

H e a d n o t e s

to the Order of the First Senate of 30 June 2020

- 1 BvR 1679/17 -

- 1 BvR 2190/17 -

(Offshore Wind Energy Act)

- 1. Subject to certain conditions, Art. 14(1) of the Basic Law protects the legitimate expectation that the law that forms the basis for property investments will not change. However, this requires a legal position capable of creating property rights.**
- 2. A transitional legal framework may be required under Art. 12(1) of the Basic Law if pursuing an occupation that has previously been permissible will become impermissible. However, in principle the protection of legitimate expectations under Art. 12(1) of the Basic Law does not extend to frustrated investments that have been made with a view to future business activities.**
- 3. The general principle of the protection of legitimate expectations deriving from Art. 2(1) in conjunction with Art. 20(3) of the Basic Law complements the specific guarantees protecting legitimate expectations contained within the specific freedoms of the Basic Law. The criterion of retroactivity can give some indication of whether a change in the law means that expectations of stability that merit protection have been frustrated, i.e. that such a change does not merely affect a general expectation that the currently applicable law will not change. The constitutional limits of retroactive effects, which are further determined by the principle of proportionality, not only apply to tax law but are also applicable to other areas of law.**

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 1679/17 -

- 1 BvR 2190/17 -



IN THE NAME OF THE PEOPLE

In the proceedings on the constitutional complaints

- I. 1. of P... GmbH,
represented by its managing directors,
2. of P... GmbH,
represented by its managing directors,
3. of N... GmbH,
represented by its managing directors,
4. of N... GmbH,
represented by its managing directors,
5. of N... GmbH,
represented by its managing directors,
6. of N... GmbH,
represented by its managing directors,
7. of N... GmbH,
represented by its managing directors,
8. of N... GmbH,
represented by its managing directors,
9. of N... GmbH,
represented by its managing directors,
10. of N... GmbH,
represented by its managing directors,
11. of N... GmbH,
represented by its managing directors,

12. of H... GmbH, c/o C... GmbH,
represented by its managing directors,
13. of H... GmbH, c/o C... GmbH,
represented by its managing directors,
14. of H... GmbH, c/o C... GmbH,
represented by its managing directors,
15. of P... GmbH,
represented by its managing directors,
16. of P... GmbH,
represented by its managing directors,
17. of P... GmbH,
represented by its managing directors,

- authorised representatives: ... -

against Article 2, § 46(3) first sentence of the Act to Introduce a Tender Process for Electricity from Renewable Energy Sources and to Further Amend the Law on Renewable Energies (*Gesetz zur Einführung von Ausschreibungen für Strom aus erneuerbaren Energien und zu weiteren Änderungen des Rechts der erneuerbaren Energien*) of 13 October 2016 (Federal Law Gazette, *Bundesgesetzblatt* - BGBl I page 2258)

- 1 BvR 1679/17 -,

- II. of E... GmbH,
represented by its managing directors,

- authorised representatives: 1. ... -

2. ... -

against Article 2, Part 3 (§§ 14 to 43), § 46(3) to (6), § 66 and § 71 of the Act to Introduce a Tender Process for Electricity from Renewable Energy Sources and to Further Amend the Law on Renewable Energies of 13 October 2016 (BGBl I page 2258)

- 1 BvR 2190/17 -

The First Senate of the Federal Constitutional Court
with the participation of Justices

President Harbarth,
Masing,

Paulus,
Baer,
Britz,
Ott,
Christ,
Radtke

held on 30 June 2020:

- 1. The Act to Develop and Promote Offshore Wind Energy (*Gesetz zur Entwicklung und Förderung der Windenergie auf See – Windenergie-auf-See-Gesetz – WindSeeG*) (Article 2 of the Act to Introduce a Tender Process for Electricity from Renewable Energy Sources and to Further Amend the Law on Renewable Energies of 13 October 2016 <BGBl I page 2258>, including in the version last amended by Article 2 of the Act of 25 May 2020 <BGBl I page 1070>) is not compatible with Article 2(1) in conjunction with Article 20(3) of the Basic Law (*Grundgesetz – GG*) in that, as set forth in the reasons attached to the decision, providing for a compensation regime is necessary.**
- 2. For the rest, the constitutional complaints are rejected.**
- 3. The legislator is obliged to adopt an adequate compensation regime by 30 June 2021. The Act to Develop and Promote Offshore Wind Energy remains in effect until new provisions have been enacted.**
- 4. The Federal Republic of Germany must reimburse the complainants one fifth of their necessary expenses each.**

Table of contents

	para.
A. Facts of the case	1
I. Background and history of the Offshore Wind Energy Act	2
1. Special conditions in the exclusive economic zone	3
2. Legal developments until entry into force of the Offshore Wind Energy Act	4
3. Key provisions of the Offshore Wind Energy Act	7
4. Provisions regarding grid connection	10
5. Transitional legal framework	14

II. The complainants and their project situation	25
III. The constitutional complaint proceedings	30
1. Submissions of the complainants in proceedings 1 BvR 1679/17	30
2. Submissions of the complainants in proceedings 1 BvR 2190/17	40
3. Statement of the Federal Government	48
B. Admissibility of the constitutional complaints	58
I. Standing to lodge a constitutional complaint	59
II. Exhaustion of remedies and subsidiarity in the broader sense	66
III. No determination by EU law	72
C. Merits of the constitutional complaints	73
I. Art. 14(1) of the Basic Law	74
1. Approval (1 BvR 2190/17)	75
a) Approval decisions merely serve as authorisation	76
b) Objections raised by the complainants	78
aa) Saleability	79
bb) Financial investment	80
cc) Substitute for real property	81
2. Procedural position in the approval process (1 BvR 1679/17)	84
3. Right to establish and carry on a business	85
4. Investments	88
II. Art. 12(1) of the Basic Law	89
1. Interference with the practice of the occupation of offshore wind farm operator	90
a) Scope of protection	91
b) Interference	94
c) Justification	99
aa) Legitimate purpose	100
bb) Suitability	102
cc) Necessity	105

dd) Proportionality in the strict sense including protection of legitimate expectations under Art. 12 of the Basic Law	106
(1) Standard	107
(a) Requirement of transitional legal framework	108
(b) No protection of investments	110
(2) Application of the law to the present case	111
(a) Transitional legal framework for installations put into operation	111
(b) Transitional legal framework for installations not put into operation	112
(aa) Projects with a prospect of grid connection	113
(bb) Projects without timely prospect of grid connection	114
2. Interference with the practice of the occupation of offshore wind farm developer	118
a) Scope of protection and interference	119
b) Justification	120
III. General protection of legitimate expectations under Art. 2(1) in conjunction with Art. 20(3) of the Basic Law	121
1. Standard	122
a) Basis	122
b) Protection of legitimate expectations vis-à-vis the legislator	123
c) Retroactive effects of laws	127
aa) Relevance of the protection of legitimate expectations	127
bb) Differentiation between real and quasi retroactivity	128
(1) Real retroactivity	129
(2) Quasi retroactivity	130
(a) Definition	130
(b) Constitutional requirements	131
(aa) Limits set by the principle of proportionality	131
(bb) Requirement to balance interests	132
(cc) Criteria for assessing whether an expectation merits protection	133

2. Retroactive effects of the Offshore Wind Energy Act	134
a) No real retroactivity	135
b) Quasi retroactivity	136
aa) Circumstances set in motion	137
bb) Future implications	138
cc) Legal position affected	139
dd) Loss of value of the legal position	141
ee) Causality of the Offshore Wind Energy Act	142
(1) Complainants nos. 3 and 4 (1 BvR 1679/17)	143
(2) Projects in zone 4 of complainants nos. 15 to 17 (1 BvR 1679/17)	144
(3) Base line surveys	145
(4) Reservation of new approval process (1 BvR 2190/17)	146
(5) General risk of failure under the Offshore Installations Ordinance	147
3. Constitutional justification of quasi retroactivity	148
a) Legitimacy of expectations	149
b) Proportionality of quasi retroactivity	150
aa) Reference point of the proportionality assessment	151
bb) Legitimate purpose and suitability	152
cc) Necessity	153
(1) Option: Classification as an existing project	154
(2) Option: Takeover right	155
(3) Option: Compensation for usable preparatory work	157
(a) Less intrusive means	158
(b) Equal suitability	159
dd) Proportionality in the strict sense 160 (1) Need for protection of the expectation	161
(a) Expectation of a change in the law	162
(b) Investment incentive by the state	163

(c) Uncertainty regardless of the change	164
(2) Interest of the complainants in the continuation of the old law	165
(3) Public interest in a change in the law with quasi-retroactive effects	166
(4) Balancing of interests	167
4. Protection of legitimate expectations under EU law	168
IV. Art. 3(1) of the Basic Law	170
1. Unconstitutional unequal treatment	171
2. Unconstitutional equal treatment	172
D. Legal consequences	173
I. Violation of constitutional law	173
II. Legal consequences	176
III. Decision on expenses	177

R e a s o n s:

A.

