

# CHANGES TO THE GERMAN RENEWABLE ENERGY REGIME FROM JULY 2016

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Legal Briefings - By **Silke Goldberg, Partner** and **Marius Boewe, Counsel**

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## INTRODUCTION

On 8 July 2016, the German Upper House approved a number of acts relating to the future of the German energy market. This included the German Renewable Energy Act (“EEG”), which was heavily amended less than two years ago when the EEG 2014 became effective on 1 August 2014). The amendments to the EEG constitute the EEG 2017, which will become effective as of 2017 and will once more change the entire system of promoting the generation of electricity from renewable sources.

The ministry of Economy and Energy, which has been in charge of the legislative process, has stated that the EEG 2017 will be the next step in promoting the generation of renewable energy. The EEG 2017 affirms the model of determining the feed-in tariffs individually in the course of tender processes for the most important renewable energy sources (ie, onshore and offshore wind, solar and biomass). To date, this model has only been tested in a pilot phase. It is thought that this model will determine the real market prices of renewably generated electricity for the first time since the introduction of the original version of the EEG in 2000. This change in the remuneration system does not only aim to lower the energy costs for energy consumers, but also to fulfil objectives set by the European Commission over recent years.

As of 2017, the German renewable energy projects above certain capacity thresholds will be subject to auctions and no longer benefit from statutory defined feed-in tariffs. Smaller installations and energy sources of the auctions (eg, hydropower) will remain in the currently applicable remuneration system. The conditions to participate in auction processes include some cost-intensive steps to be financed in advance of the auction which will limit the number of future tenderers to financially strong energy companies.

## **LEGISLATIVE TARGETS REMAIN**

The EEG 2017 defines specific targets as to the portion that electricity generated from renewable sources should make up in the future:

- until 2025, this portion should total 40 - 45 per cent;
- until 2035, this portion should total 55 - 60 per cent; and
- until 2050, this portion should total at least 80 per cent.

Until 2020 the portion of renewable energy of the gross energy consumption should total at least 18 per cent.

For the second time, these legislative goals were not altered in the course of implementing a new EEG. Given the fact that in 2015 the gross energy consumption amounted to 12.5 per cent and the portion of renewable electricity to 32.6 per cent, those goals remain achievable if the growth of renewable electricity and energy continues as it has done over the last decade.

Like EEG 2014, EEG 2017 defines targets for the annual expansion of onshore, offshore, biomass and solar electricity installed capacity.

The annual increase rate for onshore wind amounts to 2,800 MW p.a. for 2017, 2018 and 2019, and as of 2020 to 2,900 MW p.a. The annual increase rate for solar electricity amounts to 2,500 MW and for biomass to 150 MW in 2017, 2018 and 2019, and to 200 MW in 2020, 2021 and 2022. The installed capacity for offshore wind shall amount to 6,500 MW in 2020 and to 15,000 MW in 2030. To reach this latter goal, German legislators have, for the first time, implemented a specific offshore wind act ("WindSeeG"). This effectively includes all relevant provisions for the construction and operation of offshore wind parks (such as regional planning, permitting or net integration). Whilst there are some offshore wind stipulations in EEG 2017 these only serve to supplement the WindSeeG regime.

# THE BASIC PRINCIPLES OF THE AUCTION

The idea to determine the electricity price to be paid for renewable energy was originally tested in a pilot phase for solar electricity pursuant to EEG 2014. The Federal Ministry for Economic Affairs and Energy in charge of the legislative process of the EEG 2017 considers this test phase to be a success and decided to extend the principle to onshore, offshore, solar electricity as well as biomass. Only minor installations with a capacity of less than 750 kW (in case of biomass, less than 150 kW) are exempted from the auction process. As the renewable electricity generation is dominated by wind and solar in Germany, 80 per cent of the newly to be installed renewable energy will be subject to the new auction regime.

The aim of the auction is to determine the specific amount required to define the market premium (Marktprämie) of the relevant specific capacity being put to tender. This market premium will be paid to successful auction participants in addition to the electricity market price prevailing at the relevant time. In the past, the market premium was introduced in the context of the operator's direct marketing obligations. At the time, the market premium paid to operators of renewable energy plants was the difference between the statutorily defined feed-in tariffs and the amount to be received by direct marketing. Under the EEG 2017 regime, the feed-in tariff is no longer the relevant figure to determine the market premium but the specific amount determined in the course of a specific tender process.

The German national regulator, Bundesnetzagentur, Federal Network Agency ("FNA") will conduct future tender processes following a strict regime set out by EEG 2017. S.28 of the Act defines the specific capacity volumes to be put to tender as well as the dates on which such auction shall be conducted. For example, on 1 May 2017, 800 MW installed capacity of onshore wind will be put to tender. Should the amount of installed capacity for specific renewable energy sources deviate from the statutory target, the amount for the following years may be altered.

