Update Energy Law: Renewable Energies

Part 1 of our client briefing gives an overview of the regulatory status and the expected developments in the renewable energies, namely solar, wind and biomass.

The EU member states have set themselves the goal of increasing the share of energy from renewable sources in the EU's gross final energy consumption to at least 32% by 2030 (in 2018, this share already totaled 18% (including Great Britain)).\(^1\) However, no binding national targets have been set for the EU member states; instead, they must report their contributions to the EU Commission via the Integrated National Energy and Climate Plans.\(^2\) In Germany, the share of renewable energies already exceeded 30% in the first half of 2015.\(^3\) Germany therefore aims to increase the share of renewable energies to 65% of gross electricity consumption by 2030.\(^4\)

The targets are needed, inter alia, to achieve the global climate targets set out in the Paris Convention 2015. In addition, green hydrogen plays a key role in the overall strategy of the EU and Germany, and can only be produced using renewable energies.\(^5\) The use of renewable energies is also to be promoted in the heating and cooling sector.\(^6\) The volatile supply, which in the case of photovoltaics and wind at any rate depends on the weather and not on demand, is to be integrated into the market by expanding storage technologies.\(^7\)

1. European regulatory framework

At the European level, the relevant regulatory framework for renewable energies was initially established by the Renewable Energy Directive I (RED I).\(^8\) According to this directive, the expansion of renewable energies was to be achieved through corresponding support schemes in the EU member states, primarily by means of support in the form of a market premium after prior capacity auctions.

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5 Cf. on this our Client Briefing “Hydrogen”.
7 Cf. on this our Client Briefing “Storage Technologies”.
Renewable Energies Directive (2018)\(^9\)

The subsequent Renewable Energies Directive (RED II) also leaves a wide scope for support schemes for electricity from renewable sources; once again, a Europe-wide support system was not introduced. The directive only requires EU member states to provide incentives for the integration of electricity from renewable sources in the electricity market in a market-based and market-responsive way, while avoiding unnecessary distortions of electricity markets as well as taking into account possible system integration costs and grid stability (cf. Art. 4 paras 1 and 2). RED II also mentions sliding or fixed market premiums (Art. 3 para. 3) and capacity auctions (Art. 3 para. 5) as possible support schemes. Support must be granted in an open, transparent, competitive, non-discriminatory and cost-effective manner (Art. 3 para. 4). In addition, EU member states may support electricity from renewable sources which is produced in another EU member state by opening national support schemes to foreign producers (Art. 5 para. 1).

At the same time, Art. 19 introduces guarantees of origin for electricity, gas (including hydrogen\(^10\)), heating and cooling (in RED I guarantees of origin only existed for the electricity sector). The guarantee of origin is an electronic document that certifies that the energy comes from renewable sources. It ensures that this quality can only be sold once. If the producer receives financial support, the market value of the guarantee of origin for the same production must be taken into account appropriately in the relevant support scheme (Art. 19 para. 2, which also contains assumptions regarding the existence of due consideration).\(^11\) Guarantees of origin can be transferred separately or together with the physical energy (Art. 19 para. 2), so that guarantees of origin can be traded and used throughout Europe.\(^12\)

Under Art. 29, sustainability criteria and criteria for greenhouse gas savings apply to biofuels, liquid fuels and biomass fuel. It sets forth that, in order to integrate renewable energy into the transport sector, the EU member states shall set an obligation on fuel suppliers to increase the share of renewable energy in final energy consumption in the transport sector to at least 14% by 2030 (Art. 25 para. 1). The requirements of RED II must be transposed into national law by 30 June 2021 at the latest.

Internal Electricity Market Directive (2019)\(^13\)

The Internal Electricity Market Directive pays little attention to renewable energies. With regard to the tasks of the distribution grid operators, Art. 31 para. 4 only stipulates that an EU member state may require the distribution grid operator to give priority to generating installations using renewable sources when dispatching generating installations and within the scope of demand response.

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\(^10\)cf. on this our Client Briefing "Hydrogen", Number 1. European regulatory framework.

\(^11\) As a result, no certificates of origin are issued in Germany for electricity subsidized under the Renewable Energy Sources Act ("EEG"). Cf. also Sec. 42 Energy Industry Act (EnWG) on electricity labelling.

\(^12\) This enables German producers of EEG-subsidized electricity to acquire guarantees of origin in other European countries and thus prove that the green electricity sold by them was generated in Europe and sold only once.

Internal Electricity Market Regulation (2019)\textsuperscript{14}

The Internal Electricity Market Regulation is directly applicable in the EU member states. It includes statements on the use of renewable energies in the management of electricity grids. The principles for the operation of electricity grids include the integration of electricity from renewable sources (Art. 3 lit. f)). The balancing reserve market must be organized in such a way that non-discriminatory access is also granted to market participants offering electricity from variable renewable energy sources (Art. 6 para. 1 lit. c)). When power plant operators plan the use of generating installations, grid operators must, under certain conditions, give priority to generating installations using renewable energy sources (Art. 12 para. 2). When redispatching is required, transmission and distribution grid operators must take appropriate grid and market-related operational measures to minimize the downward redispatch of electricity from renewable energy sources.

