



**LEGAL FRAMEWORK OF OFFSHORE WIND  
FARMS IN FRANCE**

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- I. Overview of existing offshore (fixed) wind farm projects in France
- II. Legal framework: inside or outside competitive procedures?
- III. Competitive processes – support schemes
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# I. OVERVIEW OF EXISTING (FIXED) OFFSHORE WIND FARM PROJECTS IN FRANCE



# OVERVIEW OF EXISTING OFFSHORE (FIXED) WIND FARM PROJECTS IN FRANCE



**First call for tender launched in July 2011 for a targeted capacity of 3000MW divided into 5 lots**

Site / Main features	Winner of the tender process	Steps/ Permits obtained	Litigations	Commissioning target date
<b>Fécamp</b> 498 MW 83 masts 13 and 22 km	Eolien Maritime France (EMF – EDF RE, WPD, Enbridge) transferred to the Société Eoliennes Offshore des Hautes Falaises	Operating license Water law approvals (L214-3 Environmental Code) obtained in April 2016 Concession over the maritime public domain	Conseil d’Etat (“CE”), 29 March 2018 reject of the challenge against the impact study, the duration of the public enquiry, the visual impact, and the maritime safety. CAA Nantes, 3 April 2018, reject of the request for cancellation of the concession over the maritime public domain	Commissioning expected in 2022
<b>Courseulles-sur-Mer</b> 480 MW 75 masts > 10 km from the coasts	Eolien Maritime France (EMF – EDF RE, WPD, Enbridge) transferred to Société Eoliennes Offshore du Calvados	Operating license Water law approvals (L214-3 Environmental Code) obtained in June 2016 Concession over the maritime public domain	Cour Administrative d’Appel (“CAA”) Nantes, 2 October 2017 reject of the challenges brought by 8 associations CE 16 May 2018 dismissed the admissibility of the challenges.	Commissioning expected in 2023
<b>Saint-Nazaire</b> 480 MW 80 masts 12 to 20 km from the coasts	(EMF– EDF RE, WPD, Enbridge) transferred to the Société Parc du Banc de Guérande	Operating license Water law approvals (L214-3 Environmental Code) obtained in March 2016 Concession over the maritime public domain	Reject of the CAA Nantes Court hearing before the CE on 13 February 2019, the public rapporteur requested a referral before the CAA on the ability of the association to act before courts – decision of the CE expected	Should be the first wind farm to be commissioned – commissioning expected in 2021
<b>Saint-Brieuc</b> 500 MW 62 masts 16 km from the coasts	Ailes Marines SAS (Iberdrola, RES and CDC)	operating license Approval under L214-3 Environmental Code obtained in April 2017 New order authorizing the occupation of the maritime public domain passed on 21 June 2018	CAA Nantes, 12 January 2018 : reject of the cancellation requests of (i) the decision awarding the project to the winner Ailes Marines SAS and (ii) the operating license  CAA Nantes, 3 April 2018 : cancellation of the agreement for the occupation of the maritime public domain	Starting of the works expected in 2021, i.e. 3 year delay  Commissioning expected in 2023
<b>Le Tréport</b>	Abandoned project (price of the bidders too high)	–	–	–



# OVERVIEW OF EXISTING OFFSHORE (FIXED) WIND FARM PROJECTS IN FRANCE

**Second call for tender launched in March 2013 for a targeted capacity of 1000MW (2 offshore wind farms)**

Site / Main features	Winner of the tender process	Steps/ Permits obtained	Litigations	Commissioning target date
<b>Tréport</b> <b>496 MW</b> <b>(62 wind turbines of 8 MW)</b> <b>15,5 km from the coasts</b>	Société les Eoliennes en Mer Dieppe Le Tréport (EMDT) – Subsidiary of ENGIE, EDP Renewables, Sumitomo Corporation and Banque des Territoires	Operating license Approval under L214-3 Environmental Code, derogation for protected species regime and order authorizing the occupation of the maritime public domain passed on 27 February 2019	Litigation with the association of fishermen de pêcheurs threatening a challenge before courts, reaction of the prefect in order to update the social and economic study to take into account the local situation	Commissioning expected in 2023
<b>Îles d'Yeu and Noirmoutier</b> <b>496 MW</b> <b>(62 wind turbines of 8 MW)</b> <b>11,7 km from the coasts</b>	Société Eoliennes en Mer îles d'Yeu et Noirmoutier – Subsidiary of ENGIE, EDP Renewables, Sumitomo Corporation and Banque des Territoires	Operating license Approval under L214-3 Environmental Code obtained in October 2018 order authorizing the occupation of the maritime public domain passed on 29 October 2018	CE reject CAA Nantes reject dated 26 February 2018 TA (administrative court) of Nantes reject	Commissioning expected in 2024



