

Ministerial Order issued by the Minister for Climate and Energy Policy, 12 December 2023, no. WJZ/ 41203178, to amend the Offshore Wind Energy Implementing Regulations in connection with a screening for risks to public safety or long-term or short-term security of supply

The Minister for Climate and Energy Policy,

Having regard to Article 14(2) of the Offshore Wind Energy Act (Wet windenergie op zee); Hereby decrees as follows:

ARTICLE I

Three paragraphs are added to Article 1 of the Offshore Wind Energy Implementing Regulations, reading:

5. In assessing whether the construction of a wind farm is financially feasible and economically feasible, account may be taken of the information submitted by the applicant with regard to the structure of control over the applicant and the associated potential risks to public safety or long-term or short-term security of supply.
6. When submitting the information referred to in paragraph 5, the following will be submitted:
 - a. the current form of control of the applicant and, if the applicant is a collaborative venture, of each participant in the collaborative venture;
 - b. the intention of the applicant and the underlying strategy of the applicant and, if the applicant is a collaborative venture, of each participant in the collaborative venture; and
 - c. the past performance of the applicant in the electricity production sector and, if the applicant is a collaborative venture, of each participant in the collaborative venture.
7. If the information provided by the applicant is insufficient for the assessment referred to in paragraph 5, the applicant will provide the supplementary information requested by the Minister for Climate and Energy Policy.

ARTICLE II

These regulations will take effect on 1 January 2024.

These regulations and the accompanying Explanatory Notes will be published in the Government Gazette.

The Hague, 12 December 2023

*The Minister for Climate and Energy Policy,
R.A.A. Jetten*

EXPLANATORY NOTES

1. Assessment of financial and economic feasibility

In order to be able to take account of information about the structure of control over the permit applicant and the related potential risks to public safety and long-term or short-term security of supply in the assessment of financial and economic feasibility, pursuant to Article 14(1)(c) and (e) of the Offshore Wind Energy Act (hereinafter: the Act), three paragraphs are added to Article 1 of the Offshore Wind Energy Implementing Regulations. The reasons for this addition are explained immediately below and are closely connected with the increased risks to the energy system with regard to public safety and long-term or short-term security of supply.

This reflects the fact that the financial and economic feasibility of an offshore wind farm involves aspects that bear on the protection of public safety and long-term or short-term security of supply. For example, the permit applicant may not have a good record with regard to the operation or management of such energy systems, as a result of which the continuity of the energy system may be compromised, and with it long-term or short-term security of supply. Including this aspect in the assessment of the permit application will avoid the need to mitigate this risk at a later date by means of (increased) oversight and enforcement.

The permit applicant may also be a resident in, or the central management of the applicant may be based in, or the applicant may be under the influence of, a state that is known to have one or more offensive programmes aimed at disrupting or compromising the integrity, security, safety or availability of a critical process. In such a case, the applicant may have made an apparently sound proposal to construct the offshore wind farm, but the underlying intention is to gain access to the Netherlands' energy system and so build a position that enables it to threaten the long-term and short-term security of supply. This may also be revealed by the fact that the (disguised) motives for submitting the permit application and constructing the wind farm are not consistent with the usual economic motives of commercial operation, for example because the permit application includes a financial plan that is particularly attractive to the government or fellow investors even though it is not logical from a business perspective.

Recent geopolitical developments demonstrate that companies that are under the influence of a state with offensive programmes are willing to manipulate their investments in the energy system in such a way as to disrupt long-term and short-term security of supply, despite the fact that this will result in significant loss of income, loss of market share or loss of value.

The financial solvency and other indicators of the permit applicant's financial stability are already subject to screening, but this also has a security component: the dependence of the permit applicant on the ultimate financier may entail the influence of a state actor with an offensive programme as described above.

