vonBredow Valentin Herz

Partnerschaft von Rechtsanwälten mbB

vBVH special newsletter EEG 2023

+++ AUTOMATIC TRANSLATION +++

Notes on this special newsletter

Please note that the content of this newsletter is intended solely to provide you with general information on legal developments. It cannot replace binding legal advice that takes into account the specifics of each individual case.

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Dear Readers,

On January 1, 2023, it was that time again: The EEG got a new version, the EEG 2023 came into force. Fortunately, this time the amendment took place with a little more advance notice. The EEG 2023 was passed by the Bundestag almost half a year before it came into force, namely on July 7, 2022, as part of the "Act on Immediate Measures for an Accelerated Expansion of Renewable Energies and Further Measures in the Electricity Sector".

The title of the law ("Immediate Measures") shows that the legislative process has been significantly influenced by current political events. Russia's attack on Ukraine and the resulting immediate energy (procurement) crisis have highlighted the importance of the energy transition and the advantages of renewable energies. Energy security and the reduction of energy imports became arguments that could now be used to convince even long-time doubters of the energy transition. In this situation of scarcity, uncertain winter prospects and skyrocketing energy prices, the EEG 2023 was launched as part of various measures to further accelerate the energy transition. An overview of the so-called Easter package, which includes the EEG 2023, can be found here, for example.

With the entry into force of the EEG 2023, we would once again like to provide you with an overview of the - in some cases far-reaching - changes with a special newsletter and point out some aspects that have caught our attention during the analysis of the EEG or have already occupied us in our daily work. One thing we will say in advance: Unlike some previous EEG amendments, it is at least clear with the EEG 2023 that the legislator was guided by the goal of advancing the energy turnaround and, in particular, accelerating the expansion of capacity. In any case, the increased expansion targets speak in favor of this. However, one thing remains the same for the user of the law: Some technical and systematic "construction sites" remain and new ones are emerging.

One or the other point discussed in this newsletter is also dealt with in the following two essays, the reading of which we gladly recommend for further in-depth study:

- Dr. Bettina Hennig et alii, The Easter Package and Other New Developments in Energy Law: Legal and Governance Issues, Zeitschrift für neues Energierecht (ZNER) 3.2022, p. 195 et seq.
- Dr. Bettina Hennig et alii, Das Osterpaket und andere Neuerungen im deutschen und europäischen Energierecht - ein Update, Zeitschrift für neues Energierecht (ZNER) 4.2022, p. 355 et seq.

We hope you enjoy reading it.

Your attorneys at the law firm von Bredow Valentin Herz

About vBVH

von Bredow Valentin Herz Rechtsanwälte (vBVH) from Berlin is a law firm specializing in energy issues, based in Berlin-Mitte.

With a highly qualified team of currently 13 lawyers, we advise companies throughout Germany and beyond on legal issues relating to the generation, storage, supply and consumption of electricity, heat and gas. Preferably from renewable energies. The focus of our advice is on energy regulatory issues, the drafting and review of all contracts required for the implementation of energy projects, energy trading or energy supply, as well as licensing and planning law. It goes without saying that we also represent our clients' interests before courts and authorities.

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A. The EEG 2023 in the context of the Easter Package 2022

The EEG 2023 is part of a comprehensive legislative package from spring 2022 - the so-called Easter Package. The Easter Package is a conglomerate of various laws with which the legislature is attempting to respond to the current energy and security policy situation and with which, moreover, the acceleration of the energy turnaround set out in the traffic light coalition agreement is to be implemented. In order to be able to place the new contents of the EEG 2023 in the context of the other measures for the energy transition, the topics of the laws and the systematics of the Easter Package are briefly presented below:

- Act on Immediate Measures for Accelerated Expansion of Renewable Energies and Further Measures in the Electricity Sector (BGBl. I p. 1237). This article law essentially contained four major blocks of regulations:
    - Article 1: Amendments to the EEG 2021, which came into force as soon as the law was promulgated, i.e. still in 2022 (here, in particular, the regulation on the special importance of renewable energies, amendments for solar plants and a new tender segment for certain hydrogen projects were provided for); these amendments were occasionally referred to as "EEG 2022", but in legal terms they were amendments to the EEG 2021. These amendments are not the subject of this newsletter.
    - Article 2: Numerous changes and new regulations that came into force on January 1, 2023, the "EEG 2023".
    - Article 3: Act on the Financing of the Energy Turnaround in the Electricity Sector through Payments by the Federal Government and the Levying of Apportionments (Energy Financing Act), EnFG.
    - Articles 4 to 19: Numerous amendments and consequential amendments to various other laws and regulations.
    - Article 20: Entry into force and expiry.
- Second Act Amending the Wind Energy at Sea Act and Other Provisions (BGBl. I p. 1325):
    - This article law contained, in particular, far-reaching changes to the legal framework for offshore wind turbines as well as some consequential amendments. Like the EEG 2023, the amended WindSeeG came into force on

January 1, 2023.

- Act to amend energy industry law in connection with the immediate climate protection program and to make adjustments to the law governing end-customer supply (BGBl. I p. 1214):
    - This article law came into force at the end of July 2022 and regulates various details in energy industry law, in particular in connection with the legislative programmatic objective of greenhouse gas neutrality, the associated requirements for grid expansion planning, and the mitigation of the consequences of significant price fluctuations on the energy markets for end consumers.

Not directly related to the Easter package in the narrower sense, but often associated with it was also the

- Act to reduce the cost burden of the EEG surcharge and to pass on this reduction to end consumers (cf. BT-Drs. 20/1025 and BT-Drs. 20/1544):
    - The core of this law was the reduction of the EEG surcharge to 0 cents/kWh from July 1, 2022 (until then it had been 3.723 cents/kWh in 2022). In addition, the law obliged electricity suppliers to pass on this reduction to their customers.

B. The EEG 2023 in the context of European legal requirements

I. Implementation of EU law

Among other things, the EEG 2023 also served to implement the requirements of European secondary legislation:

In particular, it implements the concept of renewable energy communities underlying Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (also referred to as "RED II") in the EEG 2023. Thus, together with the more extensive provisions on community energy companies in Section 22b EEG 2023, it makes the definition of community energy companies compatible with the concept of renewable energy community from Article 2 number 16 of the Directive.

The EEG 2023 also implements the revised guidelines of the European Commission on climate, environmental and energy aid of 27 January 2022 (C(2022) 481 final; also referred to as "KUEBLL"). Since the introduction of the financing of the EEG 2023 from the special fund "Energy and Climate Fund", the promotion of renewable energies through the EEG is - probably now indisputably - to be regarded as aid. Therefore, it was now mandatory to comply with the requirements of European state aid law. With the EEG 2023, in particular the conditions for the levy exemption of energy-intensive companies were adapted to the requirements of the new guidelines. Section 19 (4) and (5) of the EEG 2023 also stipulated that neither companies in difficulty nor companies against which there are outstanding claims for recovery based on a decision of the European Commission establishing the inadmissibility of aid and its incompatibility with the European internal market may receive aid.

Section 28d (6) EEG 2023 contains a new regulation on volume control for biomethane, as is already known from wind energy: The Federal Network Agency can reduce the tender volume of a bid date for biomethane in the event of an "imminent signature". An impending signature is said to exist if the capacity reported as approved in the register between the previous and the upcoming bid date plus the capacity not awarded in the previous bid date is below the volume of the date to be carried out and the previous bid date was also already signed. The provision is also intended to comply with European state aid law. However, the draft law expressly emphasizes here that the Federal Network Agency has discretionary powers in this regard, as the EU Commission's Climate, Environment and Energy Aid Directives stipulate that signatures are to be tolerated to a certain extent and that other measures, such as the removal of regulatory barriers, could also promote competition.

Disadvantaged areas resulting from Regulation (EU) number 1305/2013 (OJ (EU) L 347, p. 487 as amended by Delegated Regulation (EU) 2021/1017 of 15 April 2021 (OJ L 224, p. 1) shall also be covered from 1 January 2023 when the EEG 2023 enters into force (cf. section 3 number 7 letter b EEG 2023).

II. Reservation of approval under state aid law

In the EEG 2023, Section 105 (6) EEG 2021 and Section 101 EEG 2023 again contain a provision that is also closely related to European law requirements (formerly Section 105 EEG 2021). The provision is entitled "State aid approval proviso". According to this provision, the affected provisions of the EEG 2022 and the EEG 2023 may only be applied

after approval under state aid law by the European Commission and in accordance with this approval.