[Excerpt from Press Release No. 78/2020 of 20 August 2020]

The constitutional complaints are directed against provisions of the Offshore Wind Energy Act (*Windenergie-auf-See-Gesetz* – WindseeG). The Act created new rules, in force since 1 January 2017, for the establishment of offshore wind farms particularly in the exclusive economic zones in the North Sea and the Baltic Sea. Prior to the Act entering into force, offshore wind farms could be approved on the basis of priority considerations, without any prior formal planning or systematic coordination of their connection to the grid. As the law now stands, the state conducts a preparatory exploration of specific sites that are designated in a site development plan drawn up by the state. The Federal Network Agency (*Bundesnetzagentur*) invites tenders for any site for which an exploration has been completed. The bidder whose tender is accepted has an exclusive right that a formal planning approval procedure (*Planfeststellungsverfahren*) be carried out and a right to receive payment for any power they will generate in the future. The provisions on the approval of offshore wind farms must be read together with the provisions on grid connection, as establishing a wind farm makes no commercial sense if it is not connected to the power grid. The Offshore Wind Energy Act coordinated the planning of wind farms and the development of grid connection. The bidder whose tender is accepted also has a right to have access to a power line that establishes connection to the power grid and a right to the assigned grid capacity for the relevant site. Pursuant to § 46(3) WindSeeG, any

processes that had been initiated prior to the Act entering into force were terminated on 1 January 2017; permits that had already been granted could not be extended and are no longer valid under the current law anyway. § 77(1) WindSeeG creates a transitional legal framework for wind farms that have been established subject to the provisions of the Offshore Installations Ordinance (*Seeanlagenverordnung*) and started operating prior to the Offshore Wind Energy Act entering into force. The Act also creates a transitional framework for wind farms that have not yet started operating but will do so by 31 December 2020 and for which grid connection has been confirmed unconditionally or which have been assigned grid capacity. Moreover, §§ 26 ff. WindSeeG provides for invitations for tenders for existing projects during a transitional period. In addition, § 39 WindSeeG affords owners of such projects a right to take over the award of the tender. However, none of these provisions are applicable to the complainants' projects.

The complainants are businesses that requested approval to establish offshore wind farms pursuant to the provisions of the Offshore Installations Ordinance, which was applicable before the Offshore Wind Energy Act entered into force. One of the complainants had already been granted a permit under the old law. However, none of the projects had started operating. Construction had not yet taken place either. The necessary offshore power line for connection to the grid was not available for any of the projects and it was not likely that such connection would be established in the near future for any of the proposed wind farms. Above all, none of the complainants had received confirmation of connection to the grid under the provisions of the Energy Industry Act (*Energiewirtschaftsgesetz*) applicable at the time. However, between 2009 and 2011, the complainants conducted an environmental base line survey of the relevant site as part of the approval process. Most of them also conducted an exploration of the ground of the building site and submitted an environmental impact assessment. Each of the complainants incurred costs amounting to several million euros, most of which were incurred in relation to surveying the marine area concerned and assessments of environmental and ground conditions. In March 2015, the Federal Maritime and Hydrographic Agency (*Bundesamt für Seeschifffahrt und Hydrographie*) announced that all planning approval procedures for wind farms in zones 3 to 5, in which all projects at issue in these proceedings are located, would be discontinued, as there was no prospect that connection to the grid could be established soon.

The position the complainants had reached in the procedural process under the old law no longer has any legal effect under the Offshore Wind Energy Act and they have not received any compensation in return; the complainants claim that their fundamental rights have thereby been violated.

The Federal Government considers the constitutional complaints to be inadmissible or at least unfounded.

End of excerpt]

[...]	1
I.	
[...]	2-24
II.	
[...]	25-29
III.	
1. The complainants in proceedings 1 BvR 1679/17 challenge § 46(3) first sentence WindSeeG, which terminated ongoing planning approval procedures in the areas of the exclusive economic zone affected in this case.	30
[...]	31-39
2. The constitutional complaint in proceedings 1 BvR 2190/17 is directed against Part 3 of the Offshore Wind Energy Act (§§ 14 to 43 WindSeeG), insofar as this also excludes wind farms which have already been approved from participating in tenders for existing projects, and against § 46(3) to (6), § 66 and § 71 WindSeeG. The complainant claims that Art. 14(1) and (3), Art. 12(1) and Art. 3(1) of the Basic Law (<i>Grundgesetz</i> – GG) have been violated.	40
[...]	41-57
B.	
The constitutional complaints are admissible insofar as they concern the provisions regarding the termination of ongoing planning approval and permit procedures and the ban on extensions of existing permits (§ 46 WindSeeG) as well as the transition to a centralised process for inviting tenders (§§ 14 to 43 WindSeeG). However, the complainant in proceedings 1 BvR 2190/17 lacks standing with regard to § 66 and § 71 WindSeeG, which were additionally challenged by them.	58
I.	
[...]	59-65
II.	
[...]	66-71
III.	
The admissibility of the constitutional complaints is not precluded by EU law given that the challenged provisions do not implement binding standards of EU law into German law (cf. Decisions of the Federal Constitutional Court, <i>Entscheidungen des Bundesverfassungsgerichts</i> - BVerfGE 73, 339 <387>; 121, 1 <15>; 152, 152 <169, para. 42> - Right to be forgotten I; Order of the First Senate of 27 May 2020 - 1 BvR	72

1873/13, 1 BvR 2618/13 -, para. 84 – Subscriber data II; established case-law). Neither Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ EU No. L 140 of 5 June 2009, p. 16) nor the subsequent Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ EU No. L 328 of 21 December 2018, p. 82) have led to harmonisation in this area. While the guidelines issued by the European Commission on the subject matter relevant here (Communication from the European Commission - Guidelines on State aid for environmental protection and energy 2014-2020, OJ EU No. C 200 of 28 June 2014, p. 1) provide for tender rules for the provision of aid to promote electricity from renewable energy sources, some of which are similar to the provisions under review here, this does not mean that the provisions challenged here are determined by EU law, given that the provisions of German law – in contrast to what the legislator had originally considered (cf. *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 18/8860, pp. 5, 146 at the end, 154, 156) – do not constitute State aid within the meaning of EU law (cf. CJEU, Judgment of 28 March 2019 - C-405/16 P - EU:C:2019:268, para. 80).

C.

The constitutional complaints are only in part well-founded. Insofar as the Offshore Wind Energy Act introduces a fundamentally revised legal framework for the approval of offshore wind farms that renders invalid procedural steps completed in the process under the previously applicable law, including permits and planning approvals, this is compatible with Art. 14(1) GG (see I. below). It does not violate Art. 12(1) GG either (see II. below). However, the quasi-retroactive effects following from the transition are not entirely compatible with the general principle of the protection of legitimate expectations (Art. 2(1) in conjunction with Art. 20(3) GG) (see III. below). There has been no violation of Art. 3(1) GG (see IV. below).

73

I.

Art. 14(1) GG has not been violated. The challenged provisions do not affect protected property rights. In principle, the constitutional guarantee of property protects all rights constituting assets (*vermögenswerte Rechte*) that the legal order assigns to those entitled to these rights in such a way that they may exercise the associated powers at their own choice for their private benefit (cf. BVerfGE 131, 66 <79> with further references; established case-law). The permit granted to the complainant in proceedings 1 BvR 2190/17 does not, however, constitute property within the meaning of Art. 14(1) GG, and nor do the procedural positions reached by the complainants in proceedings 1 BvR 1679/17 under previously applicable law.

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1. The permit granted to the complainant in proceedings 1 BvR 2190/17 under the Ordinance on Offshore Installations Seaward of the Limit of the German Territorial

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Sea (*Verordnung über Anlagen seewärts der Begrenzung des deutschen Küstenmeeres – Seeanlagenverordnung*, Offshore Installations Ordinance) is not a property right protected by Art. 14(1) GG.

a) It is true that the protection afforded by Art. 14(1) GG is not limited to property rights within the meaning of private law (cf. BVerfGE 95, 267 <300>; established case-law). However, in its judgment of 6 December 2016 on the nuclear phase-out (BVerfGE 143, 246), the Federal Constitutional Court already held that the approval of installations is not a position capable of creating property rights – a question which had been left open in the past. Such a permit for the operation of hazardous installations is an authorisation granted by the state that gets past preventive bans imposed unless express authorisation is obtained (*Verbote mit Erlaubnisvorbehalt*). The permit merely confirms that the project is compatible with the provisions for the protection of the interests jeopardised by the operation of the installation, i.e. that the conditions for approval are met. Such a permit thus differs from those subjective public rights which, according to the Federal Constitutional Court's established case-law, are granted property protection because they give the individual a legal position akin to that of an owner (cf. BVerfGE 143, 246 <328 and 329 para. 231>).