In view of this, the Minister for Climate and Energy Policy is enabled to consider the interests of public safety and long-term and short-term security of supply in the assessment of the financial and economic feasibility of a permit application for the construction and operation of an offshore wind farm when assessing compliance with criteria of financial and economic feasibility pursuant to Article 14 of the Act. Consequently, the Minister is also enabled to refuse a permit in the event of concerns about financial and economic feasibility informed by the risks to public safety and long-term and short-term security of supply. This is in line with the increasing importance of offshore wind energy for our energy supply and geopolitical developments.

In assessing the information presented by the applicant with regard to the permit applicant and the related structure of control and potential risks to public safety and long-term or short-term security of supply referred to in Article 1(5), a number of factors are taken into account which are closely linked to the specific facets of the definition of national security associated with critical processes and their providers. The more sectoral frameworks for the management of the financial stability of a critical service provider are lacking, the greater the reason to consider financial stability as one of the risks to national security. In assessing financial feasibility, the financial position and solvency of the permit applicant or permit holder are taken into account because this information provides insight into its capacity to provide the investments required for continuity, for example for maintenance and security.

Articles 16 and 18 of the Act do not contain a separate assessment framework to be used in the event of the transfer of a permit or a change in control over the permit holder. This is because applications to this end are assessed on the same grounds as an application for a permit. This means that the above assessment framework will also be applied in those cases and that the permit holder must supply the information about the party to which it wishes to transfer the permit or the party to which control will pass as set out in this ministerial order when submitting an application for permission to transfer the permit or change the party that holds control over the enterprise. This applies to offshore wind farms that are not yet operational. For operational wind farms, Article 86f of the Electricity Act 1998 (in future, Article 6.3 of the Energy Act) stipulates that in the event of any change in the structure of control of a power generation facility or of an enterprise that manages a power generation facility, one of the parties involved must notify the Minister for Climate and Energy Policy. This obligation only applies if the power generation facility has a production capacity of at least 250 MW (in the bill for the Energy Act, this limit is reduced to 100 MW). A similar notification requirement is included in the Gas Act with regard to changes to the structure of control of an LNG plant or an LNG company.

The Minister for Climate and Energy Policy can conduct assessments and impose rules in response to those assessments based on potential risks to public safety and long-term or short-term security of supply following the granting of a permit and in the event of changes to the permit holder. Article 16 of the Act provides for the possibility of transferring the permit. It stipulates that the holder of a permit may transfer the permit to another person/entity with the written consent of the Minister for Climate and Energy Policy. Rules may be attached to such consent and the consent may be granted

with restrictions. The so-called “*Lex silencio positivo* principle“ has been declared applicable to this consent (i.e. a positive decision regarding the application by operation of law). This means that in principle, the minister has six weeks to decide on a request for consent. However, in accordance with Article 4:15 of the General Administrative Law Act, this term may be extended. In addition, under the Foreign Direct Investment Screening Regulation (Implementation) Act, the minister may request information from third parties, suspending the decision period. In acknowledgement of the fact that in practice, a longer decision period may be required in order to conduct an investigation into financial and economic feasibility and the associated potential risks to public safety and long-term or short-term security of supply, as described above, a legislative amendment will be prepared in order to scrap the declaration of applicability of the *Lex silencio positivo* principle.

For the *amendment or revocation* of a permit, the *Lex silencio positivo* principle has not been declared applicable because it is desirable that the amendment or revocation of a permit should be handled with caution. Article 18 of the Act provides that Article 16 shall apply *mutatis mutandis* if one of the persons wishes to transfer their share of the permit to another person. If there are grounds for doing so, pursuant to Article 16(2) of the Act, further rules may be attached to the proposed change. This assessment will focus on, for example, the financial reliability of the company in question, the manner in which the company is managed and supervised and the degree of transparency in its actions.

In addition, the record of the party/parties concerned will be considered with regard to the assurance of safety and their technical expertise for reliably conducting the activities in question. If a decision is taken to impose further requirements or take other restrictive measures, these measures must be reconcilable with Article 36 of the Treaty on the Functioning of the European Union. This means that the measures must be justified on grounds of protection of public morality, public order, public safety, health or one of several other grounds.

