FINAL REPORT ON LIABILITY OF ELECTRICITY TRANSMISSION SYSTEM OPERATORS FOR SUPPLY FAILURE

In the framework of the EC TENDER TREN/C2/395/2009 on “the liability of electricity transmission system operators for supply failure”

Prepared by the law firm Philippe & Partners

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1. **INTRODUCTION**

1.1. **SCOPE OF SCRUTINY**

1. On 25 June 2009 the European Commission (the “Commission”) selected the law firm Philippe & Partners for performing a study on “the liability of electricity transmission system operators for failing to supply” in Europe. The study aims at:

- Understanding liability of transmission system operators (“TSOs”) for all failures of supply (any type of supply failure, such as failure resulting from operation deficiencies, capacity curtailment, etc.);
- Analysing the way TSOs are insured against risks;
- Highlighting differences, common practices, good practices, etc. in the scrutinised Member States (“MS”);
- Determining to what extent such differences or practices affect the internal electricity market and/or hamper competition; and
- Assessing whether a Europe wide approach is recommendable.

The study covers eight MS, namely Poland, the Netherlands, Denmark, Italy, France, Germany, the United Kingdom and Czech Republic.

1.2. **METHODOLOGY**

2. For the purpose of performing the study, we have chosen to address a legal questionnaire to one national correspondent for each scrutinised MS. These national correspondents were either representatives of TSOs or lawyers specialised in TSOs related legal matters. You will find a list of our national correspondents in Annex 1 of this report. We are grateful to them for having replied to the questionnaire in detailed, and for having provided clarifications and additional information as needed or as requested by the Commission.

In a nutshell, the legal questionnaire contained detailed questions on elements allowing the understanding of liability of TSOs in all possible aspects (legal basis for liability, content/elements of liability, questions on proceedings and on insurances, etc.). You will find the detailed legal questionnaire in Annex 2 of this report.

Following the reception of the answers to the legal questionnaire, we prepared the present report, by analysing and comparing the received responses. As each national correspondent had sometimes its own understanding of how to respond to the questions, it was not always possible to align all answers at the same level of information. This explains why, for example, in some MS, some information is provided, whereas it is not the case in others. In a few cases, some national correspondents withheld information for confidential reasons.

Moreover, we organised, with the Commission, a workshop on the preliminary findings of this study on 10 March 2010 (Brussels). The results of this workshop are also used as a

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1 The following persons participated to the workshop: Mr. CUYSTERS, representative of FEBELIEC (the “Federation of Belgian Industrial Energy Consumers” and IFIEC Europe (“International Federation of Industrial Energy Consumers”); Mr. T. VANDEN BORRRE, representative of the Commission; Mr. H. STAPPERT, German
material for this report. In the framework of this workshop, Prof. Dr. M. Faure LL.M. provided Philippe & Partners with insightful comments on the materials used for the workshop (dated 6 April 2010). His comments are also used as an input for this report. The references, in this report, to information obtained during the workshop do not reflect positions of our national correspondents but only the positions of those having participated to the workshop.

1.3. INTRODUCTION TO TRANSMISSION SYSTEM OPERATORS AND MARKET ACTORS

3. TSOs are “natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity”.

2 TSOs usually transport electricity on the extra high-voltage and high-voltage interconnected system.

4. TSOs do not act in a vacuum. They interact with various grid users and other market actors in the performance of their mission. National laws and contracts govern these relations. They put rights and duties on the TSOs, creating cases for liability. We have identified several relevant actors interacting with TSOs:

- Other TSOs (neighbours or foreign TSOs, e.g.);
- Producers;
  Producers are natural or legal persons “generating electricity”. Producers need access to the grid to reach consumption of electricity, access granted, by TSOs, via a specific contract.
- Distribution System Operators (“DSOs”);
  DSOs are persons responsible for the operation, maintenance and development of the public distribution network. The system of the DSOs is usually of lower voltage that of TSOs. DSOs are interconnected to TSOs on ground of specific contracts.
- Industrial consumers;
  Industrial consumers are consumers having important needs in electricity so as to be directly connected to the transmission system. As such, they have direct contractual relationships with TSOs.
- Power exchanges (“PXs”).
  PXs are natural or legal persons operating a negotiation platform/regulated market for wholesale trades of electricity (“spot trading”) or of financial instruments on electricity (“electricity derivatives”, “financial trading”). Spot trading implies the physical delivery of electricity at some point on the transmission system. Consequently, PXs must take into account transmission system constraints and must

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lawyer specialised in Energy law and TSOs issues; Mr. D. PHILIPPE, managing partner of Philippe & Partners; Ms. C. MUSIALSKI, senior associate at Philippe & Partners; Ms. Z. IESEANU, junior associate at Philippe & Partners.


3 Electricity Directive, article 2, §3.
act in collaboration with TSOs for the physical delivery of electricity. TSOs and PXs may set up this collaboration in an agreement, which creates additional cases for TSOs’ contractual liability.

Agreements with balance responsible parties ("BRPs") and with holders of physical transmission rights ("PTRs") have consequences on the volumes of electricity exchanged between MS and were, as such, subject to investigations as well. BRPs are persons responsible for ensuring balance between a defined intake and outtake of electricity in a given system. BRPs do not necessarily have direct physical links with TSOs but, due to their mission, have direct contractual links with TSOs.

Finally, other market actors were quoted as relevant by some of our national correspondents for the purpose of the study, namely:

- Traders in Poland (not connected to the grid); and
- Adjusting performers ("acteur d’ajustement") and programming responsible parties ("responsable de programmation") in France.

5. TSOs are interconnected between each other by way of interconnectors. Some TSOs are synchronously interconnected, meaning they have to reach synchronism at all time. Synchronously interconnected TSOs must achieve the same system frequency. They must bring mutual support between the interconnected systems. A high level of coordination is necessary between them and the respective coordination centres have to perform coordinated actions. We find two areas in Europe where TSOs are synchronously interconnected, namely the Nordic area (ex-Nordel area) and the continental European area (ex-UCTE area). Synchronism implies additional obligations on the concerned TSOs, which creates additional cases for TSOs’ liability. Two important agreements govern these obligations, namely the:

- The “Multilateral Agreement” (“MLA”) for the continental European part;
  The MLA contains, in appendix the so-called “Operational Handbook” (the “Operational Handbook”), i.e. a book of rules developed by ex-UCTE TSO members for coordinating operation between these TSOs. The Operation Handbook is thus made mandatory on the continental European TSOs (ex-UCTE members) by way of the MLA.
- “System Operation Agreement” (“SOA”) for the Nordic part of Europe.

### 1.4. INTERNAL ELECTRICITY MARKET AND COMPETITION

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4 UCTE means the Union for the Coordination of Transmission of Electricity (“UCTE”). UCTE was an international association of TSOs on continental Europe dealing with operation aspects. UCTE (as well as other TSOs associations such as Nordel, ETSO, etc.) disappeared for the creation of one single TSO association in Europe, ENTSO-E. The members of UCTE were the TSOs of the following countries: Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Czech Republic, Croatia, Denmark (West), France, FYROM, Germany, Greece, Hungary, Italy, Luxemburg, Montenegro, the Netherland, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain and Switzerland. They are now part of the so-called “regional group continental Europe” of ENTSO-E.
6. Beside the analysis of various liability regimes, the study aims at assessing the consequences of these on the internal electricity market. Several questions arise:
   - Are there differences between the various examined liability regimes and, if yes, do these differences are a problem *per se*?
   - Do the identified differences reflect competition distortions?
   - Do the identified differences lead to restrictions in the development of the internal market?

7. We would like to highlight the fact that the study focuses on theoretical aspects of liability (what are the liability rules, how do they work, etc.). This study does not provide empirical evidences and/or quantitative analysis following the implementation of various liability regimes. The conclusions in terms of internal electricity market/harmonisation are thus exclusively based on theoretical assumptions and on discussions in the framework of the workshop. They are not meant to be validated by any empirical/quantitative evidences.

1.5. **STRUCTURE OF THE REPORT**

8. Under general common law, there are two types of liabilities, namely contractual liability (between the parties to a contract) and liability in tort (between persons, among which there is no agreement). When there is no agreement, general (tort) law is applicable. When there is an agreement, the provisions of the contract prevail over general law for the matters covered by the contract. For matters not covered by the contract, general (contractual) law is applicable.

Two types of laws are applicable to TSOs specifically, namely general law and sector specific laws (i.e. laws designed specifically for the need of the electricity/energy industry). Sector specific laws prevail over general law. Items not covered by sector specific laws are governed by general law.

Section 2 provides an overview of laws and regulations (general and/or sector-specific) applicable to TSOs’ liability. Section 3 provides an analysis of TSOs’ liability under relevant agreements.

Section 4 addresses matters related to insurances (obligations to insure; type of insurance; insurance amounts; etc.).

Section 5 addresses the issue of tariffs in relation with security of supply.

In Section 6 (conclusions), we summarise our findings and assess the consequences of differences in liability regimes in terms of impediments to competition and to the development of market integration.
2. ANALYSIS OF LAWS AND REGULATIONS

9. The present section analyses TSOs’ liability on ground of laws and regulations, both of general scope (general law) and under sector specific laws. Discussions at the workshop reveal that, in principle, sector specific laws are taken after consultation of all relevant stakeholders (association representing interests of grid users, e.g.). TSOs or government/legislative bodies make a proposal of text, which is then discussed with national regulation authorities (“NRAs”), after consultation of stakeholders. Sector specific rules on liability thus reflect negotiations/bargaining between relevant stakeholders.

2.1. LIABILITY EXTENSIONS

10. Our investigations reveal several cases of strict liability (i.e. liability without any fault or negligence). Identified strict liabilities are of two types:
   - General cases of strict liability (Polish and Czech civil codes); and
   - Sector specific cases of strict liability.

2.1.1. General cases of strict liability

2.1.1.1. Strict liability in tort in Poland

11. Under article 435, §1 and article 437 of the Polish civil code, the Polish TSO is under a strict liability “for any occurring damage” (except in case of exclusive fault of another party or force majeure, or of the fault of the injured party). This liability is, in principle, applicable in case of tort liability only. For contractual liability, the TSO is liable, on the basis of article 471 and 472 of Polish civil code, for fault, i.e. for failure to observe the due diligence. On the basis of article 443 of the Polish civil code, creditors have the right to choose the liability type (contractual or tort) that will be the basis for claims against debtors. Under this theory, the strict liability could be applied against the Polish TSO either following tort or following the breach of a contractual obligation. In case the debtor chooses tort as a basis, no fault is necessary and recoverable damages are material and immaterial damages (vs. material damages under contractual liability). Strict liability under article 437 under the Polish civil code cannot be limited or excluded by way of agreement. It is thus much wider than contractual liability.

12. Our national correspondent informs us that there have been very few litigation cases regarding liability of the Polish TSO for failure to supply. Polish courts and tribunals are not uniformed as for what type of liability should be applied in certain cases. It is worth noticing that, for cases of failure to supply customers by DSOs, courts and tribunals sometimes consider that the Polish energy law obliges DSOs to maintain the operability of equipments, installations and grids with the aim to provide supply in a continuous and reliable manner. This means that, for the damages resulting from the non-performance of these obligations, DSOs are liable without fault. After further investigations, it appears that the Polish TSO is owned by the Polish state but that the State Treasury is not liable for the TSO’s economic activities or any potential
 damage that the TSO may cause. The strict liability under the Polish civil code is thus not
due to any state guarantee whatsoever.

2.1.1.2. Strict liability for “operating activities” or for “operators “

13. Under article 420, §a of the Czech civil code, “damage is deemed to be caused by an
operational activity when it is caused by”:

- “An activity having the nature of an operating activity or an item used in the conduct
of an activity;
- The physical, chemical, or biological effects of an operating activity on the
environment;
- The unauthorised performance or procurement of work that causes damage to
another person’s real property or significantly hinders or prevents the use of real
property”.

Article 420, §a of the Czech civil code is applicable to any operator of some business
operational activity, thus also to the Czech TSO. This provision may apply irrespective of
whether there is a contractual relationship between the TSO and the damaged party.
In such a case, the company carrying out operation activities is liable without fault. It may
be exonerated from liability if it demonstrates force majeure or that the damaged is caused
by the damaged party itself.

14. Our German correspondent mentions (German public liability act) as strict liability
the liability of operators for damages resulting from power effects […] that arise from a
power line system or a system for delivery of power if a person is killed, the body or the
health are injured or an object is damaged. “Operators” are, among others, operators of the
power systems. They are liable regardless of negligence or fault “but claims are excluded in
case of pure failure”.

2.1.1.3. Other general cases of strict liability (for information)

15. Some national correspondents report other cases of strict liability under general
laws. These cases are not specifically related to the activities carried out by TSOs but are
applicable to any company. For the sake of completeness, we provide an overview of these
cases in the present section. We do not however think they have a direct impact on supply
failure.

Under article 2049 and 2050 of the Italian civil code, the Italian TSO is, such as any other
company, under strict liability for:

- An employer for the tort of his employees/agents/servants, committed within the
scope of employment;
  In this case, it is necessary that the employees pursued a consistent aim with the
  company activities.
- Performance of dangerous activities causing harm to others (while it is always
  possible for the company demonstrating to have taken a correct standard of due
care for avoiding every liability).
Our German correspondent moreover mentions strict liability cases for defective products. Liability for defective products is analysed under the section 2.4.2 below.

In France, there are also cases of strict liability under general law, such as liability for inanimate objects under one’s custody (“responsabilité du fait des choses”, article 1384, §1st of the French civil code) or masters’ liability for the servants under their custody (“responsabilité du commettant du fait de ses préposés”, article 1385, §5 of the French civil code).

2.1.2. Sector specific cases of strict liability

16. Specific legislations of some MS provide cases of strict liability.

17. Under the Dutch grid code, the Dutch TSO is under strict liability in case (“Compensatieregeling”):
   • Of supply failure on grid lower than 220 kV,\(^5\) which cause is attributable to its grid;
   • Towards direct and indirect connected electricity users (producers only for the amount of electricity they use, not the amount they produce);
   • In the event the failure of supply lasts longer than one hour;
   • For a fixed amount calculated per period of four hours.

In such a case, the TSO must pay a lump sum, which amount depends on the duration of the failure. The height of the compensation depends on the capacity of the connection. The standard compensation awarded to consumers is EUR 35.00 per event, i.e. the fixed amount for the first period of four hours (as of 3 May 2006).\(^6\) This liability may be cumulated with other liabilities on other legal bases. It is not applicable in case the TSO uses its right, as a TSO to limit supply according to the technical codes in case of problems on the grid or in case of force majeure.

18. Under the public transport system specifications in France, the French TSO is liable, except in case of disturbed operational conditions (“situation d’exploitation perturbée”), towards consumers and distributors in case it does not comply with quantitative commitments regarding electricity quality. It has a compensation obligation without the need to evidence any fault/negligence on its side. However, the TSO’s liability requires the proof of a causal link between the damageable event and the undergone damage. These principles are translated in agreements with grid users, as it will be seen in section 3.3 below.

Moreover, the French TSO is responsible (without fault) towards producers of consequences of “unplanned unavailability” (“indisponibilité non programmée”) of the upstream (“réseau en amont”) network, except in case of force majeure. Unplanned unavailability is defined as the “unavailability resulting either from the functioning of an automated device or from a voluntary action to ensure safeguard of persons or of goods. In case of voluntary action, the cause of the unavailability must be either an installation’s electricity risk of proximity towards a third party or an unforeseeable and irresistible abnormality identified on an

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\(^5\) We understand from discussions during the workshop that only one industrial consumer is directly connected to the 220 kV grid. Most consumers are connected to lower grids (for which Compensatieregeling is applicable).

installation, necessitating the system recovery and leading the decommissioning of the installation”. Production losses following unplanned unavailability of the upstream network (“réseau en amont”) are treated as downward adjustments (“ajustements à la baisse”). If the said unplanned unavailability leads to a production cease lasting one day or the following days, the French TSO negotiates a financial agreement with the producer to compensate the damage. However, the French TSO’s liability will be triggered upon fulfilment of the following conditions:

- The producer must prove the causal link between the TSO’s behaviour and the damage;
- An expert procedure must identify which damages can be compensated (only those that are real, proven, except indirect damages resulting from obligations towards third parties, such as lump sum clauses, take or pay clauses, etc.); and
- The TSO’s liability is reduced (or even excluded) in case of producer’s own fault.

19. Finally, the Danish TSO is under strict liability in case it does not connect offshore wind farms according to tender specifications. This liability extends to any constraint in the grid connection of the farm. It concerns two wind farms (Rodsand II and Horns Rev II). We understand from discussions during the workshop that this liability is not primarily related to supply failure concerns but to priority dispatch of renewable energy sources.

2.1.3. **Assessment**

20. Cases of strict liability under the Polish and the Czech civil codes, as well as under the German public liability act, are cases of liability for performing an activity entailing some risk for the society (or “risk liability”). According to some authors, risk liabilities seek, among other things and like in fault liability, to canalise the liability on the person operating the activity (and also receiving profits from this operation). Risk liabilities are generally speaking based on the willingness of legislators to give a solvable debtor to the victim. Risk liabilities generally contain a cap on the recoverable damage to pay to the victim. The purpose of such caps is to avoid impediments to the development of industrial activities.7 Setting up objective liability regimes sometimes also aim at facilitating the burden of proof for the victim (without what, due to the type of activity carried out by the persons under strict liability, it would be impossible for the victim to prove the causal link between the damage and the fault).

21. The strict liability on the Polish and on the Czech TSOs is quite “extraordinary” in comparison with provisions in other MS. First, strict liability cases under sector specific laws and regulations have a narrower scope of application. Second, unlike in other sectors, such as – as reported by our Polish national correspondent – aviation, nuclear energy, etc. they are not accompanied by financial caps.8 Indeed, under the laws applicable to these sectors, the strict liability tends to be compensated by compensatory limits (financial caps, e.g.),

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8 The Treaty of Paris on the operation of nuclear power plants canalises liability on the plants’ operators but, at the same time, limit the recoverable damage to a certain amount, e.g.
which is not the case for strict liability under the Czech civil code. In Poland, as it will be seen below (section 2.3.3.3), the TSO’s liability is now capped by way of law. Third, we understand from our national correspondent that this strict liability forces the Polish TSO to acquire important insurances to cover the numerous risks it implies. Our investigations reveal (section 4 below) that the Polish TSO cannot find all necessary insurances on the Polish insurance market. As a result, some activities of the Polish TSOs are not insured at all. The fact that not all activities or assets can be insured can be detrimental to grid users or other damaged third parties. On the other hand, not insuring the totality of one’s activities or assets can be an incentive to behave prudently for the part of activities/assets not insured.

Bearing in mind the purpose of facilitating the burden of proof that strict liability regimes sometimes entail, an alternative to strict liabilities could be to foresee, by way of law, a rebuttable presumption, putting the onus of proof on the company carrying out the industrial activity (such as the one in Germany, as it will be seen in section 2.3.3.1 below).

22. It appears from the above that the risk (objective) liability on the Polish and, especially, on the Czech TSOs goes beyond the boundaries generally put to other types of risk liabilities. When objective liability is not accompanied by a financial cap, strict liability entails a risk of insolvency (when the magnitude of the damage exceeds the available assets of a person under strict liability). This risk is now greatly reduced for Poland as the Polish law now contains caps on liability, as it will be seen in section 2.3.3.3 below. This leads us to question to the appropriateness of these (especially for the MS – Czech Republic – where there is no financial cap). One way to mitigate the insolvency risk could be (or could have been as far as Poland is concerned) to provide compulsory insurance obligations.

23. The above-mentioned two cases of strict liability entail a second consequence. Economic literature generally recognises that strict liability cases incorporate changes in activity levels (whereas liability for regular fault/negligence does not). Strict liability cases could thus deter the concerned TSOs of developing new activities. Should these activities be beneficial to the improvement of the internal electricity market integration (such as new activities on interconnectors, e.g.), strict liability of general nature could be viewed as detrimental to the development of the internal market. We do not have figures or evidences demonstrating that the presence of extraordinary strict liability actually deters TSOs from developing such kind of new activities, useful for market integration. However, this remains possible theoretically.

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9 With this respect, some authors identify under-deterrence problems when damage compensations exceed the wrongdoer’s wealth. “Under strict liability, the injurer will consider the accident as one which is equal to his total wealth and will therefore only take the care necessary to avoid an accident with a magnitude equal to his total wealth. If that wealth is lower than the magnitude of an accident he will take less than the optimal care and therefore a problem of under-deterrence arises under strict liability”. In: M. FAURE, “Economic Analysis”, in Unification of tort law: strict liability (B.A. Koch et H. Koziol EDS), European Center of Tort and Insurance Law, 2002, p. 368.

24. Finally, these two cases of strict liability have a direct impact on the TSOs’ daily business activities while they were drafted and designed in the context of civil codes, i.e. laws that are, by nature, of general scope. The question arises whether such legal design choices (sector specific provision in a general code) are appropriate. Legislative processes for laws of general nature might not involve the consultation of all relevant stakeholders for civil and commercial codes development, as it is the case in the adoption of sector specific laws and regulations.

25. By contrast, the Dutch and the French cases of strict liability are of very different nature than that on the Polish and on the Czech TSOs. We first believe that they are first taken in the framework of a regulatory procedure, involving consultation of relevant stakeholders. Second, discussions at the workshop reveal that such types of liability rely on quality and on continuity of supply criteria that are set up regularly, taking into account the historical performance of the TSO. Discussions at the workshop reveal, for example, that interruptions are more frequent in South of France than in North of France. The use of strict liability could contribute, among others, to the alignment of quality levels throughout the country, according to discussions held at the workshop. As such, such types of strict liability act as incentives for TSOs to either keep up the high quality standards or improve the lower ones. They are recognised, by the economic theory, as a specific way (“standards”) to incentivise a distribution or transmission company to maintain/improve quality of supply.

2.2. LIABILITY LIMITATIONS

26. Liability exemptions may be found under laws and regulations, both under general law (force majeure, e.g.) and under sector specific laws (sector specific definition of force majeure, special cases of exclusions of liability for regular fault/negligence, regulated supply limitations/outages, etc.). This section 2.2 discusses all these cases individually.

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11 This information was not provided to us by our national correspondent in France. It was collected during the workshop organised by the Commission, to which the French national correspondent did not participate.
12 We understand from discussions during the workshop that the Compensatieregeling is related to the fact that the balancing mechanism in the Netherlands is more mature/advanced than in other MS. As an alternative to buying expensive balancing electricity, the Dutch TSO offers the possibility for grid users to participate to balancing by contractually accepting to be cut/interrupted under defined terms and conditions. Beyond however a certain period of time of interruption (one hour), the TSO is liable and must compensate (strict liability).
13 According to economic literature, three types of regulations can be implemented to influence network quality significantly. The first type of regulation is indirect instruments: NRAs may require network firms to publish comparative overviews to expose the firms to public criticism, e.g. The second type of regulation is standards dictating a minimum performance level for a network firm. Standard breaches lead to a fine or a tariff rebate. The third type of regulation is incentive schemes. They function like standards but are more closely linked to a price: the firm’s performance is compared to some quality target. Deviations result in price adjustments, being either a penalty or a reward. In: V. AJODHIA, K. PETROV, G.C. SCARSI, B. FRANKEN, “Experience with Regulation of Network Quality in Italy, the UK and the Netherlands”, Electrical Power Quality and Utilisation Magazine, Vol. II, No. 1, 2006, pp. 4 and 5.
2.2.1. **Liability exclusion in case of regular fault**

27. Our investigations reveal one single case where liability is excluded, by a specific law or regulation, in case of regular fault/negligence. Under the Italian grid code,\(^{14}\) when the TSO and its users breach “their obligations, in compliance with [NDLR: as defined in?] the grid code”, the TSO’s liability is explicitly limited to fraud and/or gross negligence only in respect of any material damages, such as the direct result of its behaviour.\(^{16}\) Discussions at the workshop reveal that TSOs’ liability is usually excluded for breach of network codes in case of regular fault/negligence. Our investigations do not reveal whether this is true and/or whether such limitations occur by way of law or by way of agreement.