# OVERVIEW OF EXISTING OFFSHORE (FIXED) WIND FARM PROJECTS IN FRANCE

## Third competitive process (“*dialogue concurrentiel*”) launched in April 2016 - ongoing

Site / Main features	Bidders (at the end of the <i>dialogue concurrentiel</i> )	Steps	Winner	Commissioning target date
<b>Dunkerque between 250 and 750 MW</b>	6 candidates (according to AFP): <ul style="list-style-type: none"> <li>• Deme-Quadran Énergies marines-Shell;</li> <li>• Vattenfall-WPD-Caisse des Dépôts;</li> <li>• Boralex-Eneco-Van Oord-DGE;</li> <li>• Engie-EDPR-E.ON;</li> <li>• Elicio-Total-Orsted ; and</li> <li>• EDF-Innogy-Enbridge.</li> </ul>	December 2016: launch of the competitive process (“ <i>dialogue concurrentiel</i> ”)  Spring 2018: notification of the tender specifications (“cahier des charges”) to the European Commission	Award initially expected end 2018, postponed to mid-2019, deadline for bids: 15 March 2019	Commissioning expected in 2022

# OVERVIEW OF EXISTING OFFSHORE (FIXED) WIND FARM PROJECTS IN FRANCE



## Fourth competitive process (“*dialogue concurrentiel*”) launched in November 2016 – ongoing or abandoned?

Site / Main features	Steps	Commissioning target date
<b>Oleron</b> <b>Minimum 500MW</b> <b>between 60 and 80</b> <b>wind turbines</b>	Consultation launched in November 2016 Positive opinion of the French energy regulation supervisory authority (“Commission de régulation de l’énergie” or “CRE”) on the conditions for the competitive dialogue dated 13 April 2017  No opinion of the CRE as regards the specifications of the tender	?



## II. LEGAL FRAMEWORK: INSIDE OR OUTSIDE COMPETITIVE PROCESSES?



➔ It is legally and theoretically possible to implement an offshore project outside competitive processes:

- Competitive processes should solely be used when the production capacities do not comply with the requirements of the multi-annual programming for energy (so called “*programmation pluriannuelle de l’énergie*” or “PPE”);
- Competitive processes give solely right to:
  - a power purchase agreement (“*contrat d’achat*” or “PPA”) or a feed-in premium contract (“*contrat de complément de rémunération*”);
  - an operating license;other permits have to be obtained by the candidate.

➔ but:

- No support scheme in those cases now, a corporate PPA could be negotiated alternatively ;
- The whole of the authorizations shall be filed / obtained by the project owner;
- Rép. Min. n°100589 dated 22 February 2011, JOAN 31 May 2011, p. 5801: indicates that offshore projects developed outside competitive processes will not be examined.



# III. COMPETITIVE PROCESSES – SUPPORT SCHEMES



# COMPETITIVE PROCESSES BEFORE AND AFTER 2015



## Before 2015: call for tender

**Call for tender ruled by the ordinance dated 9 May 2011 (n°2011-504) and the decree dated 28 June 2011 (n°2011-757)**

- Main features of the call for tender provided by the Ministry in charge of Energy, the French energy supervisory authority (“CRE”) establishes the specifications of the call for tender, the call for tender is launched by the CRE after review of the specifications by the Ministry in charge of Energy
- The winners of the call for tender are awarded with:
  - An operating license (“*autorisation d’exploiter*”)
  - A power purchase agreement (“*contrat d’achat*”)

Procedures applicable for the 1st and 2nd calls for tender.

