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ENERGY BRIEFING

THE NEW GERMAN
OFFSHORE WIND ACT

JULY 2016

- CENTRAL MODEL TO BE IMPLEMENTED
- FIRST AUCTION 1 MARCH 2017
- STEP-IN RIGHT WITHIN THE CENTRAL MODEL
- DELAYED EXPANSION IN THE NORTH SEA



On 7 July 2016, the Federal Parliament (*Bundestag*) passed legislation which introduced an auction system for electricity from renewable energy sources and which further amended the law relating to renewable energy (*Gesetz zur Einführung von Ausschreibungen für Strom aus erneuerbaren Energien und zu weiteren Änderungen des Rechts der erneuerbaren Energien*; "EEG 2017"). On the same day, the Federal Council (*Bundesrat*) refrained from lodging an appeal to the conciliation committee (*Vermittlungsausschuss*), i.e. it waived its right to raise further objections. These decisions follow an intense discussion of various "key points" papers and draft bills which began in July 2015, and in which details were hotly debated up until just a few days prior to the Federal Parliament's decision.

As expected, a separate Offshore Wind Act (*Gesetz zur Entwicklung und Förderung der Windenergie auf See*; "WindSeeG") has been implemented regarding the auction system for offshore wind power. The WindSeeG combines the new tender system with the planning and permitting process for such plants.

This briefing describes the key terms of the WindSeeG and is accompanied by a separate briefing addressing the new legislation regarding other renewable energy sources.

The WindSeeG will enter into force on 1 January 2017. The first auction is planned for March 2017.

Overview

Increasing the share of power generated by renewable energy sources remains the main component of Germany's proposed energy transition (*Energiewende*). Accordingly, the EEG 2017 stipulates an increase in the annual gross electricity consumption (i.e. the total power produced in Germany less any that is exported) from the current 33% to 40-45% in 2025, to 55-60% in 2035 and to at least 80% in 2050. The target corridor (*Ausbauziel*) of offshore wind power amounts to 15 GW by 2030. The intermediate cap of 11 GW by 2025 that was announced in draft papers was ultimately not included in the final EEG.

In order to take better account of fundamental energy policy objectives such as environmental impact, supply security and cost efficiency, the new EEG introduces a competitive auction system for renewable energy. Such transition is in line with the European Commission's environmental protection and energy subsidies guidelines, which stipulate that, as of 2017, subsidies have to be awarded in an auction system in order to ensure the subsidies system is admissible as state aid.

"A TRANSITIONAL REGIME APPLIES TO OFFSHORE WIND INSTALLATIONS COMMISSIONED BETWEEN 2021 AND 2025."

A transitional regime applies to offshore wind installations commissioned between 2021 and 2025 before the WindSeeG's new "central" auctioning concept is fully implemented. The new system will fully apply to plants commissioned from 2026 onwards.

In addition to the introduction of the auction system, the WindSeeG also sets out the relevant statutory provisions for the planning and permission process of offshore wind farms. Therefore, the WindSeeG will replace the respective provisions of the EEG, the Offshore Installations Ordinance (*Seeanlagenverordnung*; "SeeAnIV") and the Energy Industry Act (*Energiewirtschaftsgesetz*; "EnWG") for the most part. The EnWG, however, still sets out the details of offshore grid connections.

The WindSeeG includes provisions regarding area planning in the German Exclusive Economic Zone ("EEZ") and coastal waters (*Küstenmeer*), regarding preliminary investigations and suitability tests of potential project sites – which will no longer be performed by future wind farm operators, but by governmental authorities under the new "central" system – and regarding plan approval procedures (*Planfeststellungsverfahren*).

"OFFSHORE WIND TURBINE GENERATORS THAT RECEIVED AN UNCONDITIONAL GRID ACCESS CONFIRMATION BEFORE 1 JANUARY 2017 ARE EXEMPT FROM THE AUCTION PROCESS."

