



Reform of the Renewable Energy Sources Act passes Parliament

On July 11, 2014, the German Federal Council (*Bundesrat*) approved a legislative bill amending the Renewable Energy Sources Act ("EEG").¹ The bill already passed the Federal Parliament (*Bundestag*) on June 27, 2014 and will enter into force on August 1, 2014. The bill fundamentally reforms the EEG with an emphasis on more market integration and more competition.

The "EEG 2014" as now enacted takes into account in particular the requirements of the new environmental and energy state aid guidelines published by the European Commission on April 9, 2014 ("**Energy Aid Guidelines**").² The following provides an overview over the most important amendments for the renewable energy industry:

Global system changes

- (1) **Statutory expansion targets / caps.** In order to better steer the expansion of renewable power generation and related costs, the bill introduces expansion targets or "corridors" for the various renewable energy technologies, which in effect are caps. The proposed statutory targets place a clear focus on onshore and offshore wind as well as photovoltaic (PV) electricity.
- (2) **Mandatory direct marketing.** In order to promote the integration of electricity produced from renewable sources in the power market, all operators of new plants with an installed capacity of at least 500 kilowatts (kW) will be required to market their electricity directly; from 2016 onwards, the threshold is lowered to 100 kW. As under the current system of voluntary direct marketing, the operator's income from the sale of electricity on the market will be supplemented by market premiums paid under the EEG. The market premiums cover the difference between the average monthly reference market value and the respective tariff guaranteed by the EEG. However, due to the system change from feed-in tariffs to mandatory direct marketing, the EEG 2014 uses the term "reference amounts" in place of "feed-in tariffs". The so-called management premium, which is currently paid in addition to the market premium and covers marketing costs, will be abolished. Instead, the marketing costs will be taken into account in determining the statutory reference amounts.

In order to protect plant operators in situations where they are temporarily unable to effectively market the electricity generated in their plant, e.g. due to the direct marketing services provider becoming insolvent, plant operators will



¹ Please find a preliminary, non-binding text of the new EEG 2014 [here](#).

² Please find our client alert on the new environmental and energy state aid guidelines [here](#).

be able to opt for a reduced feed-in tariff as a fallback solution. The feed-in tariff in this case is limited to 80 percent of the respective reference amount.

- (3) In principle, plants commissioned from 2016 onwards will not receive funding for periods in which the electricity trading price for the price region Germany/Austria at the European power exchange (EPEX Paris) is negative for at least six hours.³ This limitation was inserted during the legislative process in order to take into account requirements of the Energy Aid Guidelines. It applies to both market premiums and feed-in tariffs.
- (4) **Transition to competitive bidding processes.** The established system of statutory feed-in tariffs and market premiums will be replaced by bidding processes at the latest by 2017. Therefore, the reference amounts set out in the EEG 2014 have only very limited significance. However, the statutory rates will remain applicable to installations that are issued an operational license prior to January 1, 2017 and are commissioned by December 31, 2018 at the latest. For offshore wind installations, an extended transitional period ending on December 31, 2020 applies, provided that the operator receives an allocation of grid connection capacity before January 1, 2017. In contrast, all funding for new freestanding PV plants will be determined by bidding processes immediately upon entry into force of the new EEG 2014, subject to the general transitional provisions. Following pressure from the European Commission, the EEG 2014 now also states the goal to open up the bidding processes for at least five percent of the yearly new renewable capacity to power generation from other EU Member States.
- (5) **Grandfather rights / transitional provisions.** The new EEG 2014 rules will, in principle, apply to all installations commissioned after the entry into force of the reform on August 1, 2014. However, the funding rates of the EEG 2012 will continue to apply to installations commissioned by December 31, 2014, provided that the respective installation is subject to licensing requirements and was issued an operating license before January 23, 2014. Existing installations are grandfathered, i.e. they will continue to receive funding in accordance with the provisions of the EEG in force at the time of their commissioning over the entire funding period.