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Accordingly, the purpose of the permits and planning approvals granted pursuant to the Offshore Installations Ordinance was to determine the legal conformity of the planned installation and thus to get past a ban imposed unless express authorisation is obtained, but not to create property rights. The operation of an offshore wind farm can, among other things, cause hazards to animals and plants, the marine environment as a whole and to shipping. The role of the approval process for such wind parks was and is, in particular, to check whether such hazards stand in the way of the project. It is irrelevant in this respect that an offshore wind farm poses lower risks than a nuclear power plant. In the judgment on the nuclear phase-out, the finding that the case concerned a permit for the operation of a hazardous installation (cf. BVerfGE 143, 246 <328 para. 231>) did not mean that such a permit did not enjoy property protection because of the particular hazard posed by nuclear power plants. Instead, the role of the approval process under public law was emphasised, namely to determine whether the project was compatible with the provisions for the protection of the interests jeopardised by the operation of the installation, i.e. whether the conditions for approval were met. The approval decision under the Offshore Installations Ordinance had the exact same function.

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b) The complainants' objections do not change this conclusion.

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aa) The commercial significance of the permit and the fact that it can be sold do not, in themselves, mean that it constitutes property. While the permits granted under the Offshore Installations Ordinance were capable of being transferred and were, in fact, regularly the subject of sales transactions, the fact that the market attaches a value to something does not make it property within the meaning of the Basic Law.

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bb) Insofar as the complainants refer to the several million euros of investments re-

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quired prior to the grant of a permit, this does not mean that the approval constitutes property either. Even permits that are granted only after significant investments have been made do not, as a result, become property of the permit holders (cf. BVerfGE 143, 246 <329 para. 232>).

cc) Moreover, the fact that no real property can be acquired in the exclusive economic zone does not mean that the approval of the installation itself constitutes property.

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(1) Accordingly, the situation of the project developers in this case is not fundamentally different from the situation of operators that want to build installations requiring approval in an area in which real property can be acquired. Even though in such an area the land and the installations constructed on the basis of the permit enjoy the protection of Art. 14(1) GG, the fundamental rights protection does not extend to the permit itself. The fact that the complainants – unlike nuclear power plant operators – are not able to acquire ownership of the land is an argument against, but certainly not an argument for, the permit under the Offshore Installations Ordinance constituting property. If the permit for an installation to be constructed on land owned by the operator is not protected by Art. 14(1) GG, then it is all the more true that the permit for an installation to be constructed on land that is exclusively under state authority is not protected by Art. 14(1) GG. Unlike on private land, in the exclusive economic zone the statutory claim to the approval of an offshore wind farm is not based on constitutional law. Rather, the legislator could have refrained from granting a claim to approval without being subject to restrictions under Art. 14(1) GG because, in the absence of land ownership, this would not have required justification.

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(2) On the other hand, the Federal Constitutional Court has in the past regarded permits under mining law (§ 8 of the Federal Mining Act, *Bundesberggesetz* – BBergG of 13 August 1980 <BGBl I p. 1310>) as property within the meaning of Art. 14(1) GG (cf. BVerfGE 77, 130 <136>; likewise BVerfG, Order of the Second Chamber of the First Senate of 13 April 2007 - 1 BvR 284/05 -, para. 4). This, too, relates to the use of parts of land that are not directly capable of creating property rights given that ownership of land does not extend to certain mineral resources (*bergfreie Bodenschätze*) (§ 3(2) second sentence BBergG). The function of a permit under mining law, however, is different from the function of a permit under nuclear law and an approval decision under the Offshore Installations Ordinance or the Offshore Wind Energy Act. According to § 8(1) no. 1 BBergG, a permit under mining law grants the exclusive right to search for, extract, and obtain property rights for the mineral resources in a certain area and to extract other mineral resources in that area at the same time. Accordingly, the use of the land is not merely authorised, as in the present case, for the construction of a physical structure, but for the obtaining of property rights for the mineral resources found on the land.

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2. If an approval that has already been granted does not constitute property within the meaning of the Basic Law, it is all the more true that the mere positions reached

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by the complainants in proceedings 1 BvR 1679/17 under the Offshore Installations Ordinance in the procedural process prior to an approval cannot constitute property within the meaning of Art. 14(1) GG either. The fact that the mere procedural positions were the subject of contracts under private law does not in itself mean that they should be included in the scope of protection of Art. 14(1) GG (see para. 79 above).

3. The procedural position reached under the Offshore Installations Ordinance is also not protected by Art. 14(1) GG with regard to the right to establish and carry on a business (*Recht am eingerichteten und ausgeübten Gewerbebetrieb*).

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[...]

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4. The complainants' investments as such do not constitute property within the meaning of Art. 14(1) GG either. Seen in isolation, they are merely expenses. Subject to certain conditions, the fundamental right to property protects against property investments losing their value owing to changes in the law. In this respect, the principle of the protection of legitimate expectations in accordance with the rule of law has found its own expression in Art. 14(1) GG with regard to possessions and assets (*vermögenswerte Güter*). The fundamental right to property thus also protects the legitimate expectation that the law that forms the basis for property investments and their usability will not change; whether and to what extent such expectation is legitimate depends on the circumstances of the specific case (BVerfGE 143, 246 <383 para. 372> with further references). In any event, however, this property-specific protection of legitimate expectations for investment decisions requires a legal position that is capable of creating property rights, which is de facto created by investments being made based on the expectation that the law will not change, or a legal position that can have been the basis for existing legitimate expectations based on which investments were made. By contrast, investments themselves cannot be protected by Art. 14(1) GG if – as is the case here – there is no property.

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II.

Art. 12(1) GG has not been violated either. While the ban on the operation of offshore wind farms unless approval is obtained does interfere with the occupational freedom of offshore wind farm operators, the interference is justified under constitutional law; this also applies in the event that this leads to an approval of an installation, or even just a position reached in the procedural process under previous law, losing its legal significance (see 1. below). If, in addition, the challenged provisions are regarded as a separate interference with the occupation of mere developers of offshore wind farms that has already been practised, this interference is also justified under constitutional law (see 2. below).

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1. Insofar as the challenged provisions of the Offshore Wind Energy Act generally prohibit the operation of offshore wind farms in the exclusive economic zone and only permit it in the event that a tender has been accepted (§§ 23 and 34 Offshore Wind Energy Act) and the authorities grant approval in the specific case, and insofar as the

90

provisions thus simultaneously render invalid any approval granted under the old law and the position reached in the procedural process, they do not violate Art. 12(1) GG.

a) However, the provisions do affect the scope of protection of occupational freedom of those who want to operate an offshore wind farm. 91

aa) Art. 12 GG grants the right to take up an activity as an occupation and to pursue it freely (cf. BVerfGE 141, 121 <130 para. 32> with further references). Occupation means any long-term activity pursued to create and maintain a livelihood (cf. BVerfGE 141, 121 <130 and 131 para. 34> with further references); the protection of occupational freedom is not limited to lawful activities (cf., contrary to previous case-law, BVerfGE 115, 276 <300 f.>). 92

bb) Accordingly, the operation of an offshore wind farm is protected by Art. 12(1) GG. This is not precluded by the fact that the exclusive economic zone is subject to special legal conditions and that the seabed is closed to private access ([...]). While it is true that statutory provisions are required to open up the field of lawful occupations to private operators in this case, the scope of protection of occupational freedom is in principle not limited to lawful activities given that otherwise occupational freedom could be devoid of meaning vis-à-vis the legislator (cf. BVerfGE 115, 276 <300>). In addition, the possibility to engage in occupational activities in this field had already been introduced by the previous approval provisions of the Offshore Installations Ordinance in conjunction with the United Nations Convention on the Law of the Sea (Art. 60 UNCLOS) prior to the entry into force of the challenged provisions. The Offshore Wind Energy Act modifies access to marine areas in the exclusive economic zone but does not introduce the possibility of operating wind farms there for the first time. Instead, the challenged provisions concern a possibility of engaging in occupational activities that had in principle already existed previously and that is protected by Art. 12(1) GG. 93

b) Insofar as the provisions of the Offshore Wind Energy Act generally prohibit the operation of offshore wind farms and only permit it in the event that a tender has been accepted and a planning approval decision has been issued ([...]), they interfere with the freedom to pursue the occupation of offshore wind farm operator that is protected by Art. 12(1) GG. 94

aa) Art. 12(1) GG protects against impairments that specifically concern occupational activities by directly preventing or restricting the practice of an occupation (cf. BVerfGE 113, 29 <48>; established case-law). Interferences with occupational freedom include, for instance, provisions that generally prohibit the practice of an occupation or that permit it only provided that the authorities grant approval in the individual case (cf. BVerfGE 8, 71 <76>; 145, 20 <70 f. para. 129>). Provisions that impose a ban on the construction and operation of an installation unless express authorisation is obtained directly interfere with occupational freedom if the installation represents the main basis of an occupational activity and is the focus of this activity (cf. BVerfGE 25, 1 <10 f.>). 95

By contrast, occupational freedom does not protect against any legal framework that affects the general parameters of business activities (cf. BVerfGE 148, 40 <50 f. para. 27>). The protection of Art. 12(1) GG is not directed against any impairment of an occupation that only has indirect effects. It is not sufficient if a legal provision or its application may, in certain circumstances, have retroactive effects on the occupation (cf. BVerfGE 113, 29 <48> with further references). This is because otherwise the contours of the fundamental right might become blurred, given that under certain conditions almost every legal provision or its application can have retroactive effects on an occupational activity (cf. BVerfGE 97, 228 <253 f.>; established case-law).