According to a press release from the BMWK dated July 29, 2022, corresponding talks between the German government and the Commission were initiated early this time. By decision of December 21, 2022, the Commission approved the EEG 2023 and the WindSeeG 2023 under state aid law, thus clearing the way for unconditional application of the laws (see here).

C. General changes with effects for all energy sources

I. Transitional provisions: To whom does the EEG 2023 apply?

When a new EEG comes into force, the first question is always to whom it should apply: Only to new plants, to the entire stock or to the stock in parts? This in turn determines how complicated the transitional provisions will be. Compared to the previous versions (especially EEG 2014 and EEG 2017), the transitional provisions in the EEG 2021 were characterized by an almost redeeming clarity. At least, this may be the opinion of those who have worked or struggled with the previous transitional provisions for years. The EEG 2023 essentially changes this neither for the better nor for the worse.

This is also due to the transitional system itself: The EEG 2023 only applies directly to new plants, i.e. to those plants that are commissioned from January 1, 2023 or whose value to be applied is determined in a tender from January 1, 2023 and to pilot wind energy plants (so-called research pilot wind energy plants) whose status is determined by the BMWK from January 1, 2023. For all older plants as well as for research pilot wind turbines whose status has already been determined before January 1, 2023, the EEG 2021 remains applicable (and according to its transitional system, in turn for plants commissioned before January 1, 2021, the EEG 2017 and correspondingly the EEG 2014). As in the EEG 2021, the transitional provisions of the EEG 2023 are based not only on the commissioning date of the plants, but also on the bid date in which a surcharge was won, if applicable. For operators who successfully participated in a tender with their plants before January 2023, the EEG 2021 therefore continues to apply in principle.

In addition, however, the EEG 2023 contains a whole series of exemptions whose effect is also to be extended to existing plants. However, this is explicitly stipulated in the transitional provisions (cf. Section 100 (2) ff. EEG 2023). Unfortunately, it is not quite so easy to identify

the right regulations for one's own plant in each individual case. Therefore, in addition to the continuing regulations in the EEG 2021 or EEG 2017 (depending on the commissioning of one's own plant), one will always have to see whether the EEG 2023 contains a new regulation whose effect is extended to one's own plant.

Ultimately, therefore, what always applies to the EEG remains the same: operators of existing plants are well advised to inform themselves thoroughly as to which of the new regulations will affect their plants and how. Where particularly relevant, we address below regulations for existing plants if the applicability of new regulations is ordered for them (e.g. in the case of regulations on the financial participation of municipalities in wind and solar parks according to § 6 EEG 2023).

II. Quantity structure and expansion path

In the EEG 2021, the target to be achieved by 2030 was still to reach a share of electricity generated from renewable energies in gross electricity consumption of 65%. This target will be raised sharply - by almost a quarter - with the EEG 2023: The share of electricity generated from renewables in gross electricity consumption is to be increased to at least 80% in 2030. Likewise, the explicit long-term goal of greenhouse gas neutrality of electricity generation "by the year 2050" (Section 1 (3) EEG 2021) has been newly regulated. Unfortunately, however, the wording from the draft bill of May 2, 2022, according to which electricity generation should already be nearly greenhouse-neutral by 2035, was not adopted in this respect (Bundestag document 20/1630, p. 22), but instead - without naming a specific date - greenhouse gas neutrality is now targeted "after completion of the coal phase-out", Section 1a (1) EEG 2023.

In this context, a gross electricity consumption of 600 TWh is assumed for the achievement of the 80% target in 2030. The legislator has regulated the interim targets provided for checking the achievement of this overall target in § 4a EEG 2023 ("electricity quantity path"). According to this, a total of 287 TWh of electricity is to be generated from renewable energies in 2023 and this value is to increase continuously to 600 TWh by 2030.

In order to achieve the statutory targets, § 4 EEG 2021 prescribes new expansion paths for individual energy sources. For onshore wind turbines, the following increase in installed capacity is envisaged:

- to 69 gigawatts in 2024,

- to 84 gigawatts in 2026,
- to 99 gigawatts in 2028,
- to 115 gigawatts in 2030,
- to 157 gigawatts in 2035
- and to 160 gigawatts in 2040.
- as well as the maintenance of this installed capacity after the year 2040,

The expansion of offshore wind turbines continues to be governed by the Wind Energy at Sea Act. This provides for a total of 20 gigawatts of installed capacity to be connected to the grid by 2030 and 40 gigawatts by 2040.

The following expansion path is envisioned for solar installations:

- to 88 gigawatts in 2024,
- to 128 gigawatts in 2026,
- to 172 gigawatts in 2028,
- to 215 gigawatts in 2030,
- to 309 gigawatts in 2035
- and to 400 gigawatts in 2040.
- as well as the maintenance of this installed capacity after the year 2040,

Biomass plants are projected to have an installed capacity of 8,400 megawatts in 2030.

As in the EEG 2021, Section 5 of the EEG 2023 contains the possibility of awarding subsidies to installations erected abroad within the framework of the tenders. It is now envisaged that twenty (previously: five) percent of the total annual capacity to be installed can also be subsidized in another member state of the European Union. In addition, the provision in Section 5 EEG 2023 continues to stipulate that the scope can be exceeded by the cross-border expansion of offshore wind turbines. This is intended in particular to promote cooperation with neighboring countries for the cross-border expansion of offshore wind energy in the future. In addition, no credit is given towards the expansion targets for installations where

the electricity is generated in the territory of the Federal Republic of Germany, provided that payments are made in accordance with the support system of another member state of the European Union and an international agreement does not stipulate otherwise. However, plants located in the territory of another member state are taken into account if electricity from these plants is physically imported or has a comparable effect on the German electricity market.

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Assessment on the expansion targets:

Critically, the expansion targets based on gross electricity consumption of 600 TWh may prove to be too low, in particular due to the requirements of increasing sector coupling for rapid decarbonization of the entire energy system. At the latest when substantial amounts of electricity are needed to make electromobility, green hydrogen production and other power-to-X applications possible on a large scale, the electricity demand is likely to be far higher. It is to be hoped that the ongoing review envisaged according to the explanatory memorandum to the law will ensure an appropriate and timely adjustment.

However, as recent years have shown, the expansion targets laid down in the law and the tender volumes derived from them are not in themselves a guarantee that the corresponding expansion will actually proceed at the required speed. The sluggish expansion of renewable energies - especially in the wind sector, but increasingly also for large-scale ground-mounted solar projects - is more likely to be due to a shortage of land and the difficult situation with regard to permits, i.e. hurdles that lie outside the EEG. In addition, the sluggish grid expansion and the associated increasing competition among RE projects for a timely and economical grid connection is becoming more and more relevant for the delay of the expansion. Although the issue of the licensing situation found its way into the amendment. Solutions to the problems in the area of grid expansion and connection, however, fall far short of what is necessary.

All in all, however, the law certainly demonstrates the political will to push ahead more strongly with the energy turnaround in the electricity sector. It is to be hoped that the measures envisaged as well as the measures to this end can make a contribution - but they will certainly not be enough.

III. Overriding public interest and public safety

Already in the first draft of the EEG 2021, § 1 (5) provided for the legislative statement that the expansion of renewable energies was in the public interest and served public safety. In the last committee report (BT-Drs. 19/25326, p. 10), it was then stated that this assessment had already been sufficiently formulated in law and was therefore not necessary in the EEG 2021. The provision was therefore deleted in the legislative process and was no longer included in the EEG 2021, which ultimately came into force.

The urgency of the necessary transformation of energy generation to sustainable and CO2-free sources, which requires a short-term massive expansion of renewable generation plants, has meanwhile not only reached the population and the political level, but has also been clearly highlighted by the recent case law of the Federal Constitutional Court, in particular the well-known climate decision (BVerfG, decision of March 24, 2021 -1 BvR 2656/18 et al.). Based on this, the legislator has included in § 2 EEG 2023 that the construction and operation of plants and the associated ancillary facilities are in the overriding public interest and serve public safety. This assessment must be taken into account - as is also stated in § 2 sentence 2 EEG 2023 - in any consideration of protected interests.