In Germany (under the network access ordinance, referring to the low voltage connection ordinance, “NAV”), TSOs are not liable for damages amounting to less than 30 € except in case of gross negligence/wilful misconduct.

2.2.2. **Liability exclusion in case of force majeure**

28. In this section, we compare force majeure as defined under general law and force majeure as defined under sector specific laws/regulations. Force majeure definition is provided under general law only in some MS (Germany, and, we assume, Denmark). In other MS, our national correspondents provided both general law and sector specific definitions of force majeure (Germany, the Netherlands, Poland and France).

In Czech Republic, force majeure is not defined as such under Czech law. Force majeure belongs to a broader concept, the called “circumstances excluding liability”, as defined under article 374 of the Czech commercial code. Circumstances excluding liability also include other events than force majeure, such as acts of third parties. Parties are entitled to include, by way of agreements, more specifically defined events in the circumstances excluding liability. In Italy, article 45 of the Italian criminal code, as elaborated by courts and tribunals (case law), provide a definition of force majeure. According to our Italian national correspondent, “otherwise, force majeure is an event that excludes liability in case of breach of contract”.

2.2.2.1. **Force majeure under general law**

29. Force majeure is a general case of liability exemption in all studied jurisdictions.

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\(^{14}\) The Italian grid code reads as follows on this point: “any liability on the part of the Operator and the Users in their reciprocal relations due to the violation of their obligations, in compliance with the law or this Grid code, is limited to any material damages that are the direct result of their behaviour, excluding any liability for indirect damages or loss of earnings, excepting the provisions of individual contracts. Moreover, any liability on the part of the Operator is explicitly limited to cases of fraud and/or gross negligence”.

\(^{15}\) NDLR means “note de la rédaction” and indicates an observation of the authors of this report.

\(^{16}\) The compensation obligation is moreover limited to direct and material damages (safe other provisions in relevant agreements).
30. The definition of force majeure slightly varies from one MS to the other. The common criteria we find in almost (but the Netherlands) jurisdictions is the “non imputable”/“exterior” aspect of force majeure: force majeure may not be due to the fault of the person invoking it. Another criterion we find in five jurisdictions (Denmark, Italy, France, Czech Republic, Poland and Germany) is the “unavoidable”/“uncontrollable” aspect of it: the party invoking force majeure may not be in the situation where it actually can avoid it. Another criterion we find in five jurisdictions (Poland, Czech Republic, Denmark, Italy and France) is the “unanticipated”/“unpredictable” aspect of force majeure: if the event is foreseeable, it may not be qualified as such. Another criterion we find in two jurisdictions (Italy and Denmark) is the “non controllable” aspect of force majeure: force majeure must be beyond the control of the person invoking it. Finally, when facing force majeure, the party invoking it must show “prudence” (Denmark). In Germany, force majeure can only be invoked if it cannot be avoided with the “ultimate fairly expected carefulness” (Germany). Surprisingly, only our French, Italian and our Polish national correspondents mention that force majeure implies the impossibility for the party invoking it to perform its obligations. From our experience under Belgian law, the concept of “impossibility of performance” is central to force majeure, as it is the ratio driving the consequences of force majeure (non performance). This criterion is moreover the central criterion differentiating force majeure from another close legal institution, namely hardship (“théorie de l'imprévision” in France/Belgium).

31. Our national correspondent in Denmark stipulates that force majeure varies from one agreement to the other. From our experience under Belgian law, it appears that force majeure is non mandatory law (vs. mandatory law), to which parties may derogate by way of agreement. Under Belgian law, force majeure may thus vary from one agreement to the other. We may thus assume that force majeure may take many forms (beside the “official” definition under general law) in other MS as well.

32. Consequences of force majeure are similar from one MS to the other with some slight nuances. The common consequence to all jurisdictions where a regime of general force majeure is provided is that the party invoking it is not liable (provided all conditions of force majeure are fulfilled). Moreover, the obligations of the party invoking it are suspended. Our Dutch national correspondent stipulates that the party invoking it does not have the obligation to pay damages and that the counterparty has the possibility to terminate the agreement. Under Belgian law, the agreement may be terminated when the impossibility to perform one’s obligations due to force majeure becomes definitive.

33. In practice, a TSO who undergoes force majeure will notify the relevant counterparties of it. As a consequence, the TSO might cut power for certain customers upon due information of them as quickly as possible. In case counterparty believes the power cut is not due to force majeure, we believe that, after a correspondence exchange with the TSO, it will assign the TSO to the court if it still believes the power cut is not justified.

34. The following conclusions may be drawn from the above:
   • The definition criteria slightly vary from one MS to the other;
   • In France, Czech Republic and Denmark (as in Belgium and Poland), the event must
be “unpredictable”/”unanticipated”; From this point of view, it makes it more difficult for a party in these three MS to invoke force majeure than MS where such condition is not required.

- The Netherlands is the sole jurisdictions where the event of force majeure does not need to be “uncontrollable”/”unavoidable”; From this point of view, it makes it easier in the Netherlands to invoke force majeure than in the other jurisdictions.
- In Italy, the event must be “non imputable”;
- We find it surprising (Belgian law point of view) that only three national correspondents mention, among the conditions of force majeure, the impossibility to perform one’s obligation(s);
- The consequences of force majeure are clear in all scrutinised MS: no liability and suspension of the concerned obligation(s). However, TSOs are essential facilities and operate services of public/security interest. Their activities should as much as possible not be interrupted, including in case of force majeure. We thus think that contracts terminations due to force majeure should be possible in limited/exceptional circumstances only (when the event of force majeure lasts for an unreasonably long period of time, e.g.).

2.2.2.2. Force majeure under sector specific laws and regulations

35. There is a sector specific regime of force majeure in four MS (Germany, Poland, the Netherlands and France). In the Netherlands, this specific regime of force majeure only applies for the Compensatieregeling. The legal basis in Poland is the “instructions of transmission system operation”, prepared by the Polish TSO and approved by the NRA. The legal basis in the Netherlands is the grid code and in France the legal basis is the public transport system specification. Both Poland and the Netherlands foresee a general (generic) definition before citing a series of specific events, whereas France only enumerates a non-exhaustive list of specific events.

36. In Germany, a statutory specification of force majeure can be found in section 13, §4 of the energy industry act ("EnWG"). Accordingly, if a TSO’s supply is affected by force majeure, the obligation to supply is omitted. Therefore, TSOs are not liable for the failure. The contract partners are obliged to take all reasonable measures to ensure immediate resumption of supply.

37. Several general conditions are common in Poland and in the Netherlands, namely an event:
- Unforeseeable;
- Beyond control;
- Which outcome cannot be prevented or counteracted/which cannot be reasonably handled by the TSO.
Another general condition in Poland is nature of the event to prevent the TSO from compliance (all or in part). These general conditions are very similar to the conditions of force majeure under general law.

In the definition of force majeure in the Netherlands, there is an additional element for defining force majeure, namely the event is an “incident that occurs so rarely that it would be uneconomical to consider it into the regulation system”. This condition is interesting as it shows also some pragmatism on the side of the Dutch regulatory process (one cannot, by definition, foresee anything).

38. In Poland and in the Netherlands, the definition goes on by providing a list of specific events being qualified as force majeure. France does not provide a preliminary definition of force majeure but provides a list of specific events. Events common to all three jurisdictions are:
   • Natural disasters;
   • Acts of war;
   • Terrorism.

The following events can be found in two of the three jurisdictions:
   • Fire (Poland and France);
   • Floods (Poland and the Netherlands);
   • Earthquakes (Poland and the Netherlands); and
   • Sabotage (Poland and France).

The Polish instruction lists a series of other events (not available in the list of events in the other two jurisdictions):
   • Natural disasters, such as drought, hurricane, hoar-frost;
   • Actions of government authorities including martial law, embargoes, blockages, etc.;
   • General strikes or other social unrest including public demonstrations and lockouts.

The above listed events are very similar to “classic”/”regular” events of force majeure (i.e. not specifically related to the operation of the transmission system). We thus do not really see an added value in enumerating in sector specific laws events that are considered as force majeure under general law.

39. By contrast, the list in France is interesting as it is designed in a way specific to the operation of the transmission system. It encompasses (among more general-type events of force majeure listed above) the following events:
   • [...];
   • Sudden, fortuitous and simultaneous unavailability of several production units connected to the public transport system, provided that the available load is superior to what security rules foresee;
   • Decommissioning of works decided by public powers for public security reasons or police reasons provided that this decision does not follow the behaviour or inaction of the operator;
   • Climate phenomena of an extraordinary magnitude with regard to their impact on the system".
40. We find this list of events interesting as not all “classic” events of force majeure should be considered as force majeure for TSOs. All storms should not be qualified as events of force majeure. Heavy winds between January and March are common in our regions, e.g. Decisions of authorities are not always events of force majeure for TSOs (especially those of NRAs). Such decisions should lead to the obligation to renegotiate the affected agreement. To our opinion, well targeted lists of events of force majeure are useful.

41. The consequences of force majeure under sector specific laws imply the same consequences than those under general laws. In the Netherlands, it is stipulated that the TSO must prove that it is not able to repair the power interruption.

2.2.2.3. Assessment

42. Sector specific definitions of force majeure mimicking force majeure definition under general law lack added value. We find that the sector specific definition of force majeure in France and the in Netherlands have several added value in comparison with that under general law. They show pragmatism (the Netherlands) and take into account the specificities of the transmission system business (France).

43. The identified differences between force majeure regimes are not substantial. Such differences are not a problem per se. We do not have any empirical evidence demonstrating that the application of these conditions lead to competition distortions or to impediments to the development of the internal electricity market. However, specific conditions of force majeure in France seem rather stricter than those in other MS. As not all events of force majeure should be considered as force majeure for TSOs (heavy wind in winter, e.g.) such sector specific definition of force majeure could be seen as a good practice, that would be desirable to implement in other MS as well.

2.2.3. Security threats

2.2.3.1. Incident definitions

44. Definitions of incidents are usually provided in sector specific secondary legislations (in an ordinance on the functioning of the power system and in the instructions for transmission system operations, in Poland, e.g., or in the public transport system specification in France), except in Germany where it is provided by the NRA –however, in a report that is not binding. Some MS do not foresee any specific definition of incident (Denmark, United Kingdom and Czech Republic).

45. The definition provided in secondary legislation is usually of broad nature. In Poland, it refers to the outages of devices in case of threat to works, people or environment (“emergency outages”). The instructions of transmission system operations provide more detailed definitions of incident.\textsuperscript{17} In the Netherlands, incidents (“transport constraints”) are

\textsuperscript{17} Namely:
situations where the TSO cannot supply electricity within the required quality. In France, the
definition is very broad, referring to large scales incidents. In Germany, it refers to any single
loss jeopardising operations. The definition of incident in Italy is slightly more elaborated
involving at least three parameters, namely a voltage threshold, level (in MW per hour) of
supplied energy and duration of it. Several incidents occurring subsequently and
consequent to the same event are considered as being part of the same significant incident.

2.2.3.2. Consequences of incidents

46. As a general rule, TSOs must take preventive measures in the field of their activities
and, in case of threat to the secure system operation, they must take all necessary
measures to return to a secure state. Notably, according to the article 9j, §2 of the Polish
electricity law, “in case of a serious and unpredicted failure or equipment destruction (...) which
jeopardises operation security” the Polish TSO is entitled to take some measures to
restore correct operation, including supply limitations and cuts. In case of incidents, the
Dutch TSO is entitled to take preventive measures such as grid circuits, balancing power,
load disconnections, etc.

47. Some legislation, such as sections 13.1 and 13.2 of the EnWG, provide an order of
precedence of measures:
“If the security or reliability of the energy supply system in the respective control area is in
danger or disturbed, TSOs are authorised and obliged to eliminate the danger or the
disturbance:
• By grid-related measures, especially by circuits in the grid; and
• Market-related measures, especially by use of control or balancing energy,
contractually stipulated detachable or activable loads, information about
congestions and congestion management as well as mobilisation of additional
reserves.
If the danger or the disturbance according to the [previous paragraph] cannot be eliminated
or cannot be eliminated in time, TSOs are authorised and obliged [...] to adapt all power
outputs, power transits and power demands in their control area to the requirements of the

• Network Disturbance: “an operating event that trips out from operation a part of the national power
system which supplies to or consumes from the network the amount of electrical energy that does not
exceed 5% of the current power demand of the national power system”;
• System Disturbance: “an operating event that trips out from synchronous operation a part of the national
power system, which supplies to or consumes from the network the amount of electrical energy exceeding
5% of the current power demand of the national power system”; and
• Emergency State in NPS: “Operating conditions entailing the risk of occurrence of network or system
disturbance in relation to the non-fulfilment of the requirements regarding the quality and reliability of
network operation”.

18 An interruption is “a condition in which the three-phase voltage is lower than 1% of the nominal voltage in the
points of withdrawal or the points of energy input for a user directly connected to the National Transmission
Grid”. Interruptions are short (shorter than or equal to 3 minutes, and longer than 1 second) or long (longer
than 3 minutes). A transient interruption is an “interruption shorter or equal to 1 second, occurring due to the
activation of immediate reclosure of the circuit breakers, and recorded limited to the Users directly connected to
the national transmission grid”. An outage is “a significant incident if it results in a non-supplied energy level
exceeding 250 MWh (as defined in article 11, §9 of the Grid code)”. 

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secure and reliable operation of the transmission grid or to demand the adjustment of it [...]

48. Under section 13.4 EnWG, in “the event of an adjustment according to paragraph 2 the respectively concerned contractual obligations of the Parties shall rest until the elimination of the danger or disturbance. If the premises of paragraph 2 are on hand while the necessary measures are taken, the liability for financial losses is excluded. For the rest, section 11 Paragraph 2 remains unaffected”.

49. As a consequence of measures taken on ground of “security threat” or “incidents” some sector specific laws specifically exempt TSOs from liability (or at least part of it). Section 13.4 EnWG for example foresees that, in case conditions under paragraphs 1 and 2 (mentioned above) are fulfilled, “the liability for financial losses is excluded”. It is questionable whether this is an exclusion of liability or a specific case of force majeure where an obligation of the TSO does not exist (see n° 36 above).

50. In the Netherlands, the occurrence of “transport constraints” implies the application of the strict liability of the Compensatieregeling provided that the conditions of it are fulfilled, besides the contractual liability and liability in tort. The Dutch TSO has got certain rights as a TSO to limit supply according to the technical codes when there are problems in the grid. The Dutch TSO is not liable when it uses its right as a TSO to limit supply according to technical codes.

51. In Poland, the electricity law used not to state explicitly whether, by applying correctly the measures under article 9j, §2 of the law (including supply limitations), the TSO was exempted from liability. This casted doubts as whether the TSO was responsible or not. However, the contracts of the Polish TSO with the grid users do foresee some liability limitations in case of application of measures under article 9j, §2. The Polish TSO limits its liability for such cases by way of agreements. We understand from our national correspondent that the law in Poland changed on 11 March 2010 in this respect. Following this change, the Polish TSO is explicitly exempted from liability for measures taken due to security threats, in case the security threat has occurred due to the reasons for which the Polish TSO is not liable (i.e. the TSO has observed the due diligence in performing the TSO’s statutory tasks).

52. TSOs are under the right to limit supplies under various scenarios foreseen under sector specific legislations, which are quite similar to the incident situations as explained above:
   
   • According to the Danish electricity law, in cases of imminent risk of grid collapse and during grid collapse and subsequent restoration, the TSO may order any necessary modifications to production, trade and consumption, with no payment due;
   
   • The Czech energy act provides also cases of exemption of liability for grid security reasons. Under articles 24 and 54 of the Czech energy act, the Czech TSO is not liable for occurred damage. The concept of such an exclusion of the general obligation of the TSO to compensate for damage caused is based on the specific right to limit or interrupt the electricity delivery in the very narrow range of specific
situations, fully in accordance with the concept of force majeure (e.g. catastrophes, terrorist attacks, etc.) or in such situations where another market participants are behaving contra-legem while using the transmission system (illegal off take of electricity), respectively. Moreover, according to our Czech correspondent, "any damage could occur when the planned and announced outages are taking place. This specific right is introduced in the both aforementioned provisions of the energy act".

53. We believe that cases of threat to the system should relieve TSOs from liability for the measures taken to restore security. The TSOs should however have this right when a certain threshold of danger is reached (not all threats should entitle TSOs to cut power). Order of precedence of measures are useful in this respect (first, the TSO should try to re-dispatch, then take grid-related measures, then only take commercial measures, cutting power from grid users).

2.2.3.3. Interaction between force majeure and security threats

54. From the point of view of TSOs, “incidents” can constitute, at the same time, events of force majeure (provided that force majeure conditions are fulfilled). Our investigations reveal that the notion of “incident” is defined in various MS (namely in Poland, the Netherlands, Italy, France). Conversely an incident might amount to an event of force majeure. In case an event cannot be qualified as an incident (as defined under laws/regulations), it might still fall under the definition of force majeure (either under sector specific law – if any – or under general law). Under Belgian law, “multiple incidents” and “emergency situations” (i.e. force majeure situations) are put on an equal foot as they both allow the Belgian TSO to take emergency measures as defined in article 303 of the Belgian grid code. If an event may not be qualified as incident nor as force majeure and results in supply failures the TSO becomes responsible according to the relevant laws, regulations and agreements, as the case may be.

2.2.4. Outages

55. Some sector specific legislations provide some rules on outages, within which TSOs are not liable in case of outage, such as, e.g.:

- In Netherlands, the TSO is, with regard to the strict liability of the Compensatieregeling, exempted in case the unplanned outage lasts one hour or less. The contractual liabilities and liability in tort still apply;
- In Czech Republic the TSO is exempted in case the outage is announced at least fifty days in advance;
- In Germany, section 25a of the grid access ordinance (“StromNZV”) in conjunction with section 18 NAV stipulate the conditions under which TSOs are liable for damages resulting from disruptions (outages) or unsteadiness of grid access use. For Germany, please refer to section 2.2.3.2 above;

19 And, to some extent, in Germany, however not in a legal text/binding document.
• In Poland, the TSO is exempted for planned outages, but also for unplanned outages, within conditions of duration and occurrence as defined in the relevant legislation.  

In France, the list of force majeure events (under the public transport system specifications) covers outages resulting from production interruptions ("sudden, fortuitous and simultaneous unavailability of several production units connected to the public transport system, provided that the available load is superior to what security rules foresee"). In case an event fulfils these conditions, the TSO is exempted from liability.

56. By contrast, the Danish TSO is not exempted from liability in case of outage under Danish law. In Italy, there are no exonerations of liability for outages under sector specific law (but well under standard dispatching contracts). Our national correspondents in the United Kingdom did not specify anything regarding outages.

2.2.5. Other liability limitations

57. In the following countries, specific legislation provides other specific cases of liability exemption:
  • The Polish TSO is exempted from liability in case of supply limitations due to a decision of the Council of Ministers;
  • In Denmark, the TSO is exempted from liability for disconnection of consumers in case energy is not supplied (including losses).

2.3. RECOVERABLE DAMAGES

2.3.1. Recoverable damages under general law

58. Generally speaking, damages are recoverable only if there is a causal link between the fault/negligence and the damage. Polish, Danish and French general laws apply the theory of adequate causality. Under this theory, are considered in adequate causality with the damages, only the events, which were able to provoke the damage in the normal course of events. Notably, two criteria are applicable in order to appreciate the damage: the foreseeable aspect of the damage and the question whether the damage occurred in the normal course of events. In France the theory of adequate causality is not of general application. Certain French jurisdictions apply the theory of equivalence of conditions according to which a fault cannot be causal unless it constitutes a condition without which the damage could not be produced such as it happened concretely ("in concerto"). In the Netherlands, causation is assessed following the norms and values in force in the society ("in het verkeer geldende opvattingen"). The breach of duty must be imputed

20 Namely:
  • 16 hours planned outage in a one-time outage;
  • 24 hours emergency outage in a one-time outage;
  • 35 hours planned outage over a year;
  • 48 hours emergency outage over a year.
(“toerekenbaar”) to the author. Only the persons protected by the violated norm (”relativiteitsleer”) are entitled to damages.\textsuperscript{21}

No information is available on the type of theory used for other jurisdictions.

2.3.2. \textbf{Limitation of recoverable damages by damage type}

2.3.2.1. \textbf{Under sector specific laws/regulations}

59. Our investigations reveal that only a few MS provide limitations of recoverable damage under sector specific law (beside the limitation mentioned in paragraph 49 above). In Italy, liability between TSOs and grid users is limited to material and direct damages. This excludes compensation for indirect damages and losses of earnings. For all other cases, recoverable damage will depend on (i) contractual provisions (if any) and/or (ii) general law.

60. In Germany, the TSOs may take several measures, including supply limitations on ground of section 13.1 and 2 of the EnWG. If the measures taken by the TSOs are in conformity with these sections, the liability for financial damages is excluded from the recoverable damage. The exception under German law has thus a more limited scope of application than that under Italian law. Our national correspondent precisest that, in his view, section 13 of the EnWG provides a system of proportionate measures to be taken in an environment of force majeure where the system stability is endangered. If the network operator follows section 13, it is free from the obligation to provide his network services (section 13, § 4 sentence 1 EnWG). Only in addition, section 13, § 4 sentence 2 stipulates that damages (not only financial) are excluded. This exclusion will be declaratory at least in most of the cases since the network operator is not obliged to perform in this situation anyway.

2.3.2.2. \textbf{Under general law}

61. In some MS, recoverable damages are different depending on whether one is under contractual or tort liability. In Poland, tort liability requires the reparation of both material and immaterial damages, whereas under contractual liability, reparation relates to material damages only. Material damages encompass the \textit{damnum emergens} (i.e. the loss underwent by the affected party) and the \textit{lucrum cessens} (i.e. the loss of profit). In France, any damage is due under tort law, whereas under contractual liability, the recoverable damage is the damage foreseeable at the time of signing the agreement. All damages must be personal, certain, legitimate and direct (meaning that the reparable damage must be the direct consequence of the fault/negligence). In Italy recoverable damages include \textit{damnum emergens} and \textit{lucrum cessens} only if they are immediate and direct consequence of the party behaviour.

In Denmark, both the direct and the indirect damages are reparable. However, indirect damages are rarely called upon the TSO due to the burden of proof and the obligation to mitigate damages. No specification is made regarding recoverable damages under contract law (besides, of course, the right of the contracting parties to limit and/or extend damages

\textsuperscript{21} ASSEER, Verbintenissenrecht, Tome III, n° 114.
within the limits explained above). In Germany both direct and indirect damages are recoverable (without specifying whether this is applicable in tort and or in contractual liability).

In the United Kingdom, third parties may claim compensation provided that the following three conditions are fulfilled:

- The TSO owns them a duty of care;
- The TSO breaches this duty through negligence or omission;
- Loss resulting from this breach is, in legal terms, reasonably foreseeable.

No further information is available regarding the Netherlands.

62. Differences in recoverable damages for contractual liability from one MS to the other do not necessarily impact liability of TSOs throughout Europe. As it will be seen below (section 3) TSOs almost always limit recoverable damages to direct damages. As for tort liability, it appears that recoverable damages are broader than those under contract liability depending on the limitations of liability agreed contractually between the parties in compliance with the relevant legal framework (France and Poland).

2.3.3. **Limitation of recoverable damages by the use of caps**

63. As a general rule, specific laws do not foresee specific financial caps to recoverable damages except in Germany, the United Kingdom and, since 11 March 2010, in Poland.