Under certain conditions, however, legal provisions that do not directly concern an occupation can also interfere with occupational freedom. Therefore, Art. 12(1) GG also provides protection against provisions that objectively have inherent regulatory effects on occupations (*objektiv berufsregelnde Tendenz*) (cf. BVerfGE 113, 29 <48>; established case-law).

bb) From the perspective of those who wish to operate an offshore wind farm, the challenged provisions regarding the approval of offshore wind farms do not, however, only affect the general parameters of their business activity but directly restrict their occupation as operators of an offshore wind farm. An offshore wind farm may be constructed and put into operation only if a tender has been accepted (§§ 23 and 34 WindSeeG) and a planning approval decision has been issued (§ 45(1) WindSeeG). Otherwise, its operation is prohibited. However, an operational installation represents the main basis for the occupation of offshore wind farm operator and is the focus of this activity. The provisions regarding the approval of installations thus directly interfere with the occupational freedom of those who wish to operate offshore wind farms. It is not required to also establish that the provisions have inherent regulatory effects on the occupation in question.

c) The interference with Art. 12(1) GG is justified; in particular, it is proportionate. It serves a legitimate purpose (see aa) below) and is suitable (see bb) below) as well as necessary (see cc) below) to achieve this purpose. It does not place an unreasonable (*unzumutbar*) burden on the holders of fundamental rights; in particular, their expectation that it will be possible to continue pursuing their occupational activities is not disproportionately affected (see dd) below).

aa) The Offshore Wind Energy Act serves the aims of climate and environmental protection. According to § 1(1) WindSeeG, the overarching purpose of the Act is to expand the use of offshore wind energy in the interest of those two aims in particular. According to Art. 20a GG, the legislator is entitled and obliged under constitutional law to protect the environment and the climate (cf. BVerfGE 118, 79 <110>; 137, 350 <368 f. para. 47>).

Specifically, the aims of the Act are to make the expansion of offshore wind energy more economically viable by increasing cost efficiency and to increase certainty in the planning of offshore wind farms through improved coordination and control. On

the one hand, the installed capacity of offshore wind farms is to be increased in a continuous and cost-effective manner (§ 1(2) second sentence WindSeeG). On the other hand, the expansion of offshore wind farms and the expansion of the necessary power lines for offshore grid connection are to be coordinated to harmonise the respective plans, approvals, installations and operations (§ 1(2) third sentence WindSeeG). The two legislative aims expressed here are, in themselves, legitimate purposes in the interest of the common good. In addition, they indirectly serve the overarching legal purpose of expanding and using offshore wind energy and thus also reflect the constitutional requirement of environmental and climate protection (Art. 20a GG).

bb) Insofar as the challenged provisions generally prevent the operation of offshore wind farms and permit them only if a tender is accepted and if the authorities grant approval in the individual case, they are suitable to achieve the purpose of the law. Legal provisions are considered suitable if they potentially further the desired outcome. The mere possibility of achieving a purpose is sufficient (BVerfGE 126, 112 <144>; established case-law). 102

The legislator's assessment that the key regulatory elements of the Offshore Wind Energy Act can achieve better control and cost efficiency in the expansion of renewable energies (cf. BTDrucks 18/8860, in particular pp. 1, 150, 266 and 267) is plausible. Central mechanisms introduced by the Act are preparatory explorations conducted by the state (§§ 9 ff. WindSeeG) of the specific sites which are designated in a site development plan (§§ 4 ff. WindSeeG), the invitation to tender of any site for which an exploration has been completed (§§ 16 ff. and 26 ff. WindSeeG), the exclusive right of the bidder whose tender is accepted for a planning approval procedure to be carried out (§ 24(1) no. 1 and §§ 45 ff. WindSeeG) and their right to access the power grid and to use grid capacity (§ 24(1) no. 3 WindSeeG). Planning certainty is achieved primarily through the provisions regarding central pre-development of the sites and their legal link with the specific planning approval procedure and the connection to the grid. Increased economic efficiency is to be achieved mainly through the invitation to tender and the preparatory site explorations conducted by the state. 103

These instruments are capable of at least furthering the aims of the Act. On the one hand, the central tender model based on preparatory site explorations conducted by the state removes the uncertainty involved in site selection and grid connection – which used to be difficult to control – because a structured grid connection is now already guaranteed as part of the legal consequences of the tender process and the award of the tender. The construction of offshore wind farms can thus clearly be better coordinated with their connection to the grid, offering greater planning certainty to project developers. On the other hand, it is evident that the change in process can lead to a cost reduction. It is plausible that the preparatory site exploration by the state reduces costs because it prevents unsuitable sites from being considered in the tender process (cf. BTDrucks 18/8860, p. 266). The fundamental suitability of the call for tenders to further competition and favour cost-effective projects is also beyond question. 104

cc) To the extent that the challenged provisions prohibit the operation of offshore wind farms and only permit them in the event that a tender is accepted and on the basis of a planning approval decision, they are also necessary when measured against Art. 12(1) GG (see, however, para. 157 ff. below). A statutory provision is necessary if the legislator could not have chosen other means that would have been equally effective but that would not have restricted the fundamental right or that would have been less restrictive. When assessing necessity, the legislator has a margin of assessment and prognosis (BVerfGE 126, 112 <144>; established case-law). It is not apparent how, by enacting a different legal framework, the legislator could have achieved its aims in a way that would have been equally effective but with fewer restrictions to fundamental rights. 105

dd) There are no major doubts regarding proportionality in the strict sense either. The approval provisions pursue the aims of environmental and climate protection, which are of particular importance under constitutional law (Art. 20a GG), and they are not disproportionate in relation to the restriction of the occupational freedom of those who wish to operate an offshore wind farm. The legislator has, in particular, adopted a transitional legal framework that satisfies (see (2) below) the specific requirements arising from the protection of legitimate expectations under Art. 12(1) GG (see (1) below). 106

(1) An interference with occupational freedom may be disproportionate in the strict sense if legitimate expectations regarding the possibility of the continued pursuit of an occupation, which are protected by Art. 12(1) GG under certain conditions, are not sufficiently taken into account. 107

(a) Statutory provisions that, in themselves, limit occupational freedom in a permissible manner, may still violate Art. 12(1) GG in conjunction with the principle of the protection of legitimate expectations if they do not provide for a transitional legal framework for those who have previously pursued a permissible occupation that will become impermissible in the future. A transitional legal framework, in particular the delayed entry into force of the new law, may be necessary not least in cases where compliance with new rules regarding the practice of an occupation requires time-consuming and costly changes to business operations and where the occupational activity that has previously been permissible would have to cease temporarily or could only be continued subject to unreasonable conditions in the event that the new law entered into force immediately (cf. BVerfGE 131, 47 <57 f.>; established case-law). 108

There is no need to make a final decision on whether and to what extent a transitional legal framework may still be required under constitutional law if the new law only prohibits activities that have not been carried out yet but that had already been approved by the authorities in a formal administrative process. In any event, in the present case, where approval has been granted, and, more particularly, in the case of mere procedural positions, Art. 12(1) GG does not require any transitional legal framework (see para. 111 ff. below). 109

(b) Art. 12(1) GG does, from the outset, not protect legitimate expectations on the basis of frustrated investments, as asserted by the complainants. The complainants consider such protection necessary because their investments in site planning carried out under the old law are of no value under the new law. However, the protection of legitimate expectations as to investments made under Art. 14(1) GG (cf. BVerfGE 143, 246 <383 ff. para. 372 ff.>, para. 88 above) generally does not correspond to the protection afforded by occupational freedom under Art. 12(1) GG. Art. 14(1) GG offers a certain protection against property investments losing their value owing to changes in the law, in that it generally also protects the existing property in the hands of its owners as a basis on which to plan (cf. BVerfGE 143, 246 <383 para. 372>). If, however, investments are made with a view to future business activities, this does not create a sufficiently secure position akin to tangible property, whose continued existence would be protected by fundamental rights and could thus directly provide certainty for investment. Yet this does not mean that affected investors were deprived of protection altogether. They are protected under the general principle of the protection of legitimate expectations under Art. 2(1) in conjunction with Art. 20(3) GG (see para. 121 ff. below).

(2) (a) The requirement that follows from Art. 12(1) GG, to provide for a transitional legal framework for those for whom it will become impermissible to pursue a previously permissible occupation, has been sufficiently accommodated through § 77(1) first sentence no. 1 WindSeeG. Under that provision, offshore wind farms that have been established subject to the provisions of the Offshore Installations Ordinance and have started operating prior to 1 January 2017 continue to be governed by the previous provisions of the Offshore Installations Ordinance until an application for planning approval is made due to a significant change to the installation.