Onshore wind power

The EEG 2014 prescribes a target corridor between 2.4 and 2.6 gigawatts (GW) per year for the net expansion of onshore wind power. The "net expansion" is determined by subtracting the sum of decommissioned installed capacity from the sum of newly commissioned installed capacity, thereby taking into account the common practice of repowering older wind turbines. If net expansion remains within the target corridor, a general depression rate of 0.4 percent per quarter-yearly period (1.59 percent per year) applies, i.e. for plants commissioned at a later point in time, the statutory reference amount is reduced accordingly. If the net expansion exceeds or falls below the target corridor for a respective reference period, a higher or lower depression rate applies, thereby providing an incentive for project developers to install more or less new capacities. This instrument was first

³ Demonstration plants and small plants with less than 500 kW, or, in the case of wind power, less than 3 MW installed capacity, are exempted from this rule.

introduced in 2012 for steering the further expansion of PV capacities and is meanwhile well established. The degression will first apply on January 1, 2016.

The reference amounts for onshore wind under the EEG 2014 are 4.95 Eurocents per kilowatt hour (basic amount) and 8.9 Eurocents per kilowatt hour (initial amount), reflecting an increase of the tariffs currently in place by 0.4 Eurocents, in order to take into account the additional direct marketing costs. The bonuses currently granted for the repowering of existing installations and for system services will be discontinued. Aiming to avoid over-funding, the rules governing the extended application of the higher initial amount will be modified so as to reduce the total funding for wind power plants in locations with a high wind yield by roughly 10 to 20 percent in comparison to the funding level available in 2013. In contrast, the funding available for less windy locations was adjusted so as to ensure that these sites remain attractive for future investors.

Offshore wind power

The government has substantially reduced its previous targets for the expansion of offshore wind power. The EEG 2014 states a target of 6.5 GW total installed offshore wind capacity for 2020 and 15 GW for 2030. In order to ensure that future expansion remains within these targets, the Energy Industry Act was amended to limit the total amount of grid connection capacities that may be allocated to offshore project developers. The allocation of sufficient grid connection capacities, which is determined by the Federal Network Agency, is essential for the realization of offshore projects. However, in light of past experience with failed projects, the Federal Network Agency is authorized to allocate higher total grid connection capacities, i.e. up to 7.7 GW, until December 31, 2017. This buffer is intended to safeguard that the 6.5 GW target is not undercut due to failed projects. Furthermore, the Federal Network Agency shall revoke grid connection capacities allocated to a project if the operator does not proceed with the implementation of the project within the statutorily prescribed time frame.

The funding rates remain largely unchanged at 3.90 Eurocents per kilowatt hour (basic amount) and 15.40 Eurocents per kilowatt hour (initial amount). The so-called acceleration model, which allows operators to produce higher revenues over a shorter initial period, will be extended until the end of 2019.⁴ However, under the EEG 2014, the current uniform degression rate of 7 percent annually (beginning in 2018) is replaced by distinct degression rates applicable to the basic model and the acceleration model. By reducing the degression rate for the basic model, the government aims to renew the basic model's attractiveness for investors in comparison to the widely preferred acceleration model.

Biomass

The EEG 2014 limits the target for the expansion of biomass capacity to 100 megawatts per year. As for onshore wind power, adjustments to the degression rate are used to ensure that this target is met: If the total new capacity exceeds the target in a given 12 month reference period, the degression rate increases from 0.5

⁴ Under the acceleration model, an initial reference amount of 19.40 Eurocents per kilowatt hour is applied over a period of 8 years following commissioning. In contrast, the basic model provides an initial reference amount of 15.40 Eurocents per kilowatt hours over a period of 12 years following commissioning.

percent to 1.27 percent per quarter at the next adjustment date. However, in contrast to the rules for wind power, the depression rate is not reduced if installed capacity falls short of the target. Also, unlike for wind power, decommissioned capacities are not taken into account when calculating the relevant capacity for the target. The 12 month reference period ends at the end of the sixth month prior to the adjustment date, meaning that project developers will know five months in advance whether the standard depression or the higher depression applies.

