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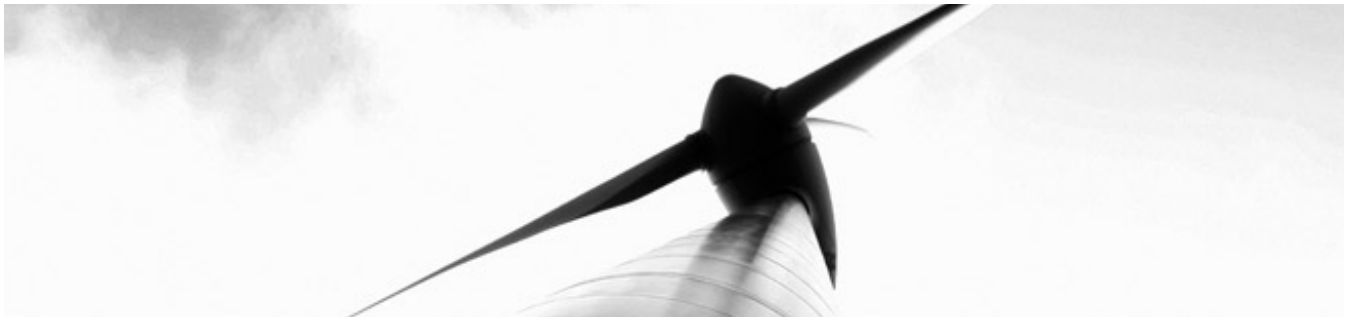

A wind of change blows on the offshore renewable energy sector

Briefing

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Is France giving itself the tools to reach its objectives?

France is behind the curve with no operational offshore wind farm (nor any under construction). With two awarded calls for tenders (round 1 and round 2) respectively in April 2012 and May 2014, related to six grounded offshore wind farms representing a capacity of 3,300 MW, and a call for tender for demonstrator floating wind farms, France is far from being in a position to achieve its objectives set at 6GW installed capacity by 2020[1]. With the issuance of a new Decree, it seems that the Government has realised that measures were necessary to enable the offshore wind industry to expand in a more favourable context.

Introduction

Decree n°2016-9 of 8 January 2016 relating to power generation and transportation facilities of marine renewable energy, published on 10 January 2016 (the "Decree") is intended to secure notably the offshore wind industry by facilitating the investments required for its development through the adaptation and simplification of the litigation rules and applicable legal framework.

The Decree, implementing the determination expressed during the recent COP 21 meeting, sends a strong political signal: France is giving itself the tools to benefit from its natural resources[2] and become one of the leading countries in marine renewable energy ("MRE").

1 According to the "renewable energy" plan of the ministry of environment, 6GW of offshore wind farms shall be installed by 2020.

2 Metropolitan France benefits of 5.853 km coastline which represents the second highest wind energy potential in Europe.

The Decree appears to be a solid step in reaching the ambitious objectives set in the Energy Transition Law[3] by contributing to the acceleration of the development of the offshore wind industry and the creation of thousands of green jobs.

We summarize below the breakthroughs achieved by the Decree that clearly focuses on the reduction of litigation constraints borne by developers and administrative complexities and clears the development of this very specific industry from some of the most significant impediments it faces. The main aspect appears to be the designation of a single court, ruling at first and last instance, within an indicative time window of one year.

MRE authorisations litigation: a tailor-made procedure

The wind industry is particularly subject to opponents systematically raising acceptability issues related to the construction and operation of wind farms. As a matter of fact, a significant number of onshore wind farms have (or have had) to experience legal challenges brought against the granting of the relevant permits. As of the current time, all the authorisations granted to Enertrag[4] and amongst the very few permits granted to the wind farm falling within the scope of the rounds 1 and 2 calls for tenders, the award decisions of the successful bidder, and the licenses to operate have been challenged. This situation underscores the necessity of ensuring an efficient settlement process.

The Decree provides for a specific litigation regime applicable to MRE authorisation intended to limit the number of recourses and the duration of the proceedings. These changes are welcome to the offshore wind industry as they limit the impact of litigation on the schedule for the development of a project and on the related expenses to be incurred.

These innovations became effective on 1 February 2016, therefore, any claim introduced from that date will benefit from the new breakthroughs.