(b) There is no need to decide here whether, beyond that, a transitional legal framework may be required under constitutional law for cases where the installation had not started operating when the Offshore Wind Energy Act came into force but the project developer had already obtained approval by the authorities in accordance with the Offshore Installations Ordinance because such a transitional legal framework under Art. 12(1) GG is ultimately not applicable to the complainants.

[...] 113-117

2. Even insofar as the challenged provisions of the Offshore Wind Energy Act concern businesses whose activities are restricted to the development of installations that could later gain approval without any intention on the part of the businesses to operate the installations themselves in the future, they do not violate Art. 12(1) GG.

a) [...] 119

b) There is no need to answer the question whether the challenged provisions [...] interfere with the rights of the complainants that have already been working as project developers because such interference, too, would be justified under constitution-

al law. In particular, no further transitional legal framework would be required (as regards the requirements under constitutional law, see para. 108 f. above). The above activities do constitute an occupation that was previously pursued. However, under the specific conditions that the developers found themselves in here, their risk that the projects developed by them could ultimately not be realised was just as high as the risk faced by those businesses that wanted to operate their projects themselves ([...]). The division of the occupational activity into development of projects on the one hand and their operation on the other does not result in any additional constitutional protection for the development work.

III.

The challenged provisions of the Offshore Wind Energy Act bring about a transition to a new legal regime that is not entirely compatible with the general principle of the protection of legitimate expectations under Art. 2(1) in conjunction with Art. 20(3) GG (see (1) below). The provisions have quasi-retroactive effects (see (2) below) that are not justified under constitutional law in every respect (see (3) below). 121

1. a) A general principle of the protection of legitimate expectations is derived from Art. 2(1) in conjunction with Art. 20(3) GG (cf. BVerfGE 128, 90 <105>; established case-law). The protection of legitimate expectations is therefore not only guaranteed, in terms of objective law, by the principle of the rule of law, but is also a subjective fundamental rights guarantee. The fundamental rights and the principle of the rule of law together guarantee the reliability of the legal order as an essential prerequisite for the right to determine one's own way of life; they are thus a fundamental prerequisite of a free constitutional order (BVerfGE 132, 302 <317 para. 41>). The general protection of legitimate expectations complements the specific guarantees protecting legitimate expectations contained within the specific freedoms of the Basic Law. Of particular relevance for business activities are the protection of legitimate expectations specific to property under Art. 14(1) GG, including the protection of legitimate expectations as to investments made comprised therein (cf. BVerfGE 143, 246 <383 para. 372>; para. 88 above), and the requirement contained in Art. 12(1) GG to provide for a transitional legal framework in order to ensure that the new legal regime is reasonable in respect of previously permissible occupations (cf. BVerfGE 131, 47 <57 f.>; para. 108 above). If the conditions of such specific protection of legitimate expectations have not been met, the general protection of legitimate expectations under Art. 2(1) in conjunction with Art. 20(3) GG may be applicable. 122

b) In particular, the constitutional guarantee of the protection of legitimate expectations can provide protection against changes in the law. Yet certainly not every change in the law that entails disadvantages from the point of view of fundamental rights holders raises questions as to the protection of legitimate expectations under constitutional law. 123

Where a change in the law is specifically foreseeable, the expectation that the law will not change is unwarranted from the outset – albeit only from the point in time at 124

which the change became specifically foreseeable – and does not merit any protection under constitutional law (cf. BVerfGE 126, 369 <393 f.>; 127, 31 <50>; cf. regarding other constellations where expectations are unwarranted from the outset BVerfGE 135, 1 <21 and 22 para. 61 f. with further references>).

Even where changes in the law are not specifically foreseeable, they must in principle be anticipated. The protection of legitimate expectations under constitutional law does not go so far as to generally protect individuals addressed by the new law from any situation where their expectation that the legal situation will not change is frustrated. Otherwise, the legislator, which is bound by the common good, would be hamstrung and prevented from exercising its democratic responsibility in key areas. This would amount to an untenable decision, at the expense of the adaptability of the legal order, regarding the conflict between the reliability of the legal order and the need to change it in light of changing living conditions and changing political preferences. A merely general expectation that the currently applicable law will not change in the future does not merit any special protection under constitutional law unless there are additional exceptional aspects that merit special protection (BVerfGE 127, 61 <76>; 132, 302 <319 f. para. 45> with further references; established case-law). Even a special expectation that the current law will continue to apply, based upon which extensive arrangements have been made, does not justify protection of legitimate expectations that is not subject to a balancing of interests (BVerfGE 145, 20 <94 para. 189>). There is no guarantee that all expectations as to investments made will be met (BVerfGE 143, 246 <383 para. 372>; cf. BVerfGE 145, 20 <94 para. 189>).

125

The criterion of retroactivity can give some indication of whether exceptional aspects that merit special protection exist (cf. BVerfGE 127, 61 <76>; 132, 302 <319 f. para. 45>), i.e. whether there is not merely a general expectation that the currently applicable law will not change in the future. If a law has retroactive effects, this is an indication that expectations of stability that merit protection may in fact not have been met (see para. 127 ff. below).

126

c) aa) Art. 2(1) in conjunction with Art. 20(3) GG protects the expectation not to be burdened by laws with impermissible retroactive effects (cf. BVerfGE 148, 217 <254 para. 132>; established case-law). It would significantly jeopardise the freedom of individuals if public authority were allowed, without any restrictions, to subject their conduct or other circumstances concerning them to more onerous legal consequences *ex post* than were applicable at the time of the relevant conduct (BVerfGE 132, 302 <317 para. 41>). The constitutional limits to laws with retroactive effects, which are derived from Art. 2(1) in conjunction with Art. 20(3) GG, not only apply to tax law (cf. regarding tax law BVerfGE 72, 200 <257>; 97, 67 <78>; 105, 17 <36 ff.>; 127, 1 <16>; 132, 302 <317 ff.>; 148, 217 <254 f.>; established case-law), but are also applicable to other areas of law (cf. BVerfGE 71, 230 <251 ff.>; 88, 384 <403 ff.>; 101, 239 <263 ff.>; 109, 133 <180>; 122, 374 <393 ff.>; 128, 90 <105 f.>; 128, 326 <389>).

127

bb) A distinction must be drawn between laws with quasi-retroactive effects and laws with real retroactive effects. 128

(1) A legal provision has 'real' retroactive effects where it makes *ex post* changes to a circumstance that has already been fully concluded. This is the case, in particular, if its onerous legal consequences are to apply to circumstances that have already been fully concluded prior to its promulgation ('retroactive effecting of legal consequences', *Rückbewirkung von Rechtsfolgen*) (BVerfGE 148, 217 <255 para. 135>). Provisions that have real retroactive effects are generally impermissible under constitutional law (cf. BVerfGE 148, 217 <255 para. 135>; established case-law). 129

(2) (a) A legal provision has quasi-retroactive effects where it has future implications affecting existing legal relationships and circumstances that have not yet been fully concluded and thereby leads to a loss of value of the affected legal position. This is the case, for instance, if the onerous legal consequences of a law only come into effect after the promulgation of the law but the statutory prerequisites prompting these consequences apply to situations that have already been set in motion before the law was promulgated ('retroactive link of statutory prerequisites', *tatbestandliche Rückanknüpfung*) (BVerfGE 148, 217 <255 para. 136>). Thus, for a law to be qualified as having quasi-retroactive effects in this sense, it must be shown that the law applies to circumstances that have already been set in motion but have not yet come to full conclusion, and that it has implications affecting the future development of the situation in a way that leads to a loss of value of legal positions secured under the previous legal regime; moreover, it must be established that the loss of value is directly caused by the change in the law (see para. 136 ff. below). 130

(b) (aa) In principle, provisions that have quasi-retroactive effects are permissible under constitutional law. However, limits to such permissibility may arise from the principle of proportionality. These limits have only been exceeded if the quasi-retroactive effects imposed by the legislator are not suitable or not necessary to achieve the purpose of the law, or if the affected individuals' interest in the law remaining unchanged outweighs the legislator's reasons for changing the law (BVerfGE 148, 217 <255 para. 136>; established case-law). 131

(bb) Accordingly, if in the specific case the constitutionality of quasi-retroactive effects that can be justified in all other respects hinges on whether the affected individuals' interest in the law remaining unchanged outweighs the legislator's reasons for changing the law, the individual's expectations that the law will remain unchanged and the public interest pursued by the retroactive effects must be balanced against one another (cf. BVerfGE 132, 302 <320 para. 46>). This balancing must take into account, on the one hand, the extent to which the expectation that the old law will not change merits protection and whether this is outweighed by the interests of the affected individuals in the continuation of the old law, and, on the other, the significance of the public interest in the quasi-retroactive change in the law. The greater the need for protection of the expectation that the law will not change, which is frustrated by 132

the retroactive effects, and the greater the weight of the interest of affected individuals in the continuation of the old law, the more likely this is to outweigh the public interest pursued by the legislator in a quasi-retroactive change in the law. However, in a weighing of the legislative reasons, it remains important that legal provisions with quasi-retroactive effects are in principle permissible (cf. BVerfGE 148, 217 <255 para. 136>) precisely because the legislator needs considerable leeway in order to be able to fulfil its obligations to the common good in accordance with its democratic responsibility (cf. BVerfGE 127, 61 <76>; 131, 47 <57>; 132, 302 <319 f. para. 45>; 143, 246 <383 f. para. 372>). In particular, when transitioning to a new legal regime or changing the law, the legislator is not constitutionally required to shield affected individuals against any burden or to counter any special burden through a transitional legal framework (BVerfGE 131, 47 <57 f.>; 143, 246 <383 f. para. 372>).