The inclusion of the prioritization of renewable energies in the context of balancing decisions in the EEG is clearly to be welcomed. Nevertheless, this raises the question of whether this is not a mere and at the same time incomplete codification of what already applied on the basis of the recent case law of the Federal Constitutional Court. In fact, the role of renewable energies and in particular the use of wind energy as being of overriding public interest both for climate protection and for securing the energy supply was already established by the Federal Constitutional Court independently of Section 2 EEG: "*The expansion of the use of wind power makes a de facto indispensable contribution to the limitation of climate change constitutionally required by Article 20a GG and by fundamental rights protection obligations. [...] At the same time, this expansion supports the security of energy supply, which is currently particularly at risk*" (BVerfG, decision of September 27, 2022 - 1 BvR 2661/21). The case law of the Federal Constitutional Court goes further than the regulation of § 2 EEG. According to the new Section 2 EEG, renewable energies are to be included as a priority concern in *the respective balancing of protected interests to be carried out.* However, case law does not provide for such a limitation. According to this, the priority of renewable energies is, for example, also to be taken into account in the interpretation of undefined terms. However,

the clear designation of the importance of renewable energies means that there is no longer any scope for ignoring or carelessly deferring the interests of renewable energies.

The explanatory memorandum to the law explicitly states that the state authorities must take into account the importance of renewable energies not only in the broad context, but with regard to each individual RE plant. In this context, the Federal Constitutional Court also recently explicitly stated that "*each individual generation plant*" is what matters in meeting the climate emergency (decision of March 23, 2022 - 1 BvR 1187/17). Exceptions can also be made for species protection, as wind farms, for example, are in the interest of public health (so also the European Commission). In view of the phase-out of coal-fired power generation, the issue of the availability of sufficient quantities of electricity is in itself virulent. Electricity is imperative for the "functioning of public administration, the health system and supply of the population, as well as for all modern communications." If 80% of the electricity is to be generated from renewable sources by 2030, the expansion will also be in the interest of the functioning of the administration, the health system, public and private communication, etc. Renewable energies are therefore no longer "only" relevant from the perspective of climate protection, but also for reasons of general supply security, stability and functioning of the community.

This new fixation of the prioritization of renewable energies in the EEG is therefore clearly to be welcomed, even if it falls short in comparison to the recent case law of the Federal Constitutional Court.

IV. Follow-up subsidies for systems that have already been subsidized

There have been hardly any changes with regard to the regulations on follow-up subsidies. In particular, only plants with an installed capacity of up to 100 kW are still eligible for follow-up support. However, shortly before the EEG 2023 came into force and in connection with the electricity price brake, the amount of the monthly market value to be passed through for de-subsidized plants in the feed-in tariff was capped at 10 cents/kWh for the period from January 1, 2023 and until the follow-up subsidy expires at the end of 2027. This is fundamentally appropriate, as subsidized plants have already been fully refinanced and have received adequate subsidies under the EEG in the past. Otherwise, the previous regulations for onshore wind turbines (including larger ones) that have been subsidized have been completely eliminated, as the temporal scope of the previous regulations expired on December 31, 2021 and has not been extended. In addition, the regulations on follow-up

subsidies for waste wood and mine gas were abolished without replacement because, in the opinion of the European Commission, these regulations were not compatible with state aid law.

V. Technical Equipment Obligation: News on Smart Meters and Co.

1. Background

Smart metering systems are digital electricity meters that are integrated into a smart energy network via a communication module. By connecting to the smart meter gateway, the digital meter can exchange the collected metering data and, if necessary, other information or control commands with third parties, including the grid operator and the direct marketer, via a communication network. The legal goal here is that as many renewable energy and CHP plants as possible are controlled remotely in an interoperable and secure manner exclusively via certified smart meter gateways.

Already with the introduction of § 9 EEG 2021, the digitization of the energy system was to be further advanced in the renewable energy segment as well, by basically regulating the gradual introduction of smart metering systems for new plants as well as for all old plants - after the corresponding market declaration of the Federal Office for Information Security (BSI) was available. However, the nationwide installation of smart meters proceeded only slowly; after the BSI's market declaration was classified as illegal by the North Rhine-Westphalia Higher Administrative Court in a decision dated March 4, 2021, the BSI withdrew the declaration. In response, the amendment to the Metering Point Operation Act came into force on July 27, 2021. At the beginning of 2022, the BSI announced that all requirements for the market declaration were now met. In the meantime, however, there is now a draft bill for a law to relaunch the digitization of the energy transition (GNDEW for short), which takes a different direction (for more on this, see below 4.).

2. Technical equipment obligations: Current status

In principle, the obligation to equip with a smart meter gateway introduced with the EEG 2021 has also been adopted essentially unchanged in the EEG 2023. This concerns the system sizes covered and the prerequisites for the obligation to record performance and (stepless) remote control. For the problems and details of the stepless remote control, please refer to our newsletter on the EEG 2021, in which we discuss the topic in detail.

What is new in the EEG 2023, however, is that the obligation to install a device with which the feed-in power can be remotely controlled at any time or the active power feed-in must be limited to 70% of the installed power (so-called 70% capping), which existed until the installation of a smart metering system, no longer applies to solar plants with an installed power of 25 kilowatts or less. Only once a smart metering system has been installed are these solar installations also covered by the requirements of Section 9 (1) to (1b) EEG 2023, cf. Section 9 (2a) EEG 2023. This also applies to existing installations, Section 100 (3a) EEG 2023.

The requirement for wind turbine operators to install a demand-controlled night indicator (NAC) has been pushed back further from July 1, 2020, to January 1, 2024.

3. Change in the specifications for remote control in direct marketing

After the completely new implementation of § 10b in the EEG 2021, hardly anything has changed. Only the applicability of § 21 (3) EEG 2023 to plants with an installed capacity of no more than 100 kilowatts in the case of full feed-in before the installation of a smart metering system has been removed. This means that operators of such plants may now only market the electricity directly if the total actual feed-in is measured and balanced on a quarter-hourly basis.

4. Draft bill for an act to relaunch the digitization of the energy transition

Changes for the smart meter rollout are now to be brought about by a draft bill for a law to restart the digitization of the energy transition (GNDEW for short). In particular, the draft bill provides for extensive amendments to the Metering Point Operation Act in order to accelerate the smart meter rollout and reduce bureaucracy. The most significant new regulation is likely to be the partial abandonment of the previously applicable "three-manufacturer rule" and the associated market declaration by the BSI. Instead, the draft provides for an "agile rollout" that is to start immediately upon publication of the law, but no later than 2025. In the case of small systems of up to 25 kW, it should also be possible to use devices that do not yet fulfill all of the functions provided for in the Metering Point Operation Act, but which can later receive an update for this purpose. The intended changes also result in consequential changes in the EEG 2023, in particular §§ 9 and 10b are to be synchronized with the rollout schedule of the Metering Point Operation Act. Instead of the obligation to equip with the necessary devices as of the market declaration, the decisive

point in time for the occurrence of the obligation is the equipment with a smart metering system itself. The obligation is subject to sanctions pursuant to Section 52 (1) EEG 2023.

Consequential changes due to the amendment of the Metering Point Operation Act also result for Section 10b EEG 2023, which contains the legal requirements for direct marketing. The changes are based on the same approach as those of § 9. Here, too, the point in time of the installation of a smart metering system will be decisive in the future and no longer the market declaration of the BSI. From this point in time, the direct marketer must be able to access the plants via a smart meter gateway.

VI. Changes to the market premium: from monthly to annual market value

For all plants that are commissioned from January 1, 2023, and that had not already received an award in the tenders before January 1, 2023, the calculation method for the market premium will change in principle. However, this change had already been introduced with the EEG 2021, but only comes into force now as planned.

For example, the market value, which as a deduction from the value to be invested determines the amount of the market premium to be paid by the network operator, will in future no longer be determined as the monthly market value for new plants, but as the annual market value. This annual market value is calculated from the actual annual average spot market price for the respective energy source in a calendar year. In short, the basic method of determining the (energy carrier-specific) market value remains the same, but in the future it will no longer be determined each month, but rather for each calendar year, and instead of twelve monthly values, only one uniform annual value will be calculated. As a result, the amount of the entitlement to the market premium for the electricity fed into the grid will only be determined after the end of the calendar year. Accordingly, the twelve monthly settlements of a calendar year will have to be adjusted retrospectively on the basis of the determined annual market value.