Designation of a single court to rule on MRE authorizations related disputes

The most obvious innovation of the Decree is certainly the designation of the administrative court of appeal of Nantes as the exclusive jurisdiction empowered to settle legal disputes brought against authorizations required to undertake MRE projects[5].

The Decree lists not less than fourteen authorizations which may be required to develop a MRE project. Among them, we can point out the power generation authorization, the water law authorization[6], the concession to occupy the public domain, the award decision of the successful bidder, and building permits for connection facilities[7].

Having a dedicated court appears to be an appropriate way to improve the litigation proceeding. The judges of the administrative court of appeal of Nantes should achieve an in-depth expertise in this kind of litigation, which is likely to accelerate the settlement of such disputes. However, attention must be paid to the risk of clogging up this jurisdiction resulting from an increasing number of litigations brought before the administrative court of Nantes, following the development of MRE projects and more specifically offshore wind farms.

3 Law n°2015-992 of 17 August 2015 about energy transition for a green growth: among those objectives there is the willingness to raise the percentage of renewable energies in the final energy consumption up to 32% in 2030 (against 10% in 2014 according to the ministry of environment in "panorama énergie – climat 2015").

4 Enertrag is the company that was awarded the first call for tender launched in 2004, pursuant to which only 105MW (out of 500MW) installed capacity was awarded and finally converted to a demonstrator site for turbines.

5 With the introduction of a new article R.311-4 in the administrative jurisdiction code.

6 Articles L. 214-1 and following of the environmental code.

7 The Decree also refers to authorizations related to electricity connection public facilities and port infrastructures needed for the construction, storage and pre-assembly of the above-mentioned facilities.

Removal of one degree of jurisdiction

Even more significant and impactful for the MRE industry, the Decree specifies that the administrative court of appeal of Nantes will decide at first and last instance[8]. The Decree removes one degree of jurisdiction. MRE is the first industry to benefit from such kind of exclusivity of jurisdiction and one degree of jurisdiction.

With this breakthrough, the parties in a MRE authorization dispute will not be entitled to appeal the ruling of the administrative court of appeal, except by filing a supreme court appeal before the "Conseil d'Etat", which recourse can only be introduced to challenge the decision strictly as to matters of law (i.e, facts are no longer subject to discussion).

The renewable industry has welcomed this modification, as opponents to renewable energy projects typically use all legal recourse available in order to delay the realisation of the projects.

It should however be noted that the change effected by the Decree could on occasion present a drawback for the MRE industry as developers will be prevented from challenging any ruling cancelling an authorisation and will have to apply for a new one.

This innovation should nevertheless reduce the time needed to resolve litigation issues, which have been forecasted by developers of MRE projects in their business plan schedules.

New tools to master the length of litigation

In order to shorten the litigation procedure, the Decree provides two interesting developments.

First development: a one-year ruling

Judges are required to issue their ruling within one year from the date on which a dispute is brought before them. Such precision is intended to provide better visibility and allow developers to maintain a precise development schedule even in case of litigation. The Decree remains silent as to any sanction or consequences in the event that the deadline is not met. Therefore, the one-year time frame must be considered as merely indicative.

Second development: freezing the arguments to be raised by the parties in proceedings

The Decree extends to MRE disputes a litigation rule presently applicable to building permits[9] . A party involved in a proceeding concerning MRE authorizations will be allowed to ask the judge to freeze the ability of any party to add new arguments *(nouveau moyen)* to the issues being disputed. Usually, it is the judge's remit to decide spontaneously when it is relevant to stop the exchanges of arguments between the parties. With this new development, parties will have an interesting means of accelerating the proceeding by arguing that the case is ready to be dealt with. However, the judge has no obligation to accept the request.

This improvement may avoid irrelevant extension of time of the pending proceeding and is likely to halve the time needed to resolve this kind of dispute.

8 The standard litigation rules provide that an administrative court (tribunal administratif) shall rule first, then, its decision could be appealed before an administrative court of appeal (cour administrative d'appel), which decision may also be challenged before the "Conseil d'Etat" on legal grounds only (the supreme administrative court).