2.3.3.1. **Germany**

64. In Germany, the NAV provides different financial caps, which amounts vary depending on the type of customer (connected or not connected/third party customer) and/or on the kind of damage and/or on the level of fault (gross negligence, etc.). In case of damages to property of connected customers damages are (limited) recoverable up to 5,000 € in each case (per customer) if the damages are not caused by intention or gross negligence. In case of intention or gross negligence the entire damage to property is recoverable. In case of damages to property of connected customers (upstream and/or downstream), damages are recoverable under the following financial caps, per damage event/incident (section 18.2 NAV):

- 2.5 millions € (up to 25,000 connected customers);
- 10 millions € (from 25,001 to 100,000 connected customers);
- 20 millions € (from 100,001 to 200,000 connected customers);
- 30 millions € (from 200,001 to one million connected customers); and
- 40 millions € (over one million connected customers).

Such damages to property may not be caused by wilful misconducts for the financial caps to apply.

In case of financial damages to connected customers due to gross negligence, damages are recoverable up to 5,000 € in each case (per customer) and up to 20/100 of the amounts under section 18.2 NAV, i.e. an overall financial cap of 500,000 €, per damaging event (section 18.4 NAV).
In case of damages to third party customers (section 18.3 NAV) a tort claim toward TSOs and third-party operators is:

- Up to three times of the maximum amount the TSO owes towards connected customers under section 18.2 and/or 18.4 NAV; and/or
- In case the network operator does not have customers connected to low voltage grid, compensation is limited to 200 millions €.

The claims for damages are reduced proportionally if the sum of the individual damages exceeds the above-mentioned limits (section 18.5 NAV). Connected customers who have undergone damage must inform the TSO without delay (section 18.7 NAV).

Finally, section 18.1 NAV sets up a rebuttable presumption for the TSO according to which:

- Financial damages were caused by intention or gross negligence;
- Property damages were caused by intention or negligence.

However, financial losses are excluded from liability for damages caused by other forms of negligence. This presumption assumes that the TSO is liable for damages sustained by his connected customers resulting from disruptions/outrages or unsteadiness of grid access use and under the condition that the damages result from its own fault (or fault of third parties who carry out operators’ tasks or of vicarious agents).

The discussions during the workshop reveal that the amounts of the above-mentioned financial caps were increased in 2008. They were viewed by market participants as too low in comparison with the potential damage. According to Dr. Holger Stappert, market participants and TSOs seem to come to terms with the new thresholds.

2.3.3.2. United Kingdom

65. In the United Kingdom, the connection and use of system code (“CUSC”) provide that liability of any of the CUSC party “shall not exceed 5 millions £ per incident or series of related incident”. Moreover, the liability of all CUSC parties shall not exceed one million £ per incident/series of related incident where “an incident or series of related incidents occur on an onshore distribution system affects users of an ET offshore transmission system or on an ET transmission system affecting users of an onshore distribution system”.

2.3.3.3. Poland

66. On 11 March 2010 amendments of the Polish electricity law came into force. Such amendments contain financial caps to damages payable by the Polish TSO similar to those in Germany.

First, only actual damages to property and real estate are recoverable.

Second, recoverable damages are limited by financial caps, which amounts depend on the number of affected grid users:

- 25 millions PLN or 6,4 millions € (less than 25.000 grid users);
- 75 millions PLN or 19,2 millions € (from 25.001 to 100.000 grid users);
- 150 millions PLN or 38,5 millions € (from 100.001 to 200.000 grid users);
- 200 millions PLN or 51,3 millions € (from 200.001 to one million grid users); and
- 250 millions PLN or 64,1 millions € (above one millions grid users).
2.3.3.4. Assessment

67. The use of financial caps and rebuttable presumptions (article 18, §1 NAV) definitely has advantages for TSOs. Financial caps are useful for TSOs as they are a mean for them to evaluate in advance possible damages caused by their activities. This is especially true when such financial caps are set towards persons not directly connected to their grid (where liability cannot be limited by way of agreements).

Moreover, financial caps help TSOs to better assess their insurance needs, to the benefit of TSOs, grid users, and eventually to the public (tariffs). Finally, for small TSOs (such as the TSO in Luxembourg, e.g.) financial caps could be a way to reduce risks of insolvency. Should the Luxembourg TSO be responsible for a major blackout throughout Europe, indefinite requests for damage compensation could lead the TSO to bankruptcy, as discussions at the workshop reveal it.

68. On the other hand, financial caps represent a limit to the users’ right to be fully indemnified, by derogation to general principles of law (especially in tort liability). Moreover, the differences between one MS to the other (cap, no cap, different type of cap, diverging amount of cap, etc.) are quite substantial. The situation as it currently stands regarding caps can potentially create discriminations between users in the European Union.

69. Moreover, financial caps have advantages for grid users. Discussions at the workshop reveal that the use of financial caps and rebuttable presumptions may be incentives for the TSO to pay damaged grid users rapidly/without long discussions on liability. According to Dr. Holger Stappert, the blackout of 4 November 200622 did not lead to substantial/long discussions between grid users and E.ON Netz, e.g. the rebuttable presumption having had contributed to the fact that the responsible TSO easily recognised the necessity to indemnify the affected grid users. The presence of financial caps would have also allowed the responsible TSO to better assess risks/amounts to be paid, which is another factor for facilitating compensation. Such a rapid recognition would also have spared expensive costs of multiple judicial proceedings.

70. Discussions at the workshop revealed that the presence of financial caps in some MS, where other MS do not have any, could imply several shortcomings from a market integration point of view.

In case of widespread blackout with effects in MS where there are financial caps and others where there are not, some grid users might choose to sue a TSO in a MS where there is no

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22 In the night of 4 November 2006, a major black-out affected the (ex)-UCTE area. The disturbances were triggered by causes on the grid of E.ON Netz (now TRANSPower). Following this event, some investigated MS were affected, namely the Netherlands, France, Germany and Italy. The Italian and the Dutch TSO did not receive any complaint. The French TSO invoked “force majeure” as well as “uncontrollable accidental event due to the behaviour of a third party” and did not grant compensation to its customers. The German TSO received 820 claims. All but one were settled by insurance payment of 350.000 € [NDLR: in total?]. One claim concerning an amount of 200.000 € is still pending. We are not aware of the position of the German NRA regarding these payments (into tariffs or not).
financial cap. Assuming that a blackout has effects in Belgium (no financial cap) and in Germany (financial caps), BASF (having plants both in Belgium and Germany) could, e.g., decide to sue the responsible German TSO (assuming that the responsible TSO is German) in front of Belgian courts and tribunals to avoid the application of financial caps under German law. Differences from one MS to the other on the application of financial caps might thus lead to forum shopping opportunities for grid users.

Grid users in MS where there are financial caps might be in a disadvantageous position in case damages to grid users go beyond the financial cap they are entitled to. Conversely, grid users where there are financial caps might be in an advantageous position in comparison to grid users where there are no financial caps if the existence of financial caps (rebuttable presumptions) facilitates their compensation.

We are not in possession of figures showing exactly to what extent financial caps might provide better/worse competition conditions between grid users. The representative of the International Federation of Industrial Energy Consumers ("IFIEC") at the workshop contended that grid users do feel competition distortions from diverging compensation mechanisms from one MS to the other in practice.

71. Should the allegations of grid users as reported by the IFIEC representative at the workshop be evidenced by empirical analysis, there could be a case for a harmonised approach regarding financial caps at the European level. One way to overcome this would be to harmonise the rules applicable to TSOs compensation in the same way as they are harmonised for agency contracts. Directive 86/653/EEC\(^\text{23}\) sets up rights and obligations of the agent and of the principal in the framework of agency contracts. These rules were felt necessary as the differences in national laws substantially affected the conditions of competition and the carrying-on of agency activity in Europe. These differences were detrimental to the protection available to commercial agents, to the security of commercial transactions and to the conclusion of agreements in case of cross-border situations.\(^\text{24}\) The Directive contains rules on rights and obligations of the agent and of the principal; remuneration of the agent; conclusion of the agency contract; and termination of the agency contract. The Directive is a relevant example as it contains rules on liability: the termination of the contract entails the right of the agent to an indemnity or to compensation for damages suffered as a result of the termination.\(^\text{25}\) However, in order to adopt a similar instrument in the field of TSOs’ liability, the Commission must prove (i) competition distortions/impediments of the national markets; and that (ii) no other measures are possible to overcome these distortions/impediments. More specifically, the Commission should demonstrate that the rules concerning conflict of laws would not, in the matter of financial caps, remove the identified problems.

72. The question that would arise in such case would be upon which criteria financial caps should be set at the European level. The discussions at the workshop reveal that several criteria could be taken into account:


\(^{24}\) Recital 4, Directive 86/653/EEC.

\(^{25}\) Art. 17, Directive 86/653/EEC.
• Historical performance of TSOs;
In some regions, electricity interruptions are more frequent (Spain, South of France, e.g.) than in other ones (Germany), as reported during the workshop. The question that would arise would be whether citizens of regions of good performance should pay for costs occurring in regions of bad performance. Progressive financial caps depending on the performance of TSOs could be a solution.
• Incentive for the TSOs to perform well (quality and continuous electricity supply) and to invest where the grid most needs it; and
Low financial caps would be poor incentives for TSOs to perform well. Bad actions (damages resulting from inefficiencies, excessive conservatism, wrong guesses, etc.) should be penalised.
• Types of grid users/industries.
Some grid users/industries suffer more from electricity interruptions than other ones. Moreover, industries that are the most vulnerable to supply failures should be incentivised for protecting themselves against interruptions (by investing in back up systems; appropriate insurances; etc.). Financial caps could be a way to set up a balance between the need to protect some industries more than others and the need for industries to protect themselves against supply failure.

73. Setting up financial caps is however a sensitive issue and does not raise unanimity among the persons involved in the preparation of this report. Dr. Prof. M. Faure strongly questions the appropriateness of extending financial caps in other MS. According to him, “any regulation in this respect is bound to lead to perverse results since the desirability of caps may well depend on who of the parties is superior risk bearer or least cost avoider. Any general regulation, disrespecting differences, is hence almost bound to create inefficiencies”.

Our Polish correspondent reports that the introduction, by way of law, of financial caps in Poland generated accusations of inconsistency of these amendments with the Polish Constitution (fundamental right to property, for example). According to our correspondent, introducing financial caps should be allowed by way of statutory act.

2.4. SPECIAL LIABILITIES

2.4.1. Criminal liability

74. Our investigations reveal that there are no cases of criminal liability especially targeted to supply failures/limitations. Some specific criminal liabilities are however applicable to TSOs. Article 18 of the Electricity Directive states that “[...] each transmission system operator and each transmission system owner shall preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its activities, and shall prevent information about its own activities which may be commercially advantageous from being disclosed in a discriminatory manner.”

26 M. FAURE, “Comments on liability of transmission system operators”, Maastricht, 6 April 2010, p. 4.
27 Now article 16 of Directive 2009/72/EC.
In particular it shall not disclose any commercially sensitive information to the remaining parts of the undertaking, unless this is necessary for carrying out a business transaction [...].”

The purpose of this provision is to avoid competition distortion (by providing sensitive information to competitors, e.g., or, in case of vertically integrated company, to its affiliated company). The Belgian legislator, in transposing this provision, chose to strongly protect confidential information collected by the Belgian TSO: employees of the Belgian TSO are under a professional secrecy (“secret professionnel”) (article 14 of the Belgian electricity law). The violation of the professional secrecy is sanctioned by criminal sanctions (article 458 of the Belgian criminal code). Other MS, beside Belgium, might have adopted similar provisions.

Moreover, TSOs and their personnel are subject to the application of general criminal law, which violations are sanctioned by criminal sanctions (tax evasion, forgery, etc.).

2.4.2. Liability for product defect

2.4.2.1. Definition of defective product

75. None of our national correspondents has defined what an “inherent defect of a product” is. Some took the view that a pure failure is not defect of the product. This is the reason why an outage should not arise in product liability by the TSO. This may also be due, as it is the case under Belgian law, to the fact that there is no statutory definition of it. The product defect definition is generally given by courts and tribunals (case law) and therefore it varies on a case-by-case basis. In Belgium, for instance, criteria are defined by case law but the application to a specific case is left to the discretion of the judge (which may be reviewed on appeal).

2.4.2.2. TSOs remain liable

76. Almost all of our national correspondents specify that, in case of inherent defect, the TSO remains liable, especially toward grid users. TSOs are liable in case of inherent defect of a material or device, which caused damage, as for general rules of liability of TSO (contractual or tort liability). Our Czech correspondent specifies that, if a defect in product owned by the Czech TSO causes the damage, the Czech TSO is liable towards the damaged party and consequently has a right of recourse as described below.

77. Our correspondents from France and the United Kingdom especially specify that the liability of TSO does not apply in case of force majeure. For the other countries we assume that the force majeure regime (explained above) applies also in the case of a defective product.

2.4.2.3. TSOs have a recourse against the component supplier

78. The fact that the TSO remains liable does not exclude the recourse, which the TSO may have, to the supplier of the defective product. If the defect is due to a fault/negligence of the supplier, the general rules of subcontractor’s liability apply (see above).
79. Generally speaking, agreements between TSOs and suppliers of components contain specific rules on liability. In Italy, for instance, usually the agreements between TSOs and suppliers of cable or other lines components specify that the suppliers are exclusively liable towards the TSO and other third parties for any material damage which is the direct consequence of their misconduct or breach – partial also – of contract or laws. In these circumstances, the supplier undertakes to relieve the TSO totally from any liability and consequent claims of third parties. Such clauses are not common in all MS (no such clause exists in Poland, e.g.).

80. Sometimes (information reported by our Dutch and Polish correspondents), contractual provisions have as consequence that there is a gap between the liability of the TSO and what the TSO can recover from the supplier. According to our Dutch correspondent for instance, the liability of the supplier is usually limited in time, scope and money.

2.4.2.4. Supplier’s liability on ground of Directive 85/374/EC

81. The supplier may also be liable towards an injured person on the basis of Directive 85/374/CEE concerning liability for defective products (strict liability) if he is the producer of that defective product (see also section 2.1.1.3 on strict liability above).

82. In Poland for instance, the supplier may be liable for the damage caused by defective products according to article 449\(^1\) and 449\(^2\) of the Polish civil code: for any damage caused by such product to anybody and/or for damages on the property if the property is limited for personal use and when the victim has used it mainly for such purposes.

83. In Germany, under the German product liability act (implementing Directive 85/374/EEC), producers are under strict liability for damages resulting from product defects in case of person death, body or health injury or material damage.

84. The victim is entitled to choose which type of liability should be the basis for his/her claim (general rules of tort law or liability for defective products) and the person against whom the claim will be lodged (TSOs or the producers).

2.4.3. Liability with subcontractors

2.4.3.1. When there is a contractual relationship with grid users

85. In Italy, France, Germany, Czech Republic and Poland TSOs remain liable towards grid users (with whom they have an agreement) for the correct performance of the relevant contract, including in case of execution through a subcontractor. The subcontractor has thus a contractual liability towards the TSO but the TSO remains liable towards the grid users with whom the TSO has an agreement (to the same extent as for fault on his own part). In such cases, even if the TSOs are liable towards grid users, contractors remain responsible towards TSO for the correct performance of the relevant contractual provisions, including in case of execution through a sub-contractor.
86. TSOs might exonerate their liability towards grid users for breach of duty of a subcontractor in some cases. In Germany, for example, the TSO may exonerate itself if it is able to prove that the subcontractor “did not” act intentionally or negligently (or if there is no causal link between the breach of duty of the subcontractor and the damage). In Poland (under article 474 of Polish civil code) the TSO is liable, as if for his own action or omission, for the action and omission of persons with whose help he performs the obligations, as well as persons to whom he entrusts performance of the obligation. Therefore the TSO may relieve itself from liability only if it proves that the non-performance or improper performance of the contractual obligation was the result of circumstances for which the debtor is not liable.

87. Moreover, the contract between the TSO and the subcontractor may specify that the subcontractor undertakes to relieve the TSO totally of any liability and consequent claims of third parties as a grid user (freedom of contract).

88. Discussions at the workshop reveal that subcontractors – who are smaller companies than TSOs usually – could however easily get bankrupt in case suits would be filed against them for the entirety of the caused damages. Unsolvable subcontractors are not attractive companies to deal with. This is why subcontractors usually limit their liability to a limited amount of money. According to the IFIEC representative, this should not however be a reason for TSOs to limit liability on their side.

2.4.3.2 When there is no contractual relationship with grid users (tort liability)

89. In general, there is a contractual relationship with grid users. Therefore TSOs are liable pursuant to the contractual liability provisions (see above). However, the situation differs regarding users of the network in other networks down- or upstream. The following mentioned “tort liability” is always applicable alternatively (when there is no contractual relationship) or in addition to the contractual liability (when there is also a contractual relationship). It is another basis of claim with different requirements.

90. In Poland (under article 429 of Polish civil code), the TSO may exonerate itself if it is free of fault in choosing the subcontractor or if it entrusted the execution of the transaction to a person, enterprise or institution which performs such transactions within the scope of their professional activity. In Germany, there is moreover a case of tort liability (i.e. towards grid users or other persons whom with the TSO does not have any agreement) of the TSO for damages caused unlawfully by “vicarious agents”\(^\text{28}\) (the subcontractor). This liability for damages however does not apply if the TSO exercises reasonable care when selecting and controlling the subcontractor, when procuring requested devices or equipment or managing the business activity, or if the damage would have occurred, even if this care had been exercised (article 831 of the BGB, the German civil code, “\textit{BGB}”) when carrying out this task (not at opportunity). That means TSOs are only liable for damages which are caused in direct connection with carrying out the task. TSOs are not liable for example for damages

\(^{28}\) When a TSO as a person (‘principal’) engages another person (‘agent’).
caused by burglary. The room for exculpation is narrow. If a company invokes such exculpation successfully, the employee is liable on his own. This is the reason why the courts will check very carefully if there is a mistake in selecting or controlling the subcontractor.

91. Our national correspondents in the Netherlands, Denmark, the United Kingdom and Czech Republic did not specify anything regarding the relationship between TSOs and grid users in case of breach of duty of a subcontractor

2.4.3.3. Liability of subcontractors towards grid users

92. If the subcontractor, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or absolute (i.e. personal) right of another person, he is personally liable to make compensation to these persons for the damage arising from this (by application of general principles of tort law). This is especially so in:
- France (article 1382 of French civil code);
- Germany (article 823, § 1 of the BGB);
- Poland (article 415 of Polish civil code); and
- Italy (article 2043 if Italian civil code).

In Germany the compensation of financial damages is excluded regarding a claim pursuant to article 823, § 1 of the BGB. Furthermore, pursuant to article 823, § 2 of the BGB a person, who commits a breach of a statute that is intended to protect another person, is personally liable to make compensation to this person. If in accordance with the contents of the statute it may also be breached without fault, then liability to compensation only exists in case of fault. In case of breach of a statute financial, damages are recoverable. Our national correspondents in Italy, the Netherlands, Denmark, the United Kingdom and Czech Republic did not specify anything regarding tort liability of the subcontractor towards the grid user.

2.4.3.4. Other remarks

93. From the answers provided by our national correspondents, it is difficult to assess whether or not victims have direct recourses against the subcontractor. In Poland, there is no such recourse. Victims prefer to sue the Polish TSO directly.

94. Finally, our Danish correspondent mentions that agreements with subcontractors tend, as much as possible, to refer to the “yellow book” of the “Fédération Internationale des Ingénieurs Conseils”, the FIDIC (general terms and conditions of contract for plant and design-build for electrical and mechanical plant and for building and engineering works). Such templates, as alternative to general principles of law (Directives) or rules of law (Regulations) might be a useful tool for harmonisation of rules applicable to grid users.

2.5. PROCEDURAL ISSUES

2.5.1. Internal procedures
95. It appears from our investigations that there are no specific procedures for damage recovery caused by TSOs. Regular procedures are applicable (subject to arbitration/jurisdiction clauses).

96. As for the duration of proceedings, proceedings are short when an amicable settlement is short. If there is no amicable solution, proceedings might be lengthy (two years in Poland, e.g.).

2.5.2. Issues related to cross-border procedures

97. Widespread blackouts such as that of 4 November 2006 generate cross-border procedural issues. As mentioned above, grid users may chose to sue the responsible TSO in a MS where there is no financial cap, with the view of avoiding the application of price caps under national law. The question that arises is whether such companies find it easy to sue in their respective MS (Belgium, e.g.) when the responsible TSO (German) does not have assets in the said MS for purposes of enforcing the judicial decision. Regulation 44/2001/EC29 facilitates enforcement of decisions in the European Union. On ground of this regulation, MS nationals (Belgium, e.g.) can easily go for damage compensation in another MS (Germany) via the request of an exequatur of the initial decision. Exequatur may be refused for public security reasons but we doubt such exception is applicable to compensation of damages caused by TSOs.

2.6. PRELIMINARY CONCLUSIONS REGARDING LAWS AND REGULATIONS

98. Our investigations reveal several similarities in several elements of liability, such as:

(i) Force majeure as the consequence of exonerating from liability and of suspending obligations.

(ii) The occurrence of “incidents”/“system threat” allows, under sector specific laws and regulations, TSOs to take measures, including supply limitation, with the view of restoring system security. As a consequence, most legislation exempts TSO from liability (or part of it, such as, in Germany, where financial damages are excluded). In the Netherlands, if conditions of Compensatieregeling are fulfilled, the TSO will still have to pay.

(iii) As a general rule, TSOs remain liable towards grid users in case of problems at the level of the supplier (supply of a defective product) and/or in case of problems at the level of the subcontractor. Only in some limited cases are TSOs exonerated from their liability towards grid users for breach of duty of a

Our investigations reveal several **divergences** in some elements of liability, such as:

(i) Some MS foresee cases of strict liability on TSOs while others do not. For those with strict liability, a distinction must be drawn between general cases of strict liability (under the civil code, as it is the case in Poland and in Czech Republic, as well as under the German public liability act) and sector specific cases of liability (*Compensatieregeling* in the Netherlands and in France). According to discussions during the workshop, strict liability in France and the Netherlands aim (among other things) at incentivising TSOs to improve/maintain quality of supply. We believe they are adopted in a regulatory framework, involving the consultation of relevant stakeholders. On the contrary, strict liabilities (which are risk liabilities) under general law entail the consequence of putting the affected TSO under heavy/large obligations, implying substantial needs for insurance, sometimes not fully met, as it will be seen below (section 4). On the other hand, not insuring the totality of one’s activities or assets can be an incentive to behave prudently for the part of activities/assets not insured. Theoretically, strict liabilities of general scope also entail the risk of deterring the affected TSOs from participating to new operational activities. This could theoretically be detrimental to the development of the internal market should the affected TSOs be deterred from participating to projects favouring the internal electricity market development. Finally, strict liability, when not accompanied by a financial cap, can put the affected company under an insolvency risk, when the damage magnitude following an incident exceeds the affected company’s total wealth. Strict liability cases without financial caps might thus turn out to be problematic to TSOs, such as for the Czech TSO. In Poland, the problem is less acute since the recent change of law introduced financial caps similar to those in Germany. Bearing in mind the purpose of facilitating the burden of proof that strict liability regimes sometimes entail, an alternative to strict liabilities could be to foresee, by way of law, a rebuttable presumption, putting the onus of proof on the company carrying out the industrial activity.

(ii) Definition of force majeure varies from one MS to the other. Some sector specific laws merely mimic the definition of force majeure under general law, which lacks added value. We find only in France statutory definitions of force majeure taking into account the specificities of TSOs’ activities. Force majeure definition reflecting TSOs’ specificities (such as in France), seem desirable for the transmission system industry and grid users.