When putting a specific capacity to tender, the FNA will publish, at the earliest 8 weeks and at the latest 5 weeks before, the final bid date:

- when the complete bid must be sent to the Agency;
- the amount of capacity subject to the tender process; and
- the maximum amount allowed to be offered as the specific amount to determine the market premium.

Companies intending to participate in a tender process are obliged to provide financial security. Such security can be given by deposit or guarantee and an amount, depending on the technology, between 30 and 60 EUR per kW of installed capacity. The participating companies must inform the FNA about the specific location of the plant involved and bid for the specific amount (ct/kWh) and the specific capacity of their plant.

The bidding party offering the lowest specific amount will be successful and will be awarded the relevant market premium in relation to the capacity it is offering. This is followed by the second lowest bid until the entire amount of capacity being put to tender has been reached. The awarded projects must be implemented within a defined term. If such a term is not met, the operator will be fined and the operator will lose their deposit.

## **SPECIFIC RULES FOR SPECIFIC ENERGY SOURCES**

### **ONSHORE WIND**

The future regime for onshore wind installations has been subject to controversial debates in Germany. According to S.36 EEG 2017, the administrative permits for the construction and operation of the installations subject to the specific bids must have been granted to the bidder no later than 3 weeks prior to the final date of the tender process. The permitting procedure is time and cost intensive; parties who want to participate in an onshore tender process have to invest a considerable amount in advance before knowing whether their offer will be accepted. Once a bidder has been rewarded in an auction, the installation must start its operation at the latest 24 months after the reward.

As such investments could only be borne by bigger and financially strong companies however, the EEG 2017 stipulates an exemption for wind farms sponsored by local initiatives and citizens (Bürgerwindparks) from this pre-offer obligation to file for a permit. These citizen wind farms are defined as companies with at least 10 individual shareholders, and at least 51 per cent of the shareholders must be natural persons living in the administrative district of the future wind farm location. No shareholder can hold a share larger than 10 per cent in the company. Such citizen wind farms are also privileged regarding the specific amount achieved in the auction. Irrespective of the specific amount of their individual bid, the citizen wind farm which was successful in a tender process will be awarded with the highest individual amount achieved in the auction. This means that a “citizen wind farm” will in any case receive the highest possible market premium granted in the individual auction (so-called uniform pricing). Each citizen wind farm is entitled to bid for up to 6 wind turbines with a total capacity of 18 MW.

Another specific feature regarding onshore wind parks is the introduction of grid expansion areas (Netzausbaubgebiet). Wind farm locations are not distributed equally throughout Germany, due to local wind volumes and historical political obstacles regarding the acceptance of wind parks in specific Federal States. This causes grid bottlenecks and leads to the temporary switch-off of wind parks. To control the distribution of the future onshore wind installations, grid expansion areas have been implemented. The capacity to be added in such areas will therefore be limited to 58 per cent of the average capacity which has been installed in this region between 2013 and 2015. The specific grid expansion areas will be determined by the FNA by 1 March 2017.

Finally, the economic efficiency of an onshore wind park primarily depends on its location. To enable a fair competition in the auction process and to make bids from different regions comparable, a one-levelled reference yield (Referenzertrag) will be established. Each bid shall be calculated for an onshore wind installation located at a reference benchmark location (the so called "100 per cent" location), with a wind speed of 100 km/h in 100m height. Such offers will be compared within the auction and after the award decisions, the actual level of remuneration will be calculated on the basis of the specific correction factor of the individual location of each wind installation. The correction factors lie between 70 per cent and 150 per cent, depending on the individual wind level in relation to the benchmark location.

## **SOLAR ELECTRICITY**

As the auction process has already been implemented under the scope of the EEG 2014, the changes within the EEG 2017 in relation to solar electricity are comparably low. Under the scope of the EEG 2017, solar installations with an installed capacity above 750 kW are obliged to participate in a tender process. The intended annual expansion of solar power amounts further on to 2,500 MW, whereas 600 MW hereof shall be subject to tender. The maximum volume of each bid amounts to 10 MW. The maximum amount accepted as bid in an auction shall correlate to the feed-in tariff for open-site installation (Freiflächenanlagen), initially 8.91 ct/kWh. Should this feed-in tariff be altered (especially under the scope of the principle of a flexible cap (atmender Deckel) once the annual capacity has been exceeded), the maximum amount will be altered in the same correlation.

## **OFFSHORE WIND**

The policy aim is to reach an installed capacity of offshore wind plants of 6,500 MW until 2020 and of 15,000 MW by 2030. At the end of 2015, there was 3,295 MW of offshore installed capacity of grid connected.

