

Model Contracts

Presentation and discussion of Contract Guidance

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Dr. Dörte Fouquet is specialized in EU law and international legal relations, with focus on competition, infrastructure, energy and environment. She is legal advisor to companies, finance institutions, associations, governmental agencies in Germany and other EU Member States, EU institutions and on international level.

- Studies of Law at the Universities of Marburg and Hamburg
- 1982 Research assistant, University of Hamburg
- 1988 Ministry for the Environment and Energy, Hamburg
- 1991 Liaison office of Hamburg and Schleswig-Holstein to the European Commission in Brussels
- 1993 Partner at law firm Kuhbier, Brussels
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Agenda

1. Objective
2. Approach
3. Presentation of the Contract Guidances
4. Outlook

- ▶ Facilitating cooperation between VRE and FID
 - Show what is possible, and what is not
 - Pre-defined Business Models as „inspiration“
 - Create „instruments“ to allow for easier implementation
 - „Check-lists“ of what needs to be considered
 - Provide a basis for discussion
 - Concrete „Contract Outlines “ perceived as more helpful
 - Point to Member State specifics
 - As different legal systems may necessitate different contractual settings
 - Give guidance to project developers in the Member States
 - „Contract Guidance“ targeted to Member State specifics

Approach

Contract Outlines under German Law

Drafting Contract Outlines under German Law has been the starting point

- ▶ See what is possible and what is not
 - E.g. because certain settings would have unwanted consequences
- ▶ See what is in practice chosen and what is not
 - E.g. because certain settings are not profitable in Germany
- ▶ Draft Contract Outlines
 - Leave out technical etc. specificities and keep in general
 - Note where there are different options for parties to choose
 - Keep the language clear and simple

Approach

Assumptions for all Business Models

Drafting Contract Outlines under German Law showed the need for further clarification of the Business Models

- ▶ Certain assumptions had to be made
 - E.g. regarding the location or the grid connection of the VRE
- ▶ Some Business Models needed more differentiation
 - E.g. Business Model A2.3 was split into three scenarios
- ▶ BUT: No assumptions on VRE plant and FID technical specificities
 - To keep the considerations sufficiently general in order to fit different projects

Approach

Check-lists

Based on the assumptions made, check-lists for contracts under the Business Models could be made

- ▶ Which contracts are needed?
 - If more than one, maybe a framework contract makes sense?
- ▶ What should be dealt with in those contracts?
 - Electricity supply?
 - Construction and/or operation of the VRE?
 - Financing arrangements?
 - Sharing of risks and liability?
 - ...

Approach

Member State specific considerations

As Member States differ, some specificities may need to be taken into account

- ▶ E.g. German law on property ownership differs from UK law
 - Important e.g. for ownership of the VRE plant on FID territory
- ▶ Some contractual arrangements may not make sense in certain Member States
 - E.g. German rules on self-consumption rather strict regarding VRE owned and/or operated by third parties
- ▶ Other specificities of a Member State may suggest other Business Models
 - ...

Contract Guidance for each Member State

Translating the Member State specifics identified into contract skeleton

- ▶ „Skeleton“ structure with respective paragraphs
 - Each paragraph identifies what parties should lay down there
 - BUT: Options are mentioned and references are made to the Report on Member State specific considerations
- ▶ Translation into the Member States languages
 - As easy reference tool
- ▶ Together with Check-lists, Report and the fully formulated contract outlines = tool kit for the parties

Presentation of the Contract Guidances

- ▶ Two Contract Guidances
 - Electricity Supply from Off-site VRE
 - Electricity bill reduction with On-site VRE
- ▶ Prepared for each Member State
 - Note: in the following presentation, the country-specific traits have been left out
 - Normally marked in footnotes

Contract Guidance “Electricity supply with Off-site VRE”

§ 1 Objective

- (1) Supply IEC with electricity from a variable renewable energy plant owned and operated by VRE
 1. (...where relevant to the Parties, indicate specifics of the plant, attach Annex with details)
 2. ...
- (2) Adaptation of IEC's electricity demand through shifting production processes to times of high generation from VRE's variable renewable power plant
- (3) Any other objectives

§ 2 Conduct of the Parties towards each other

Due diligence and good faith

Contract Guidance “Electricity supply with Off-site VRE”