## After 2015: call for tender or “*Dialogue concurrentiel*” (articles L.311-10 and R.311-12 of the French Energy code)

- Call for tender ruled by articles R.311-13 to R.311-25 of the French Energy code
- OR
- Competitive dialogue ruled by articles R.311-25-1 to R.311-25-15 of the French Energy Code

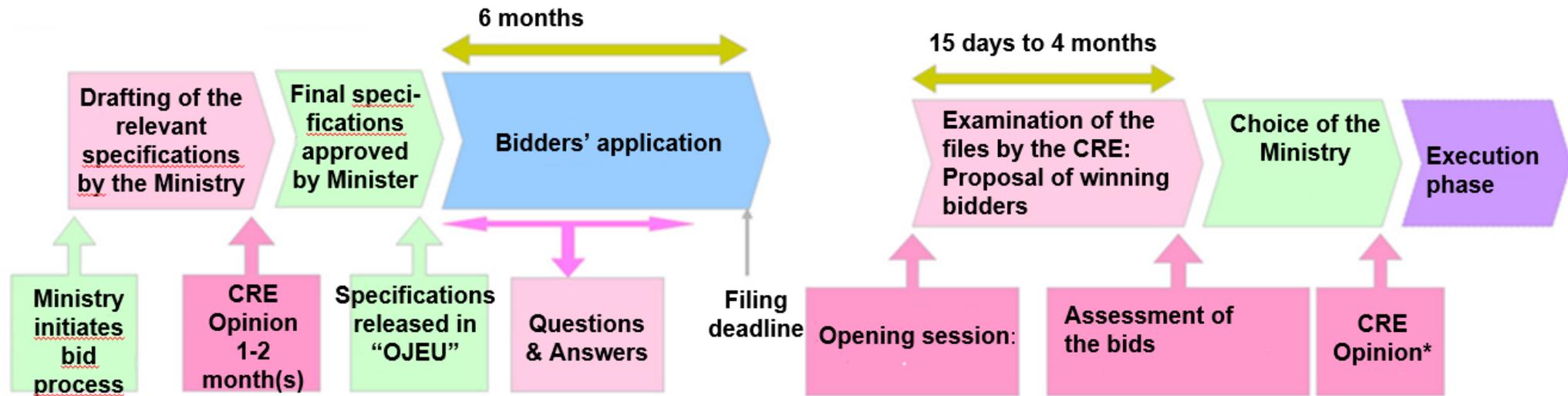
The winners of any of those competitive processes are awarded with a power purchase agreement (“*contrat d’achat*”) or a feed-in premium contract (“*contrat de complément de rémunération*”) pursuant to article L.311-12 of the French Energy code

→ Feed-in premium scheme now applicable for offshore wind farms



# After 2015: Call for tender ruled by articles R.311-13 to R.311-25 of the French Energy Code

Slight changes as compared to the call for tender process before 2015 (namely with respect to the competency between the Ministry in charge of Energy and CRE → NOT USED FOR ANY OFFSHORE PROJECT TO DATE



\* If choice of Ministry differs from CRE's proposal

Source : CRE – updated with Decree n°2016-1129 dated August 17, 2016

# After 2015: competitive dialogue implemented by articles R.311-25-1 to R.311-25-15 of the French Energy Code



## Procedure applicable for the 3<sup>rd</sup> competitive process (Dunkerque) and for the 4<sup>th</sup> competitive process (Oléron)

- Consultation document prepared by the Ministry in charge of Energy, reviewed by the CRE and then published at the official journal of the European Union, such document includes in particular:
  - Purpose of the competitive dialogue, conditions to participate to the procedure;
  - The indicative time schedule of such competitive dialogue;
  - The modalities to submit an application to participate to the dialogue;
  - The deadline to file an application.
- Decision of the Ministry in charge of the Energy upon review of the proposed list of candidates shortlisted by the CRE;
- Starting of the competitive dialogue with the shortlisted candidates aiming at finalizing the specifications of the competitive process; such specifications are drafted by the Ministry in charge of Energy at the end of the competitive dialogue, reviewed by the CRE and then published;
- Filing of the bids by the candidates with the CRE within the specified deadline;
- Decision of the Ministry in charge of Energy on the winners after proposal of the CRE (see schema above for calls for tender).

# COMPETITIVE PROCESSES

## NEW PROVISIONS – RECENT CHANGES



Recent changes brought by the law dated 10 August 2018 (modifying the Environmental Code)

- New article L.121-8-1 of the Environmental Code:
  - Before launching any competitive process (i.e. either call for tender or competitive dialogue) for an offshore project, the Ministry in charge of Energy shall refer the matter to the national commission in charge of public debate (“*commission nationale du débat public*” or “**CNDP**”);
  - The CNDP sets forth the modalities for the participation of the public to the decision to launch the competitive process, in particular on the choice of the targeted zones for the implantation of the offshore project;
  - The project owner is then exempted from those obligations.