9 Article R*600-4 of the town planning code

A new admissibility criteria of the recourse

With the purpose of striking a balance between securing the MRE authorization issued and respecting third-party rights, the Decree provides a new obligation to be borne by anyone intending to challenge the lawfulness of MRE authorisations. Such obligation already exists with respect to building permits and unique authorisations[10]. The claimant will henceforth be required to notify the issuing entity of the MRE authorisation and the MRE authorisation holder of the introduction of proceedings. Such notification must be made by registered letter with acknowledgement of receipt within fifteen days following the introduction of the challenge by the claimant.

Non-compliance with this obligation will result in the inadmissibility of the recourse. Therefore, based on the probability of such omissions, this new litigation rule, specific to MRE projects, may reduce the number of recourses that could jeopardize a project.

This new proceeding requirement will apply to all authorizations issued from the date of publication of the Decree (i.e. 10 January 2016).

Standardization of the deadlines to contest MRE authorizations required by the water law.

Providing security against claims made against MRE authorizations issued is clearly one of the objectives of the Decree. The time-window to challenge the authorizations required by the water law, has been harmonized and set at four months, when such authorization is required for renewable energy generation installations, electricity connection public facilities and necessary port infrastructures[11].

It should be noted that the draft version of the Decree made available in July 2015 proposed a recourse period of two months. Therefore, this development is of limited effect but still demonstrates the position of the government in the matter.

This innovation shall apply to all authorizations issued from the date of publication of the Decree (i.e. 10 January 2016).

Facilitating long-term projects

The Decree also provides two notable modifications of the legal framework applicable to MRE projects.

First modification: lengthening up to 40 years of the concession to occupy the public domain

The Decree adjusts the rules applicable to the concession contracts required to use the maritime public domain for generating power with renewable energy sources. The duration of such contract can now be up to forty years instead of thirty. This development should improve consistency between the duration of such concession and the power plants and submarine installations lifetime[12]. This extension will not apply to current concession

10 Article R*600-1 of the town planning code and Article 25 of the decree 2014-450 of 2 may 2014 related to the unique authorization.

11 This provision of the Decree does not apply to the authorization (autorisation unique) issued in accordance with ordinance n°2014-619 of 12 June 2014.

12 The government did not maintain a favourable legal provision of the draft version of the Decree relating to the evaluation of the compensation due to the beneficiary of an authorization to use the maritime public domain when such authorization is withdrawn for public interest reason.

contracts but only those concluded after 10 January 2016.

Second modification: extension of the duration of the electricity generation authorisation
French law requires a specific authorization in order to generate electricity. From the date of the issuance of such authorization, the beneficiary must commence production within a time-limit of three years, which can be extended up to ten years.

To take into account the specificities of MRE projects and to facilitate their development, the Decree provides a new exception allowing such time-limit to be extended for six additional years in the case of MRE projects, resulting in a maximum total of sixteen years. This change will apply not only to all such authorisations issued from 10 January 2016 but also to those currently valid.

Additional protection for third party rights

In order to improve the acceptability of the modifications provided by the Decree by people who may consider their rights to be affected by an MRE project, a new procedure ("procédure de reclamation") has been introduced.

This new procedure cannot be used to challenge the lawfulness of an authorization and the Préfet (local State representative) is in no case empowered to repeal the MRE authorizations at stake. However, any interested person may use such new procedure to contest the insufficiency of the mitigating measures set by the authorization in order to make the project acceptable regarding, for example, environmental care or the harmfulness of the plants or process used in the project. The Préfet to whom the claim is submitted has two months to assess the request and, as the case may be, to order additional mitigation measures for the implementation and/or operation of the MRE plant. If the Préfet does not respond or decide that the measures imposed are sufficient within the two-month timeframe, the claimant may challenge this (explicit or implicit) decision before the court.

A positive signal for the development of the MRE in France

The publication of the Decree fits an interesting dynamic initiated by France. After the failure of the first offshore wind farms call for tenders of 2004, the success of both round 1 and round 2 calls for tenders totalling around 3 GW of grounded offshore wind farms, the ambitious Energy Transition Law, the offshore floating wind farms call for tenders launched last August, the government, with the Decree, has offered a very hoped-for support to the offshore renewable energy sector.

While France may be currently behind the curve and compare poorly with other European counterparts, the Decree is proof of its strong willingness to catch up in the MRE sector.

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