(iii) Some MS only have statutory financial caps in sector specific laws and regulations, while most of them do not have such caps. In the United Kingdom, financial caps are absolute (5 millions £ for any CUSC party/grid users). In
Germany and Poland, financial caps are progressive (depending on the number of affected grid users, the type of damage and/or the level of fault of the TSO). Financial caps – although useful for TSOs and, in turn, for the market as a whole – limit users’ rights of being fully indemnified for underwent damages (by derogation to general law principle, especially in tort law).

(iv) General rules of law, having consequence on liability of TSOs, vary from one MS to the other, such as causation theories and types of recoverable damages.

100. The above-mentioned divergences have the consequence that, for the same event, grid users will be treated differently from one MS to the other. As the difference between MS are substantial with respect of caps, the situation regarding financial caps as it currently stands might create discrimination between users throughout Europe. However, as the present study focused on theoretical aspects of liability, we do not have any empirical evidence showing that the above-mentioned differences imply competition concerns for grid users or impede the development of the internal market. Discussions at the workshop reveal that the presence (or not) of financial caps could imply some shortcomings in terms of market integration:

- For the same incident, some grid users could be opposed financial caps whereas others not;
- Opportunities of forum shopping for grid users;
- Simplified/quicker recognition of TSOs’ fault where legal financial damages.

Should these problems be confirmed by empirical evidences, there would thus be a case for harmonisation of rules on this point. Some (M. Faure) nonetheless question the appropriateness of extending financial caps to other MS.  

101. Finally, several good practices may be highlighted:

(i) Sector specific definition of force majeure: not all storms should be considered as force majeure for the TSO industry; not all decisions of authorities (especially those of regulators) should be considered as force majeure either.

(ii) Caps have several advantages both for TSOs (predictability; accurate assessment of liability needs; decreased bankruptcy risk) and grid users (rapidity in obtaining identification when legal rebuttable presumptions). On the other hand, financial caps represent a limit to the users’ right to be fully indemnified, by derogation to general principles of law (especially for tort liability).

30 M. FAURE, “Comments on liability of transmission system operators”, Maastricht, 6 April 2010, p.
3. **CONTRACTUAL LIABILITY**

3.1. **LIABILITY LIMITATIONS BY WAY OF AGREEMENT**

**102.** In most MS, TSOs can exempt their liability (towards counterparties) by way of agreements. Conditions under which a party may limit liability by way of agreement vary slightly from one jurisdiction to the other.

**103.** Some jurisdictions are stricter than others. In France and in Italy, liability exemptions by way of agreement are valid provided that there is no exoneration for gross negligence or wilful misconduct. In addition, in France those exemptions cannot be related to an essential obligation of the contract.

**104.** Some jurisdictions are less strict than others. In Germany, liability exemptions by way of agreement are valid provided that there is no exoneration for wilful misconduct. This is true under general civil law. As regards TSOs there is the situation that there first was liability exemptions in the NAV which were not directly applicable to networks operators in use of system agreements. This was the reason why use of system agreements referred contractually to section 18 NAV. This referral has a long tradition in Germany. Such referral existed also with the legal predecessor of section 18 NAV. As there has always been a discussion whether such contractual referral was valid – the Federal High Court has confirmed such view but to some extent left open his decisions in the future – the government implemented section 25a StromNZV. In addition, all network operators refer to the statutory liability exemption and every prudent network operator will make sure that the contract does not contain a different liability exemption since the courts could take the view that the referral to the exemption balanced by the legislator is only valid when the referral is 1:1.

**105.** In Poland, one may not exonerate oneself for damages caused intentionally (article 473 of the Polish civil code).

**106.** Under Danish law, any type of clause is foreseeable provided it is not “unreasonable”.

**107.** Exemption clauses are allowed in Dutch law. However, they do not apply if they are unacceptable to the criterion of reasonableness and fairness (“
"naar de maatstaven van van redelijkheid en billijkheid"”). In order to assess this, judges take into consideration all the circumstances of the case (knowledge by the parties of a defect at the conclusion of the contract, the expertise of the parties, etc.). From our experience under Belgian law, exemption clauses are possible provided that they do not exempt from wilful misconduct (less strict than in France) or provided that they do not deprive the contract from an essential obligation of it.

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108. In Czech Republic, it is unsure whether parties to agreements may limit liability by way of agreement. Article 386 of the Czech commercial code stipulates that “*the right to damages may not be waived prior to the breach of an obligation (duty) from which damage may arise*”. This provision is of mandatory nature and cannot be changed by contract. Our national correspondent informs us that there are almost no court decisions (*judicature*) of the higher courts on limitation of liability. It is generally known that the courts are mostly in favour of the approach that limitation of liability is not allowed in the Czech law (based on the above-mentioned article). On the contrary, many legal theorists believe that the limitation is possible through grammatical and logical interpretation of the legal provisions of the commercial code. They offer various kinds of provisions (*wordings*), which (according to their opinion) limits the liability and stand up in front of the court. Very careful approach must be followed when drafting liability limitation provisions. Until such cases are decided by final and effective court decision, the general opinion is that the liability cannot be limited. Due to aforementioned high legal uncertainty (unpredictable decisions of the courts) limitation of liability in overwhelming majority of all the contracts governed by the Czech law is not used.

However, several tools are at disposal of Czech lawyers for limiting liability by way of agreements, namely by:

- Limiting the recoverable damage when damaged is caused by regular fault/negligence (or sometimes also in case of gross negligence, but in this case, it is unsure whether the clause will stand in front of courts and tribunals for the reasons mentioned above);
- Extending the list of “circumstances excluding liability” mentioned above (n° 28);
- Excluding compensation of profit losses;
- Etc.

109. It appears from above that it is possible for a TSO to limit its liability for at least simple fault/negligence in many jurisdictions, but in Czech Republic (for the time being). In other jurisdictions, such as in Germany e.g., it is also possible for gross negligence.

110. As it will be seen below, liability may also be excluded, by way of agreements, with respect to damage type (property, financial damage, e.g.), cause of damage, etc. (n° 154).

3.2. AGREEMENTS BETWEEN TRANSMISSION SYSTEM OPERATORS

111. Our investigations reveal two main types of agreements/rules between TSOs, namely:

- Agreements for the purpose of coordinating operations (section 3.2.2); and
- Agreements containing rules on capacity allocation (section 3.2.3).

Some national correspondents did not specify whether information provided regarding agreements between TSOs relate to operation or capacity allocation (Czech Republic and Germany). Information regarding these agreements is provided in a separate section (section 3.2.1).
3.2.1. **Information on agreements between Transmission System Operators in general**

112. Our Czech and German correspondents state that the German and the Czech TSOs are responsible, under agreements with other TSOs, for regular fault and/or negligence. Answers for Germany are based on a template draft agreement.

113. In Germany, it is common practice that national TSOs agree on the applicability of section 25a StromNZV in conjunction with section 18 NAV concerning the liability; some TSOs agree on (full or partial) applicability of article 13 MLA (see section 3.2.2.1). According to the knowledge of our national correspondent, in contracts between national (German) TSOs the contract partners shall in the course of performing under this contract be liable for damages caused by any negligent act or omission by its personnel pursuant to the law applicable. For consequential damage, i.e. damage which is caused by interruption of energy exchange, the contract partner may only liable in case of intentional acts or gross negligence.

114. In Germany and Czech Republic, the clauses of force majeure are “standard”, according to our national correspondents. In Denmark, there is no specific definition so that the general definition under Danish law is applicable. We did not obtain specific information for the Netherlands and the United Kingdom. Some agreements list specific events as being events of force majeure, such as, in Czech Republic, loopholes. After further investigations, our Czech national correspondent specifies that loopholes are “international superimposed loop flows” (“ISLF”). ISLF are not regular loopholes according to our correspondent. They have their origin in an unpredictable and unexpected situation in other TSOs control area, which cannot be overcome by the Czech TSO. ISLF originate in other TSO control area caused by various force majeure events, such as line failures, breakdowns, etc. They have a negative impact on other TSOs (in general, a reduction of services) that are considered as force majeure as well, according to our correspondent.

The general consequence of the occurrence of an event of force majeure is the suspension of performance of obligations and liability exemption. These consequences are thus similar to those under general law/sector specific regulations.

115. As a general rule (and subject to a couple of exceptions explained below) only direct damages are recoverable under agreements between TSOs. Interface TSOs shall not be liable as well in case of wilful misconduct or gross negligence if the damage is not typical and foreseeable. Interface TSOs are only liable in case of wilful misconduct or gross negligence regarding typical and foreseeable damages.

116. Financial caps are very rarely included in agreements of the Czech TSO. Agreements between national TSOs refer to section 18.2 of the NAV (see above for details).

3.2.2. **Agreements on coordination of operation**
117. When TSOs are synchronously interconnected, they must coordinate operations. TSOs organise the required coordination by way of the MLA for the TSOs synchronously interconnected on the continental European area (ex-UCTE area) and by way of the SOA for the TSOs synchronously interconnected in the Nordica area (ex-Nordel area) (section 3.2.2.1). Bilateral agreements with interface TSOs are moreover necessary for secure operation of the two control neighbour areas (section 3.2.2.2).

3.2.2.1. Multilateral agreement and System Operation Agreement

118. The MLA is an agreement between the ex-UCTE members (now members of the Regional Group Continental Europe of ENTSO-E). It is an agreement which makes binding upon the MLA parties the common rules of operation and of coordination of the ex-UCTE members (compiled in the so-called “Operation Handbook”). The rules contained in the Operation Handbook are justified by the fact that the ex-UCTE TSO members are synchronously interconnected, which requires coordinated actions among them. When a TSO does not comply with a standard in the Operation Handbook, it may table an “addenda” to the MLA, by which the other parties recognise that it is not compliant and by which the non-complying TSO sets a timeframe, within which it will become compliant again with the said standard through a specific list of actions. A TSO who tabled an addenda cannot be pursued by the other MLA parties in case of incident due to the breach of this addenda.

Under the MLA, liability is limited to wilful misconduct and gross negligence only (no liability for regular fault/negligence). Only “the resulting foreseeable damage in the context of the agreement” is recoverable. Liability is limited to a € cap.

119. Under the SOA (agreement for coordinated operation of synchronously interconnected TSOs of Nordic countries), liability is limited to gross negligence and wilful misconduct (no liability for regular fault/negligence). Recoverable damages exclude indirect, consequential damages and revenue losses. We find no financial cap in the SOA.

3.2.2.2. Bilateral operational agreements

3.2.2.2.1. Agreements list

32 There is another important multilateral agreement between TSOs formerly members of ETSO (now of ENTSO-E), the inter-compensation transmission agreement (the so-called “ICT Agreement”). The ITC Agreement is an agreement setting compensation schemes between TSOs in Europe for cross-border uses of electricity between the parties to the ITC Agreement. It replaces cross-border tariffs (prohibited under the Cross-Border Regulation). It is developed in the framework of ETSO (now ENTSO-E) and has encountered an increased number of parties over the years (source of information: ETSO, ITC Agreement 2009-2009, 3 October 2007, available at http://ec.europa.eu/energy/gas_electricity/consultations/doc/2009_02_28_tso_explanatory_note.pdf.). We do not however believe that this agreement has incidents on security of supply.

33 By appending the Operation Handbook to the MLA, the Operation Handbook becomes an integral part of the MLA and becomes a binding commitment for the MLA parties.


35 The SOA is available on the website of ENTSO-E (www.entso-e.eu).
120. Bilateral agreements are agreements between two TSOs, such as agreements between two TSOs on the TSO sides of an interface. Interface agreements contain rules on the development, operation and maintenance of such interfaces. Allocation of available capacity may also be ruled by bilateral and/or multilateral agreements (for further details on these, please refer to section 3.2.3 below). Our investigations reveal the existence of the following bilateral agreements:

- In Poland (Polish TSO),
  - Operation agreement between the Polish TSO and its neighbouring TSOs;
- In Denmark (Danish TSO),
  - The “System Operation Agreement of 15 January 2007” (for the interface with Norway and Sweden); and
  - An interface agreement with Kontek (East DK);
- In Italy and France (Italian and French TSOs),
  - Agreement for mutual emergency assistance service between Terna and the French and the Swiss TSO (the “MEAS”);
- In the Netherlands, the Dutch TSO has a bilateral operational agreement with neighbouring TSOs; and
- In the United Kingdom (for the British TSO),
  - An Interconnector Framework Agreement with the French TSO; and
  - The so-called “Moyle Interconnector Capacity Framework Agreement”, i.e. a bilateral agreement concerning Scotland and Northern Ireland.

3.2.2.2.2. Types of liability

121. Generally speaking, under these agreements, TSOs are liable for gross negligence, wilful misconduct only, and sometimes for “culpable dereliction”. In some cases, TSOs are not liable for regular fault/negligence. As a rule, the Polish TSO is liable for gross negligence/fault or wilful misconduct only in agreements with other TSOs. Our national correspondent stipulates that the liability standard is the standard of due diligence (diligence of a specialised professional and as a responsible control area manager). The Danish TSO is liable under the contracts with interfaces with Norway, Sweden and with Kontek (East Denmark) for gross negligence and wilful misconduct only. Under the MEAS, it is liable for gross negligence and wilful misconduct only. In particular, liability for lost profit, indirect damages, and consequential damages is excluded.

122. In some agreements, the level of liability (regular/gross fault, etc.) is not defined, such as in the agreement at the interface between (West) Denmark and TRANSPOWER.

For this agreement, liability thus covers regular fault/negligence.

We do not have specific information for the United Kingdom and the Netherlands on this point.

3.2.2.2.3. Force majeure
3.2.2.3.1. Force majeure definition

123. Under agreement between TSOs in Poland, Italy and France, definitions of force majeure are close to those under general law. The event of force majeure must be:

- Beyond the (reasonable) control of the party invoking it;
- Unforeseeable;
- Unavoidable;
- Unexpected; and/or
- Not due to the fault of the persons invoking it/exterior.

Only a couple of agreements mention that, as a consequence, the obligations affected by the event of force majeure are impossible to perform (agreements with the French and the Italian TSOs).

124. Some agreements list specific events as being events of force majeure, such as:

- In Czech Republic,
  - Loopholes (see n° 114);
  - Atmospheric phenomena (our correspondent does not stipulate whether these must be extraordinary ones);
- In Poland,
  - War, terrorist activities;
  - Acts of nature (without specifying anything regarding their importance);
  - Orders of authorities.
- The MEAS (signed by Italy and Swiss and French TSOs) refer to force majeure as to a list of natural disasters or any other cause beyond a party’s reasonable control and which the party itself cannot overcome by means of its actions.

Specific weather conditions (similar to those listed in some agreements in France) are listed in the connection and user of system code (“CUSC”) in the United Kingdom:36

- “[...] provided that, for the avoidance of doubt, that weather conditions which are reasonably to be expected at the location of the event [...]”

3.2.2.3.2. Consequences of force majeure

125. The general consequence of the occurrence of an event of force majeure is the suspension of performance of obligations and exemption of liability. Such consequences are thus similar to those under general law/sector specific regulations.

3.2.2.4. Damage

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36 Although the CUSC is not applicable as such between TSOs (but between the British TSO and producers and DSOs), provisions in relevant agreements between the British TSO and other TSOs are similar to that in the CUSC.
126. As a general rule (and subject to a couple of exceptions explained below), only direct damages are recoverable under agreements between TSOs. Some national correspondents stipulate that, beside being direct, the damage must also be:

- Foreseeable;
- Material or “physical”;
- Certain; and/or
- Typical.

Some agreements expressly stipulate that the damage must be “documented”.

The following indirect damages are thus excluded from such agreements:

- Revenue losses;
- Consequential damages;
- Indirect losses;
- Profit losses;
- Income loss;
- Contract losses;
- Increase value losses;
- Business interruptions;
- Special damages;
- Etc.

In Denmark, the interface agreement with Kontek stipulates that direct and indirect damages are due. The interface agreement with TRANSPower does not regulate the issue (which is left to the general applicable law of this contract).

We did not find any reference to damages to reputation (either as being included or excluded from the recoverable damages). Such damages are to be found in agreements with PXs (section 3.3 below).

3.2.2.2.5. Financial caps

127. There are many TSOs who do not foresee financial caps in agreements with other TSOs (Poland, subject to the remark below; Denmark; Italy; United Kingdom). In some cases, agreements with TSOs foresee some financial caps, such as in Poland, for operation agreements which relate to the MLA and which breach constitutes simultaneously a breach of the MLA (cap of [CONFIDENTIAL] €).

3.2.2.2.6. Applicable law

128. The question of the applicable law is generally provided individually by each contract. In some contract, there is no clause of applicable law at all. In the contracts between parties of the same country, the law of this country applies. The situation varies in international contractual relations.

129. In Denmark, either Danish or Swedish law is applicable to agreements with interface TSOs (when regulated). In Italy, Belgian law is applicable except in one specific case, where
Swiss law is applicable (appendix on the Italian-Swiss interconnection). In France, either French law or Belgian law is applicable to the contracts with interface TSOs (except for the CWE Rules). German law is regularly applicable between national German interface TSOs for the German capacity allocations. In Poland, the law of third countries can be applicable. In United Kingdom both French law and the law of Northern Ireland is applicable.

130. It is interesting to see that some international situations are ruled by a third party law, i.e. the law of a country to which the parties to the contract do not belong. In such cases, “neutral” laws such as Swiss law (which has always been seen as a neutral country for historical reasons) or Belgian law (which is a “small” country, like Luxembourg, towards which parties do not have mistrust, unlike for laws of big countries such as France, Germany or the United Kingdom, e.g.). Belgian law seems rather popular in multilateral agreements between TSOs. This may be explained by the fact that the main TSO association (ENTSO-E, but formerly UCTE or ETSO) are based in Brussels.

3.2.2.7. **Dispute resolution**

131. As a rule, dispute resolution is organised in the first place by amicable settlement. In case parties do not reach amicable settlement, the disputes are settled by judicial or arbitral proceedings. The arbitrations cited by our national correspondents are the UNCITRAL Arbitration Rules (Poland); Arbitration Institute of the Stockholm Chamber of Commerce (dispute between the Danish TSO and the Norwegian or the Swedish TSO); Maritime and Commercial Court in Copenhagen (dispute between TSOs in Denmark); International Chamber of Commerce; ad hoc arbitrage (in Geneva for the IFA Rules of France, e.g.).

132. Information regarding the dispute resolution clause is provided in section 4.9 below.

3.2.3. **Rules on capacity allocation and capacity curtailment**

133. TSOs are responsible for the management of interconnectors and for coordination with other TSOs regarding these. Bilateral and/or multilateral operational agreements may contain, besides rules on common operation, which are of interests for the interconnections’ users, rules on:

- The management of interconnectors, namely the build up, operation and maintenance of these; and
- The rights and obligations of holders of “physical transmission rights” (“PTR”) (i.e. producers, consumers, traders, etc. needing interconnection capacity for buying/selling electricity to/from abroad).

TSOs are responsible to make a proposal of text for those agreements, which is then discussed with NRAs, after consultation of stakeholders (association representing interests of grid users, e.g.). Depending on each TSO’s legal and regulatory framework, the NRA might

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37 Under article 12 and 15 of the Electricity Directive (“Managing electricity flows on the system, taking into account exchanges with other interconnected systems”) and under their respective national laws.
have to formally approve those rules on capacity allocation between TSOs and interconnection’s user.

Bilateral agreements are those agreements between, on the one hand, the TSOs of a concerned interconnection and, on the other hand, the interconnection’s user which relate to mainly capacity allocations, as for instance:

- Rules on allocation of interconnection capacity between France and Spain ("IFE Rules");
- Rules on allocation of interconnection capacity between France and Switzerland (the “IFS Rules”); and
- Rules on allocation of interconnection capacity between France and the United Kingdom, the “IFA Access Rules” ("IFA Rules");
- French – German Interconnection intraday capacity Allocation rules (the “IFD Rules”); and
- Intraday capacity allocation rules for the France- Belgium Interconnection (the IFB Rules”);
- Etc.

Multilateral agreements between several TSOs (more than only two TSOs of a concerned interconnection) are those agreements, in the framework regional initiatives that relate to mainly capacity allocations and, as the case may be, interconnection management. They contain rules on capacity allocation and capacity curtailment.

- The “Agreement on Auctions on the Danish-German Border of 2009” referring to the “Nordic Grid Code” (for the interface with TRANSPOWER [West DK]);
- Access Rules for interconnections between France and Italy; Switzerland and Italy; Austria and Italy; Slovenia and Italy; Greece and Italy Interconnections, namely the “Capacity Allocation Auction Rules” (the “FI Rules”);
- The Central Western Europe Region Auction Rules (the “CWE Rules”) defined by the Central Western Europe TSOs for the relevant auctions operated by the joint auction office (namely CASC-CWE) set up by the same TSOs;
- Etc.

We were not able to obtain detailed list of agreements for the TSOs in Poland, Czech Republic and Germany (for which some trends are however available).

3.2.3.1. Clauses on liability and on force majeure

134. In many of these agreements, liability is limited to gross negligence and wilful misconduct, sometimes to “culpable dereliction”. The French TSO is responsible for gross negligence, wilful misconduct and/or “culpable dereliction” under the FI Rules. Some agreements stipulate that this negligence/misconduct must relate “to an essential duty under these auctions rules”. Some agreements (IFE, IFS and IFA Rules) do not stipulate the level of liability, in which case general rules of law are applicable. Recoverable damages are direct damages only. In the agreement between the Czech and the Austrian TSOs, recoverable damages are moreover “limited to typical and foreseeable damages unless [the
parties] have acted wilfully or by gross negligence”.38 The same agreement sets up a cap to 100,000 € in total. In some agreements however, liability level is not define (interface between the Danish TSO and TRANSPOWER, e.g.).

135. In some interconnection rules with the French TSO (IFS Rules), we find interesting events listed as force majeure events.

- “[...] Natural catastrophes of abnormal intensity, when regular measures to be taken to prevent resulting damages cannot prevent the occurrence of the damage;
- Irresistible climate phenomena to which TSOs are particularly vulnerable when, during the same day and for the same cause, at least 100,000 customers of the TSO and/or of the DSO are deprived from electricity;
- Power cuts following personnel strikes;
- Power cuts following a decision of public authorities for defence or public security reasons;
- Sudden, fortuitous and simultaneous outage of several production units [...]”.

For the same reasons as mentioned above, we believe decisions of NRAs on capacity allocation should not be considered as force majeure but as an event giving the right to renegotiate the agreement. It is indeed the mission of NRAs to take decisions regarding interconnection management; such decisions are thus not “extraordinary” so as to give basis for force majeure.

136. Under some agreements with the French TSO (i.e. only under the IFE Rules), TSOs cannot be held liable, in relation to the ability of a user to participate to an auction and/or to the timely arrival of its auction bids, for any “damages resulting from a user’s auction participation or not being able to participate in a auction or in a physical transmission right (“PTR”) transfer or in a PTR resale, or from the results of the auction and/or the PTR resale and/or the PTR transfer or from an auction not being held or cancelled”. Nevertheless, under the same agreements, the TSOs bear a general contractual liability with usual limitations (to direct damages) for the performance of their obligations. In this case, the liability of the French TSO is thus not a total exemption of liability for the TSO, but only in relation to the ability of a user to participate to an auction and/or to the timely arrival of auction bids.

137. Specific consequences in case of force majeure are applicable to the French TSO, namely:

- In case force majeure lasts more than thirty days, any party may terminate the agreement (IFE Rules);
- In case force majeure lasts more than thirty days, the auction operator may suspend entitlement of the user and/or the user may request the withdraw of its entitlement (FI Rules);

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38 Please note that this information was not provided to us by our Czech national correspondent. This information is publicly available on the following website: http://www.auction-office.at/Austrian-Czech_Border/.
• In case force majeure lasts more than thirty days, the TSO may suspend the entitlement of the user and/or the user may request the withdrawal of its entitlement (IFS Rules);
• In case force majeure lasts more than six months, any party may terminate the agreement (IFA Rules); and
• In case force majeure lasts more than thirty days, the joint auction office may suspend the entitlement of the user and/or the user may request the withdrawal of its entitlement (CWE Rules).