To reach this legislative goal, the WindSeeG was implemented, comprising all relevant stipulations in relation to offshore wind farms (such as regional planning, permitting or net integration).

In principle, the auction process has been implemented for offshore wind farms, too. In this context, the EEG 2017 reflects aspects of the so called Danish model; the FNA will conduct the preliminary inspections of potential future locations within the exclusive economic zone and prepare an area development plan. These investigations used to be conducted by the future operators of the offshore wind farms. Once such appropriate areas have been detected, parts of such areas will be subject to an annual auction process, beginning on 1 September 2021. The tendered capacity will vary between 700 and 900 MW per year. Due to the intensive planning period to implement this new system, it will apply only to offshore wind farms due to be commissioned on 1 January 2026. Installations which will have received an unconditional grid connection commitment or a grid connection capacity and will start their operation before 2021, are not required to participate in the auction.

For the time between 2021 and 2025, a transitional regime has been introduced. Future offshore wind parks, which are in an advanced planning phase, are entitled to participate in two auctions, held on 1 March 2017 and 1 March 2018, each regarding a capacity of 1,550 MW. The aim of those two auctions is to increase the capacity in 2021 and 2022 by 500 MW p.a. and in 2023, 2024 and 2025 by 700 MW p.a. The 500 MW for 2021 will be limited to the Baltic Sea for grid connection reasons.

This transitional regime bears conflicts with future offshore wind park operators, who are already in a phase of planning or construction but will not fall under the privilege to be exempted from an auction as they may not meet the timelines described above. Should such wind park operator participate in one of the intermediate auctions in 2017 or 2018 and not being awarded, he has a right of entry in case its area will be subject to a future auction conducted by the FNA as of 2021. However, if the specific intended area of its project has been projected is not selected by the Federal Net Agency and not be subject to a future auction, the planning costs of the not implementable offshore wind farm will effectively be considered as sunk costs.

## **FURTHER STIPULATIONS AND OUTLOOK**

The auction process will be the defining tool to determine the future market premium and therefore the major share for end consumers to be paid via the EEG surcharge for the German energy policy. However the original system of statutorily defined feed-in tariffs (as originated in 1991 by the electricity feed-in act (StromeinspeisungsG), the predecessor of the EEG) remains in place for smaller installations. For the generation of electricity from hydropower, geothermal energy, gas from landfills, sewage or mine gas, the EEG 2017 stipulates no auction at all. For onshore wind and solar electricity, no auction obligation exists for installations below 750 kW, for biomass not below 150 kW.

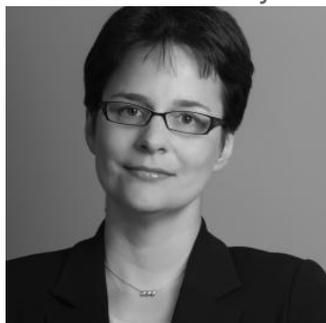
The EEG 2017 will enter into force on 1 January 2017. As of October 2016, it is possible that further amendments may be made to EEG 2017 the scope of which is currently unclear. It is understood that legislators for any such amendments to enter into force on 1 January 2017.

The EEG 2017 can be considered as the first sea change in the promotion of generation of renewable energy in Germany. This was caused by the massive, overwhelming development renewable energy has undergone over the last 15 years in Germany (starting in 2000 with an 6.2 per cent share in gross electricity consumption, reaching 32.6 per cent in 2015, being currently by far the most important energy source in Germany), corresponding with a massive increase of the EEG surcharge (amounting to 0.19 ct/kWh in 2000 and amounting to 6.17 ct/kWh in 2015), leading to a massive increase of electricity prices for the end consumers. Previous versions of the EEG tried to counteract this development of increasing costs but never considered to refrain from the statutory guaranteed feed-in tariffs. It is expected that the new regime will in the long run lower the increase of EEG related costs for end consumers. However, it will take a long time until the previous guaranteed tariffs will fade out. This is because each new version of the EEG only stipulates remuneration regimes for the installations to be installed and put into operation under the scope of the respective version of the act but not retroactively, and because the statutorily guaranteed feed-in tariffs are guaranteed for 20 years. The second reason for this change of system was the decision of the European Commission with regard to the EEG 2012, which called for the implementation of auctions instead of fixed tariffs.

The new EEG 2017 will lead to a more cost efficient generation of renewable energy in the future. It will also lead to a concentration of future operators, given the fact that financial investments must be undertaken to be allowed to participate in auctions. In any case, it is a big step forward to refrain from a system of highly subsidised energy to a more market prize orientated approach.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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