However, the new regulation only applies to new plants. For electricity from plants with commissioning dates or surcharges prior to January 1, 2023, the amount of the market premium will continue to be calculated on the basis of the energy carrier-specific monthly market value.

Assessment on the changes to the market premium:

According to the explanatory memorandum to the EEG 2021, which introduced this amendment, it is intended to encourage the optimization of plant design, maintenance and marketing strategy within a year, i.e. to encourage plant operators to manage their electricity generation over the year in such a way that revenue is generated above the annual market value. However, it was already pointed out at the time by all market participants (plant operators, grid operators and direct marketers) that this regulation would probably miss its purpose, since electricity generation from the largest renewable energy sources in terms of volume is fundamentally dependent on weather conditions (which cannot be influenced) and maintenance dates are subject to long-term planning that cannot be adjusted at short notice - for example, based on market signals. Due to the absorption of so-called windfall profits - at least in the first half of 2023 - there is currently hardly any incentive to optimize plant operation in line with the market.

It is still unclear how the new regulation can be implemented in the direct marketing contracts, in which the monthly market value is still generally agreed as the electricity price. Due to the inevitably retroactive calculation of the annual market value and the possible correction of payments made during the year, the new regulation will probably mean that all market participants will have to form provisions if necessary, which in turn may also be relevant for tax purposes. In addition, there is an increased risk of insolvency in the relationship between the plant operator and the direct marketer, as there may be claims for back payments or repayments after the end of the calendar year.

VII. Times of negative prices: As of , the 4-hour rule was abolished.

The previous regulation on subsidy reduction in the event of negative electricity prices pursuant to Section 51 EEG 2021 will be further tightened with the EEG 2023.

Thus, according to Section 51 (1) EEG 2023, the value to be applied will only be reduced to zero in 2023 if the spot market price is negative for at least four consecutive hours. However, the corresponding period required to reduce the support to zero will be successively shortened in the following years. Thus, in 2024 and 2025, the reduction in support already takes place when prices are negative in at least three consecutive hours, in 2026 when prices are negative in at least two consecutive hours, and from 2027 onwards already in every hour with negative prices. The shortened time periods apply to all new plants as of the respective calendar year. Even for a plant commissioned in 2023, the reduction of the investment value to 0 will apply from 2027 for every hour with negative spot market prices.

According to § 3 number 42a EEG 2021, the spot market price in this sense shall continue to be the electricity price resulting from the coupling of the order books of all electricity exchanges in the day-ahead auction of electricity hour contracts.

Furthermore, the scope of the regulation is extended to all new plants with an installed capacity of 400 kW or more (in the EEG 2021 still 500 kW). However, so-called research pilot wind turbines on land, whose status is determined by the BMWK, as well as pilot wind turbines at sea, continue to be excluded.

Unchanged in content from the EEG 2021, Section 51a EEG 2023 continues to provide that the support period of the plants is extended by the periods in which the plant operators have not received or would not have received support due to negative electricity prices, after the expiry of the 20-year support period. However, as in the EEG 2021, this extension only applies to plants whose investable value was determined via the tenders. Plants with a legal entitlement to subsidies will not receive an extension.

Excluded from the scope of application of these new regulations are all existing plants commissioned before January 1, 2023 and plants that have received an award in a tender before January 1, 2023. For these - insofar as the corresponding plants fall within the scope of the respective regulations - the regulations in §§ 51, 51a EEG 2021 (four-hour regulation) or § 51 EEG 2017 and § 24 EEG 2014 (six-hour regulation) remain in force.

Assessment on changes in negative prices:

The amendment of Section 51 EEG 2023 was made shortly before the EEG 2023 came into force as part of the Act on the Introduction of an Electricity Price Brake and on the Amendment of Other Provisions of Energy Law of December 20, 2022 and, according to the explanatory memorandum to the Act, serves to implement an agreement with the European Commission in order to ensure that the EEG 2023 can be approved under state aid law. For this purpose, a gradual phasing out of subsidies for new plants at negative prices was necessary.

Although the periods of negative prices have decreased compared with previous years due to the current high-price phase on the electricity markets - particularly in 2022 - the number of negative prices is likely to increase again in the event of a normalization on the electricity markets. Nevertheless, in the event of a normalization on the electricity markets, there will probably be more phases of negative prices again. In this respect, the new regulation harbors considerable potential for uncertainty among market participants, particularly with regard to plant financing, as it is very difficult to forecast what economic impact the reduction of the Applicable Value to 0 will already have in each hour of negative prices over the total operating life of a plant.

VIII. News on measurement and reporting obligations

"Unfortunately, the answer to this can be very short: Not really much.", was our answer to this question in view of the EEG 2021. This time it is different: There has actually been some improvement! This is mainly due to changes around EEG, KWKG and the offshore grid surcharge. These levies have now been spun off into a separate law or combined there: The Energy Financing Act (EnFG).

Big news first: The EEG levy is history. Reduced to 0 ct/kWh by the end of 2022, it will be abolished altogether from January 1, 2023, and can only be reintroduced if the resources of the Energy and Climate Fund are insufficient to cover the financing requirements. The possibility of reintroduction, which was originally still provided for in the draft, has been

changed in the course of the legislative process, and the EnFG now no longer provides for such a mechanism. This means that the EEG levy is now finally a thing of the past.

In addition, there is another major change that will have an impact on metering and reporting obligations: The system for levying the remaining surcharges is no longer linked to final consumption, but to the grid usage of the electricity volumes. This means that no levies will be levied on decentralized electricity consumption - without the use of a general supply network. If no surcharges are levied, measurement and reporting obligations are also eliminated in this regard. This makes it much easier and more attractive for all decentralized marketing concepts - from self-supply to on-site PPAs.

The EnFG contains numerous privileges and exemptions (e.g. for electricity-cost-intensive companies, railroads and electrically powered public transport buses as well as shore-side power plants, hydrogen projects, electricity storage systems, heat pumps and coupled gas plants). Within this framework, there are then still numerous measurement, accrual and reporting obligations (cf. §§ 45 ff. EnFG).

IX. Citizen energy companies: Definition and privilege

The most decisive change with regard to citizens' energy companies is the form of privilege: while under the EEG 2021 the privilege still consisted of so-called *uniform-pricing*, Section 22 EEG 2023 provides for a complete exemption from the obligation to participate in the tendering process.

To this end, the requirements for citizen energy companies have been tightened. Section 3 no. 15 EEG 2023 now stipulates that at least 50 natural persons must hold shares (previously ten). In addition, 75% of the voting rights must now be held by persons with a registered residence in a zip code area that lies within a radius of 50 kilometers (previously 51% with main residence in the same district). In this context, for the measurement of the 50-kilometer radius, it is specified that measurements are to be taken from the outer edge of the installation in the case of solar installations and from the center of the tower in the case of wind energy installations. This is intended to make it easier for citizens living in low-population areas to participate in the expansion of renewable energies. At the same time, it should also make it better and easier to implement projects that are located on a county border.

In addition, only small or medium-sized enterprises or municipalities (local authorities and their associations with legal capacity) may participate as legal entities. The requirement that none of the shareholders may hold more than 10% of the voting rights remains unchanged. In addition - in line with previous BGH case law - the actual possibility of influencing the company and participating in decisions of the shareholders' meeting is required. In this context, the participation of more complex corporate structures is also possible: For the actual possibility of influencing the voting rights, it is sufficient if one company holding 100% of another fulfills these requirements.

For details on requirements for citizen energy companies, see also D. I. below. 5. (solar energy) and D. III. 3. (wind energy).

X. Innovation tenders

Innovation tenders continue to be provided for all renewable energies and combinations or mergers of different renewable energies. A major change in the innovation tenders is the switch from the fixed market premium to the sliding market premium. In addition, the existing innovation tenders will be supplemented by two new tender segments in the area of hydrogen, see E below. II.

