



## Are you aware of your responsibilities as a wind farm operator?

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Board members of a wind farm company often are not aware of their operator obligations and their resulting personal responsibility. They rely on the legal department or on the insurance company to settle the matter.

### Risks for the company management

However, according to German criminal law, until today only natural persons can be prosecuted. If, for example, an employee is fatally injured during an offshore assignment or if oil flows into the sea uncontrolledly, a possible fine or imprisonment must be served by the company's responsible persons themselves. And the final responsibility always remains with the members of the management board. Insurances can only be of limited help here. They do not serve a fine or imprisonment.

But there are ways and means to minimize the risk of liability for yourself and the company.

To do this, as a board member of a wind farm, you must know your duties as an operator and demonstrably ensure that they are implemented.

### Responsibility for safety

From a legal point of view, the operation of a wind farm is basically subject to the same organisational requirements as any other German industrial company. The wind farm represents a source of danger for which the operator must take responsibility as a so-called guarantor. He must ensure that the risks arising from the operation of the wind farm do not materialise and that no third-party rights are violated. This obligation to protect exists towards the environment, the property of third parties, the own employees, but also towards all other persons in the area of the wind farm.

For the company's employees, the protection obligations are specified in the Occupational Health and Safety Act (ArbSchG). This requires the employer to carry out a comprehensive risk assessment, to define health and safety measures on this basis, to review their effectiveness regularly and to adapt them where necessary. Furthermore, the employer must take the necessary measures for first aid and emergency preparedness, e.g. by having appropriate medical personnel on site.

In the Industrial Safety Ordinance (BetrSichV), the obligation to provide first aid and emergency precautions is extended beyond the circle of the company's own employees. According to § 11 BetrSichV, the employer must take the necessary measures to ensure that in the event of an accident or emergency employees "and other persons" can be rescued and medically treated immediately.

Irrespective of these statutory regulations, the obligation of the wind farm operator to protect employees and third parties in the wind farm and to take the necessary measures already ensues from his guarantor status as owner of the source of danger.

### Incorrect transfer of responsibility

In practice, wind farm operators often delegate parts of their responsibility and the associated tasks - within their own organisation or to external companies. However, experience has shown that the delegation of tasks often is faulty because the legal requirements for effective delegation have not been taken into account sufficiently. Such legal shortcomings lead to the delegation being ineffective. The responsibility which initially should be transferred remains with the delegating party, i.e. in case of doubt with the management.

### Liability for organisational fault

Legal regulations for the organisation of companies, especially for the legally effective delegation of tasks, are almost impossible to find. The requirements in this regard were largely determined by case law. It has drafted the doctrine of organisational fault for this purpose and developed it further in numerous judgments.

According to the doctrine of organisational fault, any entrepreneur or superior that wants to delegate tasks and responsibility to employees or other companies in a legally effective manner must

- select carefully
- instruct carefully
- monitor at least randomly.

If these duties are not fulfilled sufficiently, this can have consequences under civil and social law, which may be intercepted by the company or an insurance. But it can also have criminal consequences for the persons acting (or not acting). Penalties can be imposed on the company management, the executives and, under certain circumstances, also on safety experts and other HSE functions.

However, those affected can protect themselves from such consequences by demonstrably implementing their selection, instruction and monitoring duties.

### Careful selection

During the selection process, it must be checked whether the employee or the company to be commissioned have the necessary professional qualification to perform the planned task. In the event of damage, the client which delegated tasks to an external company must be able to provide an answer to the question of why he chose this specific company. Here, the favourable purchasing price is not a valid argument! In such a case, investigating authorities become rather suspicious and will examine the matter with particular attention!

In fact, during the selection process it is to be assessed rather carefully whether the company and the employees have the qualification necessary for the task. In addition to the level of training, other criteria such as compliance with technical standards (DIN/EN), professional experience, completed offshore trainings or medical suitability for the planned assignment must also be taken into account.

### Standard of due care

In order to determine the necessary qualifications, beyond the legal regulations, even the relevant recommendations, guidelines and defined safety objectives of authorities, professional associations and employers' liability insurance associations must be consulted.

The question whether and which legal and other regulations are applicable in the Exclusive Economic Zone (EEZ) and to the persons working there, can remain unanswered here. When searching for the persons responsible for an occupational accident or an emergency in the wind farm, these regulations are in any case used to assess the question of whether the wind farm operator exercised the reasonable care in the selection of personnel and external companies.