(cc) The balancing of interests requires an assessment of the need for protection of the expectation, which may be determined by different factors. Its outcome depends on whether there are any indications for particular stability of the previously applicable law that could give rise to the assumption that there was no cause in the foreseeable future to expect a quasi-retroactive change in the law to the detriment of those affected without any compensation or recompense. An indication that a favourable legal position is relatively stable may be that investment is encouraged; the more clearly this is stated, the more likely it is that the expectation of the affected individual that the law underlying their investment will remain unchanged for a certain time merits protection (cf. BVerfGE 143, 246 <384 f. para. 376>; 145, 20 <94 para. 189>; thus already BVerfGE 30, 392 <404>). The expectation that the law will not change can also carry particular weight if provisions are changed that in turn had already governed the transition to a new legal framework implemented to protect legitimate expectations (cf. BVerfGE 143, 246 <369 para. 336> with further references). By contrast, in areas of law in which changes to the law occur frequently or even at regular intervals, individuals cannot expect that the law will not change to the same degree as in more stable areas of law (cf. BVerfGE 71, 230 <252>; 95, 64 <92>). It is also decisive how the specific legal situation of those affected would have developed under the old law. The less certain this was under the old law, the less does the expectation that the favourable law will not change merit protection and vice versa.

133

2. The challenged provisions of the Offshore Wind Energy Act do not have real retroactive effects (see a) below). However, they have quasi-retroactive effects in that processes initiated under the Offshore Installations Ordinance, which were meant to lead to the operation of offshore wind farms, were completely terminated by the Offshore Wind Energy Act and in that the new law does not attach any significance to the procedural steps already completed by the complainants (see b) below).

134

a) The challenged provisions do not have real retroactive effects. The Offshore Wind Energy Act neither had effects before the date of its promulgation, nor does it make *ex post* changes to a circumstance that has already been fully concluded. It is true that the planning approval procedures started under the old law were terminated

135

in accordance with § 46(3) WindSeeG and that the approval already granted under the Offshore Installations Ordinance to the complainant in proceedings 1 BvR 2190/17 ceased to have effect according to the Offshore Wind Energy Act. However, planning approval procedures that have merely started clearly do not constitute a circumstance that has been fully concluded. This ultimately also applies to the project of the complainant in proceedings 1 BvR 2190/17, although a permit had already been granted under the Offshore Installations Ordinance in this case. Due to its particular legal and factual circumstances, this permit could not bring the relevant circumstance to a conclusion either given that, without a connection to the power grid and without a specific prospect of connection to the grid, the permit alone did not mean that the preparations for the construction and putting into operation of an offshore wind farm had been completed or that the putting into operation of an offshore wind farm was already in sight ([...]).

b) The challenged provisions do, however, have quasi-retroactive effects given that they have future implications (see bb) below) affecting current circumstances and legal relationships that have not yet been fully concluded (see aa) below) and thereby at the same time result in a loss of value (see dd) and ee) below) of the legal position in question (see cc) below); this follows from the fact that onerous legal consequences only occur after the promulgation of the provisions, although they are triggered by circumstances that have already been set in motion. 136

aa) Circumstances that have been set in motion but have not yet been fully concluded are affected in the present case in that the complainants had initiated processes, which were in different stages and were supposed to lead to the planned wind farms becoming operational, but had not completed them fully. The complainants in proceedings 1 BvR 1679/17 initiated such a process under the old law by applying for approvals and by taking formally separate procedural steps in the planning approval procedure, and the complainant in proceedings 1 BvR 2190/17 initiated it by starting the permit process under which a temporary permit was granted to the complainant. 137

bb) The Offshore Wind Energy Act has future implications for these processes, which were initiated in accordance with the legal provisions in force at the time, in that it terminates current planning approval procedures and renders ineffective the permit granted. 138

cc) However, the mere fact that a new law has some sort of implication for a given situation that has already begun under the old law is not sufficient to establish quasi-retroactive effects. By itself, the mere expectation that the old law will not change generally does not merit protection. Therefore, the notion of quasi-retroactivity is only applicable where the position of the person [claiming legitimate expectations] has already been shaped by such recognisable legal contours that it is set apart from the general situation of being a subject of the law. That is what is meant when quasi-retroactive effect is characterised by reference to the fact that a change in the law leads to a loss of value of the 'legal position' in question (cf. BVerfGE 148, 217 <255 139

para. 136>; see also BVerfGE 128, 90 <106 f.>).

In the present case, the affected legal position in this sense is the sum of procedural steps taken under the old law to meet the approval requirements then in force, in particular the planning work and explorations carried out by the complainants. Under the old law, the complainants had already taken a number of steps in the approval process as structured by the Federal Maritime and Hydrographic Agency to authorise and implement their projects. The complainants had therefore not simply expected that a law that was favourable to them will not change but had instead gone through the approval process provided for by law and had carried out separate procedural steps, such as base line surveys of the marine environment and preparatory explorations of the ground of the building site as well as, in some cases, attending hearings as part of the planning approval procedure. The complainant in proceedings 1 BvR 2190/17 had even gone through the approval procedure in its entirety.

140

dd) These procedural positions have lost their value. The value of the procedural steps taken was to satisfy the necessary requirements for the putting into operation of the planned wind farms. Their value has been lost in that they no longer contribute to satisfying the requirements for putting the wind farms into operation. This applies to all procedural steps taken by all complainants. The steps taken under the old law have become futile because the processes have been terminated and the position reached in those processes cannot be transferred or taken into account under the new law. Under the new law, the complainants would again have to satisfy all approval requirements completely, if they won the tender at all. They would have to go through a completely new planning approval procedure. A continuation on the basis of the position reached in the procedural process under the old law would only have been possible if their projects constituted existing projects within the meaning of § 26(2) WindSeeG. In that case they could, after the award of the tender, have used their permit or continued the processes started (*a contrario* reading of § 46 WindSeeG). Yet the complainants' projects do not constitute existing projects within the meaning of § 26 WindSeeG ([...]).

141

ee) The principle of the protection of legitimate expectations is only affected insofar as the quasi-retroactive effects of the Act cause the loss of value of the legal positions in question. Some of the complainants' procedural positions did not lose their value because of the entry into force of the Offshore Wind Energy Act, but would have lost their use irrespective of that fact. In that respect, the challenged provisions do not have quasi-retroactive effects due to lack of causality ([...]). Mere uncertainties that the complainants would have encountered even if the old law had not changed do not, however, rule out that the Offshore Wind Energy Act caused the loss of value ([...]).

142

[...]

143-147

3. The challenged provisions do not entirely satisfy the constitutional requirements as to the justification of quasi retroactivity (see para. 131 ff. above). The com-

148

plainants' expectation that the law will not change was not unwarranted from the outset (see a) below). The quasi-retroactive effects are partly not necessary and therefore disproportionate in that regard (see b) below).

a) An expectation that the law will not change is from the outset unwarranted from the time at which there is a serious likelihood that new provisions will be enacted (cf. BVerfGE 126, 369 <393 f.>; 127, 31 <50>; 145, 20 <98 para. 199> with further references). However, this consideration does not preclude the protection of legitimate expectations in the present case. Even if the old law had continued to apply, the complainants could not have been completely certain that the planned installations could have ultimately been put into operation, given the special features of an approval granted under the Offshore Installations Ordinance ([...]). Even before the Offshore Wind Energy Act came into force, it was foreseeable that a fundamental change in the law could occur at some point in the future. However, whether and what change in the law would occur was not foreseeable to such a degree that any right to expect the law not to change would have ceased to apply. A draft ministerial bill regarding the Offshore Wind Energy Act only dates back to 14 April 2016. The complainants did the relevant planning work and carried out the relevant explorations much earlier.

149

b) In the present case, the failure to meet the expectation that the law will not change cannot be fully justified under constitutional law because the quasi-retroactive effects are partly disproportionate (as regards the requirements, see para. 131 ff. above). The challenged provisions ultimately fail to satisfy the element of necessity insofar as they do not provide for financial compensation in the event that the complainants have carried out planning work and explorations under the old law, which, on the basis of § 41 WindSeeG applied by analogy, can still be used as part of the preparatory site explorations carried out by the state in accordance with §§ 9 ff. WindSeeG. For the rest, the failure to meet the expectation that the law will not change is proportionate.

