

7 January 2014

Luther lodges constitutional complaint against the overriding control of industrial power plants

A severe winter can mean increased costs for businesses that own power plants

Hamburg – The German Energy Industry Act (EnWG), which was amended at the end of 2012, has an unpleasant surprise for several hundred operators of industrial power plants. The Energy Industry Act now allows network operators to adjust the amount of electricity that is fed into the electricity grid by power plants in order to avoid and remedy interferences with the electricity supply system.

This duty to feed electricity into the grid is disproportionately harsh on the operators of industrial power plants. When overriding control is exerted, it is difficult for the power plant to carry out its usual production processes. One of Europe's largest paper mills is now putting up a fight before the German Federal Constitutional Court (BverfG).

“By introducing these new rules, German legislators are trying to turn a paper mill into a power generation plant to compensate for shortfalls in power supplies in severe winters. If the power plant is controlled, depending on the degree of intervention, parts of the paper manufacturing process will be disrupted; in the worst case, production could be shut down completely. This type of drastic intervention, which also threatens livelihood, jeopardises all those industrial enterprises in Germany that run their own power plants

that produce a certain level of performance”, said Dr Gernot-Rüdiger Engel, Lead Partner at Luther and environmental law expert.

Dr Mathias Mailänder, a colleague of Mr Engel’s added: “The German legislators have apparently not considered the consequences of their actions. The Federal Network Agency (Bundesnetzagentur) also holds that industrial power plants should not be overridden. The impending damage is incalculable.”

According to the lawyers, it is not only the compensation for the affected businesses that has been insufficiently regulated; the affected businesses will only receive compensation for adjusting the feed-in capacity, not for shortfalls in production.

Background of proceedings

Based on Sec. 13 of the German Energy Industry Act, every operator of a production plant that has an electrical capacity of 10 MW or more is directly obliged by law to adjust the feed-in capacity, if requested to do so by a power grid operator. The feed-in capacity has to be adjusted by increasing and decreasing it until the production plant is shut down.

According to Sec. 13 of the German Energy Industry Act, the operator of a production plant’s duty to adjust the feed-in capacity also includes (re)instating operating status and, in particular, the postponing of planned changes. These obligations ensure that the so-called market-related measures are implemented. However, implementing these market-related measures implies that the safety and reliability of the electrical power system is threatened. This regulation does not at all provide for the effects from an insurance law perspective and the requirements of the existing maintenance agreements (e.g. term of contract).

Until the end of the year 2012, only those operators who were connected to the 110 kilovolt electrical network were deemed obliged parties. This restriction ceased to exist when the German Energy Industry Act was amended at the end of the year 2012.

Now that the restriction no longer applies, the number of parties that are obligated has increased and, in particular, now includes industrial power plants.

As a result of the regulation that is in dispute, the appellant has no longer been able to control its combined heat and power plant to produce both steam and electricity in accordance with the quantities required by the industrial production process.

On behalf of Papier- und Kartonfabrik Varel GmbH & Co. KG

Luther Rechtsanwaltsgesellschaft mbH, Hamburg

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Brief Profile Luther Rechtsanwaltsgesellschaft mbH

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Luther works closely with other commercial law firms in all the prevailing jurisdictions worldwide. On the Continent, Luther is part of a group of independent leading law firms who have worked together for many years on joint cross-border projects. Luther is also the German member of Taxand, a global organisation of tax advisory firms.

Luther Rechtsanwaltsgesellschaft mbH is a law firm with a business approach: our innovative awareness aspires us to provide our clients with customised legal advice that addresses individual needs and delivers the greatest possible economic benefit. Our lawyers and tax advisors have a solid understanding of interdisciplinary matters and a wealth of experience in collaborating on complex tasks. Further information is available at: www.luther-lawfirm.com

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