XI. Sanction system

A significant innovation in the EEG 2023 addresses a long-standing criticism of the EEG sanction system: The new section 52 EEG 2023 stipulates that in the event of violations of various obligations regulated in the EEG, the subsidy entitlement for the electricity generated will no longer be forfeited in whole or in part, as was previously the case. Instead, breaches of obligations will in future be sanctioned by a penalty payment to the grid operator. Among other things, this is a response to the criticism that has been voiced again and again for a long time that in many cases in the past the previously regulated loss of subsidies was simply disproportionate, especially since violations of obligations under the EEG are sanctioned regardless of fault and often only became known to the affected parties after a long period of time. However, the background of the concrete changes is different: In the previous logic, the sanctions were always linked to the fact that a market value below the EEG subsidy was assumed and thus, for example, the subsidy value was reduced to zero or to the market value. In times of very high market prices, however, this de facto leads to a "fizzling out" of the sanction effect, as well as in the case of plants that have been de-

subsidized or market their electricity in a decentralized manner. The change in the sanction regulation is now intended to "restore its function for all plants and irrespective of electricity price fluctuations".

Section 52 of the Renewable Energy Sources Act 2023 specifically stipulates that system operators who violate one of the obligations listed in the catalog must pay a penalty of 10 euros/kW of installed capacity to the respective connection grid operator for each calendar month in which the obligation is violated or continues to be violated, either in whole or in part. However, there are mitigations or intensifications of the penalty effect for various cases: For some breaches of duty, for example, a reduction of the penalty payment to just 2 euros/kW of installed capacity is provided for as soon as the duty is fulfilled (then retroactively to the start of the breach of duty). This applies to violations of various technical requirements and registration obligations with the market master data register with simultaneous failure to notify the grid operator. Also in the case of a violation of the new full feed-in requirement for solar systems that wish to claim the so-called full feed-in bonus (see below D. I. 4. lit. d)), the penalty shall only amount to 2 euros/kW, cf. § 52 (3) no. 2 EEG 2023. However, this is due to the fact that the system operator already loses his entitlement to the increased remuneration in case of this violation and only receives the lower own consumption tariff. However, § 52 (4) EEG 2023 again regulates cases in which a violation triggers a payment obligation for several calendar months. If several obligations are violated at the same time, the payment obligation per month is capped at a total of 10 euros/kW (Section 52 (5) EEG 2023). In addition, the regulation contains provisions on the due date of payments (whereby the grid operator can also offset corresponding claims against the EEG subsidy), on supplementary sanctions (discontinuation of charges for decentralized feed-ins pursuant to Section 18 StromNEV, so-called avoided grid charges) and on the applicability to CHP plants.

The sanctionable breaches of duty themselves have remained essentially unchanged in content and have been transferred from Section 52 (1) - (4) EEG 2021 to Section 52 (1) EEG 2023.

From January 1, 2023, the new system of sanctions will apply to all breaches of obligations, even if they are committed by operators of existing installations. In the case of violations of registration obligations in the market master data register, the new regulation will apply

from January 1, 2023, even to violations committed before this date. The new regulation thus comprehensively replaces the previous sanction provisions, cf. section 100(9) EEG 2023.

As part of the Act on the Introduction of an Electricity Price Brake, the new Section 52 (1b) EEG 2023 (applicable to new installations) and Section 100 (9) Sentence 2 EEG 2023 (applicable to existing installations) were added. Thus, for plants with an installed capacity of up to 500 kilowatts, a transitional regulation was created for the applicability of the penalty regulations in the event of violations of the direct marketing requirements as well as in the event that one of the maximum durations of the default compensation is exceeded. These plants will be given a "grace period", as the penalization of a violation of the direct marketing specifications (Section 10b EEG) as well as of exceeding one of the maximum durations of the default compensation will only be applicable from January 1, 2024. Until then, the provisions of the EEG 2021 will continue to apply in the event of violations of direct marketing requirements, i.e. a reduction in the value to be applied to zero in the event of a violation of Section 10b and a reduction to the market value in the event that one of the maximum durations of the default compensation is exceeded.

XII. Municipal Participation Model

The regulations on the participation of municipalities have been changed in some points in the EEG 2023. Essential here is in particular that also non-subsidized wind energy plants (often referred to as "PPA plants") may offer participation to municipalities (previously only wind energy plants with subsidies). Operators of permanently or temporarily unsubsidized wind turbines should thus be able to offer participation within the framework of the requirements of Section 6 EEG 2023 even without any risk under criminal law (Sections 331-334 of the Criminal Code). However, reimbursement of the municipal contribution by the grid operator will continue to be made only for plants subsidized under the EEG.

Another significant innovation is that, according to Section 100 (2) EEG 2023, the new regulation also applies comprehensively to existing plants of the eligible plant types. In the future, "old plant operators" will therefore also be able to offer the municipalities a corresponding contribution and, if financial support has been claimed for the quantities of electricity fed into the grid and the fictitious electricity quantities of the plant (see on this immediately below), demand reimbursement from the grid operator.

In addition, there are some minor changes, such as the increase of the necessary wind turbine size for a participation offer from 750 kW to 1,000 kW or for the participation of several affected municipalities. If several municipalities are affected, all municipalities must be made such an offer of participation. If one municipality declines, it should be possible to distribute its share among the others. In addition, the municipalities can make the conclusion of a participation agreement for open space plants dependent on the submission of a nature conservation concept, whereby this regulation would need to be specified or clarified according to some voices in order to increase legal certainty. Finally, it is clarified that plant operators will only receive a refund of the payments made to the municipality or district for those electricity quantities for which they have actually received financial support - this is to exclude in particular those periods in which operators have sold their electricity in the so-called other direct marketing, i.e. without EEG support, or in which the market premium was at zero due to high stock exchange prices. In this respect, the question is whether or not there was an actual payment flow from the grid operator to the system operator for the respective quantity of electricity.

Another change is that plant operators are not only allowed to involve the municipalities, but are *supposed to*. Since this is still not a legal obligation, the change from *may* to *shall is* purely rhetorical. It nevertheless expresses the legislator's attitude that municipal participation is not only permitted but explicitly desired.

It should be critically noted, however, that the regulation still applies exclusively to wind turbines and ground-mounted systems. This does not include solar installations on other structures (cf. § 3 No. 22 EEG 2023), which in practice are often also perceived as "ground-mounted installations" and in many projects there are also some demarcation difficulties here (e.g. in the case of old landfills or disused mining and open-cast mining areas, former gravel pits, diffuse areas with individual structures in the ground and partial ground-mounted areas, etc.). Therefore, it would be much more obvious to refer here to the likewise legally defined solar plants of the first segment (§ 3 number 41a EEG 2023) instead of open space plants and thus to spare the practice the considerable legal uncertainties that may arise from this conceptual allocation and the exclusion of other structural plants from the scope of application of § 6 EEG 2023.

It is also problematic that the refund claim under Section 6 (5) EEG 2023 applies to such fictitious electricity quantities for which financial support has been claimed. However,

fictitious electricity quantities also include self-supply quantities for which no financial support was claimed. However, to exclude fictitious electricity quantities entirely from eligibility for reimbursement under Section 6 (5) EEG would be inconsistent with their express mention, and an interpretation contrary to the wording would be unsatisfactory.

XIII. Elimination of the prohibition on self-supply

The abolition without replacement of the so-called self-supply ban, which was regulated in § 27a EEG 2021, is very welcome. From now on, tendering plants will no longer lose their support for the entire calendar year if they are also used for self-supply. In the absence of a transitional provision, however, this initially only applies to new plants commissioned from January 1, 2023. The deletion of Section 27a EEG 2021 was also systematically logical against the background of the abolition of the EEG surcharge and the deletion of the concept of self-supply.

D. The most important changes for the individual energy sources and the tenders

I. Solar systems

1. Overview

The EEG 2023 provides for some significant changes to the basic subsidy design. In particular, the following are worth noting: However, innovations with regard to the subsidy design can be found in the EEG 2023:

- For all solar installations, the threshold for mandatory tendering is increased from 750 kW to 1 MW.
- A so-called full feed-in bonus for rooftop systems was introduced if the electricity generated is fed into the grid in full (commercial-balance sheet).
- The statutory value to be applied for rooftop systems was increased.
- The EEG 2023 introduces privileges for citizen solar companies that do not have to participate in the tendering process under certain conditions.

In addition, there are several other detailed changes in the framework of the tenders as well as in the promotion of solar plants outside of the tender, which will also be discussed below.