150

aa) Addressees of legal provisions only have to accept failure to meet their expectation that the law will not change if this is justified by special public interests that justify precisely the retroactive link in accordance with the principle of proportionality. Accordingly, that the legislator generally pursues legitimate purposes with the change in the law and that the changes are suitable, necessary and appropriate for achieving these purposes is not sufficient to justify retroactive effects. Rather, the provisions must be proportionate precisely with regard to the fact that they bring about quasi retroactivity.

151

bb) In the present case, quasi retroactivity serves a legitimate purpose and is suitable for achieving the purpose pursued. The transition from the former, very simple approval process under the Offshore Installations Ordinance to the more sophisticated approval regime under the Offshore Wind Energy Act is intended to strengthen competition and planning certainty through improved coordination and control in order to promote climate and environmental protection, as required under constitutional

152

law, by expanding offshore wind farms (see para. 100 f. above). The central provisions regarding approval in the Offshore Wind Energy Act are suitable for achieving this purpose (see para. 102 ff. above). The same applies to the retroactive effects of the challenged provisions. It is clear that a continuation of the projects started under the old law while recognising the procedural steps carried out under the Offshore Installations Ordinance would have delayed and thereby reduced the impact of the fundamental change in the approval process. The termination of the current processes, the suspension of old decisions on approval that have not led to the realisation of a project and the expiry of positions reached in the procedural process under the old law are aimed at transitioning to the new legal framework effectively and quickly.

cc) However, the challenged provisions do not fully satisfy the element of necessity given that, besides less suitable means (see (1) and (2) below), the legislator has less intrusive but equally suitable means (see (3) below) to achieve its aims. 153

(1) An option of protecting the complainants that is not completely implausible but ultimately less suitable would be to classify their projects as existing projects within the meaning of § 26 WindSeeG. [...] Given that in that scenario, grid connection would be required at an early stage in zones 3 and 4, this could lead to higher costs and could adversely affect the centrally controlled expansion. This is a less effective means than the solution that has become law. 154

(2) While being less onerous for the complainants, the granting of a right to take over the award of the tender under the central model would not be equally suitable for achieving the aims of the Offshore Wind Energy Act. [...] 155

[...] [Such a right to take over the award of the tender] applies only to existing projects within the meaning of § 26 WindSeeG and thus not to the complainants' projects located in zones 3 and 4. As a less intrusive means, the granting of such a right would have to be extended beyond the existing scope to include projects in those zones. The legislator did not consider such an extension of the right to take over the award of the tender to be equally suitable. That is a plausible assessment. The mere possibility that the award of the tender may be taken over creates a risk that the tendering process will fail or that higher costs will be incurred because other bidders would have to contend with the complainants taking over the tender. The aim of the law would not have been achieved. In view of the risk of higher costs, the non-inclusion of the complainants' projects is within the legislator's margin of assessment and prognosis with regard to the necessity of the means used. The fact that the legislator has accepted the risks entailed by the right to take over the award of the tender in zones 1 and 2 through § 26(2) no. 2 a and § 39 WindSeeG does not compel it to accept these risks for invitations to tender in other zones, too. 156

(3) In cases where tenders for the relevant sites are accepted by 31 December 2030 in accordance with § 23 WindSeeG, a means that would in part be less intrusive yet equally suitable would be to grant financial compensation to the complainants for any necessary planning and site exploration expenses that correspond to those listed in 157

§ 10(1) WindSeeG if the complainants hand over their data and documents in accordance with § 41 WindSeeG, which can be applied by analogy.

(a) This would lessen the extent to which the complainants' expectations are frustrated. They carried out the necessary planning work and explorations in the expectation that the old law would not change and on the assumption that they would be able to benefit from them once the planned installations had been constructed and put into operation. As the law currently stands, the expectation that this interest could be realised was frustrated entirely. If, on the other hand, the complainants were compensated for the costs of the planning work and explorations carried out under certain conditions, they would at least receive financial compensation for losses incurred because their expectations were not met (*negatives Interesse*) and would not have incurred any futile expenses.

158

(b) Such compensation can be designed in such a way that the effectiveness of the transition to a new legal regime is not adversely affected. In particular, no additional costs are incurred if the obligation to pay compensation only applies to necessary costs for any explorations and surveys carried out under the old law, which are now also required as part of the preparatory site exploration conducted by the state in accordance with § 10(1) first sentence WindSeeG and which can still be used at the time the preparatory site exploration is conducted by the state. The legislator itself assumes that data that has been gathered during the development of a project under the old law can be used by the body responsible for the preparatory exploration and thus replace or at least considerably simplify the preparatory site explorations conducted by the state (cf. BTDrucks 18/8860, p. 306). This forms the background for the obligation to provide data set out in § 41 WindSeeG, which is not directly applicable here. However, with regard to the exploration of the marine environment as set out in § 10(1) first sentence no. 1 WindSeeG, this can probably only be applied to a limited extent. The key part of that exploration is what is known as a base line survey. Under the previous law, a base line survey was no longer considered to be fully usable after five years; however, the retroactive effects of the Offshore Wind Energy Act are in any case limited in that regard ([...]).

159

dd) For the rest, the provisions are proportionate in the strict sense. While an individual's expectation that the law will not change does merit protection, the interests of the general public pursued by the quasi-retroactive provisions ultimately prevail.

160

(1) The complainants' expectation that the position reached in the procedural process under the old law would continue to apply and that they could reap the associated benefits resulting from the expenses incurred for planning and explorations certainly deserve a certain level of protection.

161

(a) However, given the complexity and dynamic nature of this area of law, a change in the law regarding the construction of offshore wind farms was to be expected. It was obvious that the approval regime under the Offshore Installations Ordinance was temporary. Decisions on approval were granted in a process for which the law pro-

162

vided only limited instructions; the details of the approval process and the substantive requirements for the installations were fleshed out by the Federal Maritime and Hydrographic Agency by way of administrative directives. The allocation of de facto exclusive use of sites in the exclusive economic zone was not governed by substantive criteria but by the priority principle alone ([...]). In particular, until the entry into force of the Offshore Wind Energy Act, the state had not carried out any site planning which would usually occur in the preparatory stages of such projects. Accordingly, the plans pursued by individual project developers in the exclusive economic zone were not coordinated with the expansion of the grid. Considering the complexity of the processes for building a wind farm and for grid expansion, which need to be coordinated, it was foreseeable that a move towards more coordinated, market-oriented approval processes might occur. Therefore, the complainants' specific prospects were uncertain from the outset.

(b) Yet the complainants claim that under the old law, planning offshore wind farms was incentivised by affording certain priority positions. Since decisions on approval were granted according to the priority principle, the complainants were entitled to assume that their project could be realised provided the planning was sufficiently quick. With the entry into force of § 3 of the 2012 Offshore Installations Ordinance, the project developers were even granted a statutory priority position, although this was at the discretion of the Federal Agency. The principle of priority now applied from the time the application was submitted. This gave project developers all the more reason to assume that they would succeed. However, given that decisions on approval were subject to a general time limit, it was clear from the outset that the permit would cease to apply in the event of a delay and that a new competitive process to secure the site might be launched. In this respect, the investment incentive was temporary. At the same time, it could be ascertained that the legislator had an interest in a particularly quick construction of wind farms and wanted to create an incentive for this by applying the principle of priority. The incentive for particularly quick construction was thus ambivalent with regard to the need for protection of the expectation in question because, while the legislator signalled a particularly urgent interest to incentivise project developers, by the same token the legislative interest to incentivise them was clearly limited in time.

163

(c) Finally, given that the decisions on approval were limited in time, the complainants could not have been certain that their preparatory work would one day pay off and that their projects would be put into operation, even if the old law had continued to apply ([...]). However, they did clearly demonstrate that prolonged contacts with the Federal Agency throughout the process may give the impression that all parties involved were working towards a realisation of the projects. A subsidiary provision in the complainant's approval notice in proceedings 1 BvR 2190/17 indicated that the complainant's planning schedule was being taken into account. Regarding the possibility of extending the deadlines for realisation of the project, the notice states: "Where essential procedural steps have already been taken, this would have

164

to be considered in the decision in the context of proportionality.”