These rules look reasonable to us. TSOs are essential facilities and operate services of public/security interest. Their activities should, as much as possible, not be interrupted/terminated, including in case of force majeure. Contract terminations due to force majeure should be possible in limited/exceptional circumstances only, such as those defined above (CWE Rules).

138. Several agreements provide settlement via judicial courts (IFE Rules in France, e.g.). Some agreements provide the possibility to ask for a temporary injunction ("référé") before some courts (CWE Rules, e.g.).

3.2.3.2. Capacity curtailment

139. In case of network disturbance, security threat, etc., TSOs might have to curtail the capacity rights of PTR holders. The questions that arise are whether and when the TSOs should compensate the PTR holder for the losses incurred following the curtailment and, if yes, up to what extent.

140. In Denmark, the TSO must first apply counter-trade (if, following curtailment, less electricity can pass on one side of the border, the TSO must buy the necessary quantity of electricity on that side of the border to compensate the loss, so that the loss is not felt by the market on that side of the border). Counter-trade is the rule in Nordic countries by application of the SOA.39 Use of counter-trade greatly reduces the risk for TSOs to pay compensation to PTR holders (as they do not “feel” the consequences of the curtailment).

141. Depending on the agreement/MS, TSOs reimburse the losses incurred by the PTR holder in case of curtailment:
• "except in case of force majeure" (Germany);
• In case of “reasons linked to the safety of the system” (Germany, on ground of section 13.4 EnWG, in which case the TSOs are entitled to put the compensation amount in the tariffs);
• Except within “35 equivalent days or 840 hours”, beyond what “PTRs are guaranteed” (interconnection between France and Italy);
• Auction Rules for Italian borders provide that in case of curtailments for network security, the PTR holder is compensated at 100% of the clearing price (110% for the French border) paid corresponding to the hours of curtailed PTRs. However, PTR

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39 Art. 10 and Appendix 8 of SOA: “The Parties shall uphold the commercial players’ planned trading, by means of counter trading".
curtailment for network security reasons is allowed up to 35 equivalent days or 840 hours;
- Etc.

Depending on the agreement, the amount to be reimbursed varies from one agreement to the other.
Capacity curtailments are not covered for the Danish TSO (by application of “regulation B”), as counter-trade is applicable. In the EMCC market coupling, market participants do not “feel” capacity curtailments as these are born by EMCC (who buys and sells electricity on behalf of them on the coupled market).  

142. It appears from the above that capacity curtailment has different consequences on market participants in the United Kingdom; in Germany; in Denmark; when using the EMCC; etc. (compensated in certain cases but not in other or not compensated at all).

3.2.3.3. Assessment

143. Various means of dealing with capacity curtailments and various ways of treating their consequences (compensation, no compensation, in which situations, etc.) affect grid users differently throughout Europe: for the same event, users might be treated differently whether located in the United Kingdom, in Denmark or in Germany e.g..

144. Capacity curtailment policies moreover highlight diverging views of NRAs who are competent for approving rules on management of interconnectors. Diverging view of NRAs may have negative consequences for the internal market. The Cross-Border Regulation (both in its former version and the version currently into force) and Regulation (EC) No 713/2009 (the “ACER Regulation”) do contain a legal basis for NRAs to collaborate for cross-border issues. From the diverging rules identified above (n° 141), it does not seem that NRAs are fully using this opportunity to implement converging views on the matter.

145. Discussions at the workshop reveal that there are voices supporting the incentivisation of TSOs to make the best possible use of interconnection capacity. Counter-trade is a good practice that could be extended for avoiding the reduction of commercial deals in some cases and for avoiding discriminatory treatment between market participants (and in turn, competition distortions).

As revealed during the workshop, policies similar to “incentive regulations” could be a way to improve interconnection capacity management: TSOs could be rewarded for the good management of interconnections and penalised in case of bad management (curtailment). This leads to the question of whether TSOs should compensate the “market price spread” of capacity to curtailed market participants, i.e. the difference between the contracted value

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42 Under article of Regulation 2009/714/EC (ex-article 9 of Regulation 2003/1228/EC), NRAs “when carrying out their responsibilities, shall ensure compliance with this Regulation and the Guidelines adopted pursuant to Article 18. Where appropriate to fulfill the aims of this Regulation the [NRAs] shall cooperate with each other, with the Commission and the Agency in compliance with Chapter IX of Directive 2009/72/EC".
of capacity and the actual value of the usable capacity at the moment of curtailment (loss of profits). According to the IFIEC representative at the workshop, spread payment could be viewed as a way of incentivising TSOs to better manage available interconnection capacity. However, it could have the adverse effect of making TSOs risk-averse, leading them to become conservative in setting up the available interconnection capacity level. ERGEG currently supports the reimbursement of spread but the TSO community in Europe opposes to it.

3.2.4. Preliminary conclusions on agreements between Transmission System Operators

146. Several trends may be drawn from liability regimes in agreements between TSOs:
   (i) Liability is usually excluded for regular fault/negligence;
   (ii) Force majeure is generally speaking standard and similar in all agreements;
   (iii) Recoverable damages are usually limited to direct damages;
   (iv) In principle, there are no financial cap (except, notably, in the MLA).
   However, the studied clauses reveal many diverging definition of indirect damages from one agreement to the other (n° 126). Consequently, the same damages could be compensated in one MS but not in the other. This can have potential discriminatory consequences for grid users. We do not have empirical evidences demonstrating, with figures, such discriminations.

147. Some elements of force majeure in France can be seen as best practice in comparison with other MS:
   (i) Force majeure for climate catastrophes should be limited to events of especially broad magnitude or having as consequence to cut power for a substantial (minimal) amount of customers;
   (ii) Force majeure should be excluded in case of decisions of NRAs (in which case renegotiation of the contract is more appropriate);
   (iii) Only long lasting events of force majeure should allow the termination of the contract.

148. Diverging rules on the management of disturbances on commercial contracts at interconnectors; on the events when interconnection capacity curtailment may apply and on the consequences of capacity curtailment:
   (i) Reflect diverging positions of NRAs on interconnection capacity management; and

43 See ERGEG paper on firmness (15 July 2008):
44 See ETSO paper on firmness (30 January 2009):
(ii) Have the obvious\(^{45}\) consequence of putting grid users under various terms and conditions depending on the interconnection, on which the capacity curtailment occurs.

### 3.3. AGREEMENTS WITH GRID USERS AND OTHER MARKET ACTORS

149. The present section 3.3 covers agreements between TSOs and:
- Producers;
- DSOs;
- Industrial consumers;
- BRPs; and
- PXs.

Agreements with holders of PTRs (who may be producers, suppliers, industrial consumers, BRPs, etc.) are dealt under section 3.2.3 above.

150. We understand from discussions at the workshop that agreements with grid users (access to and/or operation of the grid)\(^{46}\) are in principle taken after consultation of all stakeholders. TSOs make a proposal of text, which is then discussed with NRAs, after consultation of stakeholders (association representing interests of grid users, e.g.). Due to the fact that TSOs are monopolists, full information is however not always available to NRAs.

#### 3.3.1. Introductory remarks

##### 3.3.1.1. Absence of separate/specific agreements

151. As a preliminary remark, it is worth noticing that, in some cases, some TSOs do not have agreements with some grid users or other market operators. [CONFIDENTIAL]. We find other cases where there are no agreements:
- The Danish TSO does not have any agreement with onshore wind plants;
- The Danish TSO does not have any agreement with DSOs. The Danish technical regulation governs these relations, without containing specific rules on liability;
- There are no specific separate BRPs agreements in Poland.

152. For all these cases, general principles of law, as explained under section 2 above, are applicable.

##### 3.3.1.2. Liability with grid users in Germany

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\(^{45}\) We do not have figures showing to what extent exactly these diverging rules affect grid users. This consequence in terms of market conditions stems from the content of the applicable rules directly.

\(^{46}\) These procedures are not applicable to agreements with PXs, e.g.
153. The information presented in the present section is valid for agreements with producers, DSOs, industrial consumers and BRPs in Germany.

154. In Germany, according to industry practice, with respect to disruption (outage) of grid operation or unsteadiness of grid use contracting parties agree on applicability of section 25a StromNZV in conjunction with section 18 NAV as specific laws to provide costs minimisation in case of major loss. This contractual agreement is not required because section 18 NAV which contains several limitations of liability is already applicable to TSOs as section 25 StromNZV refers to section 18 NAV. For further details, please refer to section 2.3.3.1.

155. Apart from disruption (outage) of grid operation or unsteadiness of grid use, the four German TSOs use different and divergent liability exemptions. The liability is generally limited to intent and gross negligence in case of property and financial damages and incidents other than resulting from disruption (outage) of grid operation or unsteadiness of grid use. Besides, model agreements may contain an additional limitation of liability amounting to 2.5 millions Euros per damage event and per year in case of gross negligence. Indirect damages may be excluded. These limitations are not applicable to damages resulting from injury of life, body and health. Moreover, contractual parties are liable for damages that were caused by simple negligence in case of breach of significant contractual obligations. The liability on the merits and on the amount is limited to foreseeable, typical damages. These liability provisions are normally applicable to representatives, third persons who carry out the operator's tasks and vicarious agents.

156. In case of force majeure, the contractual obligations are suspended and the liability is excluded. Force majeure means any particularly war, (thunder) storm, walkout by subcontractors, damage of plants for producing, transmission or distribution of electric power, legal or official order or other circumstances that cannot be averted by any contract partner and whose occurrence cannot be avoided by reasonable technical and economic aids. The contract partners will immediately care for the resumption of supply and with all reasonable measures.

3.3.2. Liability in agreements with producers

3.3.2.1. Liability types

157. In some cases TSOs are exempted from liability in case of regular fault/negligence (Dutch and Italian).\(^47\) In the case of the Dutch TSO, it is stipulated that the liability (for wilful misconduct/gross negligence) applies in the following three situations:

\(^{47}\) As mentioned above, the Danish TSO has strict liability towards offshore wind plants, when it fails to connect under the terms and conditions of the public tender. This strict liability extends to any constraint in the grid connection of the farm. This strict liability regime is applicable to wind farms established after tendering procedures, namely two (Rodsand II and Horns Rev II).
Transmission, interruption or limitations;
Breakdown, default, defect of the equipment (connection, grid, plant, etc.) operated by the Dutch TSO;
Supply failure.

For other situations, Dutch general law is applicable.

In the United Kingdom, the British TSO is exempted from liability in case of force majeure and in case of transmission constraints or insufficiency of generation which could not have been avoided by good industry practice. Liability is however limited to the breach of the grid code provisions, which are rendered binding upon the CUSC parties via the CUSC.

In Poland, there is no liability at all on the side of the TSO in the following cases:
- Force majeure (for its duration);
- Pauses and limitations under the instruction to TSO operation (“ITSOM”);
- Planned outages under the ITSOM;
- Occurrence of events under the ITSOM threatening to or causing losses of electricity supply;
- Announced state of safety threat;
- Cross-border capacity curtailment under binding regulations “in accordance with the rules of tendering procedures for reserved cross-border capacity volumes”;
- Failure of the TSO’s IT system other than inappropriate operation/maintenance (including virus and crime against information protection);
- Failures on systems of other TSOs in the (ex) UCTE synchronous area.

For other cases, general Polish law is applicable.

158. In other cases, liability extends to regular fault/negligence. In France, in case of non-programmed unavailability of production, the producer connected to the TSO’s grid may claim for damages in case of fault of the French TSO or in case of incident upstream of the production site (except force majeure). As a general rule, in France, the TSO is always liable towards producers in case of regular fault/negligence.

159. Finally, in some cases, general and/or specific law is applicable to the agreement (without further specifying liability conditions):
- Agreements between the Danish TSO and power plants; and
- Agreements between the Danish TSO and onshore wind farm.

3.3.2.2. Force majeure

160. In many cases, force majeure in agreements with producers refers to force majeure under general law (Netherlands, Denmark [except for offshore wind farms] and France). In Poland, reference is made to sector specific laws/regulations (ITSOM and NAV respectively).

161. In France, access agreements with producers firstly contain a general definition of force majeure, similar to the definition of force majeure under French general law. These agreements secondly contain a list of specific events considered, when they occur, as events of force majeure “per se”, without having to proof that the conditions of force majeure under general law are fulfilled:
• Voluntary destructions due to a series of events such as war, attacks, etc.;
• Damages caused by accidental incontrollable facts imputable to third parties (fires, air crashes, explosions);
• Natural catastrophes of extraordinary magnitude;
• Atmospheric phenomenon irresistible to electrical networks (such as “sticky snow”) provided that 100,000 customers of the TSO are deprived from electricity per day;
• Strikes at the condition to have characteristics of force majeure;
• Orders imposed by public powers for defense or public security reasons;
• Sudden unavailability, fortuitous and simultaneous of several production installations.

In the United Kingdom, the CUSC definition is applicable, which is a mix of “traditional events of force majeure” (war, strikes, etc.) and specific ones (see section 3.2.2.3.1 above).

### 3.3.2.3. Damage exoneration

162. As a general rule, direct damages only are recoverable (the Netherlands, Italy, France and the United Kingdom). Are thus excluded indirect damages.

In the Netherlands, liability regarding consequential damages (including trading losses or profit losses and immaterial damages) is also excluded for gross negligence or wilful misconduct.

Moral damages are also listed as being excluded.

163. In some countries general law is applicable (Denmark and Poland). In Germany, general law and sector specific law is applicable. In Czech Republic, there is no general damage exoneration in relation to the producers. Under Czech general law, two kinds of damages are recoverable, namely actual (real) damages and losses of profits.

164. In the United Kingdom, it is specified that liability is limited to direct loss in respect of physical damages and third party physical damages. It is also the sole country where a financial cap was mentioned: 5 millions £ per incident or per series of related incidents.

### 3.3.2.4. Other issues

165. Applicable law is national law.

166. Disputes related to performance of obligations under the agreements with producers are settled by national civil courts except for French and British TSOs where a special regime is applicable (by arbitration and/or by the NRA). In France, parties first have to try an amicable settlement. In case of failure within 30 days, the matter can be brought in front of the NRA. Parties may also decide to go to courts and tribunals. Some of the disputes with producers and other market players (i.e. connection agreements) are also decided in
front of the NRA in the Czech Republic. In such cases the NRA has the primary exclusive competence. The NRA deals also with the appeal against its decision. A last resort appeal to a court (which is not specified by our national correspondent) against the NRA decision is also possible.

3.3.3. Liability in agreements with Distribution System Operators

3.3.3.1. Force majeure

167. As a general rule, there is no liability in case of force majeure between TSOs and DSOs. Our Italian national correspondent mentions force majeure only in relation to unavailability of data transmission.

3.3.3.2. Liability exemptions and damage exonerations

168. Sector specific law (NAV, by referral to the StromNZV, and EnWG) govern liability between TSOs and DSOs in Germany. In Denmark, general Danish law is applicable (no specific liability provision either by way of agreement or under sector specific legislations).

169. For cases where there are agreements between TSOs and DSOs patterns vary from one MS to the other. In the Netherlands, the TSO is contractually liable in case of wilful misconduct or gross negligence. However, in case the TSO causes a failure of supply, there might be under conditions a liability for the TSO regarding third party claims towards the DSOs. There are no liability exemptions in such agreements in Italy (liability for regular fault).

170. In France, liability varies depending on whether the clients of the DSO are affected or whether the DSO is affected itself. In case of damages related to the DSO itself (extra manpower, performance of exceptional measures), the TSO is liable in case it has breached the quality level as defined in the agreement with the DSO and in case of fault/negligence. As for clients towards whom the DSO commits to quality thresholds: In case of supply cut resulting from a fortuitous event on the public transport system affecting the final client of the DSO, liability will fall, depending on the case, on the TSO or on the DSO by application of a contractually defined formula. In case of supply cut resulting from a proven fault of the TSO, the latter must compensate the client, including when quality thresholds are not met. As for clients towards whom the DSO does not commit to quality thresholds: The liability regime applicable to the TSO is that foreseen for the DSO, corresponding to agreements concluded by the latter with its clients. The TSO is thus liable, except in case of force majeure, for direct and certain damages caused to the final clients due to a power cut on the public transport system.

48 DEPASSErte = Crte - Srte – INDrte where Crte correspond to the numbers of breaks imputable to TSO; Srte correspond to the level TSO (numbers of non compensable breaks defined by TSO and DSO; INDrte correspond to the number of breaks indemnified by TSO during the commitment period.

• TSO liability: “DÉPASSrte” >0.
• DSO liability: “DÉPASSrte” <0.
171. In Poland, liability varies depending on the situation. There is first no liability at all in a series of events such as force majeure (or events assimilated to it), electricity limitations/cuts as defined in the relevant sector specific regulations and breach on the counterparty’s side:
- Supply and consumption limitations (“according to common law”);
- Planned outages under the ITSOM;
- Emergency outages under the ITSOM;
- Force majeure (for its duration);
- Pauses and limitations under the ITSOM;
- Cross-border capacity curtailment under binding regulations “in accordance with the rules of tendering procedures for reserved cross-border capacity volumes”
- Contractor’s payment delay (after prior failure notice) of one months;
- Contractors’ failure to established security levels under the agreement;
- Announced of a safety threat;
- Contractors’ installations having a direct threat to life, health or environment (after TSO’s inspections)
- Supply pauses and limitations in emergency cases according to relevant sector specific legislation;
- Failure of the TSO’s IT system other than inappropriate operation/maintenance (including virus and crime against information protection);
- Failures on systems of other TSOs in the (ex) UCTE synchronous area.

In case of outages caused by the contractor, the TSO is entitled to file a claim against the contractor. For all other cases, liability is not exempted “as such” (liability for regular fault/negligence) but compensation is limited to actual losses (excluding profit losses).

172. In United Kingdom, the CUSC provisions are applicable (same regime as for producers). The British TSO is exempted from liability in case of force majeure and in case of transmission constraints or insufficiency of generation which could not have been avoided by good industry practice. Liability is however limited to the breach of the grid code provisions, which are rendered binding upon the CUSC parties via the CUSC. Liability is limited to direct loss in respect of physical damages and third party physical damages. There is a financial cap of 5 millions £ per incident or per series of related incidents.

173. As for damage exonerations (beside Poland and the United Kingdom, for which information is provided in the previous paragraphs), as a general rule, only direct damages are recoverable. Our national correspondents quote the following damages as being excluded from reparation:
- Indirect damages;
- Profit losses;
- Revenue losses; and
- Immaterial damages.
**174.** Damage exoneration is not addressed specifically in Denmark. In Czech Republic, there is no general damage exoneration in relation to the DSOs. Under Czech general law, two kinds of damages are recoverable, namely actual (real) damages and losses of profits.

### 3.3.3.3. Other issues

**175.** Applicable law is, as a rule, national law.

**176.** Two MS provide an alternative between arbitration and courts and tribunals. In France, parties first have to try an amicable settlement. In case of failure within 30 days, the matter is brought in front of the NRA. Parties may also decide to go to courts and tribunals. In the Netherlands ("samenwerkingregeling"), the parties go to arbitration, unless, within 10 days, one party opts for the courts and tribunals.

**177.** In Poland, the Polish common courts are competent. In the United Kingdom, the parties may choose to go in front of the NRA or in arbitration. Nothing special is foreseen in Denmark. No information is available for Italy and Czech Republic.

### 3.3.4. Liability in agreements with industrial consumers

**178.** In Denmark, the Danish TSO does not have agreements with consumers that were worth being quoted for the purpose of the study.

**179.** For cases where there are agreements, the level of liability varies from one MS to the other. In the Netherlands, liability is limited to wilful misconduct/gross negligence in the following three situations:
- Transmission interruption or limitations;
- Breakdown, default, defect of the equipment (connection, grid, plant, etc.) operated by the Dutch TSO;
- Supply failure.

For other cases of liability, general law is applicable.

In France, the level of liability is the regular fault/negligence. In France however, liability is also extended to cases where there are supply interruptions or failures beyond a defined threshold for a given period of time (as defined in agreements with consumers). Liability in Italy is limited to wilful misconduct/gross negligence.

In Poland again, liability varies depending on the event. There is no liability at all in cases of:
- Force majeure (for its duration);
- Pauses and limitations under the ITSOM;
- Planned outages under the ITSOM;
- Occurrence of events under the ITSOM threatening to or causing losses of electricity supply;
- Safety threat announcement under the ITSOM;
• Cross-border capacity curtailment under binding regulations “in accordance with the rules of tendering procedures for reserved cross-border capacity volumes”;
• Failure of the TSO’s IT system other than inappropriate operation/maintenance (including virus and crime against information protection);
• Failures on systems of other TSOs in the (ex) UCTE synchronous area;
• Contractor’s payment delay (despite earlier notification);
• Contractors’ failure to established security levels ad under the agreement;
• Contractors’ installations having a direct threat to life, health or environment (after TSO’s inspections);
• Contractor’s breach of the agreement or of the ITSOM.

In all other cases, than listed above, the responsibility for non-performance or improper performance of the TSO’s obligation is limited to:
• Rebates, etc. as stipulated in tariffs; or
• Actual losses (excluding lost profits) according to the general rules of contractual liability in Polish civil code.

In the United Kingdom, liability is defined as in the CUSC.

180. Force majeure implies liability exoneration.

181. As for damage exonerations (besides Poland and the United Kingdom), indirect damages are, as a rule, excluded from reparation.

182. Applicable law is, for most scrutinised MS, national law.

183. Dispute resolution procedures take place in front of courts and tribunals (Poland, the Netherlands) or in front of arbitrators (Italy). In Italy, the arbitration committee is composed of one arbitrator chosen by the TSO, one by the counterparty and another one by these two arbitrators. If no consensus can be reached, the parties go to the Court of Appeal of Rome. Before judicial/arbitral proceedings, a preliminary amicable resolution is foreseen in Czech Republic. In France, the parties first have to try an amicable settlement. In case of failure within 30 days, the matter can be brought in front of the NRA. The parties may also decide to go to courts and tribunals. In the United Kingdom and in Czech Republic, the parties may choose to go in front of the NRA or in arbitration. In Czech Republic the exclusive decisive power for some specific disputes is delegated to NRA only. Nothing special is foreseen in Denmark. In Germany, depending on the contract, courts/tribunals or arbitration is available. As requested by European law and implemented into national law, every person has the possibility to appeal with the national regulator or the regulatory bodies of the Länder if the rules of network regulation or not followed by the network operator.

3.3.5. Liability in agreements with Balance Responsible Parties
184. In Poland, there are no specific agreements for BRPs. Each grid user is responsible for its respective commercial balance. Therefore, liability in this scope is regulated by proper clauses in agreements between the Polish TSO and certain grid user (as defined above for these persons). In Germany, the NAV is applicable. In Italy, grid users are demanded to sign the dispatching contract as a prerequisite for injection/withdrawal of electricity into the network. It is standardised for all users, with a published customary form (attachment A.26 to the grid code).

185. In other MS, there are separate agreements for BRPs (the Netherlands, Denmark, Italy, France and United Kingdom). Nothing is specified for Czech Republic.

186. In France and in the Netherlands, general liability regime is applicable. In Italy, the dispatching contract defines the rights and obligation for users in the provision of the dispatching service managed by TSO. Liability of the TSO is limited to the cases of wilful misconduct/gross negligence.

187. In Denmark, liability varies depending on whether the BRP is a grid user or a neighbouring TSO. With grid users, the Danish TSO is not liable in the following situations, when the TSO:
   - Adjusts notifications (in case submitted one is incorrect/deficient) or applies its own estimate (in case of failure of notification) day ahead of operations;
   - Applies emergency procedures in case of breakdown of communication with BRP not due to TSO; and
   - Applies its own estimate in case of incorrect or efficient metered data collectors.