Exempt projects

The EEG in force until 31 December 2016 ("EEG 2014") already contains a transitional provision for switching to an auction system, which remains unchanged in the WindSeeG and the EEG 2017. Offshore wind turbine generators ("WTGs") that receive either an unconditional grid access confirmation or an allocation of connection capacity before 1 January 2017 and that will be commissioned before 31 December 2020 are exempt from the auction process. Those projects will remain subject to the provisions of the EEG. Therefore, commissioning these projects on time will be extremely important. The remuneration provisions for offshore wind set out in the EEG 2017 stipulate that (if the grid access is not completed by the binding completion date pursuant to the EnWG) technical availability is sufficient in order to receive remuneration under the law. However, the regulation is not consistent in this respect: The general transitional provision of the EEG 2017 and the regulations on the scope of the WindSeeG only refer to the commissioning. There are sound arguments in favour of technical availability being sufficient for remuneration in

“FROM 2026 ONWARDS, THERE WILL BE A COMPLETE SYSTEM CHANGE TO THE PRESELECTION AND PRELIMINARY INVESTIGATION OF SITES BY GOVERNMENTAL AUTHORITIES.”

cases of delayed grid connection (since the remuneration provisions would not make sense otherwise), but explicit stipulations in this regard would have been preferable.

ENVISAGED AUCTION DESIGN FOR OFFSHORE WIND

Central model (as of 2026)

For offshore wind farms commissioned from 2026 onwards, the WindSeeG provides for a complete system change to the so-called “central model”, according to which preselection and preliminary investigation of appropriate sites will be performed by governmental authorities. During the auctions, bidders will then apply for the development rights of offshore wind farms on such preselected sites. Only the successful bidder receives funding.

Area planning

The Federal Maritime and Hydrographic Agency (*Bundesamt für Seeschifffahrt und Hydrographie*; “BSH”) is supposed to collaborate with the Federal Network Agency (*Bundesnetzagentur*; “BNetzA”) for the establishment of an Area Development Plan (*Flächenentwicklungsplan*). In addition to the sites for offshore wind farms (regarding the EEZ, this is limited to North Sea clusters one to eight and Baltic Sea clusters one to three, pursuant to the current Spatial Offshore Grid Plan (*Bundesfachplan Offshore*)) and their order within the auctions process as well as their respective capacity, this plan will also determine the converter platforms’ and substations’ locations as well as the connection grids’ cable routes. The Area Development Plan will primarily contain regulations for the EEZ. However, pursuant to an administrative agreement to be concluded between the German Federal Government (represented by the BSH) and the respective federal state, coastal waters may also be included.

The chronological order of the (envisaged) commissioning of the wind farms and their offshore grid connections are to be formalised within the Area Development Plan as well. This is in order to secure the concurrent commissioning of wind farms and their respective grid connections. As of 2026, the Spatial Offshore Grid Plan and the Offshore Grid Development Plan (*Offshore-Netzentwicklungsplan*) will be replaced by the Area Development Plan. Thus, after 2017, grid operators will neither publish a new Offshore Grid Development Plan nor will the BSH issue a new Spatial Offshore Grid Plan.

Preliminary investigations and suitability testing

The preliminary investigations for future project sites are to be performed by the BSH or (in respect to coastal waters) by the competent state authority. The purpose of such preliminary investigations is to provide information on the respective areas in order to (i) enable potential bidders to determine the bid amount, and (ii) to determine the sites’ general suitability in order to accelerate the subsequent plan approval procedure or (for projects in coastal waters) permission procedure.

In addition to environmental surveys, the governmental preliminary investigation will also comprise a preliminary exploration of the subsoil, as well as the area’s wind and oceanographic conditions. However, the successful bidders will have to perform further investigations of their own, since the preliminary investigations alone will not be sufficient for the subsequent plan approval procedure. Thus, environmental investigations as part of the preliminary investigations take place only as far as they can be performed irrespective of the specific wind farm design. Foundation types and exact placement of the WTGs within the pre-developed site are the domain of



the successful bidder, which has to perform the relevant general subsoil inspection (*Baugrundhauptuntersuchung*). Potential UXO or ship wrecks in the respective area will not be considered in the administrative exploration. Furthermore, the report on the area's wind conditions will not be sufficient to replace the future operator's own calculations of the wind yield.