Green Deal (2019)\textsuperscript{15}

The Green Deal is cautious about the role of renewable energies. It states that (i) an energy sector must be developed that is largely based on renewable energy sources, which needs to be complemented by a rapid phase-out of coal and decarbonisation of gas, and (ii) the development of offshore wind power generation is crucial and builds on regional cooperation between EU member states.\textsuperscript{16}

2. Adaptation of the European regulatory framework

With respect to the economic impact of the COVID-19 pandemic, the EU Commission’s communication “Europe’s moment” states that the renewable energy sector will be severely affected.\textsuperscript{17} However, no measures are described in relation to renewable energies, except that “the Commission will make proposals to boost uptake of offshore renewable energy and to better integrate the energy system.”\textsuperscript{18} The Action Plan for Critical Raw Materials will look at how to strengthen the market for renewable energies in a sustainable way.\textsuperscript{19} It has not yet been published.

The German Federal Government has also announced that, as part of its EU Council Presidency, it intends to promote cross-border cooperation between the EU member states, particularly in the field of offshore wind energy, by way of an “EU enabling framework”.\textsuperscript{20}

3. National regulatory framework

Already since 1991, the feed-in of electricity from renewable energies has been regulated in Germany under a separate law, the Electricity Feed-In Act (Stromeinspeisungsgesetz – StromEinspG). In 2000 it was given the title Renewable Energy Sources Act (Erneuerbare Energien Gesetz – EEG) and has

\textsuperscript{14} Regulation (EU) 2019/943 of 5 June 2019 on the internal market for electricity.


\textsuperscript{17} EU Commission: Europe’s moment, 2020, p. 4.

\textsuperscript{18} EU Commission: Europe’s moment, 2020, p. 10.

\textsuperscript{19} EU Commission: Europe’s moment, 2020, p. 17.

\textsuperscript{20} BMWi: Gemeinsam gestärkt aus der Krise - Schwerpunkte des Bundesministeriums für Wirtschaft und Energie für die deutsche EU-Ratspräsidentschaft, S. 28 f.
remained one of the cornerstones of the energy turnaround; currently the EEG 2017 applies. In addition, regulations on renewable energies can be found, for example, in the Energy Industry Act (Energiewirtschaftsgesetz – EnWG), in the Act on the Development and Promotion of Offshore Wind Energy (Gesetz zur Entwicklung und Förderung der Windenergie auf See – WindSeeG), the Combined Heat and Power Generation Act (Kraft-Wärme-Kopplungsgesetz – KWKG), the Renewable Energies Heat Act (Erneuerbare-Energien-Wärmegesetz – EEWärmeG), the Act to Amend the Promotion of Biofuels (Gesetz zur Änderung der Förderung von Biokraftstoffen – BioKraftFÄndG), the Energy Line Expansion Act (Energieleitungsausbaugesetz – EnLAG) and the Network Expansion Acceleration Act (Netzausbaubeschleunigungsgesetz – NABEG). Consequently, there is no doubt about the important role of renewable energies for the German energy landscape.

a. Implementation of European requirements

In the past, the German legislator repeatedly had to implement European specifications in the field of renewable energies and has largely fulfilled this obligation. Now, two further directives will be implemented shortly.

The requirements of the Internal Electricity Market Directive must be transposed into national law by 31 December 2020 at the latest. With regard to renewable energies, however, there is no significant need for implementation.

The requirements of RED II must be implemented by 30 June 2021. The German support schemes already largely correspond to the requirements of RED II, so there is little need for action here, either. Already under the current EEG 2017, for example, plants for generating electricity from photovoltaics, wind and biomass are only subsidized after participation in a capacity auction. As required by RED II, auctions under the EEG 2017 are generally technology-neutral and only technology-specific in certain cases. The requirements for the design of tenders laid down in the Guidelines on State Aid for Environmental Protection and Energy 2014-2020 (Leitlinie für staatliche Umweltschutz- und Energiebeihilfe - UEBLL) are in line with the provisions of RED II. The publication requirements in connection with the RED II tenders are also already fulfilled by the EEG. Furthermore, the EEG 2017 already provides for the opening up of support to other EU member states. However, the system of guarantees of origin must be extended for gases and for heating and cooling from renewable sources.

b. Further regulations

It would go beyond the scope of this report to describe the comprehensive regulatory content of the aforementioned laws in the field of renewable energies. Therefore, we will only briefly outline which provisions of the EEG 2017 on renewable energies are currently relevant for the market development:

The EEG 2017 obliges grid system operators to give priority to the purchase of electricity from renewable energies. In addition, operators of renewable energy facilities receive a remuneration for the electricity from the grid operators. Since