§ 3 Electricity supply

- (1) Clauses on amount of electricity to be delivered and arrangements to regulate possible interruptions or reductions of the supplied amount: VRE shall supply electricity to VRE from the variable renewable energy plant(s) identified; supply without reserve or balancing electricity and net of VRE own demand
- (2) Clauses on terms and conditions on the supply: Obligation for IEC to primarily use the electricity from the VRE plant(s) (take or pay); Clause allowing IEC to contract a third party supplier, where electricity from the VRE plant is insufficient; possibly identify the supplier
- (3) Obligation for VRE to operate the plant(s) at least a certain number of hours per year; explanation that surplus electricity exceeding IEC demand will not be bought from IEC
- (4) Possibly obligation for IEC to adapt production processes/demand to generation forecast from VRE (in particular where price signal is deemed insufficient)
- (5) Obligation on VRE to provide IEC with forecast; possibly attach Annex with template for such forecast

Contract Guidance “Electricity supply with Off-site VRE”

§4 Price of the electricity

- (1) Possibly agreement on minimum prices for the VRE electricity to give VRE some investment security
- (2) Clause on prices, i.e. variable prices in order to set incentives for IEC to shift demand; reference to Price Sheet/Terms and Conditions of VRE in Annex; explanation that net prices, not including taxes and surcharges; clause explaining that in particular surcharges which come attached to grid use are not included (e.g. grid surcharge/federale bijdrag)
- (3) Clause on invoicing and payment
- (4) Adaptations to the prices – when set out in price sheet – to be communicated in advance; possibly vest a termination right for IEC

§5 Renewable electricity and guarantees of origin

- (1) VRE to prove renewable quality of the electricity through guarantees of origin
- (2) No extra price for guarantees of origin

Contract Guidance “Electricity supply with Off-site VRE”

§6 Grid use and metering

- (1) IEC to have grid use contract with grid operator
- (2) VRE to have grid use contract
- (3) Definition of the grid access point through which the electricity is going to be supplied to IEC where this is not done elsewhere
- (4) Definition of the grid operator in charge for metering; likely the ones to whom IEC/VRE are connected

§7 General Terms and Conditions

Reference to the applicable General Terms and Conditions (VRE's General Terms and Conditions), in Annex

Contract Guidance “Electricity supply with Off-site VRE”

§8 Duration of the contract

- (1) Entry into force
- (2) Duration of the contract: possibly several years and/or with annual prolongation in case none of the Parties terminates it
- (3) Rules on termination
- (4) Possibly clause on early termination (contractual damages clause)

§9 Confidentiality

(Standard) clause on confidentiality

Contract Guidance “Electricity supply with Off-site VRE”

§ 10 Liability

- (1) No liability for VRE in case of disturbances in supply through disruption in grid operation or connection, provided not caused by non-authorized measures of VRE
- (2) Obligation on VRE – where this can be reasonably expected – to inform IEC about grid-related disturbances
- (3) Liability clause (liability limited to intent only or intent and gross negligence of VRE and agents, as in accordance with the terms of the Law)
- (4) Possibly: Clause on contractual damages

Contract Guidance “Electricity supply with Off-site VRE”

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- (2) Obligation on VRE – where this can be reasonably expected – to inform IEC about grid-related disturbances
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- (4) Possibly: Clause on contractual damages

§11 Force Majeure

Parties freed from obligations in case of Force Majeure, where not otherwise provided for in contract; possibly reference to the terms of the Law

Contract Guidance “Electricity supply with Off-site VRE”

§12 Transferral of rights

Clause on whether the Parties can transfer their rights and under which conditions

§13 Derogatory clause

Example: In the event that one of the clauses of this contract should be or become either invalid or impossible to perform, the other clauses of this contract will not be affected. The Parties will replace the respective provision by a valid provision which is valid and can be performed, but which comes as close as possible to the result of the provision replaced.

§14 Amendments and additions

- (1) All amendments in writing, including amendments to this clause
- (2) Clause stating whether oral side agreements have been made/other relations between parties in place.

Contract Guidance “Electricity bill reduction with On-site VRE”

§1 Objective

- (1) Supply of renewable electricity to IEC by VRE, from variable renewable energy power plant on IEC's property
- (2) IEC to adapt demand to production patterns of the variable renewable energy power plant; optimization of supply and demand
- (3) Any other objectives)

§2 Conduct of the Parties towards each other

Due diligence and good faith

Contract Guidance “Electricity bill reduction with On-site VRE”