Based on the preliminary investigation, the BSH or the competent state authority will determine the relevant site's suitability for the operation of offshore WTGs. Once such suitability and the capacity to be installed at the respective location have been established, these issues will be codified in a corresponding ordinance.

Auctions

On the basis of the Area Development Plan, auctions are to take place every 1 September from 2021 onwards, with a capacity of 700-900 MW per year, but not exceeding 840 MW on average. Participants will bid on the reference value (*anzulegender Wert*) within the meaning of the EEG, i.e. the amount relevant for the calculation of the market premium in the mandatory direct selling regime. The maximum value for such bids is set by the lowest successful bid amount (*Gebotswert*) of the second round of auctions for projects subject to the transitional system (see below). The bidder with the lowest bid amount will receive the award (*Zuschlag*). The bid amount corresponds to the reference value for 20 years as of commissioning. The WindSeeG foresees a five-year period between auctions and commissioning, for example, the 2021 auctions refer to projects scheduled for commissioning in 2026.

“ONCE THE AWARD HAS BEEN ISSUED, THE SUCCESSFUL BIDDER OBTAINS EXCLUSIVE RIGHTS FOR CONDUCTING THE PLAN APPROVAL PROCEDURE WITH THE BSH FOR THE RESPECTIVE AREA.”

The respective sites and the maximum capacity to be installed pursuant to the Area Development Plan as well as the respective grid connections and their completion dates will be published six months prior to each auction. Once the award has been issued, the successful bidder obtains exclusive rights for conducting the plan approval procedure with the BSH for the respective area (provided the area is located inside the EEZ), using the preliminary investigation's results. It then receives the respective capacity on the assigned grid connection. Projects in coastal waters will apply for a permit under the Federal Immissions Control Act (*Bundesimmissionschutzgesetz*; “BlmSchG”). In this case, the use of the respective preliminary investigations' results, which is undoubtedly intended as well, has not been explicitly provided for in the WindSeeG.

An award cannot be transferred to another project. However, it is possible to transfer the award (in conjunction with a transfer of the project) to a third party. In this case, the project's plan approval or permit are transferred together with the award. Further, the project may be transferred through the sale of shares in the relevant project company.

The WindSeeG does not contain a special rule on legal remedies. As a consequence, an unsuccessful bidder may file an objection against the award.

Plan approval procedure

Only the owner of the award for the respective area is eligible to apply for plan approval (i.e. permission to construct and operate the wind farm). The plan approval procedure, from now on subject to the WindSeeG, basically follows the general principles previously laid down by the SeeAnIV and the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*). Projects in coastal waters are still permitted on the basis of the BlmSchG.

“UPON SUBMITTING A BID IN AN AUCTION, A GUARANTEE HAS TO BE PROVIDED TO THE FEDERAL NETWORK AGENCY IN THE AMOUNT OF €200/KW.”

“... AUCTIONS WILL BE CONDUCTED FOR SO-CALLED *EXISTING PROJECTS*...”

The WindSeeG restricts the life time of offshore wind farms corresponding to the duration of the market premium payments (20 years from commissioning). As most WTGs are designed for an operating life time of 25 years, a longer permitted operational period would technically seem possible. Once the 20-year term has expired, the Federal Authorities may announce the re-auctioning of the respective area for wind use or may stipulate a different purpose for the area.

The plan approval procedure already stipulates that the future wind farm operator is obliged to issue a declaration that at the end of the permitted operating time, all offshore installations are to be transferred to a potential subsequent user without compensation, should such a provision be introduced by law in the future.

Guarantees

Upon submitting a bid in an auction, a guarantee has to be provided to the BNetzA in the amount of €200/kW. For a 400 MW wind farm, for example, the amount of €80million would be required in the form of a bank guarantee or a deposit. Group guarantees are not permitted.

