

Hot Topics



BAKER & MCKENZIE

Renewable Energy
Germany

April 2016

Government publishes first draft of Renewable Energy Sources Act 2016 reform bill and new offshore wind legislation (Part II)

On April 15, 2016, the German Federal Ministry for Economic Affairs and Energy published a draft bill for the 2016 reform of the German Renewable Energy Sources Act ("EEG") as well as a separate draft bill regarding the development and promotion of offshore wind.¹ With the current drafts, the government's plans to introduce competitive tender mechanisms for most renewable energy technologies starting 2017 continue to take shape.

In Part I of our Client Alert, we described the principles of the tender design and the proposed amendments for onshore wind and solar PV.² In the following, we discuss the main changes for offshore wind.

I. Background

Under the EEG 2014, the present system of financial support to installations generating electricity from renewable energy sources ("**RES installations**") by way of statutory feed-in tariffs and market premiums must be replaced by competitive tenders starting 2017.

Following the evaluation of two pilot tenders for freestanding PV installations and the consultation of several key issue papers in 2015, the Federal Ministry for Economic Affairs and Energy has now published a draft bill for the upcoming EEG reform. The Ministry's draft, which has not yet been aligned within the Federal Government, also includes a separate bill regarding the development and promotion of offshore wind (*Gesetz zur Entwicklung und Förderung der Windenergie auf See*; the "**Offshore Wind Development Act**"), which aims to comprehensively regulate the centralized selection, preliminary investigation and auctioning of suitable offshore wind sites. Both bills will fundamentally change the market conditions for the development of renewable energy projects in Germany.

II. Proposed offshore wind legislation

Competitive tender procedures will be introduced for all offshore wind turbines, excluding only installations with an installed capacity of no more than 1 megawatt (MW) and prototypes.

Under the proposed transitional provisions, the existing funding system will continue to apply to all offshore wind turbines for which the operator receives an

Our Expertise
Energy Law



¹ The draft bills are available (in German) [here](#) and [here](#).

² Part I is available [here](#).

unconditional allocation of grid connection capacity before January 1, 2017, provided that the turbine is commissioned by December 31, 2020.

While EEG will continue to set out general funding principles and basic rules regarding the integration of the tenders into the funding system, the proposed new Offshore Wind Development Act will provide a comprehensive framework for offshore wind projects, stipulating detailed tender rules for offshore wind projects and, more fundamentally, providing a coherent framework for offshore development planning following a centralized (Danish) model. For more information on the basic tender mechanism, please see Part I of our Client Alert.

Integration of tenders into the EEG funding system

Under the current EEG funding system, all operators of RES installations with an installed capacity of at least 100 kilowatts (kW) must directly market the electricity generated by the installation. However, they are entitled to supplementary market premiums. The market premiums cover the difference between the average monthly reference market value for the respective RES technology and the respective statutory reference amount guaranteed by the EEG.

The draft law leaves the existing EEG rules largely in place. However, for all technologies and installations covered by the tender requirements, only RES installations that have been successful in a tender will be eligible for funding. For these installations, the statutory reference amount will be replaced by the reference amounts determined in the respective tender.

Transitional regime 2021-2024

For offshore turbines commissioned between January 1, 2021 and December 31, 2024, a transitional regime will apply. Two tenders covering this transitional period will be held on March 1, 2017 and December 1, 2017, with a volume of 1,460 MW each.

The tenders will be open only to existing projects, i.e. projects for which the required public permits have been issued or at least the public hearing has taken place by the date of enactment of the Offshore Wind Development Act, but limited to certain offshore wind clusters designated in the draft Act. The Federal Maritime and Hydrographic Agency ("**BSH**") will publish a list of eligible projects by November 30, 2016. The maximum bid value for these tenders is set at 12 Euro cents per kilowatt hour. The required security payments will be 200 Euro per kW.

Successful bidders will be entitled to a market premium in the amount of the difference between the average monthly reference market price and their bid value. However, for installations located in water depths below 25 meters, the bid value will be adjusted by 0.04 Euro cents per full meter of additional water depth. This adjustment reflects higher costs for installations in greater depths. In contrast, the current adjustment for installations located farther offshore will no longer apply, because the distance to shore is no longer considered to significantly affect costs. Successful bidders will furthermore be entitled to the allocation of corresponding grid connection capacities.

It should be noted, however, that the bidders' rights to use the offshore site end with the expiry of the EEG funding period (20 years after the year of commissioning). After this period, a future offshore land use plan may stipulate another use of the site or require a new tender to be carried out. According to the draft bill, the wind farm operator will not be entitled to compensation in such cases.

On-going development consent procedures for all projects that are not qualified as existing projects will automatically be terminated upon enactment of the Offshore Wind Development Act. Likewise, upon completion of the transitional two tender rounds, the development consent procedures for all unsuccessful projects will be terminated. However, project developers of unsuccessful projects will have a right of pre-emption with respect to future tender awards under the centralized regime if such awards concern sites that they have explored and provided that the project developer hands over its project data to BSH.