§3 Electricity Supply Contract

- (1) Contract to be concluded between the Parties, under which VRE shall supply electricity to IEC from the variable renewable energy plant(s) identified; supply without reserve or balancing electricity and net of VRE own demand
- (2) Obligation for IEC to primarily use the electricity from the VRE plant(s) (take or pay); Clause allowing IEC to contract a third party supplier, where electricity from the VRE plant is insufficient; possibly identify the supplier
- (3) Possibly right for IEC to market surplus electricity freely; alternative: explanation that IEC does not take on surplus electricity and right for VRE to market the electricity
- (4) Obligation for VRE to operate the plant(s) at least a certain number of hours per year
- (5) Possibly obligation for IEC to adapt production processes/demand to generation forecast from VRE (in particular where price signal is deemed insufficient)
- (6) Obligation on VRE to provide IEC with forecast; possibly attach Annex with template for such forecast
- (7) Provisions on the price of the electricity: possibly minimum prices (for VRE to have some financial security, however, noting that green certificates may still be issued), variable prices (to give incentive for IEC to adapt consumption patterns), agreement on price adaptations

Contract Guidance “Electricity bill reduction with On-site VRE”

§4 Liability under the Electricity Supply Contract

- (1) Possibly agreement that VRE not liable for delays in delayed start of the electricity supply, except for intent or gross negligence, and/or exclusion of financial penalties
- (2) Exclusion of liability for disturbances in the supply due to faults in the infrastructure (owned and operated by IEC)
- (3) Possibly (where such risk shall be taken from VRE) exclusion of liability for VRE for deviations from the forecast, i.e. more or less production and the potential need for IEC to buy/sell on the market

Contract Guidance “Electricity bill reduction with On-site VRE”

§5 Technical specifications relating to the construction of the variable renewable energy power plant

- (1) Definition of the variable renewable energy power plant (source, size, etc), reference to annex for specifications
- (2) List of minimum “non-negotiable” points (i.e. source, size, location...) where such exist
- (3) Definition of location of the variable renewable energy power plant, reference to map in annex
- (4) Clause on how to deal with changes to the original plans (i.e. different equipment etc to be used), possibly negotiations in good faith

§6 Specifications relating to the operation of the variable renewable energy power plant

- (1) Obligation on VRE to maintain the variable renewable energy power plant operational and ensure proper functioning
- (2) Possibly define authority of IEC in operation of the variable renewable energy power plant, where such authority is agreed between the Parties

Contract Guidance “Electricity bill reduction with On-site VRE”

§7 Contract on access and use of IEC's infrastructure

- (1) Contract to be concluded that IEC has to build and operate infrastructure connecting the variable renewable energy power plant to the connection point at IEC's property to which electricity is to be supplied
- (2) Infrastructure to include certain minimum facilities, in particular metering
 1. ...
- (3) IEC to grant VRE the right to access and use such infrastructure for the purposes of delivering electricity to IEC; possibly explanation that this is not an exclusive (i.e. discriminatory) right
- (4) IEC not to charge any costs for access and use of infrastructure; neither costs for balancing or reserve will be passed on to VRE
- (5) Possibly (where IEC is responsible for marketing surplus production) possibility for IEC to regulate down VRE

Contract Guidance “Electricity bill reduction with On-site VRE”

§8 Contract on access and use of IEC's industrial property

- (1) Parties to construct a right for VRE to access and use IEC's property for the duration of the contract, possibly through limited personal servitude
- (2) After termination of the contract, VRE to remove any legacy stemming from the variable renewable energy power plant, if not agreed otherwise

§9 Time frame for the construction and operation of the variable renewable energy power plant

- (1) Start date of construction
- (2) Definition of certain interim steps
- (3) Envisioned date for becoming operations
- (4) Duration of operation (e.g. 15 years)
- (5) Clause determining what happens in case of delays

Contract Guidance „Electricity bill reduction with On-site VRE“

...

§11 Option to purchase the variable renewable energy power plant

Possibly, option for VRE to purchase the variable renewable energy power plant after duration of the contract; if so provisions on agreement on price (e.g. based on expert opinion), explanation that in such case VRE shall not be obliged to remove it

...

§13 General Terms and Conditions

Agreement on applicable General Terms and Conditions

§14 Economic Viability Clause

Possibly, clause that where circumstances arise that affect the economic viability of the project (for either party), Parties to negotiate in good faith

Contract Guidance „Electricity bill reduction with On-site VRE“



- ▶ Other clauses resemble the ones from Contract Guidance „Electricity supply with Off-site VRE“

- ▶ Completion and translation of the Contract Guidance for each Member State
 - Taking into account today's discussion
- ▶ Continued discussion of the Contract Guidance with relevant stakeholders
 - E.g. through renewable energy associations/stakeholder associations
- ▶ Last revision of the Report if appropriate

Thank you very much
for your attention.

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