With neighbouring TSOs, during operation day, TSOs on both sides will compensate capacity curtailment by countertrading. In case this curtailment is due to the fault of a TSO, system operations agreements between neighbouring TSOs are applicable (see section 3.2.2 above). In case of force majeure or threat to security, the Danish TSO is entitled to use all system’s resources. We assume this includes capacity curtailment (section 3.2.3).

188. In the United Kingdom, ELEXON is the Balancing and Settlement Code Company (“BSCCo”). Its role is defined and created by the Balancing and Settlement Code (“BSC”). The BSC contains the rules and governance arrangements for electricity balancing and settlement and all licensed electricity companies must sign it (others may choose to do so),\(^49\) including the TSO.\(^50\) The BSC does not specify any level of liability, so liability under the BSC is based on regular fault/negligence. Recoverable damages are direct damages, reasonably foreseeable as not unlikely to occur in the ordinary course of events. Indirect (profit losses, revenue losses, etc.) damages are excluded.

189. As a rule, force majeure is an event implying liability exemptions. Our French national correspondent specifies that force majeure implies the following consequences:

\(^{49}\) Information available at http://www.elexon.co.uk/aboutelexon/default.aspx.

\(^{50}\) National Grid is a party to the BSC (via the signature of a framework agreement) under article 1, §2, §2 of the BSC.
• Liability exemption;
• Indemnity exemption;
• Suspension of contractual performance (except for confidentiality obligations);
• Possibility to terminate the contract in case the event lasts more than thirty days.

190. As for applicable law, it is worth noticing that Swedish law is applicable (Nordic Grid Code). If the dispute is below 500.000 DKK (67.176 €), Danish common courts are competent. Above, the Danish NRA is competent.

3.3.6. Liability in agreements with Power Exchanges

191. Some national correspondents, such as the Dutch and Czech representatives, indicate that agreements with PXs are not relevant for the purpose of the study. For these two national correspondents, no information is available. Our British and German national correspondents do not provide details on liability in such relations. Little information is thus available regarding agreements with PXs. We nonetheless think agreements with PXs are of relevance for they provide some interesting pieces of information. The present section 3.3.6 thus presents the information regarding PXs provided to us.

192. In France, only publicly available information is refereed to (www.epex.spot.com). The participation agreement between EPEX and exchange members is also applicable to the French TSO especially as the French TSO is in charge of compensating the grid losses according to the French legislation. According to this template participation agreement between EPEX and its exchange member, the parties are liable for any breach of the agreement and of the EPEX rules and regulations (negligence, wilful default or fraud). In particular, the exchange member is liable for “discredit to the image or reputation of [EPEX], either directly or indirectly”. There is no liability for force majeure, especially arising from the unavailability or failure of telecommunication means; inaccurate, partial or unavailable technical information or data originating from third parties; and computerised data degradation. EPEX is especially not liable for force majeure affecting delivery, including “those considered as force majeure under the network access agreements signed by transmission system operators [...] as recalled in the rules and regulations of [EPEX]”. Another case where the French TSO could be a specific exchange member would be for market coupling. So far, specific agreements (and separate from the template participating agreement for the grid losses) are relevant for the full assessment of liability of TSOs in the context of operation of PXs, namely the market coupling umbrella agreement (“MCUA”) in the framework of the trilateral market coupling and the operational contract with ECC (clearing house). However, these agreements are covered by confidentiality obligations, so no details are available. The ECC agreement and the MCUA contain a liability financial cap but not for fraud or wilful misconduct. The ECC agreement excludes indirect, unforeseeable and immaterial damages. The MCUA foresees the reimbursement of direct and foreseeable damages.

193. In Poland, [CONFIDENTIAL].

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Non Confidential final version of 26 July2010
194. In Italy, the “convenzione” between the Italian TSO and Italian PX does not foresee any specific level of liability. Liability is however specifically excluded in case of defect of communication means and IT tools or data provided by third parties.

195. In Denmark, there is no agreement with PXs. The system operation agreement ("SOA") between the Nordic TSOs is of relevance. Under the SOA, the parties must apply counter-trading in case of:
   - Restriction of commercial players’ use of the interconnections;
   - Reduction of transmission capacity as a consequence of operational disturbances.

196. Liability is limited to gross negligence or wilful misconduct. Recoverable damages exclude indirect, consequential damages and revenue losses.

3.3.7. Liability in agreements with other parties

197. Some national correspondents mention the existence of agreements with other parties than those enumerated above. In Poland, the TSO has agreements with traders (not connected to the grid). These agreements contain clauses similar to those with other users. In France, the TSO has agreements with adjusting performers and programming responsible parties. These agreements refer to general law for liability level and limitations (force majeure). Indirect damages are excluded

3.3.8. Assessment

198. The following trends appear from the analysis and the comparison of agreements with producers, DSOs and industrial consumers:

(i) In some cases, there are no agreements at all [CONFIDENTIAL], so general principles of law are applicable. In other cases, liability clauses refer to general law or sector specific laws for liability clauses.

(ii) In some agreements liability is limited to gross negligence and wilful misconduct whereas in others limitations apply in case of regular fault/negligence. As a general rule, in France, the TSO is always liable towards producers in case of regular fault/negligence.

(iii) Liability is always excluded in case of force majeure.

(iv) Force majeure definition in France and in the United Kingdom contain list of specific events, especially targeted to the transmission system business.

(v) Sometimes, liability level depends on various factors, such as:
   - Who suffers the damage (DSO or its clients);
• Quality levels such as a threshold of power interruptions/reductions for a given period of time in agreements with consumers in France, e.g.;
• Type of client;
• Reference to good industry practices.

(vi) Recoverable damage is limited to direct loss (sometimes to indirect loss in case of wilful misconduct or gross negligence). We find only one case where the recoverable damage is specifically related to image or reputation, i.e. in an agreement with a PX (relating to the image and reputation of the PX).

(vii) We find three cases of financial cap, namely (a) in agreements with CUSC parties in the United Kingdom (5 millions £ per event or series of related events); (b) in an agreement between TSOs and PXs (which amount is not disclosed for confidential reasons) and (c) in Germany (section 3.3.1.2).

(viii) Applicable law is national law.

(ix) Dispute resolution clauses foreseen common law courts and tribunals or arbitration. Sometimes, a prior amicable settlement procedure is foreseen. In France, parties may bring their claims in front of the NRA for disputes falling in the scope of competencies of the French NRA.

199. For agreements with grid users (and in contrast with agreement between TSOs), it is thus difficult to draw general trends (except for recoverable damages, where indirect damages are always excluded, and fore majeure).
4. **INSURANCES**

4.1. **OBLIGATION TO INSURE**

200. Our investigations do not reveal any explicit obligation to insure related specifically to the supply failure risk. Our French national correspondent stipulates that, considering the fact that there is no insurance obligation under the French law and/or regulations, the French TSO has its own margin to decide how to cover the civil liability risk. According to our Dutch correspondent, the Dutch TSO is insured in accordance with the industrial practice.

Under the German stock company act, German TSOs have a general duty of a faithful diligent merchant to take insurances against failure to supply and other types of liabilities. Moreover the diligence required under German company law may also force TSOs to take general insurances for liability extending in enormous damages.

TSOs moreover have obligations to take insurances as any other company has in their respective MS: car liability, employers’ liability, workers’ compensation, or public liability in United Kingdom, etc. but this is not directly relevant for the purpose of the present study.

201. We believe that the setting up of an obligation to insure could be useful. According to the economic literature, when insurance companies are under a duty to insure, they are exposed to full liability of the insured risk. This leads insurance companies to “make sure that the [insurance taker] will take all the necessary care to avoid an accident with the real magnitude of the loss”.

4.2. **TYPES OF INSURANCE**

202. The French, the Dutch, the Danish, the Italian and the Polish TSOs subscribe to civil liability insurance. These insurances may relate to different risks. The insurance in Poland covers the civil liability of the TSO itself (including that of the board of director’s members, etc.). The insurance in France is against damages occurring to TSO’s client but not to the damages to its own system/grid (covered by insurance for assets).

203. Several TSOs subscribe to insurances for supply failure specifically (Italy, Germany, the United Kingdom and [CONFIDENTIAL]). In Poland, in Italy and in the Netherlands, the supply failure risk is covered by civil liability insurances (in Poland, for third party damages). In Poland, the insurance against this risk covers direct pure financial losses, physical damages and personal damages caused by a series of wrongdoings on the TSO’s side and, according to our national correspondent, are relatively expensive. The Danish TSO is not

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52 Please note that, with regard to Germany, our national correspondent precises that it is not sure whether this is applicable to all TSOs in Germany. This is valid for at least one of the TSOs.

53 Such as failure to/in the collection or supply of energy; restrictions in the collection or supply of energy; supply of energy of inappropriate parameters; scheduled power outages (planned outages); and unscheduled power outages (unplanned outages).
insured against supply failure. According to our Danish national correspondent, this is due to the fact that such insurance would be very expensive (especially in the light of the strict liability of the Danish TSO, mentioned in n° 19 above) in comparison with low likeliness of the Danish TSO to be responsible for supply failure.\textsuperscript{54}

204. All interviewed TSOs declared subscribing to insurances for \textit{assets or property} (owned, leased, etc.). Insurances subscribed by the [CONFIDENTIAL] cover the assets of the TSO only. Damages to assets of third parties are covered by civil liability insurance in France, Poland and Denmark.

205. [CONFIDENTIAL].

206. It is also interesting to outline that the development of the environmental law foreseeing a significant environmental liability led the French and the Danish TSOs to be ensured specifically against \textit{environmental damages}. Other TSOs did not specify whether they are insured against environmental damages via liability insurances (they were not required to do so in the legal questionnaire) but our German correspondent suspects that all German TSO have a coverage regarding environmental liability as they have motor vehicles, etc.\textsuperscript{55}

207. Generally speaking, TSOs are insured against \textit{acts of terrorism} (Poland, Denmark, France and Italy). Our German correspondent precises that terrorism is normally excluded in Germany but that TSOs are free to conclude a specific insurance contract in this regard. This kind of insurance is compulsory under French law. Such insurances are available on the London market. German insurance [CONFIDENTIAL] is specialised in covering such acts. For the French TSO, an extra-premium [CONFIDENTIAL] covers terrorist attacks and is managed by a specific fund.

208. Finally, no interviewed TSO declared having an Insurance against \textit{insolvency risk}. The Danish TSO stipulates that it uses credit ratings and bank guarantees if needed. Moreover, the Danish TSO is planning to acquire insolvency insurance in the course of 2010.

209. It is surprising to see that not all investigated TSOs have insurances against security of supply. Supply failures might have much more important financial consequences than damages to property, e.g. This might constitute a danger for the general financial balance of

\textsuperscript{54} The liability of the Danish TSO may be involved only in serious cases, which is highly unlikely to happen, according to our national correspondent, and so far has never happened.

\textsuperscript{55} The growth of environmental liabilities and their considerable consequences in the near future on the TSOs and their insurances becomes increasingly important. Recent case-law of the European Court of Justice of 10 December 2009 (Case C-205/08) confirm the extension of the environmental law and its impact on TSOs when it decides that “Articles 2, §1 and 4, §1 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, are to be interpreted as meaning that the competent authorities of a Member State must make a project referred to in point 20 of Annex I to the Directive, such as the construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, subject to the environmental impact assessment procedure even where the project is trans-border in nature and less than 15 km of it is situated on the territory of that Member State.”
the companies. Several interviewed TSOs highlight that such insurance would be too expensive to acquire. Moreover, insolvency risk is a real risk for TSOs, especially small ones, as large blackouts can cause substantial damages to numerous parties. It is thus also surprising that no TSO declared subscribing to insolvency risk.

4.3. **INSURANCE PREMIUMS, DEDUCTIBLES AND LIMITATIONS**

210. Our investigations do not reveal any explicit obligation to insure upon a minimum amount.

211. You will find in a table below (non confidential version) an overview of all insurance amounts and their corresponding deductible amounts.
### Table 1.- Type of insurances undertaken by TSOs and corresponding premiums/deductibles

<table>
<thead>
<tr>
<th>Insurance Type</th>
<th>TSO in</th>
<th>Insurance Description</th>
<th>Corresponding Amount &amp; Deductible (when available)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CIVIL LIABILITY</strong></td>
<td>Poland</td>
<td>Civil liability of the TSO itself (board of director’s members). This covers damages to assets of third parties.</td>
<td>[BETWEEN 1 AND 50] M € per each and all incident(s) [BETWEEN 1 AND 50] k € deductible</td>
</tr>
<tr>
<td></td>
<td>France</td>
<td>Against damages occurring to the clients of the TSOs and other third parties</td>
<td>[ABOVE 500] M € per year</td>
</tr>
<tr>
<td></td>
<td>The Netherlands</td>
<td>Liability for own risks. This covers damages for supply failure.</td>
<td>CONFIDENTIAL</td>
</tr>
<tr>
<td></td>
<td>Denmark</td>
<td>Also covers damages to assets of third parties.</td>
<td>[BETWEEN 100 AND 500] M €</td>
</tr>
<tr>
<td></td>
<td>Italy</td>
<td>Not specified</td>
<td>CONFIDENTIAL</td>
</tr>
<tr>
<td><strong>SUPPLY FAILURE</strong></td>
<td>Italy</td>
<td>Not specified</td>
<td>CONFIDENTIAL &amp; CONFIDENTIAL</td>
</tr>
<tr>
<td></td>
<td>Germany</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td></td>
<td>United Kingdom</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td></td>
<td>[CONFIDENTIAL]</td>
<td>[CONFIDENTIAL]</td>
<td>CONFIDENTIAL</td>
</tr>
<tr>
<td></td>
<td>Poland</td>
<td>Negotiated on an individual basis/civil liability insurance type</td>
<td>[BETWEEN 1 AND 50] M €</td>
</tr>
<tr>
<td><strong>ASSETS/PROPERTY</strong></td>
<td>[CONFIDENTIAL]</td>
<td>[CONFIDENTIAL]</td>
<td>CONFIDENTIAL</td>
</tr>
<tr>
<td></td>
<td>Poland</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td></td>
<td>United Kingdom</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td></td>
<td>[CONFIDENTIAL]</td>
<td>[CONFIDENTIAL]</td>
<td>CONFIDENTIAL</td>
</tr>
<tr>
<td></td>
<td>France</td>
<td>Damages to buildings and substations (the lines are not insured)</td>
<td>[BETWEEN 50 AND 100] or [BETWEEN 100 AND 500] M € per event</td>
</tr>
<tr>
<td><strong>OTHER</strong></td>
<td>[CONFIDENTIAL]</td>
<td>[CONFIDENTIAL]</td>
<td>CONFIDENTIAL</td>
</tr>
</tbody>
</table>

---

56 The French TSO insurance is part of a EDF group program of insurance and [CONFIDENTIAL]. The annual insurance limit is of an amount of [ABOVE 500] M € for the whole group.

57 However, insurer’s liability is limited to the sum of [BETWEEN 100 AND 500] M € for the direct pure financial losses associated with the events mentioned above.

58 With an annual premium to cover this Insurance of [CONFIDENTIAL].
212. Some correspondents specify that there are guarantee limitations to their insurances, namely by:

- Type of damages (financial losses, immaterial damages),
  - In France, in case of immaterial damage non consecutive of a material damage (clients exploitation losses without material losses), up to [CONFIDENTIAL];
  - [CONFIDENTIAL];
  - In Denmark, in case of professional indemnity for [BETWEEN 1 AND 50] millions €;

- Type of event,
  - Pollution in Denmark for [BETWEEN 1 AND 50] millions €;
  - Environmental damages in France for [BETWEEN 50 AND 100] millions € per incident and [BETWEEN 100 AND 500] millions € per year;
  - [CONFIDENTIAL];

- Behaviour of the insured person,
  - In France, for the inexcusable fault of the TSO as employer in France in case of professional accident or illness for [BETWEEN 50 AND 100] millions €.

In Poland, the civil liability insurance in case of financial losses without material losses is limited and property insurance of transmission lines is limited to certain incidents only (specified in details in insurance agreements). The guarantee of the German TSOs liability is also limited to certain damages (not specified). Our German correspondent precises that the amounts are limited and that specific kinds of damages may be excluded. The terms and conditions of the TSOs are subject to individual negotiations with the insurers. And, as there are four TSOs, the conditions of the TSOs may differ.

213. It appears from the above table that disparity between insurance amounts is relatively high. For instance, the insurance with the highest amount is [CONFIDENTIAL]. The second highest is [CONFIDENTIAL]. Other amounts per claim/incident are about [CONFIDENTIAL] million €. The lowest available amount is [CONFIDENTIAL]. Amounts “in total” range from [CONFIDENTIAL] to [CONFIDENTIAL].

4.4. AVAILABLE INSURANCE COMPANIES

214. Our study reveals that there are insurance companies offering specialised services in covering risks for TSOs in the European market, such as [CONFIDENTIAL] (Denmark), [CONFIDENTIAL] (Germany). The British TSO uses a group insurance company as a direct underwriter who works with recognised insurers in the global market.

215. As a rule, TSOs work with several insurance companies. This way of functioning helps them to diversify risks, to have different alternative of products and also it places TSOs on an advantageous position to negotiate insurance conditions.

216. In the Netherlands the TSO is insured by approximately six insurance companies. The Polish TSO is insured by three insurance companies in civil liability and four insurance
companies for property damages. The Danish TSO works mainly with three insurance companies.

4.5. CRITERIA FOR SELECTING INSURANCE COMPANIES

217. Insurance companies are chosen by public tender. Our Dutch national correspondent specifies that the Dutch TSO uses use an insurance broker, but in the selection process, it uses a public tender, hosted by the insurance broker.

218. TSOs apply several criteria in order to select insurance companies. Generally speaking, the main criteria are pricing, quality, and insurance conditions. Other criteria may be used such as liability limitation and duty to cover force majeure/breach of coverage value (Germany and the United Kingdom); financial stability and market position (Czech Republic) and security (the United Kingdom).

4.6. INSURANCE CAPACITY

219. As a rule, TSOs acquire a part of the capacity available on their respective local markets. However, the [CONFIDENTIAL] and the Polish TSOs buy all capacity available on their local market. Concretely, this implies that insurers in these countries are not able to offer a higher amount of insurance and in product diversification. Our Polish national correspondent stresses that the insurance policy market does not offer enough capacity for covering the Polish TSO’s insurance needs although the Polish TSO purchases insurance under Polish procurement law, which allows to present an offer by any insurer from the European Union (tender offers is publicly available to all interested insurers – European bulletin of public tenders). According to some experts, the Polish TSO’s insurance need is about two times higher than what is actually covered. Our Polish national correspondents highlight the fact that the combination of high liability with limited cover of insurance needs put the Polish TSO under a high risk. This risk used to constitute an insolvency risk. It does not constitute an insolvency risk anymore as the polish electricity law now contains caps to the liability of the TSO. Our [CONFIDENTIAL] national correspondent stresses a similar problem.

220. One way to remedy this problem would be for these TSOs to take, for that capacity which is not entirely covered by local insurers, insurances in other countries. The difficulty in this case is to determine the conditions under which the second insurance might intervene: up to a certain amount, for certain risks not covered by the first insurance, etc. Insurances against terrorist acts constitute an excellent example of creating such opportunities: the Polish, German and Danish TSOs are insured against act of terrorism on the London Market.

4.7. LEGAL CLAIMS
221. As a rule, insurance companies have the right to file legal claims against the third party responsible for the incident.

222. In some MS (Poland, Italy and France), victims can file claims against insurance companies directly.

4.8. MUTUAL INSURANCE SCHEME

223. Our investigations reveal only one case of mutual insurance scheme, namely in the Netherlands, between the Dutch and the Norwegian TSOs. The reason is the joint operation of a common cable (under joint property).

4.9. ASSESSMENT

224. We only find one case of obligation to insure, namely in France (against acts of terrorism). Consequently, TSOs are relatively free in choosing and negotiating insurance policies, premiums, etc. We find various types of insurances. Civil liability insurance is the insurance having the largest coverage, including covering damages to third parties’ assets; supply failure; own risk; management errors; etc. Most of the questioned TSOs are insured for assets/property (sometimes also to that of third party); some interviewed TSOs have insurances against supply failure; acts of terrorism and environmental damages.

225. It is surprising that not all investigated TSOs have insurances against supply failure, as this is the highest risk encountered in doing their business. Likewise, it is surprising that no interviewed TSO mentioned being insured against insolvency risks. Blackouts do entail a risk of insolvency for the responsible TSO, especially for small TSOs.\textsuperscript{59} Our investigations do not reveal that TSOs are impeded (from a legal or regulatory point of view) to take the above-mentioned insurances.

We believe insurance against supply failure is a good practice that should be extended throughout the European Union. The amounts that have to be paid in case of incident in the absence of insurance against supply failure are much higher than those to be paid in the presence of an insurance (corresponding to the insurance premium). The more TSOs will have to pay, the more this might be recuperated through tariffs, to the detriments of the users and of the end consumers.

Moreover, in case of important blackout, the absence of insurance against supply failure might have the consequence to put the TSO under an insolvency risk (especially when there are no statutory financial caps).\textsuperscript{60} The question that arises is whether the state should

\textsuperscript{59} We do not believe that bankruptcy would lead to electricity interruption: TSOs are essential facilities and monopolies, performing a service of public interest and, in case of bankruptcy, the State would take over transmission system operations for the time necessary for a new TSO to be put into place.

\textsuperscript{60} According to EURELECTRIC, “The outages cost more and more for the society. One consequence of this is that the public administration lays higher requirements for the operators. Furthermore, customers try to claim more and more compensation referring to blackouts. This tendency will be amplified along completing liberalisation of the market […]. Different studies, mainly based on customers’ own evaluations, provide widely ranging
intervene in case of insolvency risk, to prevent the TSO from going bankrupt or whether it should allow the TSO to go bankrupt (and assigning the TSO’s tasks to another entity for ensuring continuity of supply, e.g.).

226. It is difficult to say to what extent the amounts mentioned above are adequate for each TSO. We understand from the Polish TSO that the amounts are not adequate (not covering all needs of the TSO). It appears from the above table that disparity between insurance amounts is relatively high. For instance, the insurance with the highest amount is [CONFIDENTIAL]. The second highest is [CONFIDENTIAL]. Other amounts per claim/incident are about [CONFIDENTIAL] €. The lowest available amount [CONFIDENTIAL]. Amounts “in total” range from [CONFIDENTIAL] to [CONFIDENTIAL].

227. We learn from discussions during the workshop that amounts of premiums depend on the level of reliability of TSOs:

- A low reliability level (such as in Southern France or Southern Italy, e.g.) would allow for higher insurance premiums;
- A high reliability level (20’ per year in Germany, e.g.) would allow for lower insurance premiums.

Discussions at the workshop reveal that premium levels would thus logically vary depending on the region (high reliability regions, such Germany, e.g. vs. lower reliability regions, such as Southern France/Italy, e.g.). In any event, discussions regarding premiums would logically involve the concerned industries. Industries with the highest needs in steady electricity delivery would indeed consent in paying higher tariffs due to higher amounts of liability recuperated by the TSO in tariffs.61

228. Our investigations did not cover the question of insurances against supply failure taken by grid users. According to the IFIEC representative at the workshop, it is difficult for users to take insurance for a risk, over which they do not have any control. However, we believe that highly qualified professionals, such as the companies connected to the high voltage grid, are able to know, if not the exact risk under which they are, at least whether they are under a low or a high risk of suffering a supply failure. According to the IFIEC representative, grid users with important needs of steady electricity supply should be encouraged/incentivised to take measures to prevent damages in case of supply failure (such as the use of bobbins, e.g.). One way to incentivise them would be to taken into account such measures for the calculation of tariffs.

estimates for the cost of an unsupplied kWh. Shorter outages for industrial customers are valued the highest levels (e.g. 1,000 €/kWh), while long outages (over 24 hours) are put by residential customers around 5€/kWh, and in cases below 1€/kWh. It must be noted that these estimations are to a great extent uncertain; partly due to a lack of objective approximation of actually incurred costs, and partly due to the difficulties of drawing an appropriate balance between including and excluding directly and indirectly associated damages (e.g. a longer outage of the London Underground due to safety considerations was a consequence of the otherwise short UK event). In: EURELECTRIC: “Power Outages 2003”, Brussels, June 2004, p. 16, available at http://www.globalregulatorynetwork.org/Resources/PowerOutagesin2003.pdf (last visited in July 2010).