Centralized regime beginning 2025

For offshore wind turbines to be commissioned after December 31, 2024, a centralized regime will be introduced. Under this regime, the Government will designate and explore sites for future offshore wind farms. Bidders will then compete for the right to establish a wind farm at the designated sites.

- **Offshore land use plan.** The Government will enact an offshore land use plan for the period from 2025 to at least 2030. Based on the Government's overarching marine spatial plans, the land use plan will designate specific sites for wind farms, grid connections and related installations, as well as the order and calendar years in which the sites will be auctioned. The land use plan shall structure the order and timing of the tenders so as to ensure that sufficient grid connection capacities will be available at the planned date of commissioning of the respective offshore wind farms.
- **Preliminary investigation of designated offshore wind sites.** The Government will then carry out preliminary investigations of the designated sites to determine their suitability and to collect information needed by the bidders to price their bids. The information provided to the bidders will include a survey and assessment of the current environmental status of the site, a preliminary ground survey of the site and a report on wind and oceanographic factors at the site. The determination of the sites' suitability will be made by way of ordinance and will be binding in the following development consent procedure with respect to the issues reviewed (in particular safety of maritime traffic, exclusion of conflicts with military and mining activities). The suitability assessment will also include an initial strategic environmental review, but environmental issues will remain subject to detailed review in the environmental impact assessment within the framework of the following development consent procedure.
- **Tenders for designated sites.** Tenders for designated sites will begin in 2020, with one tender per year and a yearly auction volume of between 600 and 900 MW, but no more than 730 MW on average. Bidders must provide a security in the amount of 350 Euro per kW of their bid. The maximum bid value will be determined by the results of the 2017 tenders under the transitional regime. Successful bidders will have the exclusive

right to initiate a development consent procedure for the respective sites and are entitled to grid connection capacities in the amount of the successful bid volume. Again, however, their rights to the use of the offshore sites will end upon expiry of the EEG funding period. A right to compensation is expressly excluded under the current draft.

- **Milestones for project realization.** The draft furthermore stipulates penalties if the project developer fails to meet project realization milestones. In exceptional cases, the award for the project may be revoked.

Compared to the current system, where typically several project developers develop projects for the same or overlapping offshore locations and then compete for these areas in the development consent process and the allocation of grid connection capacities, the future centralized regime has the advantage of ensuring that only specific wind farm projects will be developed in alignment with the Government's marine spatial planning and offshore grid expansion planning, thereby avoiding unnecessary development costs. However, investors should be aware that, under the future legislative framework as currently drafted, their investment will only be guaranteed for a period of 20 years. After that time, they will in principle be required to remove the offshore wind installations or to transfer ownership of the installations to a new operator, with no right to compensation. Industry associations have already harshly criticized these proposals, in particular in light of the longer life span of offshore wind turbines.

Outlook

The Federal States and industry associations were invited to submit comments to the drafts until April 15, 2016. After evaluating the results of the consultation, the drafts will be finalized and aligned within the Federal Government. The bill will then be introduced in Parliament. The Government currently plans to enact the legislative bill by summer 2016 and to start the first tenders in late 2016.

For further information, please contact:



Prof. Dr. Joachim Scherer, LL.M.
E-Mail: joachim.scherer@bakermckenzie.com



Dr. Janet Kerstin Butler
E-Mail: janet.butler@bakermckenzie.com

Baker & McKenzie - Partnerschaft von Rechtsanwälten, Wirtschaftsprüfern und Steuerberatern mbB

Berlin

Friedrichstrasse 88 / Unter den Linden
10117 Berlin
Tel.: +49 (0) 30 2 20 02 81 0
Fax: +49 (0) 30 2 20 02 81 199

Dusseldorf

Neuer Zollhof 2
40221 Dusseldorf
Tel.: +49 (0) 211 3 11 16 0
Fax: +49 (0) 211 3 11 16 199

Frankfurt / Main

Bethmannstrasse 50-54
60311 Frankfurt/Main
Tel.: +49 (0) 69 2 99 08 0
Fax: +49 (0) 69 2 99 08 108

Munich

Theatinerstrasse 23
80333 Munich
Tel.: +49 (0) 89 5 52 38 0
Fax: +49 (0) 89 5 52 38 199

www.bakermckenzie.com

Get Connected:



This client newsletter is prepared for information purposes only. The information contained therein should not be relied on as legal advice and should, therefore, not be regarded as a substitute for detailed legal advice in the individual case. The advice of a qualified lawyer should always be sought in such cases. In the publishing of this Newsletter, we do not accept any liability in individual cases.

Baker & McKenzie - Partnerschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors is a professional partnership under German law with its registered offices in Frankfurt/Main, registered with the Local Court of Frankfurt/Main at PR No. 1602. It is associated with Baker & McKenzie International, a Verein organized under the laws of Switzerland. Members of Baker & McKenzie International are Baker & McKenzie law firms around the world. In common with terminology used in professional service organizations, reference to a "partner" means a professional who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

© Baker & McKenzie