In addition, the general prohibition of self-supply according to § 27a EEG 2021 for tendering plants has been abolished - for all RE plants but especially for rooftop plants this is of great relevance. Self-supply, even with tendering plants, will thus be possible for new plants in the future (see also above C. XIII.).

2. Tenders for solar plants of the first segment

The EEG 2023 provides for some significant changes for the tenders for solar systems of the first segment (ground-mounted systems and solar systems on other structural installations).

a) Tender volume

Worth mentioning, although not surprising in view of the declared acceleration targets, are the significantly higher tender volumes. As early as 2023, up to 5,850 MW of installed capacity is to be subsidized under the tendering process instead of the previous 1,650 MW. For 2024, the volume will be increased to 8,100 MW (previously 1,650 MW) and for each of the years 2025 to 2029 to 9,900 MW (previously 1,650 and 1,550 MW, respectively). However, the EEG 2023 (as already the EEG 2021) also provides for various adjustment mechanisms.

As before, the tender volume is reduced by the sum of the installed capacity of solar plants in the first segment of projects awarded in other EU countries and by the installed capacity of PPA plants commissioned outside the EEG in the previous year. In addition, the tender volume is reduced by the installed capacity of solar plants awarded in the innovation tenders pursuant to Section 39n EEG 2023 and tenders for innovative concepts with hydrogen-based electricity storage pursuant to Section 39o EEG 2023.

At the same time, the tender volume is increased by the quantities for which no award was made in the previous calendar year or which were awarded and cancelled after December 31, 2022.

b) Bid dates

For solar systems in the first segment, there will continue to be three bidding dates per year, which will take place on March 1, July 1, and December 1 in each of the years 2023 to 2029. As before, the bid quantity per bid may not exceed a capacity of 20 MW to be installed, Section 37 (3) EEG 2023.

Deviating from this, the threshold for all bid dates in 2023 is 100 MW. This change was subsequently incorporated into the EEG 2023 by the "Act Amending the Energy Security Act and Other Energy Industry Regulations" of October 8, 2022.

c) Changes with regard to the area backdrop

The new § 37 EEG 2023 provides for various adjustments of the area allocation for the tendering of solar plants of the first segment. The aim of the legislator was a "moderate" expansion of the area allocation, which should be "at the same time compatible with nature conservation". Despite some sensible innovations, however, the expansions made fall short of the industry's demands, so that the shortage of land is likely to continue to be the bottleneck in the expansion of renewable energies.

First, Section 37(1)(2) EEG 2023 contains a new general restriction: in principle, only land that is not drained and used for agricultural purposes is eligible.

The EEG 2023 provides for a welcome expansion of the eligible areas for the so-called verges along highways or railroads: For example, the verge strip on which solar installations can be erected has been widened from the previous 200 meters to 500 meters. In addition, the 15-meter animal protection corridor introduced with the EEG 2021 will no longer apply.

In addition, solar installations that meet the requirements of Section 35 (1) No. 8 lit. b BauGB (along highways or railroads and at a distance from them of up to 200 m measured from the outer edge of the roadway) are also eligible. Recently, these are also eligible without a development plan.

Furthermore, an expansion of the definition of disadvantaged areas in Section 3 (7) EEG 2023 to include the latest EU regulation has enabled the federal states to designate additional arable land and grassland for the tenders in their territory.

In addition, floating solar plants (so-called floating PV) and so-called special solar plants have been explicitly included in the subsidy universe of the EEG 2023, whereby a bonus on the surcharge value is granted for the latter if certain conditions are met.

However, floating PV systems, which could already be erected as solar systems on other structural facilities as a rule under the previous versions of the EEG, are now defined in Section 37(1)(2)(j) EEG 2023 as "solar systems on artificial or heavily modified bodies of water" as defined in Section 3(4) or (5) of the Federal Water Act (WHG), such as quarry lakes,

opencast mining lakes or harbors. However, floating PV systems are subject to the water law requirements of Section 36 (3) WHG, which was also newly introduced as part of the amendment. According to this, a floating solar system may not cover more than 15 % of the water surface and may not be erected at a distance of less than 40 meters from the shore.

The other previously known area categories of the first segment remain largely unchanged.

d) Special solar installations (agri-, parking lot- marsh-, grassland PV).

In Section 37(1)(3) EEG 2023, "special solar installations" have now been included as a separate category. Agri-, grassland, parking lot and moorland PV systems are considered to be such special solar systems.

The individual requirements to be fulfilled by these special solar systems are to be determined by the BNetzA within the framework of a stipulation, whereby the stipulation of the BNetzA already published within the framework of the innovation tenders on October 1, 2021 shall continue to apply until then.

For Agri-PV, Section 37(1)(3) EEG 2023 stipulates that these areas must have another "parallel use" to solar cultivation, namely as agricultural land. This is arable land with simultaneous crop cultivation as well as other agricultural land on which permanent or perennial crops are cultivated. In the case of agri-PV areas, the bidder must submit a self-declaration in the invitation to tender stating that it has verified that the areas are not relevant under nature conservation law, Section 37(2)(3) EEG 2023.

Grassland PV refers to areas that are simultaneously used agriculturally as permanent grassland in addition to the construction or operation of the solar plants. However, certain areas are excluded (moorland soil, Natura 2000 site as defined by § 7 (1) no. 8 BNatSchG, habitat type according to Annex I of Directive 92/43/EEC). The existence of the corresponding prerequisites or the examination of the corresponding nature conservation exclusion categories must also be confirmed by self-declaration in the case of bids for grassland facilities.

Pursuant to Section 37(1)(3)(e) of the Renewable Energy Sources Act 2023, peatland PV systems are solar systems installed on previously drained and agriculturally used peatland soils. The prerequisite is that the area is permanently rewetted with the construction of the solar plant. In the explanatory memorandum to the law, there are some explanations about

which requirements should apply to rewetting: In order to enable the binding of greenhouse gases, minimum water levels of a maximum of 10 cm below ground level in winter and a maximum of 30 cm below ground level in summer are to be achieved. Successful rewetting would also have to be confirmed by the responsible water authority and this confirmation submitted to the grid operator. The special requirements of peatland PV are to be defined by the Federal Network Agency as early as July 1, 2023, in joint consultation with the Federal Agency for Nature Conservation and the Federal Environment Agency (Section 85c (3) EEG 2023).

e) Maximum value for solar plants of the first segment (§ 37b EEG 2023)

The maximum value is calculated - as before - from the average of the highest bid values of the last three bid dates, increased by 8 %, whose surcharges had already been announced in accordance with section 35(1) EEG 2023 when the respective bid date was announced in accordance with section 29 EEG 2023. However, it shall continue to amount to a maximum of 5.9 cents/kWh. For the calculation of the maximum value in 2023, the bid values in 2022 shall be used.

f) Bonus for elevated Agri-PV and Moor-PV

For PV systems on arable land, other agricultural land or grassland, which are elevated with a clear height of at least 2.10 meters, the value to be applied obtained in the tender is increased by a bonus in the amount of

- 1.2 cents/kWh (with surcharge in 2023),
- 1.0 cents/kWh (with surcharge in 2024),
- 0.7 cents/kWh (with surcharge in 2025) and
- 0.5 cents/kWh (for surcharge in 2026 to 2028).

The elevated elevation is intended to allow standard agricultural machinery to be used on the land below. The legislator justifies the additional remuneration with the higher electricity production costs caused by the elevation. The bonus is intended to minimize the competitive disadvantage of bids for these turbines.

Moor-PV receives a bonus on the surcharge of 0.5 cents/kWh for the additional costs of this type of plant. Since the legislator does not expect any economies of scale in the future due to

a strong market ramp-up - in contrast to Agri-PV - no degressive design of the bonus was chosen.

No bonus is provided for parking lot PV.

g) Repowering even without defect/theft/damage

The repowering of ground-mounted systems was simplified as part of the EEG amendment.

Previously, the replacement of solar systems was only possible in a way that preserved remuneration if the modules were replaced due to a technical defect, damage or theft. This requirement now no longer applies to solar systems of the first segment. These can now be replaced without a specific reason without losing their entitlement to remuneration from the surcharge, provided that the replacement takes place to the extent of the originally surcharged output and is not accompanied by an increase in output.