61 Information following discussions at the workshop.
229. On the supply side, our investigations do not reveal any problem of competition that TSOs might face. TSOs seem to be able to choose services among various insurance companies. There are also several insurance companies providing services targeted to the TSOs’ business in Europe. We identify a problem of lack of capacity on the Polish and the [CONFIDENTIAL] markets. TSOs in these countries are not able to cover all their insurance needs on their local market, although the Polish TSO purchases insurance under Polish procurement law, which allows to present an offer by any insurer from the European Union (tender offers is publicly available to all interested insurers – European bulletin of public tenders).
5. **TARIFFS IN RELATION TO SECURITY OF SUPPLY**

5.1. **COSTS SCHEMES VS. INCENTIVE SCHEMES**

230. Under article 37, §1 of the Electricity Directive, NRAs have the competency to fix or approve transmission or distribution tariffs in accordance with transparent criteria. The regulatory methods NRAs use will have a direct incidence on the way costs related to liability (insurance costs and damage compensations, e.g.) will be calculated into tariffs. Two main types of regulation schemes are regularly opposed in terms of tariffs calculation, namely incentive regulation schemes (“incentive schemes”) and other traditional regulation schemes based on costs (“costs schemes”). Beside incentive schemes, NRAs may, according to economic literature, use other methods for incentivising TSOs to improve/maintain quality of supply, as already seen above (n° 25). These other methods include *indirect instruments* (comparative overviews publications, e.g.) or *standards* dictating a minimum performance level for a network firm, the breach of which leading to a fine or a tariff rebate.\(^{62}\)

231. At present days, only a few MS implement some forms of quality incentive regulation in Europe. Since 2005, a new incentive mechanism focusing on system reliability is implemented in the United Kingdom, as reported by the economic literature. This mechanism measures the quantity of unsupplied energy (supply failures) resulting from transmission network outages. The British TSO receives penalties or rewards when outages fall outside a deadband of +/- 5%. This deadband is defined by the distribution of historical outage performance, including potential adjustments in case of extreme weather conditions, using a sliding scale with a cap and a floor on the revenue impact.\(^ {63}\) The *Compensatieregeling* in the Netherlands is another way through which NRAs incentivise the TSO to improve quality of supply.

In France, the conditions under which the French TSO is or is not exempted from liability (force majeure definition, conditions under which consumers have to be reimbursed, etc.) as mentioned above are another way by which the TSO is incentivised to improve/maintain quality of supply, as discussions during the workshop reveal it. Moreover, according to our French national correspondent, in France, the third tariff for use of public systems (“TURPE 3”) foresees a mechanism of qualitative incentive regulation. With the TURPE 3, the CRE expects to incentivise TSOs and DSOs to offer the best performing service at the best cost. To this effect, the CRE puts into place an incentivising regulation aiming at avoiding that these operators realise productivity gains to the detriment of service quality (security of supply). This regulation contains several measures, including a measure related to incentivising regulation of quality. Under the retained mechanism, when the average duration of power cuts is, for a year N, below a reference duration, the TSO benefits of a bonus. Contrarily, when it is superior to that reference, the TSO is penalised. The French


NRA excludes from this mechanism cuts due to exceptional events corresponding to disturbed operational conditions ("situation d’exploitation perturbée") (article 19 of the public transport system specifications).

5.2. CONSEQUENCES IN TERMS OF TARIFF CALCULATION

232. According to the IFIEC representative at the workshop, under the incentive regulation applicable in the United Kingdom, if the British TSO performs well (in comparison with historical performance, investment objectives, etc.) it receives the right to compensate related amounts via tariffs. In case the TSO does not perform well, it looses the right to get compensation via tariffs. A contrario, cost regulations do not provide incentives, in terms of quality of supply, as efficient as those under incentive regulations. They tend to include into tariffs many payments due by TSOs due to liability (premium increases, damage compensations, etc.), without incentivising TSOs to reduce these, according to the IFIEC representative.

5.3. INFORMATION AS REPORTED BY OUR NATIONAL CORRESPONDENTS

5.3.1. Insurance costs

233. The table below shows whether TSOs recuperate costs related to supply failure through tariffs and, if yes, which ones.

Table 2.- Costs related to supply failure and tariffs

<table>
<thead>
<tr>
<th>Member State</th>
<th>Recuperated through tariffs? Yes/no?</th>
<th>If, yes, which costs exactly and to what extend?</th>
</tr>
</thead>
</table>
| Poland       | Partly                              | • Premiums: partly (only those considered by NRA’s justified costs, meaning that not all of them are recovered through tariffs)  
• Compensation payments: no |
| The Netherlands | Partly                             | • Liability:  
  - Premiums and damages paid that were not subject to insurance coverage paid are (partly) recovered. For the determination of the tariffs the NRA uses a reference year for the next regulation period. Premiums and damages are recovered according to the amounts of the reference year. So, the "normal" compensation of premiums and damages in day to day business are compensated in the tariffs and a larger or incidental increase of compensation is not compensated in the tariffs.  
  - Strict liability/Compensation payments  
  - Payments under the Compensatieregeling are not recovered |
| Denmark      | Yes                                 | • Premiums: they are recovered through tariffs as they are considered as “necessary costs”  
• Compensation payments: not specified |
### Italy
- Yes
- Premiums are recovered through tariffs as part of operational costs

### France
- Yes
- Premiums: they are recovered through tariffs as part of operational costs.
- Compensation payments: they are recovered through tariffs as part of operational costs. In case of significant incident, recoverable costs may be re-evaluated by the NRA

### Germany
- Yes
- Premiums: they are recovered through tariffs. Premiums are included in the revenue cap based on the network tariff assessment in 2008. Until the next regulatory period (starting in 2014 for electricity and 2013 for gas transmission networks), they will be adjusted on the basis of a CPI development and an overall efficiency improvement factor of 1.25% per year
- Compensation payments: when not covered by insurance, included in the revenue cap for the following regulatory period if the cost incurred in a snapshot (i.e. 2011 for the regulatory period 2014-2018 for electricity transmission and 2010 for the regulatory period 2013-2017 for gas transmission networks) year for the following regulatory period and provided that the costs incurred are considered by the NRA as in line with the requirement of efficient operation of the network. In case of material damage not covered by insurance with significant financial impact, the TSO may apply for a hardship case allowance in order to adjust the revenue cap

### United Kingdom
- Yes
- Premiums: they are recovered through tariffs as part of operational costs and subject to a price control of the NRA. No information was provided on the price control
- Compensation payments: not specified

### Czech Republic
- Yes
- Premiums: those related to licensed activities are recovered through tariffs
- Compensation payments: not specified

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234. The blackout of 4 November 2006 had the consequence for E.ON Netz (now TRANSPOWER) the payment of unforeseeable sums. E.ON Netz had to pay to customers 350,000 € [NDLR: in total?] (one claim concerning an amount of 200,000 € is still pending). E.ON Netz moreover had to compensate some TSOs (France, Italy and Belgium) for the costs due to the energy purchase necessary under the adjustment mechanism to satisfy the electricity demand and re-establish balance between offer and demand.64

64 At the level of the TSOs, three TSOs (Italy, France and Belgium) filed a formal complaint against E.ON Netz. This claim was based on the MLA, for failure to comply with the Operation Handbook (policies 1, 2 and 3). The MLA contains a dispute resolution clause for any breach of the Operation Handbook causing “damage”. In such case (and after a preliminary amicable settlement procedure), two committees, namely an incident committees (for technical issues/violation of technical rules under the Operation Handbook –composed of technical experts) and a damage panel (for setting up the recoverable damage –composed of legal experts) are set up.
5.4. **ASSESSMENT**

235. It appears from the above that the right to calculate liability costs (insurance premiums and/or indemnification payments) is not implemented evenly from one MS to the other. TSOs do recover insurance costs through tariffs. Such recovery is, for some MS, subject to some conditions, such as the condition to be part of operational costs in Poland, which, according to our Polish national correspondent does not cover the recovery of all of paid insurance premium. TSOs are not always able to recover indemnification payments through tariffs. In France, they are allowed to do so as part of operational costs. In case of significant incident, the NRA may re-evaluate recoverable costs. In other MS, TSOs may calculate compensation payments under stringent conditions, such as only when the payment results from damage not larger than “normal” damages, by reference to a reference year (the Netherlands). Some TSOs are not entitled to recover indemnification payment through tariffs, such as the Polish TSO.

236. According to the IFIEC representative, it would be good to extend the incentive regulation schemes such as that in the United Kingdom to other MS. According to him, the debate on a widespread use of incentive regulations in Europe is controversial, TSOs being, generally speaking, reluctant to it. From the information available, it is not possible to say whether the application of incentive scheme such as in the United Kingdom allows for more efficiency in terms of recuperation of costs through tariffs.

The practice is that TSOs recuperate insurance premiums through tariffs as well as compensation payments. In this respect, and more specifically in relation to contractual liability, Dr. Prof. M. Faure believes that TSOs should have the freedom to calculate increasing (contractual) liabilities or insurance premiums into their tariffs. According to him, tariffs can also adequately reflect an agreement between the parties concerning the division of risks. *Ex-ante* limitations of the possibility to pass on these costs would be bound to lead to inefficiencies. Dr. Prof. M. Faure stresses the importance to bear in mind that in specialised industries such as the transmission system industry there is a great likelihood that well-informed parties will agree to wealth maximising contracts. Any regulatory intervention might therefore almost be bound to lead to inefficiencies, according to him.65

As mentioned above, we believe insurance against supply failure is a good practice that should be extended throughout the European Union. The amounts that have to be paid in case of incident in the absence of insurance against supply failure are much higher than those to be paid in the presence of an insurance (corresponding to the insurance premium).

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The parties have the possibility to exchange submissions [NDLR: this information is not provided by our national correspondents but comes from our general knowledge of dispute resolution clauses in international agreements in the field of electricity]. The claim did not lead to the set up of such committees but to an agreement on compensation of the direct losses underwent by the affected TSOs (i.e. the costs due to the energy purchase necessary under the adjustment mechanism to satisfy the electricity demand and re-establish balance between offer and demand). Moreover, the claim led to an investigation of the causes and recommendations and a commitment of E.ON Netz to comply with the relevant obligations under the Operation Handbook.

65 M. FAURE, “Comments on liability of transmission system operators”, Maastricht, 6 April 2010, pp. 4 and 5.
The more TSOs will have to pay, the more this might be recuperated through tariffs, to the detriments of the users and to the end consumers.
6. **CONCLUSIONS**

6.1. **LIABILITY LEVEL**

6.1.1. **Strict liability**

237. Strict liabilities of general scope, such as in Poland and, more specifically, Czech Republic raise several questions. First, as they find their basis in general law (civil codes), it is not sure whether the interests of all involved stakeholders are taken into account, the way they are for sector specific legislation. Second, these cases of strict liability are quite “extraordinary” in comparison with other cases of strict liability in the transmission system industry and in other industries. In other industries, these liabilities are often compensated by financial caps. The problem in Poland is nowadays less acute than it was before as the recently changed energy law introduced financial caps for the Polish TSO. These cases of strict liability have also the consequence that the concerned Polish and Czech TSOs have/used to have very high insurance needs, which are apparently not fully covered for both of them. This is negative for the TSOs but also for grid users. On the other hand, not insuring the totality of one’s activities or assets can be an incentive to behave prudently for the part of activities/assets not insured (n° 21).

238. Strict liabilities specifically targeted to the TSOs’ needs (such as those in France and in the Netherlands) seem more adequate than strict liabilities of general scope. They are first taken in the framework of a regulatory procedure that takes into account interests’ of stakeholders. They are second based on objective criteria (such as performance of TSOs by region) and act as an incentive for TSOs to maintain and/or improve quality of supply, as discussions during the workshop reveal it.

239. Bearing in mind the purpose of facilitating the burden of proof that strict liability regimes sometimes entail, an alternative to strict liabilities could be to foresee, by way of law, a rebuttable presumption, putting the onus of proof on the company carrying out the industrial activity (such as the one in Germany, mentioned in section 2.3.3.1 below).

6.1.2. **Level of fault/liability**

240. The level of fault first depends on what is possible to do from a legal point of view. Under some sector specific laws, liability is excluded in case of regular fault/negligence (violation of the grid code under Italian law, e.g.). Liability limitations by way of agreements also depend on what is it possible to do under national law. For example, liability may be excluded for gross negligence in some MS but not in others. As a general rule, it is possible in all scrutinised jurisdictions to exclude liability for regular fault by way of agreement.

241. General trends emerge from the analysis of agreements between TSOs. For these agreements: (i) liability is usually excluded for regular fault/negligence; (ii) force majeure is generally standard and similar in all agreements; (iii) recoverable damages are usually limited to direct damages; and (iv), in principle, there are no financial cap (except in the MLA notably).
As for agreements with grid users, it is difficult to draw general trends. All scenarios are possible: (i) liability may be excluded in case of gross negligence and/or of wilful misconduct; (ii) liability may vary depending on additional factors, such as; (a) who suffers damages (DSO or its clients); (b) quality levels, such as thresholds of power interruptions/reductions for a given period of time; (c) type of client; (d) reference to good industry practice; (e) type of incident; etc. We found three cases of financial caps, (i) one among the CUSC parties (United Kingdom); (ii) one between TSOs and PXs (which amount is not disclosed due to confidentiality reasons); and (iii) another one in Germany (section 3.3.1.2).

242. Under general laws, individuals are responsible for their simple fault and for all damages following these. One thus may question why TSOs should benefit from a more favourable regime than that applicable to all of us. Law on liabilities and on tort however reflect political choices and social values. We find, for example, that quality thresholds (in terms of duration of interruption and/or quality of electricity) are a good way to set up liability levels for TSOs, as discussions during the workshop reveal it. Such thresholds should be sufficiently flexible to reflect performance of the TSOs depending on the region (in some regions, TSOs perform better, in others performance is not as good) and should thus be based on historical trends. Adequate thresholds could allow TSOs to maintain quality and/or to improve it, which favours efficiency in the interest of the market as a whole.

6.1.3. Force majeure

243. Force majeure definitions under general laws slightly vary from one MS to the other. In some MS, the event must be “unpredictable”; in others the event must be “uncontrollable”; in others the event must have as consequence the impossibility to perform one’s obligations. Depending on the MS, it is thus easier for TSOs to call upon force majeure events than in other MS.

244. Most of sector specific definitions of force majeure lack some added value as they merely list events that are “classic” events of force majeure under general law. Definitions of force majeure in France (both in laws and in agreements with TSOs and grid users) are however interesting. Not all climate catastrophes should be considered as force majeure (only exceptional ones); not all authorities’ decisions (especially those of NRAs) should be considered as force majeure for TSOs. In France the definition in agreements uses thresholds beyond which force majeure is applicable (when over 100.000 are affected by interruptions, e.g.). As it is difficult to exactly determine when an event becomes force majeure, such thresholds might be useful for TSOs and grid users. They should be based on historical performance of TSOs and on historical records of abnormal events.

245. We do not have empirical evidences demonstrating that the absence of harmonisation lead to competition distortions or impediments to the development of the internal electricity market. However, varying definitions imply, by definition, that, for the same event, it is more or less difficult, from one MS to the other, to have force majeure. In
other words, depending on the MS, it is more or less difficult to be compensated or not, as grid user, in case of event close or assimilated to force majeure. Obliging MS to implement a harmonised level or definition of force majeure could be a good option, from an internal market and from a quality of supply viewpoints. Without obliging all MS to align their definitions (which would probably be counter-productive) it would nonetheless improve the level playing field between grid users throughout Europe.

6.1.4. **Financial caps**

246. Our investigations reveal several cases of financial caps, namely three cases of caps under sector specific laws and regulations (Germany notably) and by way of agreements. Financial caps in agreements with grid users are not widespread, whereas there are some in agreements between TSOs. Most of the identified caps are absolute caps, whereas the legal caps in Germany and in Poland are progressive ones.

247. Financial caps and rebuttable presumptions definitely present some advantages for TSOs. They first allow TSOs to assess risks in advance (in terms of insurance, risks, etc.), which has an influence on tariffs (more efficiency) and, in turn, on grid users. Mix of financial caps and of rebuttable presumptions (such as in Germany, e.g.) also turn out to be incentives for TSOs to pay in case of damage rather than going through lengthy and expensive judicial proceedings. As such, financial caps allow for efficiencies, to the benefit of grid users. On the other hand, financial caps represent a limit to the users’ right to be fully indemnified, by derogation to general principles of law (especially for tort liability). Moreover, the differences between one MS to the other (cap, no cap, different type of cap, diverging amount of cap, etc.) are quite substantial. The situation as it currently stands regarding caps can potentially create discriminations between users in the European Union.

248. The presence in some MS of financial caps and the absence of these in others could potentially lead to several shortcomings from a market integration point of view. First, such differences create forum shopping opportunities for grid users. Second, according to the IFIEC representative at the workshop, grid users do feel competitive differences among themselves depending on whether there are financial caps (in which case not all damages can be recovered) or not (in which cases there are no such limitations to recoverable damages).

249. We do not have figures demonstrating exactly to what extent competition conditions are affected due to the presence or absence of financial caps. Should the allegations of the IFIEC representative be confirmed by empirical evidences, there would be a case for improving the level playing field between MS. One way of overcoming these differences would be to impose conflict of law rules, stating, for example, that the applicable law would be that of the MS where the damage originates. But this method could be questioned: on which ground, for example, could one event give rise to full compensation whereas for others it would not? Another way for overcoming these differences would be to extend the use of financial caps to all MS. In such a case, and as reported during the workshop: (i) financial caps should not be set at a too low level, in which case they would tend to lead to inefficiencies (the TSO
would have no incentive to perform well); (ii) the level of caps should take into account the overall performance of the TSO (history) and the interests of grid users (some grid users suffer more from electricity interruptions than others, e.g.); and (iii) the overall aim of implementing financial caps should be to incentivise TSOs to maintain and/or improve quality levels. Please note however that some persons who were involved in the preparation of this report are sceptical as for the efficiency of extending financial caps to other MS (n° 73).

6.1.5. Recoverable damages

250. Recoverable damages depend on several factors:
- The causality theory applied by courts and tribunals (in most MS, the adequate causality theory – less strict – is applicable whereas in some cases – France, e.g. – the theory of equivalences – stricter – is applicable);
- Sector specific laws and regulations; and
  In Italy, the grid code excludes compensation of indirect damages, e.g.
- Provisions on recoverable damages in relevant agreements.

251. A general trend emerges from agreements that TSOs have between each other and with grid users: indirect damages are excluded from reparation. Indirect damages can have different meanings under different laws (for example, losses of profits are or can be considered as direct damages under Belgian and French laws respectively whereas they are not in other MS). This is why the studied agreements usually enumerate in details what the parties consider as “indirect damages” under the agreement. Many damages fall out of scope of reparation, such as consequential damages, indirect damages, profit losses, revenue losses, income losses, contract losses, etc.

252. The studied clauses reveal many diverging definition of indirect damages from one agreement to the other. Consequently, the same damages could be compensated in one MS but not in the other. This can have potential discriminatory consequences for grid users (although we do not have empirical evidences demonstrating, with figures, such discriminations).

253. As discussed during the workshop, some industries are more affected by electricity interruptions than other ones. Profit losses for some of them might be very important following a blackout. It is thus questionable whether the exclusion of indirect damages (including exclusion of profit loss) should be applicable to all situations. The extended use of financial caps could allow grid users to be compensated for profit losses, however up to a certain extent.

6.2. INSURANCES AND TARIFFS

6.2.1. Insurance
254. As for insurance types, generally speaking, TSOs are insured against similar risks, by way of different types of insurance policies (civil liability, supply failure, assets/property for the most important ones). This is so despite the fact that there are no obligations to insure on TSOs (except in France for terrorist attacks). The fact that not all TSOs have insurances against security of supply is surprising. Supply failures might have important consequences for TSOs, and might put in danger the general financial balances of TSOs. We believe insurance against supply failure is a good practice that should be extended throughout the European Union. The amounts that have to be paid in case of incident in the absence of insurance against supply failure are much higher than those to be paid in the presence of an insurance (corresponding to the insurance premium). The more TSOs will have to pay, the more this might be recuperated through tariffs, to the detriments of the users and of the end consumers.

255. Moreover, no national correspondent mentioned the existence of insurances against insolvency risks. Due to the mission of TSOs and the risks faced by them, it would be preferable that all TSOs have insurances against such risks. Some national correspondents however mentioned that insurances against insolvency risk are too expensive. In case of important blackout, the absence of insurance against supply failure or against insolvency might have the consequence to put the TSO under an insolvency risk (especially when there are no statutory financial caps). The question that arises is whether the state should intervene in case of insolvency, to prevent the TSO from falling bankrupt, or whether it should allow the TSO to go bankrupt (and assigning the TSO’s tasks to another entity for ensuring continuity of supply, e.g.).

256. Our investigations reveal important disparities between insurance amounts. We understand from the Polish TSO that the amounts are not adequate (not covering all needs of the TSO). According to discussions during the workshop, amounts of premiums should be depending on the level of reliability of TSOs:

- A low reliability level (such as in Southern Europe, e.g.) should allow for higher insurance premiums;
- A high reliability level (20 minutes per year in Germany, e.g.) should allow for lower insurance premiums.

Premium levels should thus vary depending on the region (high reliability regions, such as Northern Europe vs. lower reliability regions, such as Southern Europe). In any event, discussion regarding premiums should involve concerned industries. Industries with the highest needs in steady electricity delivery should indeed consent in paying higher tariffs due to higher amounts of liability recuperated by the TSO in tariffs. Several factors show that the insurance market for risks of TSOs is competitive:

- Several insurance companies are able to provide targeted services in Europe;
- TSOs purchase insurances towards many different insurance companies;
- TSOs may use various criteria (not only the price) for purchasing insurances/selecting insurance companies.

257. The Polish and the [CONFIDENTIAL] TSOs however have difficulties in finding all insurance needed on their local market.
6.2.2. **Tariffs**

258. Recuperation of liability costs through tariffs is a field where NRAs’ policies diverge from one MS to the other. Conditions for recovery vary depending on the type of amount (insurance premiums or indemnification payments). In some MS, it is more difficult to recover insurance premiums (Poland, e.g.) than in others (Denmark, France, the Netherlands, etc.). As for indemnification payments, it is possible to recover these in some MS, but not in others (Poland notably).

259. According to the IFIEC representative, it would be good to extend the incentive regulation schemes such as that in the United Kingdom to other MS. According to him, the debate on a widespread use of incentive regulations in Europe is controversial, TSOs being, generally speaking, reluctant to it. From the information available, it is not possible to say whether the application of incentive scheme such as in the United Kingdom allows for more efficiency in terms of recuperation of costs through tariffs.

260. One way to overcome disparities between TSOs (and thus, in turn, between national markets) in terms of right to recuperate liability costs through tariffs would be to apply incentive regulations uniformly throughout Europe. As incentive regulation promotes efficiency, this would, in turn, improve efficiency of transmission system operation in Europe.