The system of construction milestones that was introduced in the respective legislation for offshore grid connections has been adopted by the WindSeeG (with certain amendments). If any milestones are missed, the successful bidder faces penalties up to the entire amount of the guarantee provided to the BNetzA. Thus, among other things, the documents for the plan approval procedure have to be submitted to the BSH (or, in case of installations in coastal waters, the competent state authority for the BImSchG permit procedure) within 12 months of the award being issued. The financing of the project has to be shown by means of binding contracts for the WTGs, foundations, substation and inner array grid at least two years before the binding completion date. The technical availability of the WTGs (at least 95% of the awarded capacity) must be achieved within 18 months of the binding completion date. Non-compliance with the deadlines stipulated above leads to penalties and will also trigger a revocation of the award by the BNetzA; however, the latter only applies with respect to the capacity not installed in time. Deviating from the current grid access regime, the BNetzA is “forced” to revoke the award in these cases. The WindSeeG provides for a dropping of sanctions by way of exemption, however, if the operator is not responsible for the delay. In such cases the burden of proof lies with the operator, which must assume full liability for any of its contractors and subcontractors.

Transitional period (2020 - 2025)

For wind farms that are at an advanced stage in the planning procedure or are already approved (so-called “existing projects”), auctions will be conducted within a transitional period (*Übergangsphase*). An offshore wind farm is considered to be an existing project, if prior to 1 August 2016:

- (i) a plan approval or permit under the SeeAnIV; or
- (ii) a permit under the BImSchG had been issued; or
- (iii) a public hearing (*Erörterungstermin*) in the course of a plan approval procedure or permission procedure had been held.

Projects within the EEZ are eligible only if they are located within North Sea clusters one to eight and Baltic Sea clusters one to three – in each case pursuant to the definitions set out in the current Spatial Offshore Grid Plan. Prerequisite for participating is, among other things, that the project received neither a grid access confirmation nor an allocation of connection capacity.

There will be two auction rounds for “existing projects” in total, namely on 1 March 2017 and 1 March 2018, each offering a capacity of 1,550 MW. The maximum price of the bids to be made is set at 12 Cent/kWh. A “pay-as-bid” mechanism shall apply, i.e. the reference value for the successful bidder (consistently for the entire 20-year funding period) corresponds to the amount of the bid. Existing projects also have to provide a guarantee with their bid. It amounts to €100/kW, which is at a reduced rate compared to the central system. For example, a 400 MW wind farm would have to provide a guarantee of €40million.

In addition to the bid amount, the award also depends on the available grid access capacity. The current system of grid planning pursuant to the Offshore Grid Development Plan will continue to apply during the transitional period. The respective cluster needs to have sufficient capacity for the planned wind farm. Alternatively a cross-cluster connection must be admissible. If the available connection capacity is not sufficient for the wind farm (cluster-internal shortage), the bidder will not receive an award.

“DUE TO THE DELAYED GRID EXPANSION IN THE NORTH SEA, PROVISIONS HAVE BEEN INCLUDED IN THE WindSeeG AT SHORT NOTICE TO DEFER EXPANSION OF OFFSHORE WIND CAPACITY THERE.”

Due to the delayed grid expansion in the North Sea, provisions have been included in the WindSeeG at short notice to defer expansion of offshore wind capacity there: The North Sea and Baltic Sea expansion is supposed to be controlled to the effect that, in 2021, an overall capacity of 500 MW will be commissioned solely in the Baltic Sea. In 2022, a further 500 MW should be commissioned in North and Baltic Seas, and in 2023-2025 a respective amount of 700 MW should be commissioned in the North and Baltic Seas. The aforementioned restrictions will be introduced by specific awards criteria, and awards will also be issued with a fixed year for commissioning.

In the auctions during the transitional period, it will be possible to submit bids with auxiliary information. Such information becomes relevant if the initial bid cannot be fully awarded, because there is only insufficient WTG capacity or grid connection capacity available. In this case, information regarding the lowest capacity that may apply to the bid may be provided, effectively allowing to bid for a capacity range. Using an auxiliary bid, an operator may also bid a different reference value for less capacity.

The WindSeeG contains a special rule on legal remedies in auctions for existing projects: Claims can only be brought with the aim of receiving an (additional) award. It is not possible to raise an objection against an award granted to a third party.

The installation of projects of the transitional phase may not commence until the respective operator has issued written consent regarding the possible transfer and hand over of their installations to a third party without compensation after the expiration of the wind farm’s permitted 20-year term, if required by law.