For rooftop systems, however, the situation remains the same: their modules can only be replaced in order to receive compensation if they are either defective/damaged or stolen.

h) Other changes for first segment solar plants

In Section 38a (1) no. 1 EEG 2023, the words "and the bidder is the system operator at the time of application" have been deleted. This is to clarify that the bidder only has to have been the operator of the solar system at the time of commissioning - and no longer necessarily at the time of application for payment entitlement.

3. Tenders for second-segment solar systems ("rooftop PV")

The tendering procedure hardly changes for this plant segment. What is new, however, is that bids pursuant to Section 38c (2) EEG 2023 must in future include a self-declaration by the bidder that he is entitled to erect a solar plant on the site.

However, there are changes in the tender dates and the tender volume:

In the future, there shall be three bidding dates per year on February 1, June 1 and October 1 in the years 2023 to 2029 (cf. Section 28b (1) EEG 2023), instead of the two bidding dates previously provided for.

Furthermore, the tender volume for solar plants in the second segment will also be significantly increased and is to be raised to 650 MW as early as 2023 instead of the previous

350 MW. In 2024, the volume will be increased to 900 MW (previously 350 MW) and in the years 2025 to 2029 to 1100 MW (previously 400 MW) of installed capacity. Here, too, however, as with plants in the first segment, various adjustment mechanisms will take effect (cf. Section 28b (3) to (5) EEG 2023).

Thus, from 2024 onwards, the tender volume pursuant to Section 28b (3) no. 1 EEG 2023 will be increased in each case by the quantity that did not receive any subsidy in the respective previous calendar year.

Pursuant to Section 28b (3) no. 2 EEG 2023, the bidding volume is reduced in each case by the sum of the installed capacity of the solar systems of the second segment with an installed capacity of more than 1 megawatt for whose electricity no value to be applied or the value to be applied has not been determined by means of tenders (in the case of the former, these are PPA systems and in the case of the latter, rooftop projects of citizens' energy companies - see below under 5.) and which have been reported to the register as commissioned in the respective previous calendar year, and by the sum of the bid quantities for solar plants of the second segment which have received an award according to the new § 39o EEG 2023 in the previous calendar year.

As before, the maximum bid value is set at 9 cents/kWh (cf. Section 38e (1) EEG 2023). However, the degression of the maximum value by 1% per calendar year is not to start until January 1, 2024, cf. section 38e (2) EEG 2023.

4. Promotion of PV systems outside of the tendering process (statutory promotion).

The following innovations for solar plants up to an installed capacity of 1 MW, which are subsidized by law, should be mentioned in particular:

a) New eligible asset category

In Section 48 (1) no. 1a EEG 2023, a completely new eligible installation category was introduced. Thus, in the future, solar systems that are erected on land on which there is a residential building that is not suitable for occupancy with solar systems (e.g. due to the protection of historical monuments or a thatched roof) will also be eligible. However, the regulation is only applicable in the inner area according to § 34 BauGB, properties in the outer area are therefore excluded. In addition, the systems eligible for subsidies are limited in terms of area (maximum floor area of the residential building) and output

(maximum 20 kW). However, the increased rooftop tariff is not paid for the systems in the new subsidy category; instead, it corresponds to the subsidy for ground-mounted systems and systems on other buildings.

b) Expanding the land use envelope (floating, agri, parking, marsh PV).

The eligible area was also expanded for legally supported solar plants. Thus, in Section 48 (1) EEG 2023, the same changes and extensions were ultimately made as for tendering systems, i.e. the category of floating PV systems as well as agricultural, parking lot, moorland and grassland PV were included. Furthermore, the eligible verges along highways and railroads were also extended to 500 meters in the statutory subsidy and areas were included that meet the requirements of Section 35 (1) No. 8 lit. b BauGB (German Federal Building Code) In this respect, reference can essentially be made to the above explanations.

c) Increase in the value to be invested

As of January 1, 2023, the value to be applied for electricity from solar systems on other buildings and for ground-mounted systems is 7.0 cents/kWh.

The value to be applied for electricity from building facilities is:

- 8.60 cents/kWh (up to and including an installed capacity of 10 kilowatts),
- 7.50 cents/kWh (up to and including an installed capacity of 40 kilowatts) and
- 6.20 cents/kWh (up to and including an installed capacity of 1 megawatt).

d) Bonus scheme for full feeders and sharing option

Another much-discussed innovation is the bonus for electricity from building systems whose electricity is fed entirely into the general supply grid (so-called full feed-in bonus). In principle, the plant operator can choose whether to opt for this or also to consume (part of) the electricity himself or otherwise supply it locally and therefore waive the bonus.

According to Section 48 (2a) EEG 2023, the prerequisite for claiming the significantly increased subsidy is in particular that the entire electricity generated in a calendar year is fed into the grid. However, this can also be a so-called commercial-balanced full feed-in, in which purely physically an on-site consumption of the solar electricity actually takes place. The only exception to the full feed-in requirement is electricity that is consumed in the solar system or in its ancillary and auxiliary systems for the generation of electricity in the

technical sense. Whether the full feed-in bonus is to be claimed must be communicated to the grid operator before commissioning and again before December 1 of the preceding calendar year.

If the plant operator selects the full feed-in bonus, the value to be applied increases by depending on the power threshold:

- 4.8 cents/kWh (up to and including an installed capacity of 10 kW)
- 3.8 cents/ kWh (up to and including an installed capacity of 40 kW)
- 5.1 cents/ kWh (up to and including an installed capacity of 100 kW)
- 3.2 cents/ kWh (up to and including an installed capacity of 400 kW)
- 1.9 cents/kWh (up to and including an installed capacity of 1 MW)

If - contrary to a corresponding notification - no full feed-in takes place in a calendar year, the value of the solar system in question to be invested is reduced to the market value for the entire calendar year in question. Furthermore, the system operator must pay a penalty of 24 euros per kW of installed capacity for the entire calendar year.

Instead of registering a plant as a whole for the full feed-in bonus, there is still the option of claiming the full feed-in bonus for only one part of the plant and implementing self-supply or direct delivery with the other part. The prerequisite for this is that the electricity from the different parts of the plant is billed via a separate metering device in each case and the grid operator is informed before commissioning and then every year before December 1 for the following year as to which of the two parts of the plant the operator wishes to claim the full feed-in bonus.

e) Change of the degression mechanism for all solar plants in legal support

When the EEG comes into force in 2023, the so-called breathing cap will no longer apply. Instead, the degression will be updated on a linear basis and will no longer be dependent on the annual expansion of solar installations. Furthermore, the degression will be suspended for the time being. Specifically, the values to be applied in accordance with sections 48 and 48a EEG 2023 will decrease by 1 percent every six months from February 1, 2024.

f) Gradual abolition of the 50% rule

Under the EEG 2021, plants with an installed capacity of more than 300 kilowatts were only

entitled to support for 50 percent of the electricity generated in a calendar year in the statutory compensation pursuant to Section 48 (5) EEG 2021.

The amount of electricity eligible for subsidies had already been increased to 80% by July 30, 2022.

With the EEG 2023, this regulation has now been deleted without replacement, which is very welcome.

5. Citizen solar companies

In the future, the EEG will also provide privileges for citizen energy companies that operate solar plants. These are exempt from participating in tenders, provided that the installed capacity of the solar plant does not exceed 6 megawatts.

The value to be applied is then determined by law. For solar systems of the first segment, the value to be applied is the average of the bid values of the highest bid still awarded for the bid dates for solar systems of the first segment in the calendar year preceding commissioning (cf. Section 48 (1a) Sentence 1 EEG 2023). For building systems, the value to be applied is determined accordingly from the bid values of the highest bid still awarded for the bid dates for solar systems of the second segment in the calendar year preceding commissioning (cf. section 48 (1a) sentence 2 EEG 2023).

The requirements to be fulfilled by the citizen solar companies correspond to those described under C. IX. for citizen solar companies. However, in the case of citizen solar systems, notification is not required when the permit is issued, but only when the solar system is commissioned three weeks after it was commissioned. As in the case of wind energy plants, in order to be exempt from the obligation to participate in the tendering procedure, the citizens' energy association and its voting members or shareholders must not have commissioned any other solar plants in the same segment in the previous three years.

