Nouel

8 September 2021

AGENDA

- ◆ The multi-year programme for energy (*Programmation pluriannuelle de l'énergie*) has set a goal of 2,4 GW of electricity produced by offshore wind farms by 2023 and between 5,2 and 6,2 GW by 2028.
- ◆ Article L. 100-4 of the energy code sets an objective of fostering the production of electricity by offshore wind farms and to award 1GW of installed capacity per year by 2024.
- ◆ However, offshore wind farms are still new in France and several risks must be considered.

- I. Risk of disputes
- II. Risk of delay
- III. Compensatory payments

I. RISK OF DISPUTES

The recent simplification of litigation : the exclusive jurisdiction of the Conseil d'Etat

- ◆ Art. 55 of law no. 2020-1525 dated of 7 December 2020 *d'accélération et de simplification de l'action publique* ("ASAP") has modified article L. 311-13 of the Administrative Justice Code **by transferring to the supreme administrative court, i.e. the Conseil d'Etat, the exclusive jurisdiction** over decisions relating to offshore wind farms and related components and public electricity grid infrastructures, port facilities necessary to the construction, the storage, the pre-assembly, and the operation and maintenance of the installations and facilities.
- ◆ Previously, the administrative court of appeal of Nantes had been competent since decree no. 2016-9 dated of 8 January 2016, and its decisions could be challenged before the Conseil d'Etat at last instance.
- ◆ **Advantage** : the main goal was to simplify the litigation process and to cut delays. Indeed, according to the Ministry in charge of energy **this measure will allow to save 2 years on average on the development schedule of offshore wind farm projects and to reduce to less than 2 years the suspension period.**
- ◆ **Disadvantage** : for potential claimants and opponents to offshore projects, it hinders the right to challenge decisions regarding offshore projects as **the Conseil d'Etat will be the only jurisdiction level, without appeal.**
- ◆ Decree no. 2021-282 dated of 12 March 2021 has listed the 33 types of disputes that are concerned (e.g.: operating license, environmental autorisation, building permit...). It is now codified in article R. 311-1-1 of the Administrative Justice Code.

I. RISK OF DISPUTES

Review of dispute risks against offshore wind farm projects

- ◆ There are 2 main risks of disputes : (i) the reconsideration of one of the steps of the project that could jeopardize its feasibility and/or (ii) the delays caused by the suspension due to the litigation process.
- ◆ Between 2019 and 2020 there has been approximately 20 disputes. Since the publication of the ASAP law awarding exclusive jurisdiction to the Conseil d'Etat, there has been 2 disputes (as of July 2021) : one relating to an implicit decision to dismiss the ruling designating an operator and granting an operating license, the other against an order modifying another order authorizing an offshore wind farm (source : National Assembly, information report on the application of law no. 2020-1525 of 7 December 2020, 13 July 2021).
- ◆ For example, the administrative court of appeal of Nantes in several decisions dated of 6 Octobre 2020 :
 - has deemed illegal the water police authorisation of a floating wind farm in the Mediterranean sea which is suspended until regularisation : indeed, pursuant to the court, there is a scientific doubt on the potential effects of the project on 3 species of protected birds as : (i) it jeopardizes the goals of 3 Natura 2000 sites (ii) there should have been a prior assent from the national parks of Calanques and Port-Cros and (iii) there was no derogation to the prohibition to destroy protected birds species (CAA Nantes, 6 October 2020, no. 19NT02389, *Assoc . Nature et citoyenneté Crau Camargue Alpilles*).
 - has partially cancelled an order as regards to the derogation to the prohibition to destroy protected marine species and has suspended the execution of the water police autorisation and of the operating license under energy law (CAA Nantes, 6 October 2020, no. 19NT01714, 19NT02501 & 19NT02520, *Assoc. "sans offshore à l'horizon"*).
- ◆ However, it must be noted that, to this date, no judicial ruling has undermined any offshore project in France.