# COMPETITIVE PROCESSES

## NEW PROVISIONS – RECENT CHANGES



Recent changes brought by the law n°2018-727 dated 10 August 2018

- Article 58 III of the law n°2018-727 dated 10 August 2018 :
    - For any of the competitive processes referred to under article L.311-10 of the French Energy Code for offshore project as far as the winner has been selected before 1<sup>st</sup> January 2015 and that the power purchase agreement (“*contrat d’achat*”) or feed-in premium contract (“*contrat de complément de rémunération*”) has not been executed on the date of publication of the law n°2018-727 dated 10 August 2018 (i.e. 11 August 2018), the Ministry in charge of Energy can request before executing the contract that the winner improves the conditions of its offer, in particular with a reduction of the feed-in-tariff or feed-in-premium or of the payment or of the review conditions;
    - Such modifications can derogate to some of the provisions set forth under the specifications of the competitive process.
- the acceptance by the Ministry in charge of Energy of the revised offer updates accordingly the specifications.
- It concerns all offshore projects under the 1<sup>st</sup> and 2<sup>nd</sup> calls for tender: the Feed-in-tariff of 200€/MWh should be reduced to 150€/MWh accordingly (more specifically between 126 and 161 €/MWh).**

# COMPETITIVE PROCESSES

## NEW PROVISIONS – RECENT CHANGES



Recent changes brought by the law n°2018-727 dated 10 August 2018

- Article 58 IV of the law n°2018-727 dated 10 August 2018:
  - The decision awarding the project to a winner can be revoked;
  - Such decision also consequently revokes the operating license and terminates the concession over the maritime public domain granted;
  - The candidates shall be reimbursed for the costs directly incurred with the project ;
  - A new competitive process shall be launched within 6 months from the revocation decision for an offshore project with at least the same installed capacity over the same zone or a zone nearby.



## IV. PERMITTING & LAND TENURE



## Is a building permit required?

- No: according to articles L. 421-5 e) of the Urban planning Code (amended by the law 2010-788 dated 12 July 2010) and the implementing decree n°2012-41 dated 12 January 2012 modifying article R.421-8-1 of the Urban Planning Code:

*« Pursuant to e) of article L.421-5 of the Urban planning Code, installation for the production of electricity from renewable energy sources, including the grid connection facility, in particular wind turbines, (...) are exempted from any formalities under present Code due to their nature and their implementation on the **immersed maritime public domain** over the low water mark ».*

- However: this should not apply to offshore wind farms related installations which are not located on the immersed maritime public domain but “onshore” (for instance: onshore delivery post)

# PERMITS REQUIRED FOR AN OFFSHORE WIND FARM OVER THE MARITIME PUBLIC DOMAIN – Water law & Environmental authorization



## Before 1<sup>st</sup> March 2017: Water law approval codified under article L.214-1 seq. of the Environmental Code

- Approval required for works that are not covered by the ICPE regulations (classified installations for the protection of environment regulations) but **generating withdrawal of superficial or underground water (...)** ;
- R.214-1 of the Environmental Code sets forth that works in contact with the marine area having a direct impact on such area which exceeds 1.9 million euros are purpose of a water law authorization ;
- Such approval is delivered by the prefect after a public enquiry;
- It can be revoked by the public authorities without indemnities under specific circumstances.

## After 1<sup>st</sup> March 2017: Environmental authorisation

- Provided by articles L.181-1 of the Environmental Code in connection with article L.214-3 of the Environmental Code, articles L.181-19 to articles L.181-23 of the Environmental Code for installations, works and facilities which might have an impact on water or aquatic environment;
- According to article L.181-20 of the Environmental Code: when one or more petitioners plan(s) to carry out on the same site, various installations, works or facilities which are each subject to the sole approval under article L.181-1 1° [water law] a single environmental authorization can be obtained for the whole set of installations, works and facilities;
- Such authorization is delivered by the prefect after a public enquiry (L.181-10 of the Environmental Code), it can be revoked by the public authorities without indemnities under specific circumstances.