Paragraph 6 specifies which information – supplementary to the requirements laid down in the regulations to open the permit procedure for a specific wind farm – must be submitted to enable assessment of the information referred to paragraph 5 of this article. This relates to information about the form of control of the applicant, its intentions and underlying strategies and its experience in the electricity production sector. If the applicant is a collaborative venture, this information must be provided for each participant in the collaborative venture.

The assessment of the information provided with regard to the structure of control and the associated potential risks to public safety and long-term or short-term security of supply is carried out by the Investment Assessment Agency (Bureau Toetsing Investeren – BTI) of the Ministry of Economic Affairs and Climate Policy.

2. Consequences

Market effects and competitive position

The assessment of the information supplied by the applicant or the holder of the permit with regard to the structure of control and the associated potential risks to public safety and long-term or short-term security of supply (hereinafter: “assessment of the structure of control and risks to public safety and long-term or short-term security of supply”) is not without consequences for the investment climate and hence for the business sector. An open economy like the Netherlands that particularly benefits from its openness and international interconnectedness must therefore be mindful of the effects on the investment climate and hence the proportionality of the instrument when introducing an assessment of the structure of control and risks to public safety and long-term or short-term security of supply.

In this regard, it is important to note that national security is the only basis for applying the assessment of the structure of control and risks to public safety and long-term or short-term security of supply and that this assessment is in line with the existing instruments. This will prevent possible misuse of this instrument for protectionist purposes. Each party must be clearly aware of which assessment criteria apply in which cases. The uncertainty for businesses is limited by clearly delineating the scope in this ministerial order. In addition, the assessment of the structure of control and risks to public safety and long-term or short-term security of supply is clear and transparent about the assessment criteria.

3. Implementation

As regards implementation, both simple and comprehensive assessments are envisaged. These two types of assessment for the assessment of the application and the duty to notify changes of control are both described below.

Assessment by the Investment Assessment Agency (BTI)

The Minister for Climate and Energy Policy implements the assessment of the structure of control of the enterprise and the risks with regard to public safety and long-term or short-term security of supply. This assessment at the time of the application and upon a change of control will be handled by the Investment Assessment Agency (BTI). BTI’s assessment will be considered by the Minister when assessing the permit application. In order to assess whether the permit applicant and its control over the activities connected with the construction and operation of a wind farm may represent a risk to public safety and the long-term and short-term security of supply, the Minister for Climate and Energy Policy will need to conduct an investigation into the permit applicant. Usually this will be a legal entity, which in turn is often part of a group of legal entities or a multiplicity of shareholders participating in that party. The Minister for Climate and Energy Policy will therefore have to identify the parties behind the legal entity and with whom ultimate control rests.

Under the authority of the Minister for Climate and Energy Policy, BTI performs the substantive activities for the assessment of these specific elements of a permit application and prepares the assessment. This assessment of an application pursuant to Article 14(1)(c) and (e) of the Act represents part of the decision-making by the Minister for

Climate and Energy Policy regarding the permit application.

Assessing the application

In assessing the application, the relevant information will be shared with BTI by the Netherlands Enterprise Agency (RVO). Pursuant to the regulations under which they are able to submit an application, permit applicants must supply all the information about the enterprise and its available financial resources to RVO. In addition, pursuant to Article 1(5), additional information will be requested that specifically relates to the risks referred to above relating to public safety and long-term and short-term security of supply. BTI will conduct this investigation based on the details supplied, public and non-public sources and, if necessary, additional information which the Minister for Climate and Energy Policy can request from the party in question and which this party must supply. Article 1(7) provides for the Minister to subsequently, i.e. after the end of the application period for a permit application, request additional information from the applicant, who must then provide this information.