II. RISK OF DELAY

Review of the risks of delay and their impact on the offshore wind farm projects

- ◆ The risk of delay regarding offshore wind farms is particularly important and at this stage several projects are concerned, for example :
 - the first projects (e.g. Fécamp, Saint-Nazaire...) were awarded in 2012 and have still not been commissioned, thus jeopardizing the objectives set by the French State. They should have been commissioned between 2018 and 2020. However, they now should be in operation in 2022.
 - the project of offshore wind farm in Normandy has also been delayed as it should have been awarded in 2020 pursuant to the PPE.

- ◆ Several reasons may explain such delays :
 - as aforesaid, disputes is one of the causes of delays. For example, the projects awarded in 2012 (first call for tender) have been cleared of appeals through periods ranging between 2 years and 2 months and 3 years and 8 months ;
 - delays in the project schedule (e.g. public debate) ;
 - delays relating to the building of the project and notably the connection to the public grid. For example, the Saint Brieuc project is currently experiencing delays due to the drilling process.

- ◆ Delays may impact the offshore wind farm projects and their feasibility by reducing the duration of contracts for difference under energy law.

II. RISK OF DELAY

Mitigation of the risks of delay and their impact on the offshore wind farm projects

The risk of delay and its impact on project have been mitigated by the following measures :

- ◆ The simplification of the procedures thanks to art. 55 of the ASAP law. Apart from the exclusive jurisdiction of the Conseil d'Etat (see I), the following measures have been codified in the Environmental Code (art. L. 121-8-1) :
 - the Ministry in charge of energy may ask the national commission of public debate to consult the public on several projects of calls for tenders on a same seafront (a new public debate will have to be launched if the call for tender has not been organized within 7 years after the publication of the conclusions of the public debate);
 - the limitation of the duration of the public debate to the duration set in art. L. 121-11 of Environmental Code (i.e. 4 months for projects);
 - the Ministry may now launch the first phase of the call for tenders before the end of public debate process. However, the potential localisation of the project will be set after the publication of the conclusions of the public debate.
- ◆ The specifications of each call for tender also regulate the risks of delays. For example, the duration of the contract for difference may be impacted in case of delays, but some exceptions have been set to reduce the financial impact (e.g. if the availability date of the grid connection facilities by the transport system operator has not intervened before the set deadline and if the said delay is not compensated, in case of dispute relating to the environmental authorisation (see art. 7.7 of the specifications of the Dunkirk call for tenders)). However, the producer will have to prove such delays before the Ministry in charge of energy.
- ◆ Compensatory payments (see III).

III. COMPENSATORY PAYMENTS

- ◆ Compensatory payments mechanisms may also mitigate risks on offshore wind farm projects.
- ◆ Notably, compensatory payments shall be awarded by the transport system operator (RTE) in case of delay or damage. Such a mechanism is provided for in the call for tenders specifications or, if not, in a decree (decree no. 2018-222 for projects in which RTE takes in charge the grid connection and decree no. 2017-628 for projects of the first two calls for tender for which grid connection costs were paid by the producer).
- ◆ According to decree no. 2018-222, in case of delay or damage, the compensation paid by RTE to the producer will amount to 80% of the financial loss of the electricity that has not been generated in the previous month. At most, 7 months after the end of the works or of the damage, the producer will be compensated of 90% of the financial loss. Similar provisions are set in the specifications (e.g. art. 4.9 of the Dunkirk specifications).
- ◆ The compensation for delays cannot last more than 3 years and the compensation for damage will have to amount to a certain threshold to be paid.
- ◆ However, the model of grid connection contract sets that, in some cases, delays cannot be imputed to either of the parties, notably due to the particularity of offshore projects (e.g. bad weather, risk of security at sea, unexploded ordnances).

*

YOUR CONTACTS



Jean-Nicolas Clément

Associé | Partner - Gide Paris

Dispute Resolution | Public Administration Law

☎ +33 (0)1 40 75 21 44

✉ jean-nicolas.clement@gide.com

Gide Loyrette Nouel A.A.R.P.I

15 rue de Laborde - 75008 Paris

Tél. +33 (0)1 40 75 60 00

GIDE

GIDE LOYRETTE NOUËL



BY YOUR SIDE AT KEY MOMENTS

ALGIERS
BEIJING
BRUSSELS
CASABLANCA
ISTANBUL
LONDON
NEW YORK
PARIS
SHANGHAI
TUNIS
WARSAW

gide.com