(2) Besides the need for protection of the expectation, the complainants’ interest that the position reached in the procedural process under the old law would continue to apply must be taken into account. This interest can be weighed on the basis of the volume of investment made by the complainants. They have invested several million euros per project. However, this is in contrast to an estimated total investment of more than one billion euros per wind farm ([...]). The complainants’ previous investment costs compared to the total costs and the expected profit from the subsequent wind farm operation are relatively low, not least because the operators incurred no expenses for the acquisition of sites due to the special features of the exclusive economic zone. The planning site was available to them free of charge. 165

(3) The complainants’ interests must be balanced against the interests of the general public pursued by the quasi-retroactive change in the law (see para. 152 above). If the processes that had been started under the previous law had been continued, this could have adversely affected the effectiveness of the transition to a new legal regime regarding approval of installations. 166

(4) The outcome of the balancing of these interests carried out by the legislator is not objectionable under constitutional law – especially since the provisions at issue bring about a transition to a new legal regime – which means that the legislator must be assumed to have considerable leeway when designing the transition (see para. 132 above). The change in the law serves legitimate interests of the general public that, in principle, can only be reached if the complainants give up the position they have reached in the procedural process. In § 77(1) first sentence no. 2 Wind-SeeG, the legislator also created a transitional legal framework for as yet incomplete wind farms which applies provided that they are intended to become operational by 31 December 2020 and provided that grid connection has been confirmed unconditionally or that they have been assigned grid capacity. Thereby, account is taken of the fact that, where grid connection is anticipated, the prospect that the project will be realised has become more specific and the project developer’s expectation that the law will not change thus has a greater need for protection, even though the complainants do not benefit from this. In addition, the transition to the new law for advanced projects is made easier by §§ 26 ff. WindSeeG, provided they were planned in clusters of zones 1 or 2. Even if these provisions regarding transitional invitations to tender are not aimed at protecting expectations but were meant to pave the way for the most effective transition to the new legal regime from the perspective of the state, they met stability expectations of the operators of existing projects in zones 1 and 2 whose grid connection was more foreseeable than the connection of the sites planned by the complainants. In comparison, the complainants’ expectation that the law will not change merited less protection. Accordingly, apart from the constitutionally required compensation for planning work and explorations that continue to be usable (see para. 157 ff. above), the legislator’s decision not to accord more weight to the interest that the law will remain unchanged on the part of the complainants and 167

other businesses in a comparable situation is therefore within its broader leeway in this case.

4. Insofar as the complainant in proceedings 1 BvR 2190/17 asserts that the challenged provisions breached principles of legitimate expectations under EU law, this is not relevant for the review undertaken by the Federal Constitutional Court in the present proceedings, the question of the contents of such EU principles notwithstanding. 168

The provisions are not determined by EU law (para. 72 above), and should also not be considered in a wider sense to be provisions implementing EU law (Art. 51(1) first sentence of the Charter of Fundamental Rights of the European Union) because EU law does not provide for a sufficiently substantial framework here (cf. BVerfGE 152, 152 <169 f., para. 44> – Right to be forgotten I). The fundamental rights of the European Union are therefore not applicable in addition to the fundamental rights of the Basic Law. Even if this were to be assessed differently, there is no indication that the Basic Law's standards regarding legitimate expectations do not simultaneously ensure the level of protection required by EU fundamental rights (cf. on the assumption that EU fundamental rights are simultaneously guaranteed BVerfGE 152, 152 <171 ff., para. 49 ff.>.). Rather, it must generally be assumed in this case that in areas that have not been fully harmonised under EU law, the level of fundamental rights protection required under EU law seeks to accommodate fundamental rights diversity (see BVerfGE 152, 152 <172 ff., 179 f., para. 50 ff., 65>). In exceptional cases, ordinary EU legislation may contain stricter fundamental rights requirements even where it affords Member States latitude in implementation, and thereby narrow the scope for fundamental rights diversity (cf. BVerfGE 152, 152 <173 f., paras. 53 and 60>). However, this is not the case here. The 29th recital of the Renewable Energy Directive (EU) 2018/2001 explicitly addresses the need for predictability of policies supporting renewable energy, and Art. 6 of the Renewable Energy Directive (EU) 2018/2001 lays down more detailed provisions on the stability of financial support for renewable energy projects. However, this does not result in more stringent fundamental rights requirements regarding the protection of legitimate expectations to be guaranteed under EU law for the matters to be assessed in this case. The provisions at issue are very openly worded. More importantly, however, they concern adjustments to the level of financial support and are therefore not relevant here for this reason alone. 169

IV.

The challenged provisions do not violate Art. 3(1) GG. The differentiation between projects on the basis of their location underlying the definition of 'existing projects' in § 26(2) no. 2 a WindSeeG does not lead to unconstitutional unequal treatment of the complainants compared to businesses whose projects are considered to be existing projects under §§ 26 ff. and § 39 WindSeeG and thus have a chance of being continued (see 1. below). Furthermore, the fact that one of the complainants in proceedings 1 BvR 2190/17 is treated in the same way as other developers whose projects were 170

also planned in zone 3 but who had not yet received a permit does not constitute equal treatment that would violate Art. 3(1) GG (see 2. below).

1. The differentiation between projects on the basis of their location underlying § 26(2) no. 2 a WindSeeG is justified. The legislative aim was to enable a steady increase in the volume of climate-friendly wind energy produced on the sites of the exclusive economic zone that is economical and provides planning certainty. By taking a cluster-wide approach as provided for in § 26(2) no. 2 a WindSeeG, the connection to the grid can be achieved in a more cost-effective way than if sites in the entire exclusive economic zone had been included in the transitional invitations to tender and the right to take over the award of the tender, which applies until 2030 (§ 39 WindSeeG) (see para. 154 ff. above). There is thus no doubt that the legislator was allowed to distinguish between zones and clusters. The selection of the clusters to which the transitional regime applies is not objectionable under constitutional law either. The legislator assessed the projects by type on the basis of their proximity to the coast and has thus established a link to previous grid development plans (cf. BT-Drucks 18/8860, p. 295). 171

2. It is also compatible with Art. 3(1) GG that there was no derogation from the differentiation according to clusters as defined in § 26(2) no. 2 a WindSeeG for projects that have already been approved, such as that of the complainant in proceedings 1 BvR 2190/17. The fact that § 26(2) WindSeeG focuses cumulatively on the position reached in the procedural process and on location serves an effective transition to the new legal regime. The complainant in proceedings 1 BvR 2190/17 claims that its project was closer to zone 2, which is included in the transitional arrangements, than the other projects in zone 3. However, under constitutional law the legislator is allowed, when forming legitimate clusters, to draw a line between certain clusters even if this involves hardship for those whose projects are particularly close to the line (cf. accordingly regarding cut-off dates BVerfGE 126, 369 <399> with further references). This hardship is also mitigated by the compensation regime that is necessary in view of the protection of legitimate expectations (see para. 157 ff. above). 172

D.

I.

Ultimately, the Offshore Wind Energy Act violates Art. 2(1) in conjunction with Art. 20(3) GG insofar as it does not provide for compensation for the planning and site exploration expenses incurred by project developers whose projects were terminated when the Offshore Wind Energy Act entered into force, even though the documents and results of explorations could still be utilised for the preparatory site explorations under §§ 9 ff. WindSeeG. Under constitutional law, compensation must be granted for the necessary costs of such explorations and documents that correspond to those listed in § 10(1) WindSeeG. 173

Given the assessment made by the legislator in § 39 WindSeeG it can be assumed, 174

in terms of time, that the preparatory work is usable if a tender is awarded for the site concerned by 31 December 2030. Yet as regards the costs for the base line survey of the marine environment (cf. now § 10(1) first sentence no. 1 and third sentence no. 1 WindSeeG), compensation is only required for a small proportion of the costs because, for the most part, the Offshore Wind Energy Act does not have quasi-retroactive effects in that respect ([...]); this is in line with the fact that these explorations will probably only be of limited use because of the time that has since elapsed.

It is for the legislator to design the necessary statutory basis for compensation claims in respect of expenses incurred for the planning and exploration work. The obvious solution would be for the legislator to apply § 41 WindSeeG by analogy in respect of the compensation claim, combining it with an obligation to provide to the Federal Maritime and Hydrographic Agency all documents submitted by the project developer as part of the planning approval procedure or permit procedure in accordance with the Offshore Installations Ordinance and all documents and results of any explorations in the possession of the project developer that correspond to those listed in § 10(1) WindSeeG, including the raw data and free from any third-party rights that might limit or prevent their use by the Federal Maritime and Hydrographic Agency and other project developers. Yet such a solution is not required under constitutional law. The legislator must decide how to design the necessary compensation regime in detail.

175

II.

The Offshore Wind Energy Act is declared incompatible with Art. 2(1) in conjunction with Art. 20(3) GG to the extent set out above. It is ordered that the Act continue to apply until new provisions have been enacted and the violation of constitutional law has been remedied. The legislator must enact new provisions by 30 June 2021. The violation of the Constitution that has been identified does not result in a declaration of voidness of the Offshore Wind Energy Act but merely in a declaration of incompatibility with the Basic Law combined with an order of continued applicability until new provisions have been enacted. The violation of constitutional law that has been identified does not affect the essence of the main objective pursued by the Offshore Wind Energy Act, namely to expand the use of offshore wind energy through more effective provisions regarding approval. The approval provisions themselves are compatible with the Basic Law in principle, and in particular with occupational freedom protected by Art. 12(1) GG. Measured against the legal framework in its entirety, the shortcoming that is objectionable under constitutional law only concerns a marginal area. Overturning the legal framework in its entirety by declaring the Offshore Wind Energy Act void would therefore not be justified (cf. BVerfGE 143, 246 <394 para. 402>).

176

III.

[...]

177

Harbarth

Masing

Paulus

Baer

Britz

Ott

Christ

Radtke

**Bundesverfassungsgericht, Beschluss des Ersten Senats vom 30. Juni 2020 -
1 BvR 1679/17, 1 BvR 2190/17**

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