The standard for reasonable care is not defined by the common or widespread practice in an industry, but rather by the degree of care "which, according to the judgment of prudent and conscientious members of the relevant public, must be observed" (BGH NJW 72, 150, 151). In addition to the applicable legal regulations, the standard for reasonable care is specified by accident prevention regulations, technical standards (DIN/EN) and industrial recommendations as well as by guidelines and standards of the responsible authorities. As the state of the art or best practice, they form the basis for assessing the reasonable care.

If this care is not observed, this can be judged as negligent behaviour in the event of damage and thus, depending on the type and extent of the accident, lead to a conviction for negligent bodily injury or even negligent homicide.

### What is to be done?

For the wind farm operator this means: He must ensure that the personnel deployed have the necessary qualifications for the job. If an external company is used, the operator must contractually oblige the contractor to comply with these requirements and check this occasionally (see below).

If foreign companies are to be used, the operator must also check whether the education, trainings, medical checks etc. completed abroad are comparable with German qualifications. Especially with regard to the qualifications of electrical and medical personnel (emergency doctors, paramedics etc.) there sometimes are considerable differences.

But only if the comparability can be affirmed, foreign employees can be deployed for the corresponding activities. If a lack of comparability leads to delayed medical treatment or a treatment error, the accusation of negligent behaviour may again apply.

### Careful instruction

In order to fulfil the duty of instruction, a clear division of tasks, competencies and responsibility is required. All those involved in the operation of the wind farm must know their area of responsibility and the interfaces relevant to them.

For the employees, corresponding specifications can be made in functional and process descriptions, for external companies the contract forms the basis. General formulations in the service description such as "carrying out minor repair work" or similar are not sufficient for an effective delegation. Especially if the tasks are to be assigned together with a certain responsibility (e.g. the responsibility for an electrical installation according to DIN VDE 0105-100), the tasks must be defined clearly and the assignment of responsibility must be unambiguous.

At the same time, the (decision-making) competences required for the performance of the tasks must also be delegated. If no sufficient competences are transferred, the delegation is ineffective and the responsibility remains with the delegate. If, for example, parts of the operator's responsibility according to DIN VDE 0105-100 are to be transferred to a plant manager effectively, the latter must also be given the appropriate monetary scope of decision-making. If, for instance, the operator reserves the right to make any decision in excess of 1,000 euros, the majority of responsibility remains with him.

In day-to-day operations, it is important to define and adhere to clear instruction paths. If, for example, the operator's asset manager gives direct instructions to the operative employee of an external company instead of going through his superiors, this can be considered as unlawful employee leasing. It can also result in employees suddenly carrying out tasks without being sufficiently qualified for them - with corresponding risks for the plants, but also for the employees themselves.

### Monitoring of execution

Whoever delegates a task does not get rid of it completely. In any case, he remains obliged to check whether the employee or the assigned company carries out the tasks according to his ideas and in compliance with the legal requirements.

Often the question is asked how and how often such monitoring measures are to be carried out. The answer of the lawyers to this question usually is: "It depends!" However, it is to be noted that the obligation to monitor never stops completely, it always remains.

In order to determine the frequency, various parameters such as the risk potential of the work, the qualifications of the personnel carrying out the work and the experience from previous work orders must be taken into account. New employees or companies must be looked at much more frequently than those with whom one has already had good experience.

As appropriate means in particular audits, on-site inspections, the control of safety passes and certificates, joint meetings, toolbox talks, safety exercises, etc. as well as the control of site journals, shift logs, etc. come into question.

It is important for the operator to think about whether and how the monitoring should be carried out and to prepare and maintain a minimum of documentation on it.

### Important: Create verifications!

In the event of damage, the wind farm operator must be able to prove that the described selection, instruction and monitoring obligations have been fulfilled. Experience shows that the most promising form of proof is the proof by means of a document.

When commissioning external companies, the contract is the essential basis for the proven fulfilment of the selection and instruction obligations. Therefore, when drawing up the contract, particular attention must be paid to a clear definition of the services to be provided, the necessary qualifications and the certificates to be provided.

By the way, a "glossy paper" or a notarial certification is not always required as proof. Especially when carrying out inspections, an entry in the site journal, a note on the work permit or in a notebook is often sufficient.

### Conclusion

In the event of damage, it is essential to convince the investigating authorities that the selection, instruction and monitoring obligations were carefully fulfilled when delegating tasks.

If the wind farm operator is able to provide this proof, the accusation of organizational fault can be avoided and the liability risk can be considerably reduced - for the company, but also for the members of the management boards personally.

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