When taking the decision on the granting of a permit, BTI advises the Minister for Climate and Energy Policy with regard to long-term and short-term security of supply and public safety, so that the Minister can include this advice in taking the decision on the permit application. To this end, the Minister will ask BTI for advice about one or more applicants. The Minister will not automatically conduct an investigation into every applicant with regard to potential risks relating to long-term and short-term security of supply and public safety. Depending on the number of applicants and potential risks relating to long-term and short-term security of supply and public safety, the Minister can decide how many applicants to order such investigations by BTI for. Based on a risk analysis, BTI will advise the Minister regarding the probability and the impact on public safety and long-term and short-term security of supply.

BTI strives to provide an assessment within eight weeks regarding the risks to public safety and long-term or short-term security of supply that have a bearing on financial and economic feasibility. Since it is expected that most cases will be able to be dealt with by means of a simple assessment, this will satisfy the needs of the investment climate and the business community. BTI's assessment forms part of the overall assessment for the award of permits for the construction and operation of offshore wind farms; as such, this is also the timeframe within which certainty will be provided as to whether a permit can be awarded. The aim is that the assessment should be completed within a timeframe such that the decision on the award of the permit can be taken within the term specified in the Act.

If there are reasons to suspect a risk to national security, further investigation will be required. The term can be extended in such a case. If the case gives cause to do so, experts from other government departments may also be consulted. During such an investigation, the companies involved will be asked follow-up and additional questions and enquiries will be made of other information sources. A request may also be made to the intelligence and security services to carry out a check of their records. As part of this investigation, besides information from the intelligence and security services in the Netherlands, information may also be used from sources such as friendly foreign authorities and the Dutch network of diplomatic missions in the country of origin. If the investigation is extended, the applicant for the permit will be informed of this fact, along with the reason why the investigation will take longer and the amount of time allotted for this purpose.

Once the investigation is complete, BTI will confidentially share a recommendation based on the risk analysis with the Minister for Climate and Energy Policy. The Minister for Climate and Energy Policy will consider the recommendation of BTI when taking a decision on the permit award.

Organisation

Since the information to be processed contains personal data and may include state secrets or commercially sensitive information, BTI will be provided with secure equipment and a protected physical space within the Ministry of Economic Affairs and Climate Policy which meet the security requirements for the receipt, processing and transmission of sensitive information. Secure connections, secure workspaces, suitable computers and peripherals will be used.

4. Enforcement and objections

The officials appointed by the Minister of Economic Affairs and Climate Policy will oversee the assessment of the (change to the) structure of control and the risks to public safety and long-term or short-term security of supply. The Minister for Climate and Energy Policy has various powers and instruments at his/her disposal for performing enforcement duties, in accordance with the competencies and instruments of the General Administrative Law Act. In the event of a contravention of the provisions of or pursuant to this Act, the Minister for Climate and Energy Policy may issue an administrative enforcement order.

Every applicant for a permit for the construction and operation of an offshore wind farm has the option to submit an objection against the refusal to award a permit, followed by an appeal against the decision on the objection.

5. Regulatory burden

The regulatory burden for the permit applicant or the permit holder primarily consists in taking cognisance of the regulations, supplying the required information to accompany the application and gathering the correct information in order to be able to make a complete application in the event of the granting of or a change to a permit. If BTI requests further information, it will need to be obtained and submitted. As such, the regulatory burden for the application is of an administrative nature and relates to information that is available to the applicant, making it workable in practice. The estimated costs of the regulatory burden detailed below are based on two types of assessment: simple and comprehensive.

The estimated average cost of both types of assessment are given below.

Scenario of simple assessment for permit application and change of control

- In the case of a simple assessment for a permit application and a change of control, the assumption is that the permit holder will require approximately 21 hours of internal consultancy and 19 hours of external consultancy in order to submit a complete application. If additional information is submitted, another 15 hours of internal consultancy and another 3 hours of external consultancy will be needed. This is based on a standard hourly rate of €54 for highly qualified staff and €400 as the hourly rate for external consultancy. Assuming that additional information is requested in one-fifth of instances of a simple change of control, the average costs of an application will amount to €9,136.

