

ACCELERATION OF COURT PROCEEDINGS IN THE INFRASTRUCTURE SECTOR

On 18 August 2022, the German Federal Government presented a draft law which aims to considerably reduce the duration of administrative court proceedings for major infrastructure projects. The new proposal should help to speed up the decision practice so that operators and investors receive certainty about their projects within a shorter timeline. This newsletter provides an outline of the legislative proposals and some of their implications.

ENERGY SHORTAGE AND THE ENERGY TRANSITION

In the light of the existing energy shortages and the ongoing energy transition, the Federal Government has broadly acknowledged the importance of new major infrastructure projects in Germany. As an example, the Federal Government is currently pushing for the expansion of gas pipelines and particularly LNG terminals which shall make Germany less dependent on foreign pipeline imports. The same applies to the expansion of the transmission grid as the ongoing energy transition requires a rapid expansion of renewable energies such as wind and solar.

Already in the coalition agreement, the Federal Government agreed that fast administrative, planning and approval proceedings are indispensable prerequisites for transforming the German energy landscape. This is of particular importance as proceedings in the infrastructure sector can last for years due to the complexity of factual and legal circumstances as well as the close scrutiny by the courts. The draft law now specifically intends to reduce the duration of administrative court proceedings and, thus, contribute to an accelerated implementation of infrastructure projects. The scope of the projects benefitting from the proposal includes gas pipelines, onshore wind farms (with a total height of more than 50 m), offshore wind farms, CHP-plants (from a rated thermal input of 50 MW), but also major roads and highways.

Key issues

- Amendment of administrative court proceedings in the infrastructure sector
- Procedural provisions tightened to speed up the procedure
- Considerable advantages for operators and investors regarding the implementation of their projects
- Further legislative acts to accelerate administrative, planning and approval proceedings announced

ENVISAGED AMENDMENTS

The Federal Government essentially proposes the following amendments:

- *Priority and acceleration of administrative court proceedings:* Significant infrastructure projects should be treated with priority over other administrative court proceedings (e.g. court hearings, deadlines for the submission of statements or the like and the decision practice). Furthermore, no later than two months after receipt of the statement of defence, the court shall explore the possibilities of an amicable settlement of the dispute with the parties. In case such a settlement is not reached, a procedural plan shall be determined to structure the further proceedings in an efficient manner.
- *Foreclosure within the administrative court proceedings:* The court shall be obliged to reject evidence that is not provided after a set deadline and shall decide on the case without further investigation (unless a party can sufficiently excuse a delay). This new concept is intended to limit the scope of the proceedings and delays shall be prevented.
- *Interim legal protection:* Interim legal protection may in practice lead to a construction freeze until the decision in the main proceedings is taken. The aim of the envisaged modifications is to reduce the duration of the interim proceedings by declaring certain faults (for instance, procedural or formal faults) to be irrelevant, if they can be cured in the near future. Moreover, the importance of infrastructure projects shall be considered within the procedure, i.e. if these infrastructure projects are in the overriding public interest. The court must therefore consider the priority of infrastructure projects within its decision.
- *Special chambers for infrastructure projects:* In order to further accelerate the proceedings, special chambers or senates shall be formed for matters of planning law. The draft law further provides that the judges in these chambers and senates shall have expert knowledge of planning law.
- *Deadline for legal action:* Any action based on the Energy Industry Act must be justified within a deadline of ten weeks (as of now: six weeks) after the action is filed.

IMPLICATIONS IN PRACTICE

The legislative proposals by the Federal Government are useful amendments of the existing legal framework which have the potential to accelerate administrative court proceedings. The overall aim to obtain legal certainty for operators and investors within a considerably shorter period of time could be reached if the proposed amendments are introduced and strictly followed by the courts. At the same time courts will have to build up additional capacities to take care of these proceedings with highest priority.

The practical implications of the legislative proposals can consequently be summarized as follows:

- The acceleration of proceedings generally leads to a faster overall implementation of infrastructure projects (construction, commissioning) which in practice are frequently challenged in courts.
- The promotion of (even more) specialised planning chambers or senates in combination with an exclusive jurisdiction of the Federal Administrative

Court for certain "high priority" infrastructure projects will further speed up proceedings.

- The foregoing applies also with regard to the interim legal protection. Generally, the legislative proposals strengthen the right to enforce an infrastructure project once it has been approved (i.e. no construction freeze).
- An early amicable settlement can evolve as important means to end a dispute (which rarely happens under the current legal framework). Against the background of the envisaged special expertise of the court, an amicable settlement might be a reasonable alternative to a decision for the parties. This would lead to an even earlier ending of a proceeding and significantly lower costs.

OUTLOOK

The draft law is one of several legislative proposals envisaged in the coalition agreement by the Federal Government to accelerate administrative, planning and approval proceedings for major infrastructure projects. It has the potential to accelerate administrative court proceedings from a practical point of view. However, in particular the administrative proceedings themselves must be accelerated (e.g. through standardisation in species and nature conservation law and improvement of the personnel and technical equipment of the authorities). These proceedings take in practice too long to achieve the ambitious goals of the energy and transport transition targets.

The Federal Government has clearly demonstrated its willingness to support the rapid implementation of significant infrastructure projects (e.g. Act on the Acceleration of the use of LNG or the Amendment to the Offshore Wind Energy Act). Furthermore, the Federal Government has also announced a draft law concerning the Increase and Acceleration of the Expansion of Onshore Wind Farms. It becomes clear that the acceleration of proceedings with regard to major infrastructure projects is pivotal for the Federal Government. It will now be crucial to monitor the implementation and announced next steps to achieve a comprehensive acceleration of proceedings which have been long awaited in the infrastructure space.

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