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21 An overview of infringement proceedings for non-implementation of EU directives can be found in “Bundestagsdrucksache” 19/18483 of 6 April 2020, including proceedings for failure to implement the Energy Efficiency Directive.
introduction of the EEG 2017, this remuneration is no longer determined by the legislator, but by auctions on the market. Support is granted to those who charge the smallest amount for the economic operation of a new renewable energy system. The system serves to refinance the investment costs and is borne by the consumers via the EEG surcharge. The EEG also regulates the grid connection and access of renewable energy plants. Section 28 of the EEG 2017 defines detailed volumes of auctions for onshore wind energy plants, solar plants and biomass plants. The WindSeeG provides for the auction volume for offshore wind energy plants.

4. Adaption of the national regulatory framework

The Climate Protection Plan 2050\textsuperscript{22}, the Climate Protection Programme 2030\textsuperscript{23} and the Corona Economic Stimulus Package contain points of reference for reforms in the field of renewable energies that should lead to an amendment of the EEG in 2020.

Wind energy onshore

By 2030, the total installed capacity of onshore wind energy is expected to increase to 67-71 GW. The auction volumes for EEG support will be adjusted accordingly. The German government intends (i) to remove obstacles, particularly in the planning and approval of plants and with regard to land availability, and (ii) to take measures to ensure sufficient competition and acceptable solutions for the construction and operation of plants on site. These measures include strengthening the repowering in line with minimum distance regulations (generally 1000 m for pure and general residential areas and village structures with significant residential development), improving the permit situation in line with climate, nature and species protection concerns, and increasing the involvement of citizens and municipalities. A regionalization bonus is to be introduced for a better regional distribution of newly installed wind energy plants.

Wind energy offshore

The expansion targets of the EEG 2017 and the WindSeeG will be raised to 20 GW by 2030, provided that binding agreements are reached with the coastal states involved. The purpose of the WindSeeG is to better and more cost-efficiently coordinate land planning, plant approval, EEG support and grid connection.

Photovoltaic

The existing cap on subsidies for PV systems will be removed. In addition, the goal is to achieve a better regional distribution. By 2030, the total installed capacity of solar plants is planned to reach 98 GW.

Biomass

By 2030 the total installed capacity of biogas energy plants should increase to 8.4 GW. The annual auction volumes for EEG support will therefore be redefined for the years from 2023. The legislator’s intention is that the used biomass energy will be

\textsuperscript{22} Federal Ministry of Economics: Climate Protection Plan 2050, 2016.
\textsuperscript{23} Federal Government: Climate Protection Programme 2030 of the Federal Government to implement the Climate Protection Plan 2050, 2020, p. 37 et seq.
based more on waste and residual materials and less on plant-based cultivated bioenergy. In addition, a new Fuel Emission Trading Act (Brennstoffemissionshandelsgesetz – BEHG) for national CO2 pricing in the heating and transport sectors was already introduced in December 2019 to make sustainable biomass economically more attractive as an energy source. The objective is to promote the development of liquid and gaseous regenerative fuels from biomass and their large-scale production in biogas synthesis plants in order to be able to use them in the medium and long term in certain segments of the transport sector (especially in air, sea and heavy goods transport). In addition, the Federal Government plans to launch a funding programme for heating networks and heat storage facilities, designed to promote in particular also biomass heating plants.

Cross-energy source topics

According to the will of the legislator and taking into account the provisions set forth in Art. 15 para. 8 RED II, better legal conditions for long-term power purchase agreements ("PPAs") should be facilitated. Generally, PPAs regulate the purchase of a certain amount of electricity at an agreed price between a power producer and a power consumer (either a large electricity consumer or a power trader). PPAs are particularly interesting for the continued operation of renewable energy systems after the EEG support for the first renewable energy facilities will expire in 2021. The 2020 amendment to the EEG also aims to better synchronise the expansion of renewable energies with the expansion of the electricity grid.

5. Conclusions and prospects

In the future, there will be no way around renewable energies. The climate goals of the EU and Germany can only be achieved, e-mobility can only be developed and green hydrogen can only be established as the energy source of the future if the share of renewable energies in the electricity mix grows massively in the coming years and decades. The required technologies are available, and investors are nowadays also prepared to realize projects without state incentives (such as the payment of a high feed-in tariff). However, they are currently held back by long-standing problems such as scarcity of land, slow and costly approval procedures and resistance from citizens. These problems can only be solved at political level. On the other hand, new lines of business and investment opportunities are opening up in the field of renewable energies, for example the direct marketing of electricity through PPAs, in the sectors of storage technologies and digitalization.

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24 It states that "Member States shall assess the regulatory and administrative barriers to long-term renewables power purchase agreements, and shall remove unjustified barriers to, and facilitate the uptake of, such agreements. Member States shall ensure that those agreements are not subject to disproportionate or discriminatory procedures or charges."
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