## The Operating license

Operating license provided for under article L.311-1 and seq. of the Energy Code

- Such operating license is usually granted in the framework of the competitive procedure (article L.311-11 of the Energy Code);
- New decree dated 21 December 2018 modifying article R.311-2 of the Energy Code: pursuant to article L.311-6 of the Energy Code following installations are deemed authorized:

*"(...) 10° offshore power generating installation using wind energy sources which were purpose of a competitive procedure set forth under article L.311-10 of the Energy Code [which installed capacity is less or equal to]: 1 GW"*



# LAND TENURE – PROJECT LOCATED ON THE MARTIME PUBLIC DOMAIN

## Concession over the maritime public domain

- Article L.2124-3 of the General Code of the Property of Public Persons sets forth that:
  - A concession can be granted to occupy the maritime public domain;
  - A public enquiry is carried out before the delivery of such concession:
    - before 1<sup>st</sup> January 2017 such public enquiry was not provided for by article L.2124-3 of the general Code of the Property of Public Persons;
    - The applicable public enquiry regime is the one set forth under article L.123-1 of the Environmental Code (decision having an impact on the environment: consultation of the concerned actors, administrative services, municipalities etc.).
  
- The regime is further detailed under article R.2124-1 of the General Code of the Property of Public Persons
  - The concession can be granted for one of the following purposes: the public use, a public service or an operation of general interest;
  - Until January 2016, the duration of the concession was 30 years, thereafter: duration of 40 years
  
- Fees for the concession: a fee is usually due in the framework of such concession but article 58 VI. of the law n°2018-727 dated 10 August 2018 sets forth that such concession may be granted for free for the whole duration of the contract entered into in the framework of the competitive process (PPA or Feed-in-premium contract).

Such provision is applicable to existing concessions → possibility but not an obligation.



## The unique authorisation

### Reminders:

- The maritime public domain encompasses the “territorial sea” (i.e. a distance of 12 nautical miles or 22.2km from the low water mark), i.e. but not the zone beyond;
- The competitive procedures (calls for tender 1 and 2, competitive dialogues 3 and 4) related to projects over the maritime public domain.

### The ordinance n°2016-1687 dated 8 December 2016 relating to maritime spaces under the French sovereignty:

- Article 20 of the ordinance sets forth that a single authorization is required for the operation of natural resources or the use of marine area located in the economic exclusive zone and the continental shelf: such single authorization encompasses all required approval for the construction, use, operation of facilities, works and the associated facilities:
  - Such single authorization shall comply with the environmental targets of the action plan for marine areas (article L.219-9 of the Environmental Code);
  - In this respect the petitioner shall provide the competent authority with the data of the impact study carried out under article L.122-1 of the Environmental Code.
- Nevertheless a specific approval is required for the cabling layout (Article 28 of the ordinance).

# PERMITTING & LAND TENURE

## NEW PROVISIONS – RECENT CHANGES



Recent changes brought by the law n°2018-727 dated 10 August 2018

The implementation of the envelop permit (“*permis enveloppe*”):

New article L.181-28-1 of the Environmental Code applicable to offshore wind farms and related grid connection works:

- The impact study can be carried out by the Ministry in charge of Energy and then made available to the project owner;
- The authorizations listed thereafter can indicate variable features within which the project can evolve after delivery of the authorization:
  - The unique authorization under article 20 of the ordinance n°2016-1687;
  - The concession over the maritime public domain (article L.2124-3 of the General Code of the Property of Public Persons);
  - The environmental authorization (article L.181-1 of the Environmental Code);
  - The operation license (article L.311-5 of the Energy Code).
- Such “envelop permit” is solely applicable for authorization requests filed 6 months after the entry into force of the law (i.e. after 11 February 2019).



## Specific procedures for challenges against the authorizations granted

The administrative court of appeal of Nantes has exclusive jurisdiction in first and second instance (new article R.311-4 of the Administrative Justice Code implemented by the decree n°2016-9 of 8 January 2016) for challenges against – in particular – following authorizations:

- The unique authorization under article 20 of the ordinance n°2016-1687;
- The concession over the maritime public domain (article L.2124-3 of the General Code of the Property of Public Persons);
- The environmental authorization (article L.181-1 of the Environmental Code);
- The operation license (article L.311-5 of the Energy Code).



## Specific procedures for challenges against the authorizations granted

Claims against the environmental authorization can be brought before courts:

- By the petitioner or operator within 2 months from the day the authorization has been delivered to it (article R.181-50, 1° of the Environmental Code)
- By interested third parties before courts within 4 months from the last of the following publication formalities: (i) publication in the Townhall and (ii) publication on the website of the prefecture (article R.181-50, 2° of the Environmental Code)

Claims against the environmental authorization can be brought before the prefect:

- By interested third parties after commissioning of the project to challenge the lack of prescriptions or the improper prescriptions of the authorization (article R.181-52 of the Environmental Code).