It is the practice that TSOs recuperate insurance premiums through tariffs as well as compensation payments. The introduction of incentive schemes should not prevent TSOs from doing so. In this respect, Dr. Prof. M. Faure believes that TSOs should have the freedom to calculate increasing liabilities or insurance premiums into their tariffs. According to him, tariffs can also adequately reflect an agreement between the parties concerning the division of risks. *Ex-ante* limitations of the possibility to pass on these costs would be bound to lead to inefficiencies. Dr. Prof. M. Faure stresses the importance to bear in mind that, in specialised industries such as the transmission system industry, there is a great likelihood that well-informed parties will agree to wealth maximising contracts. Any regulatory intervention might therefore almost be bound to lead to inefficiencies, according to him. \(^{66}\)

Any initiative at the European level should not deprive TSOs from such a fundamental right.

6.3. **COMPETITION DISTORTIONS AND IMPEDEMENTS TO THE INTERNAL ELECTRICITY MARKET DEVELOPMENT**

261. Our investigations reveal several substantial divergences in liability regimes from one MS to the other, namely:

- Absence and/or presence of strict liability in some MS;
- The definition of force majeure under general law and/or under sector specific laws;
- Outages definitions;

\(^{66}\) M. FAURE, “Comments on liability of transmission system operators”, Maastricht, 6 April 2010, pp. 4 and 5.
In some MS, TSOs are responsible in case of outages; in others they are not for planned outages and in others they are not also for unplanned outages (under certain conditions).

- **Type of fault;**
  As mentioned above exclusion of some types of faults (gross negligence) are possible in some MS and in others not. Moreover, agreements vary a lot on this point, without being able to set general trends.

- **Financial caps;**
  Some MS have financial caps others do not. When they do have financial caps, caps are absolute (United Kingdom) or progressive (Germany and Poland). Amounts slightly vary from one MS to the other.

- **Extensions and/or limitations of liability of subcontractors and/or of component suppliers.**

262. These above-mentioned differences have the consequence that, for the same event, grid users will be treated differently from one MS to the other, which is, at first sight, a case of discrimination between grid users. However, according to Dr. Prof. M. Faure, the existence of the differences in contractual liability regimes should not at all come as a surprise: “after all, strengths and weaknesses of contracting parties may vary, […] but also technological conditions may substantially differ. That may hence lead wealth maximising contracting parties to choose varying agreements concerning the allocation of risks. Any paternalistic intervention whereby this freedom would be removed is bound to lead to inefficiencies since one particular liability regime would then be chosen which may fit for one particular [MS] but not for others. The large differences show moreover that parties apparently have diverging preferences in this respect”.67 We would add to these observations that TSOs are monopolists. Consequently, counterparties of TSOs are sometimes in a disadvantageous position compared to that of the TSO when negotiating agreements with TSOs.

263. The key question is thus whether these differences in liability regimes lead to competition distortions and/or impediments to the internal electricity market development. According to the IFIEC representative at the workshop, some grid users feel competitive disadvantages (or advantages) depending on how easy it is to put TSOs’ liability at stake and/or what is recoverable. As the present report focuses on theoretical aspects of liability and as the methodology retained was to send a (legal) questionnaire to TSOs (or to legal counsels of TSOs), we do not have any empirical evidences showing whether this statement is true or not and, if yes, to what extent.

Some elements nonetheless deserve being mentioned.

264. First, differences in financial caps create forum shopping opportunities for claimants who will prefer to sue a TSO in a MS where there is no financial cap than in a MS where there are financial caps.

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67 M. FAURE, “Comments on liability of transmission system operators”, Maastricht, 6 April 2010, p. 5.
265. Second, discussions at the workshop reveal that the absence/presence of financial caps implies some shortcomings in terms of market integration. According to the IFIEC representative, grid users do feel competition distortions among themselves. Moreover, it appears from the mere content of the rules that, for the same incident some grid users could be opposed to financial caps whereas others would not (and thus would be in a competitive advantageous position to those to whom financial caps are opposed). Moreover, the presence of rebuttable presumptions along with financial caps could facilitate the indemnification process. This would mean that cases where market participants benefit from rebuttable presumptions are more easily/quickly solved than cases where they do not.

266. Third, our investigations reveal that, in case of capacity curtailment, market actors will be compensated (or not) under varying conditions from one MS to the other (n° 141). In some MS, the question of compensation is a non-question as market actors do not feel the consequences of capacity curtailment due to the application of counter-trade (Nordic countries) or due to the organisation of the market (in the EMCC market coupling, e.g., where the participating TSOs take on themselves consequences of capacity curtailment). Various means of dealing with capacity curtailments and various ways of treating their consequences (compensation, no compensation, in which situations, etc.) definitely affect grid users throughout Europe. For the same event, users might be treated differently whether located in the United Kingdom, in Denmark or in Germany e.g. Capacity curtailment policies moreover highlight diverging views of NRAs who are competent for approving rules on management of interconnectors. Diverging views of NRAs have negative consequences for the European internal market development. NRAs should be obliged to coordinate more on such fundamental issues as interconnectors. There is a case here for a better enforcement of coordination obligations on NRAs, as required under the Cross-Border Regulation (former and new versions) and, more recently, as required under the Agency Regulation.

267. Four, some sector specific definitions of force majeure, such as those in France, seem more appropriate to the TSO industry than definitions under general law or sector specific definitions mimicking definitions under general law. Under French law and by application of agreements with the French TSO, not all authorities’ decisions are events of force majeure, e.g. and not all extreme weather conditions may be considered as such (only those of extraordinary magnitude/nature, such as sticky snow, or events putting a minimum number of consumers in the dark). This way of defining force majeure is interesting. As revealed during the workshop, it is based on historical data on the performance of the TSO. It provides incentives for the TSO to maintain/improve quality of supply, as revealed during the workshop. For these reasons, similar approaches of force majeure events could be extended to other MS. This should not mean that all MS should adopt the same definition of force majeure, which would be counter-productive, TSOs having different level of performance from one MS to the other; access to different technologies; industries having different needs; etc.

268. Five, general cases of strict liability (risk liability), if not appropriately balanced by financial caps, put the concerned TSOs at risk of insolvency. This has the theoretical possible
consequence of deterring the affected TSOs from participating to new operational activities. Should these activities be beneficial to the development of the European internal electricity market (such as activities on interconnectors, e.g.), these general cases of strict liability could be viewed as detrimental to the development of the European internal electricity market.

6.4. COMMON EUROPEAN APPROACH?

269. Financial caps, force majeure definition and recoverable damage definition could be cases where a common European approach would be a good solution to improve level playing field between grid users throughout Europe. As mentioned above, what works for one MS may not work for another one. MS should be free to set up levels of financial cap depending on various criteria, such as:

- Historical performance of TSOs;
- Incentive for the TSOs to perform well (quality and continuous electricity supply) and to invest where the grid most needs it; and
- Type of grid users/industries.

Levels of force majeure could also take into account historical performance and records of events similar to force majeure events.

270. In order to adopt a measure in the field of TSO liability, the Commission has to define its legal basis as all European legislations have to be based on a treaty disposition. The choice of the legal basis depends on two elements, namely the content and the objectives of the future instrument. Regarding TSO liability, the objective of a European legislation would be to prevent competition distortions or impediments to the internal electricity market development. The content would be linked to private law, and more specifically to contractual and tort law.

271. The best disposition that could serve as legal basis for a measure in the field of TSO liability would be article 114 of the Treaty on the functioning of the European Union (“TFEU”) (ex article 95 of the Treaty of the European Community, “TEC”). On this basis, the European Parliament and the Council can adopt “measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”. The meaning of this disposition was specified by the Court of justice of the European Union who stated that measures adopted on ground of this legal basis should aim at the prevention of competition distortions and obstacles to free movement of goods (in the present case: obstacles to the development of the European internal electricity market). The objective of a measure on TSO liability being (among others) the suppression of competition distortions

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68 Regarding procedural aspects, article 114 TFEU entails the application of the co-decision procedure. As defined in article 294 TFEU, the Commission submits a proposal to the European Parliament and the Council. This proposal is followed by a dialogue between the Parliament and the Council. At the end, if an agreement is reached, the measure is adopted. If not the Conciliation Committee meets and proposes a joint text. This final text is either approved by the Parliament and the Council, either reject.
matches with these requirements. This disposition is the legal basis generally used for European law instruments adopted in the field of private law. All these instruments are based on article 114 TFEU, and are justified by the fact that the existing disparities may distort competition. In order to adopt a similar instrument in the field of TSOs’ liability, the Commission must prove (i) competition distortions/impediments of the national markets; and that (ii) no other measures are possible to overcome these distortions/impediments. More specifically, the Commission should demonstrate that the rules concerning conflict of laws would not, in the matter of financial caps, remove the identified problems. It is thus unsure whether the conditions imposed by article 114 TFEU would be fulfilled in the present case.

272. With regards to article 114, the Treaty leaves the choice open whether to proceed by way of Regulation or Directive. Regulations are of general application and are binding on all MS. Moreover, regulations are directly applicable, i.e. no national legal measures are needed for the regulation to be part of the national legal system. Directives do not have to address all the MS and are only binding to the extent of the goal to be achieved. The form and the methods to be used are left to the discretion of the MS. Directives are not directly applicable but the Court held that directives have direct effect if sufficiently precise, increasing their strength.70

To conclude, Regulations have direct impact and therefore must be capable of entering directly into the national legal systems. Such an instrument is adequate only on subjects suited to immediate impact. Therefore, regulations are generally used to implement new European instruments where no national dispositions have to be harmonised. On the contrary, Directives being more flexible are more suitable for complex legislative change and harmonisation. In the present case a Directive would thus suit better than a Regulation. Moreover, the Commission agreed in the Single Act to prefer directives when approximation of national legislations is concerned. However, we observe a tendency to replace directives by regulations, e.g. the regulation on the law applicable to contractual obligations. This tendency was laid down in the Governance white paper of the Commission (2001).71 Eventually, the interinstitutional agreement on better law making (2003) lays down an obligation to the Commission to justify the choice of the legal instrument.72


71 “The use of regulations should be considered in cases with a need for uniform application and legal certainty across the Union. This can be particularly important for the completion of the internal market and has the advantage of avoiding the delays associated with transposition of directives into national legislation.”

72 “The Commission will explain and justify to the European Parliament and to the Council its choice of legislative instrument, where possible as part of its annual work programme or of the normal dialogue procedures and, at all events, in the explanatory memoranda attached to its initiatives. It will consider any request in this connection from the legislative authority, and it will take account of the results of any consultations which it has undertaken before tabling its proposals.”
273. Should the European piece of legislation contain obligations to implement incentive regulation schemes at the level of liability regimes, the use of article 114 of the TFEU could be questioned. Other legal basis (provided that the liability aspect is put aside) would suit better, such as article 194, §2 of the TFEU, since it deals with the energy area. This legal basis focuses more precisely on measures related to the functioning of the energy market, security of supply, promotion of energy efficiency and energy savings, promotion of interconnection of energy networks, but does not include the adoption of private law measures.  

274. Should the Commission lack of a legal basis to take a piece of legislation on ground of the TFEU, harmonisation could be possible by way of recommendations or by commonly agreed initiatives between MS and all concerned stakeholders (such as by measures as implemented via the Florence Forum, e.g.). The level of agreement of MS should however be very high as modifications of rules on liability require statutory acts.

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ANNEX 1.- LIST OF NATIONAL CORRESPONDENTS
ANNEX 2.- LEGAL QUESTIONNAIRE

73 We do not think that article 177 TFEU (ex article 155 of the TEC) that deals with trans-European networks would be an appropriate legal basis. This article concerns measures necessary to ensure interoperability of the networks, in particular in the field of technical standardisation, but does not include the adoption of private law measures.
Annex 1.- List of National Correspondents

<table>
<thead>
<tr>
<th>Member State</th>
<th>National Correspondent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Poland</td>
<td>Ms. H. Napierała, Kancelaria Prawnicza Energo-Lex</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Mr. M. Van Oostveen, Tennet</td>
</tr>
<tr>
<td>Denmark</td>
<td>Mr. J. Bruun, Energinet.dk</td>
</tr>
<tr>
<td>Italy</td>
<td>Ms. I. Di Cioccio, Terna</td>
</tr>
<tr>
<td>France</td>
<td>RTE EDF TRANSport (RTE)</td>
</tr>
<tr>
<td>Germany</td>
<td>Dr. H. Stappert, Luther Rechtsanwaltsgesellschaft mbH</td>
</tr>
<tr>
<td>United Kingdoms</td>
<td>Ms. A. Quinn, National Grid</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Mr. V. Divis, CEPS</td>
</tr>
</tbody>
</table>
## Annex 2.- Legal Questionnaire

<table>
<thead>
<tr>
<th>Question n°</th>
<th>Question</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>I. SECTOR SPECIFIC LAWS AND REGULATIONS (INCLUDING TECHNICAL REGULATIONS) IF ANY</strong></td>
<td></td>
</tr>
<tr>
<td>1.1.</td>
<td>Please list all provisions in specific laws and regulations (including technical regulations) applicable to liability of TSOs in your jurisdiction (if any). Please also provide an English translation of their content.(^{74})</td>
</tr>
<tr>
<td>1.2</td>
<td>What is the definition of incident (failure to supply but not exclusively) under your national law?</td>
</tr>
<tr>
<td>1.3</td>
<td>What is the definition of force majeure under your national law? What are the consequences of force majeure?</td>
</tr>
<tr>
<td>1.4</td>
<td>Are there measures guaranteeing costs minimisation in case of major loss, of multiplication of law suits, etc.?</td>
</tr>
<tr>
<td>1.5</td>
<td>Do TSOs take/have to take preventive measures under your national law? Do insurance companies require TSOs to take preventive measures in your jurisdiction?</td>
</tr>
<tr>
<td>1.6</td>
<td>Under which conditions are TSOs exempted from liability under your national law? For which type of fault/negligence (&quot;regular&quot;, gross, etc.)? Are there cases of objective liability (i.e. liability without fault or without negligence) in your jurisdiction?</td>
</tr>
<tr>
<td>1.7</td>
<td>Which damages are recoverable under your national law (direct, indirect, incidental, etc.)?</td>
</tr>
<tr>
<td>1.8</td>
<td>Are their caps to damages due for liability under your national law? If yes, under which conditions are they applicable (for a single incident or several incidents; towards a single damaged party or several of them; covering which types of damages exactly; etc)? If yes, what are their amounts?</td>
</tr>
<tr>
<td>1.9</td>
<td>Please explain the sharing out of liabilities between TSOs and DSOs.</td>
</tr>
<tr>
<td>1.10</td>
<td>Are there cases of criminal liability of TSOs for supply failure? If yes, please explain.</td>
</tr>
<tr>
<td><strong>II. APPLICABLE GENERAL RULES ON LIABILITY</strong></td>
<td></td>
</tr>
<tr>
<td>2.1</td>
<td>Please explain general rules on liability under your national law. This description shall provide insight on items 1.2 to 1.8 (force majeure/incident, exemptions, damages, liability limitation, etc.). Please explain to what extend they apply to TSO liability for failure of supply. If relevant for comprehension, please also provide an English translation of relevant provisions.</td>
</tr>
<tr>
<td>2.3</td>
<td>Does your national law contain a duty to mitigate in case of failure to comply with contractual/legal provisions? If yes, please explain.</td>
</tr>
<tr>
<td>2.4</td>
<td>What is TSOs' liability in case of inherent defect (&quot;vice de la chose&quot; in French) (inherent defect of a cable supplied to a TSO by a cable manufacturer, e.g.)?</td>
</tr>
<tr>
<td>2.5</td>
<td>What is TSOs' liability in case of break of the causal link (&quot;rupture du lien causal&quot; in French)?(^{75})</td>
</tr>
<tr>
<td>2.6</td>
<td>What is liability regime between the TSO acting as principal (&quot;commissant&quot; in French) or work supervisor (&quot;maître d'ouvrage&quot; in French) (when ordering a work, e.g.) and its contractor (the company building the work, e.g.)?</td>
</tr>
</tbody>
</table>

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\(^{74}\) *In the present questionnaire, an English translation is not necessary when provisions are written in French or in Dutch.*

\(^{75}\) *For example: a TSO causes a small incident with insignificant consequences. In order to remedy the situation, the TSO calls a subcontractor to perform some maintenance/reparation works on cables. The subcontractor causes a substantial incident with substantial consequences. What is the liability of the TSO for this subsequent substantial incident?*
### III. BI-AND/OR MULTILATERAL AGREEMENTS BETWEEN TSOs

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1</td>
<td>Please list all provisions on liability in agreements your company has with interface TSOs governing liability between you and the relevant TSOs. Please also provide an English translation of their content.</td>
</tr>
<tr>
<td>3.2</td>
<td>Please list all provisions on liability in agreements your company has with other TSOs governing liability between you and the relevant TSOs. Please also provide an English translation of their content.</td>
</tr>
<tr>
<td>3.3</td>
<td>Under which conditions is liability triggered under these agreements (agreements under items 3.1 and 3.2)?</td>
</tr>
<tr>
<td>3.4</td>
<td>Under which conditions can a TSO be exempted from liability under these agreements (agreements under items 3.1 and 3.2)? For which type of fault/negligence (“regular”, gross, etc.)?</td>
</tr>
<tr>
<td>3.5</td>
<td>What is the definition of force majeure under these agreements (agreements under items 3.1 and 3.2)? What are the consequences of force majeure?</td>
</tr>
<tr>
<td>3.6</td>
<td>Which damages are recoverable under these agreements (direct, indirect, incidental, etc.) (agreements under items 3.1 and 3.2)?</td>
</tr>
<tr>
<td>3.7</td>
<td>Are there caps to damages due for liability under these agreements (agreements under items 3.1 and 3.2)? If yes, under which conditions are they applicable (for a single incident or several incidents; towards a single damaged party or several of them; covering which types of damages exactly; etc)? If yes, what are their amounts?</td>
</tr>
<tr>
<td>3.8</td>
<td>What is the applicable law to these agreements (agreements under items 3.1 and 3.2)?</td>
</tr>
<tr>
<td>3.9</td>
<td>How are disputes settled under these agreements (agreements under items 3.1 and 3.2)?</td>
</tr>
</tbody>
</table>

### IV. AGREEMENTS WITH OTHER MAIN ACTORS OF THE MARKET AND NETWORK USERS

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1</td>
<td>Please list all provisions in agreements on liability your company has with producers (all types of producers included) governing liability between you and the relevant producers (including access and/or connection agreements and/or other types of agreements if relevant). Please also provide an English translation of their content.</td>
</tr>
<tr>
<td>4.2</td>
<td>Please list all provisions in agreements on liability your company has with DSOs (governing liability between you and the relevant DSOs) (including access and/or connection agreements and/or other types of agreements if relevant). Please also provide an English translation of their content.</td>
</tr>
<tr>
<td>4.3</td>
<td>Please list all provisions on liability in agreements your company has with industrial consumers governing liability between you and the relevant industrial consumers (including access and/or connection agreements and/or other types of agreements if relevant). Please also provide an English translation of their content.</td>
</tr>
<tr>
<td>4.4</td>
<td>Please list all provisions on liability in agreements your company has with balance responsible parties governing liability between you and the relevant responsible parties. Please also provide an English translation of their content.</td>
</tr>
<tr>
<td>4.5</td>
<td>Please list all relevant provisions on liability in agreements in the framework of operation of PXs if any (including market rules, etc.). Please also provide an English translation of their content.</td>
</tr>
<tr>
<td>4.6</td>
<td>Please list any other relevant provisions on liability in other agreements with any market participant that is of relevance for the subject matter if any. Please also provide an English translation of their content.</td>
</tr>
<tr>
<td>4.7</td>
<td>Under which conditions is liability triggered under these agreements (agr.under items 4.1 to 4.6)?</td>
</tr>
<tr>
<td>4.8</td>
<td>Under which conditions can a TSO be exempted from liability under these agreements (agreements under items 4.1 to 4.6)? For which type of fault/negligence (“regular”, gross, etc.)?</td>
</tr>
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<td>4.9</td>
<td>What is the definition of force majeure under these agreements? What are the consequences of force majeure (agreements under items 4.1 to 4.6)?</td>
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<td>4.10</td>
<td>What is the applicable law to these agreements (agreements under items 4.1 to 4.6)?</td>
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<tr>
<td>4.11</td>
<td>How are disputes settled under these agreements (agreements under items 4.1 to 4.6)?</td>
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76 “Bi and/or multilateral agreements” cover any type of agreement between two or more TSOs regarding operation of the system properly speaking (coordinated actions, etc.); information exchange for the purpose of coordination; etc. Market rules (electricity exchanges on power exchanges, e.g.) are also covered.
### V. QUESTIONS RELATED TO SPECIFICITIES OF JUDICIAL PROCEEDINGS

5.1 How are procedures for damage statement ("constat de dommage" in French) carried out in your jurisdiction?

5.2 How rapid and efficient do you assess the payment of compensation to victims in your jurisdiction?  

### VI. QUESTIONS RELATED TO INSURANCES

6.1 Is your company under obligations to insure itself against failure of supply or any other type of liability (under laws, regulations, contracts, etc.)? If yes, please list these provisions and provide an English translation of their content. If not, does your company insure itself against failure of supply or any other type of liability despite no legal obligation?

6.2 What is (are) the amount(s) of insurance for incidents caused by your company? Is this amount set by law or by national regulation authorities ("NRAs") or by your company on its own? Do TSOs buy more cover insurance than that set by law or NRAs?

6.3 Under which general terms and conditions do insurances apply? Please specify at least deductibles and limitations of the coverage.

6.4 Are there insurance companies specialised in insurance of risks encountered by TSOs in your jurisdiction?

6.5 How many insurance companies offer insurance coverage for the kind of risks encountered by TSOs in your jurisdiction? Are there substantial differences between the products offered by those insurance companies or not? Please explain.

6.6 How does your company purchase insurances (public tender, etc.)?

6.7 On which criteria does your company choose its insurance company?

6.8 Are there limitations of guarantee to insurance offered to your company by insurance companies?

6.9 Does your company buy all the capacity available or only a party of it?

6.10 Do insurance companies have legal claim against the insured TSO or against third parties (such as a defaulting supplier, e.g.)?

6.11 Do victims have a direct legal claim against the insurance company?

6.12 Do TSOs have a property damage cover? How high is that coverage? Which criteria do TSO apply for setting the insured amount for property damage (in comparison to other types of damages, as in item 6.2 above)?

6.13 Do TSOs set up mutual insurance schemes, captives, etc.? If yes, what role do these play (reinsurance or other)? If yes, why do TSOs set up mutual insurance schemes?

6.14 Are you aware of any common initiative (either between TSOs or with other actors) for the purpose of insuring TSOs? If yes, why do TSOs use such common initiatives?

6.15 How do you insure yourself against acts of terrorism? Are there specific insurance pools regarding these? Is this type of risk included in the insurance cover?

### VII. TARIFFS REPERCUSSION

7.1 Are you entitled to put into tariffs amounts paid by your company in the framework of liability and insurance against such liability? If yes under which conditions? Please explain and be specific (with a break down between insurance premiums paid, deductible pay [if any], damages paid that were not subject to insurance coverage, etc.).

7.2 What is the role of NRAs regarding the repercussion of insurance and liability in network tariffs?

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77 In some countries, payment of compensation to victims is more rapid and efficient than in other countries (no fault liability, or constitution of funds and subrogation of the fund against the liable parties, time schedule, class actions, etc.).
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<tr>
<th>IX. STATE RELATED QUESTIONS</th>
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<th>IX. BLACK OUT OF NOVEMBER 2006</th>
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<td>9.1</td>
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</table>
| 9.2 | How did the following questions were tackled/dealt with following the blackout of November 2006:  
  - Incident definition;  
  - Force majeure definition;  
  - Minimisation of costs;  
  - Use of preventive measures;  
  - Liability exemptions;  
  - Damage recovery; and  
  - Any other issue that might seem relevant to you for the purpose of understanding the legal consequences (in terms of liability) following the blackout. |

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<th>X. OTHER QUESTIONS</th>
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