



LEGAL UPDATE

Offshore Wind Power: Bill of Law

Overview

The development of multiple renewable energy sources is an increasing goal among several countries worldwide. It has become a fast-growing segment and a focus of investment for Brazilian and international companies. The Brazilian Institute of the Environment and Renewable Natural Resources ("IBAMA") recently disclosed that there were 66 offshore wind projects under environmental licensing proceedings in Brazil, totaling around 169 GW of capacity – an increase of more than two-fold compared to the beginning of 2022.

The Brazilian Government issued Decree No. 10,946/2022 ("Decree") on January 25, 2022, which was the first legislation on offshore power generation projects in the country. The Decree originally established a public bidding procedure, where the winning bidder will execute an use assignment agreement related to the project's area with the Ministry of Mines and Energy ("MME"). The Brazilian National Electric Energy Agency ("ANEEL") will then issue an authorization for the winning bidder to act as an independent power producer or self-producer.

Following the Decree, the Bill of Law No. 576/2021 ("Bill of Law") was introduced early this year in the Senate to further regulate the exploitation of offshore wind energy. In an attempt to align the Bill of Law with the Decree, the Infrastructure Services Commission of the Senate proposed certain amendments to the Bill of Law; however, some of its key points remained unaddressed or inconsistent with the Decree. Still, the Bill of Law was submitted for approval to the House of Representatives on August 30, 2022.

If the House of Representatives proposes any amendments, the Bill of Law will be sent back to the Senate for further review. Otherwise, the Bill of Law will be sent to the president of the Republic, who will have 15 days to (i) approve the Bill of Law, in which case it will become law, or (ii) veto the Bill of Law, in which case it will return to Congress for consideration. If enacted, the Bill of Law will also require further regulation to be issued by competent authorities.

Main Aspects

For a better understanding of the structure and rules being proposed, below we present the main aspects of the Bill of Law.

Energy Prisms and Declaration of Prior Interference

The offshore power generation activities will be implemented in a geographic area to be defined by the Federal Government – the so-called 'prism' under the Decree or 'energy prism' under the Bill of Law .

The Bill of Law innovates by detailing the requirements for the definition of energy prisms, such as establishing that energy prisms cannot coincide with blocks awarded under the production sharing, concession and transfer of rights regimes for oil and natural gas E&P activities during the term of the relevant E&P contract. The Bill of Law expressly allows the operators under such contracts to create or consent with the creation of energy prisms in such areas.

Interested parties may also propose the creation of possible energy prisms at any time, as established by both the Decree and the Bill of Law. The latter requires prior submission of a preliminary study of the area, which will be subject to further regulation.

In line with the Decree, the Bill of Law also requires a declaration by the Federal Government on the interference of the energy prism with other facilities or economic activities (Declaration of Prior Interference – “DIP”). The Decree provided for an exhaustive list of several public authorities that are entitled to issue the DIP, while the Bill of Law has focused on the interference standards and combined the issuance procedure into a single Government entity – which was not defined by the Bill of Law.

It should be noted that both the Decree and the Bill of Law will be the subject to further regulations, which are expected by the industry to provide legal certainty on the major outstanding issues.

Award of rights

The Bill of Law provides that the technical, financial and legal requirements for the qualification of interested parties will be established by a specific regulation. The energy prisms will be offered in accordance with two proposed mechanisms.

a) **Planned Offer:** Bidding procedure for interested parties to acquire pre-defined energy prisms under the concession regime. The bid criteria will consider (i) the highest signature bonus, with a minimum value to be previously defined in the bid documents; (ii) the highest proportional participation to be paid monthly from the commencement of commercial operation in an amount corresponding to 1,5% of the energy generated and commercialized; and (iii) the lowest electricity fee to the consumer in the regulated market, when applicable, in addition to other criteria established in the tender protocol. The tender protocol must also indicate (i) the energy prism being offered; (ii) the transmission facilities, if applicable; and (iii) the decommissioning guarantees.

b) **Permanent Offer:** Energy prism defined upon request of interested parties and granted upon expression of interest under the authorization regime. If two or more expressions of interests are submitted, the granting authority may either organize the interested parties or redefine the energy prism. If these options cannot be applied, a planned offer will be implemented – in which case a bid procedure would be required accordingly.

The above provisions generally diverge from those of the Decree, especially in relation to the administrative acts that authorize the use of the energy prisms. Pursuant to the Decree, prior to the grant of generation by ANEEL, the interested party will execute an use assignment agreement with the MME or ANEEL (after a bid procedure conducted by the MME). There is no concession or authorization regime under the Decree.

Deed of Granting and Project Phases

The grant of the energy prism will be formalized by means of a Deed of Granting for the Use of Offshore Energy Potential ("Deed"). Among other provisions, the Deed will set forth (i) the grantee's obligation to pay the Government participation; (ii) the grantee's obligation to provide ANEEL with reports and data

related to the developed activities; (iii) the grantee's right to build power generation and transmission facilities in the seabed; (iv) the contractual term and extension requirements; as well as (v) the termination events. The term of the Deed remains undefined.

Moreover, the Deed will be divided in two phases, as follows:

a) Evaluation phase: Environmental impact study, in connection with the technical and economic feasibility of the project, which will include the information on the energy potential, among other figures; and

b) Execution phase: If the energy prism is deemed feasible, the grantee will then implement and exploit the energy potential of the prism. The unfeasible areas of the energy prism will be returned to the Federal Government.

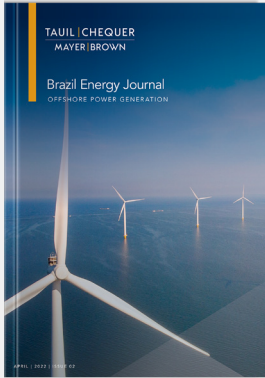
Brief Comparison Between the Bill of Law and the Decree

Item	Bill of Law	Decree
Legal Framework for the Use of the Offshore Areas	Concession or Authorization	Use Assignment Agreement
Applicable Mechanisms	Planned Offer or Permanent Offer	Planned Use Assignment or Independent Use Assignment
Bidding Procedure	Mandatory only in the Permanent Offer regime	Mandatory in the Planned Use Assignment and in the Independent Use Assignment
Obtaining the DIPs	Centralized into a single Government entity	Multiple Government entities
Government Participation	Signature bonus and Proportional Participation	Not detailed. The Planned Use Assignment will be onerous for the generation of electricity and free for research and technological activities
Bid Criteria	Multiple criteria	Highest economic return

Latest Updates

On September 9, 2022, the MME launched the Public Consultations No. 134/2022 and No. 135/2022, which aim to discuss a draft proposal of Ordinances that further detail the rules and procedures created by the Decree. The draft proposals address certain significant matters, such as the use assignment agreement, the bidding procedure, the roles of ANEEL and the Energy Research Company (“EPE”) in the context of the Decree, the creation of the Unified Portal for Managing the Use of Offshore Areas for Power Generation, among others.

Particularly on the DIP issuance, the Public Consultation No. 135/2022 glimpses to approach some sort of centralization through a system to be handled by ANEEL, in addition to other provisions that will be analyzed in more detail by our Team in a separate publication.



Also Read:
Brazil Energy Journal:
Offshore Power Generation



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