For projects neither included in the definition of “existing projects” nor successful in the transitional auctions, the WindSeeG provides for serious consequences regarding

“SERIOUS CONSEQUENCES REGARDING THE RESPECTIVE PERMITS FOR PROJECTS NEITHER INCLUDED IN THE DEFINITION OF *EXISTING PROJECTS* NOR SUCCESSFUL IN THE TRANSITIONAL AUCTIONS.”

the respective permits: Any ongoing BSH-procedures will end automatically. No further deadline extensions will be granted under existing permits, i.e. the respective operator will, without an award for remuneration, have to allow the deadline for the beginning of construction to expire and, thus, lose the permit.

Step-in rights

There is no financial compensation for projects already permitted or at an advanced stage of planning which are not successful in the transitional auctions. Projects which do not meet the criteria of “existing projects” as described above do not receive any compensation at all. The WindSeeG provides for a step-in right (*Eintrittsrecht*) until 2030 for the auctions in the central system, but only for owners of “existing projects”, who remain unsuccessful after the two transitional auctions.

The step-in right applies only if the site of the respective project already planned predominantly overlaps with the sites auctioned off in the central model (i.e. by at least 50%). The step-in right then applies to the entire area subject to the auction. The bidder’s submission of a bid for the respective auction within the central system is an additional precondition. Once the step-in right has been exercised, the award is transferred to the entity stepping in, which subsequently has to provide the guarantee as required within the central system and may then continue the project’s planning and construction. The existence of any step-in rights will be published together with the auction notification for the respective area.

However, the step-in right is tied to a de facto abandonment of the project. The invalidity of the permit/plan approval and/or the termination of all approval procedures is a prerequisite to such right. Furthermore, the project owner has to provide all documentation regarding the plan approval procedure or the plan permission procedure as well as all investigation results and surveys (including all raw data) to the BSH, unencumbered by third party rights and must have given up all rights thereto. The step-in right is intended to constitute the compensation for handing over such documentation.

COMMENT

The majority of details now regulated by the WindSeeG pertaining to the future auction design for offshore wind had already been announced via “key points” papers and draft bills by the Federal Ministry of Economics and Energy (*Bundesministerium für Wirtschaft und Energie*) and have been broadly discussed. Only very few improvements have been achieved in many respects. For example, the amounts of the guarantees that must be provided have been reduced, but will most likely still be difficult for smaller wind farm developers to obtain.

The completion of the legislative procedure before the parliamentary summer break did not leave any time for details to be discussed further. Some regulations have been included in the WindSeeG and the EEG 2017 at very short notice, some within days of the Federal Parliament’s decision. Even though a prolonged time of uncertainty regarding a new legal situation is counterproductive to investments in principle, a more thorough discussion in the Federal Parliament and the Federal Council would have been preferable, because the new legislation will have a serious effect on a number of projects.

“A MORE THOROUGH DISCUSSION IN THE FEDERAL PARLIAMENT AND THE FEDERAL COUNCIL WOULD HAVE BEEN PREFERABLE.”

Whether legal certainty will ensue after the conclusion of the legislative procedures remains to be seen. In particular, owners of already approved or planned projects are unlikely to accept the new legal provision and constraints without resistance, as this may ultimately lead to the total loss of their projects. The corresponding legal proceedings will most likely deal not only with individual compensation. Instead, it has been announced within the market that the compliance of the EEG 2017 and especially the WindSeeG with the German Constitution (*Grundgesetz*) will be questioned and be made subject to a review by the Federal Constitutional Court (*Bundesverfassungsgericht*).

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with Dr Christine Bader, Dr Malte Jordan, Thomas Hollenhorst or your regular contact at Watson Farley & Williams.



DR CHRISTINE BADER
Partner
Hamburg

+49 40 800 084 458
cbader@wfw.com



DR MALTE JORDAN
Partner
Hamburg

+49 40 800 084 461
mjordan@wfw.com



THOMAS HOLLENHORST
Partner
Hamburg

+49 40 800 084 450
thollenhorst@wfw.com