Scenario of comprehensive assessment for permit application and change of control

- In the case of a comprehensive assessment for a permit application and a change of control, the assumption is that the permit holder will require approximately 70 hours of internal consultancy and 117 hours of external consultancy in order to submit a complete application. If additional information is submitted, another 120 hours of internal consultancy and another 120 hours of external consultancy will be needed. This is based on a standard hourly rate of €54 for highly qualified staff and €400 as the hourly rate for external consultancy. Assuming that additional information is requested in three-fifths of instances of a complex change of control, the average cost of an application will amount to €83,268.

Total regulatory burden

The average cost per application of a simple assessment is €9,136. The average cost of a comprehensive assessment is €83,268. The assumption is that 16 assessments of permit applications will be conducted annually, of which the majority will be simple assessments. This is a provisional estimate, based on 13 simple assessments and 3 comprehensive assessments, with a total average estimated cost of €368,572.

The assumption is that 3 assessments of changes of control will be conducted annually, of which 1 may be a comprehensive assessment. The total estimated cost of these assessments is €101,540.

6. Government implementation costs

Assessment for application: government implementation costs

The estimated overhead costs for the implementation of the ministerial order are based on the expected number of cases that will be notified and the experience gained from other assessments. The exact scope and number of notifications is unknown. For the purposes of this calculation, 16 assessments per year have been assumed. This estimate is based on the number of anticipated permitting pathways over the next four years for the assessment of a limited number of parties per permitting pathway. The possibility of a consortium participating has been taken into account. The unit will recruit staff to handle the cases. It is estimated that at least 2 FTEs will be required. These activities will include screening and processing and also answering questions from companies and providing information. Approximately €416,000 has been reserved for this. In addition, specific equipment and physical premises need to be arranged for the screening activities. As part of the Ministry of Economic Affairs and Climate Policy, BTI currently already acts as a screening unit and engages in investment screening under the Electricity Act 1998, the Gas Act, the Telecommunications Act and the Investments, Mergers and Acquisitions Security Screening Act. This unit also represents the European contact point for the exchange of information between Member States and the European Commission on direct investments from third countries. This screening unit will add the implementation of this ministerial order to its activities. Additional equipment costs are expected to amount to €50,000. RVO will perform the activities relating to these implementing regulations within its existing staffing capacity. The costs of the screening unit will be paid from the budget of the Ministry of Economic Affairs and Climate Policy.

Assessment for change of control: government implementation costs

The estimated overhead costs for the implementation of the ministerial order are based on the expected number of applications and the experience gained from other assessments. The exact scope and number of applications is unknown. For the purposes of this calculation, 3 assessments per year have been assumed. This estimate is based on the number of wind farms that will be constructed over the next four years but will not yet be operational, taking into account the fact that parties frequently participate as part of a consortium. The unit will recruit staff to handle the cases. It is estimated that 1 FTE will be required. The activities will include not only screening and processing, but also answering questions from companies and providing information. Approximately €140,000 has been reserved for this. Specific equipment and physical premises need to be arranged for the screening activities. As part of the Ministry of Economic Affairs and Climate Policy, BTI currently already acts as a screening unit and engages in investment screening under the Electricity Act 1998, the Gas Act, the Telecommunications Act and the Investments, Mergers and Acquisitions Security Screening Act. This unit also represents the European contact point for the exchange of information between Member States and the European Commission on direct investments from third countries. This screening unit will add the implementation of this ministerial order to its activities. Additional equipment costs are expected to amount to €50,000. The costs of the screening unit will be paid from the budget of the Ministry of Economic Affairs and Climate Policy.

7. Entry into force

The present ministerial order will enter into force on 1 January 2024. This means that it will enter into force in accordance with the government policy on common commencement dates.

The Minister for Climate and Energy Policy,
R.A.A. Jetten