The basic funding rate for power generated from biomass remains largely unchanged. However, the substantial bonuses granted in the past with respect to the use of renewable raw materials and environmentally sound fuels have been abolished. This means that, effectively, new plants must focus on the use of waste and other cheap residual materials in order to be cost-efficient. Also, new biomass plants with an installed capacity of more than 100 kilowatts will no longer receive funding pursuant to the EEG for the entire electricity generated. Statutory funding is only available for half of the electricity that could theoretically be generated in the plant based on its installed capacity. Any exceeding amounts generated must be sold at market value. However, operators are entitled to a so-called flexibility bonus amounting to 40 Euros per kilowatt installed capacity in exchange for providing flexible capacities. These changes incentivize the flexible operation of biomass plants in order to offset fluctuating electricity generation from PV and wind power.

Self-owned power plants

As a rule, electricity companies may charge their customers an EEG surcharge for the financing of the EEG support scheme. Currently, however, consumers are not required to pay EEG surcharges for the consumption of electricity produced in self-owned power plants. Self-owned power plants have therefore become an attractive alternative particularly for energy-intensive companies. Aiming to ensure that the EEG financing burden is shared more fairly, the government has decided to include self-owned power consumption at least partially in the financing mechanism. However, the details of these rules were highly controversial during the legislative process and an agreement was only achieved at the last minute.

Under the EEG 2014 as now passed by Parliament, in principle all electricity consumed that is produced in new self-owned power plants (i.e. commissioned after the entry into force of the EEG 2014) will be subject to EEG surcharges, with only narrow exceptions e.g. for self-generated power used in self-owned power plants. The EEG surcharge for the consumption of electricity produced in self-owned EEG power plants or highly efficient cogeneration units is reduced and will be introduced gradually: The surcharge for these plants is set at 30 percent of the regular EEG surcharge in 2015, 35 percent in 2016 and then 40 percent from 2017 onwards. In contrast, consumers will have to pay the full EEG surcharge for the consumption of electricity produced in other types of self-owned power plants (subject to the general rules limiting the EEG surcharge for energy-intensive companies).

However, the described rates may already need to be amended. The fact that the reduced EEG surcharge for highly efficient cogeneration units also benefits plants using fossil fuels was a point of contention between the European Commission and the German Federal government in their dispute regarding the compatibility of the EEG with European law. According to a press release by the European

Commission on July 9, 2014, the Federal government has now agreed that the EEG surcharge for these plants shall be reduced only temporarily, until 2017, and only by 40 percent, i.e. equaling 60 percent of the full surcharge.⁵

In contrast to earlier drafts, the Act now adopted by Parliament does not extend the EEG surcharge to the consumption of electricity generated in existing self-owned power plants. The definition of existing plants includes self-owned power plants commissioned after August 1, 2014, provided that the plant was issued an operating license before January 23, 2014 and is operated in compliance with the rules on self-consumed electricity by December 31, 2014 at the latest. However, according to the legislative bill, this exemption will be subject to a review of its compatibility with European State aid rules in 2017. Therefore, operators of existing self-owned power plants have legal certainty only in the short term, but not beyond 2017.

Outlook

The EEG 2014 sets a fundamentally new course for the promotion of renewable energies in Germany. While the transition from voluntary to mandatory direct marketing is a predictable development building on established rules, the planned system change from statutory funding rates to competitive bidding processes within less than three years is likely to cause considerable uncertainty for investors. It is to be hoped that the many open questions regarding the design of these bidding processes are addressed as early as possible. It would also be desirable to have more legal certainty on another point: The European Commission and the Federal government achieved agreement on the compatibility of the EEG with European law only after the legislative bill passed the Federal Parliament, meaning that the EEG as enacted may already have to be amended to reflect the political agreement found.

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⁵ Please find the European Commission's press release (in German) [here](#).

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