## V. GRID CONNECTION



## Grid connection with the French public transport network operator (“RTE”)

Grid connection procedure with RTE usually requires:

- A request for grid connection;
- The signing and acceptance of a technical and financial proposal (so called “proposition technique et financière” or “PTF”) with the payment of the first instalment thereunder;
- The signing of a grid connection agreement (“*convention de raccordement*”);
- The implementation of the network access agreement (“*contrat d’accès*”) and of the operating agreement (“*convention d’exploitation*”) before the commissioning of the wind farm.



## Grid connection - Specific provisions for offshore wind farms

For offshore wind farms purpose of a competitive process, when the producer did not decide on the site of the wind farm:

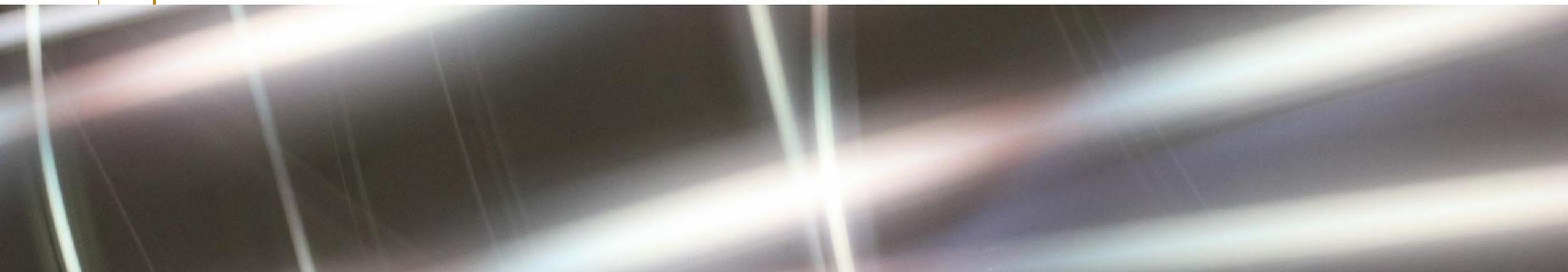
- Article L. 342-3 4° of the Energy Code (as modified by the law n°2017-1839 dated 30 December 2017) provides for that the grid connection must be achieved before a fix date. In case of delay, the network operator shall compensate the producer for the loss (modalities of calculation and cap of damages are provided by decree);
- Article L. 342-7 of the Energy Code (as modified by the law n°2017-1839 dated 30 December 2017):
  - The network operator shall bear the grid connection costs according to the specifications of the competitive process, even in case of abandonment of the competitive process;
  - Any change operated by the producer shall be borne by it;
  - In case of default of the producer, it shall reimburse the grid connection costs according to the specifications of the competitive process.

**→ Principle extended to the 1<sup>st</sup> and 2<sup>nd</sup> calls for tender through article 58 V of the law n°2018-727 dated 10 August 2018.**

- Article L. 342-7-1 of the Energy Code (as modified by the law n°2017-1839 dated 30 December 2017):
  - In case of malfunction or damage to the grid connection facilities, the network operator shall compensate the producer for the loss (modalities of calculation and cap of damages are provided by decree).



## VI. CONCLUSION





- New legal and regulatory changes should simplify the construction of offshore wind farms in France.
  
- However, a legal uncertainty remains for projects purpose of a competitive process:
  - Possibility to revoke the decision awarding the project, as well as further authorizations;
  - Example for the 1<sup>st</sup> and 2<sup>nd</sup> calls for tenders: the feed-in-tariff finally granted is lower than initially provided.
  
- Is there a place for private initiatives to erect offshore wind farms to avoid such legal uncertainty ?
  - Corporate PPA could be implemented;
  - Grid connection risk.

THANKS FOR YOUR ATTENTION



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Claire Bretheau advises banks, investors, and corporations working in the energy industry. She has over fifteen years of experience in the energy industry, half of which she acquired in law firms, and half in corporations in France, Germany, and Austria.

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Claire Bretheau is a graduate of the University of Paris X Nanterre (Master's in Franco-German Business Law) and of the University Paris IX Dauphine (Advanced Master's in Business Law).

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