6. What's new with tenant electricity

The requirements for the tenant electricity surcharge have not changed as a result of the amendment to the law, with the exception of one regulation. The limitation to systems with a capacity of up to 100 kW in Section 21 (3) EEG 2021 has been removed, so that the tenant electricity surcharge can now also be claimed for larger solar systems. However, it remains to be seen whether this change alone will be sufficient to effectively address and counteract the current multiple hurdles for tenant electricity projects.

Assessment on solar changes:

For solar plants, the EEG 2023 provides for the most extensive innovations and is in this respect and especially in comparison to previous amendments of the EEG to be assessed as quite positive. Particularly welcome are the increase of the threshold for the tendering obligation from 750 kW to 1 MW for all solar plants, the increase of the tendering volumes as well as the elimination of the unwelcome limitation of the support for rooftop plants from 300 kW. Also the increase of the remuneration rates for solar plants outside the tender, the bonuses for special solar plants in the tender, the introduction of citizen solar parks, the elimination of the performance limit for receiving the tenant electricity surcharge and the facilitations for small solar plants in terms of technical equipment described under C.V. send the right signal.

Nevertheless, the law falls short of the solar industry's demands in many areas. In particular, it should be mentioned that the area coverage was not expanded even more comprehensively. The last doubts as to whether the expansion targets for solar installations of currently approx. 60 GW to the targeted 215 GW by the year 2030 can be achieved can therefore not be dispelled, whereby overall the situation with regard to approval law for ground-mounted installations and the sluggish grid expansion probably represent the greater obstacle here than the subsidy law provisions of the EEG.

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II. Biomass, biogas, biomethane

For the energy source biomass, the Renewable Energy Sources Act 2023 is not a great success, but nevertheless brings some important changes and partly improvements. The changes for biomass and biomethane plants are primarily based on the idea of using biomass and the biomethane obtained from it as a valuable and not arbitrarily reproducible raw material as precisely as possible. Unlike for wind and PV, § 4 EEG 2023 therefore does not provide for an increase in the expansion path compared to the 8,400 MW in 2030 already

provided for in the EEG 2021. Within the expansion path, more focus is placed on highly flexible biomethane plants.

It is to be welcomed that the legislator - probably also driven by discussions about land competition due to the war in Ukraine - is trying to bring the great advantage of biomass as an energy source more to the fore. However, it seems questionable whether, with a future maximum rated output of only 10%, sensible heat concepts can still be served or whether another strength of biomass, cogeneration, will suffer as a result.

1. Focus on highly flexible biomethane plants

With the focus on highly flexible biomethane plants, the special potential of biomass as the only non-fluctuating renewable energy source that can be used in a system-serving manner is to be increasingly exploited. The tender volume will therefore shift strongly in the coming years towards highly flexible biomethane plants, so-called peakers:

- While 600 MW are still planned for biomass plants in 2023, the tender volume will be continuously reduced to only 300 MW by 2026. For this reason, there will only be one tender date for biomass from 2026 onwards, on June 1 of each year (instead of the previous dates of April 1 and October 1), see Section 28c EEG 2023.
    - 2023: 600 MW capacity to be installed
    - 2024: 500 MW capacity to be installed
    - 2025: 400 MW capacity to be installed
    - 2026 to 2028: 300 MW capacity to be installed in each case
    - From 2026, the tender volume will be increased by the quantities for which no awards could be made in the respective third preceding calendar year in the tenders for biomass plants.
    - The tender volume shall be reduced by the sum of the capacity installed in the previous calendar year of biomass installations for whose electricity no value to be applied or this value has not been determined by tendering and the installation has been reported in the register as having been put into operation.

- The tender volume for biomethane plants remains constant at 600 MW. Starting in 2023, two tenders will be held annually on April 1 and October 1. It remains the case that bids can only be submitted for biomethane plants that are built in the southern region, Section 39k (3) EEG 2023. In addition, the plants must be new plants that have not already been operated with other renewable or fossil energy sources. The power limit of 20 MW, on the other hand, is abolished. The legislator also clarifies that biomethane plants represent a separate category under subsidy law and that they are therefore not allowed to participate in biomass tenders, Section 39i (1a) EEG 2023.
    - In contrast to biomass plants, the automatic reduction of the tender volume by the capacity registered outside the regular tenders does not apply to biomethane plants.
    - However, the Federal Network Agency may reduce the tender volume of a bid date in order to prevent imminent undersubscription. However, the Federal Network Agency has discretion within the framework of the requirements set out in Section 28d (6) EEG 2023.

In order to encourage the most system-serving and flexible use of biomethane possible, the maximum design capacity eligible for subsidies for biomethane plants will be further reduced from 15% to 10%. This is intended to have the effect that the plants do not simply "pass through" but are only used in a targeted manner while complying with the maximum rated output. The value of 10% corresponds to the flexibility currently shown by peak load power plants. As a result, biomethane plants will therefore have to be overbuilt even more than before and designed to generate electricity and heat only on a maximum of 876 hours (10% of annual hours) per year. To compensate for the reduction in maximum design capacity, the maximum biomethane tender value will be increased slightly to 19.31 cents/kWh (for tender dates in 2023, with a 1% degression applying from 2024).

Moreover, support for biomethane plants under the tender for general biomass plants will no longer be considered under the EEG 2023. An entitlement for electricity from biogas acquired through a surcharge for biomass plants only exists if no biomethane is used in the plant.

The use of biomethane is now still eligible for support under the KWKG. In the Easter package, CHP plants that use biomethane were still explicitly excluded from eligibility under the KWKG from 2024 ("with the exception of biomethane"). In the version of the KWKG that has now come into force, the exclusion of biomethane has now been dropped.

Both biomethane plants that are subsidized under the EEG and CHP plants with more than 10 MW each that have been approved after June 30, 2023, must also be "H2-ready" in the future.

be. This means that from January 1, 2028, they can be converted to generate their electricity exclusively on the basis of hydrogen at a maximum of 10% of the cost that a possible new biomethane plant with the same capacity would incur. In practice, this is to be demonstrated by means of a technical expert opinion in conjunction with a manufacturer's certificate.

2. General changes

The maximum value for biomass tendering plants is set at 16.07 cents/kWh for 2023 and thus corresponds exactly to the degressive update of the values from the EEG 2021.

The corn and grain cap will be further tightened to 35 percent by mass (2024 and 2025 surcharges) and 30 percent by mass (2026 through 2028 surcharges) for plants receiving surcharges beginning in 2024.

An urgently needed correction of the transitional provisions with regard to the flexibility premium has unfortunately failed to materialize. § Section 100 (12) EEG 2021 provides that Annex 3 in the version of the EEG 2021 shall apply if operators of existing installations submit the additional installed capacity for claiming the flexibility premium to the register for the first time after 31 December 2020. Conversely, if interpreted literally, Annex 3 in the version of the EEG 2017 or earlier is decisive for plants that have already previously used the flexibility premium. This means that the so-called flexibility cap continues to apply to these plants. A further increase in capacity for flexibility would therefore not be eligible for these plants - a consequence that was presumably not intended and contradicts the objectives of the EEG 2021, as the flex cap was to be abolished in order to further incentivize flexibility in the existing stock.

Significant improvements, on the other hand, are planned for new manure handling facilities. The previous obligation to build over plants with an installed capacity of more than 100 kW

has been abolished. Now, the entire installed capacity of up to 150 kW can also be used continuously for power generation. As a logical consequence, the entitlement to the flexibility surcharge no longer applies to small-scale liquid manure plants. The value to be applied is 22.0 cents/kWh up to a rated output of 75 kW and 19.0 cents/kWh up to a rated output of 150 kW, with the subsidy rates applying proportionately to the respective output thresholds.

In order to be eligible for support as a liquid manure clover plant, it is still a prerequisite that the use of liquid manure, with the exception of poultry manure and poultry dry manure, is at least 80 percent by mass. In future, however, a proportion of up to 10 percent by mass of clover grass may be added to this. The reason given for this is that smaller and organic farms in particular would find it difficult to comply with the required proportion of manure. The use of ecologically beneficial clover grass should also enable these farms to operate a liquid manure clover plant economically. In this way, additional quantities of manure are to be tapped for the generation of electricity. The transport of liquid manure over longer distances is to be avoided. This intention is welcome from an ecological point of view. However, in view of the current market value of liquid manure due to developments in the fuel sector, it is questionable whether this will actually make local electricity generation from liquid manure attractive enough compared to transport to biogas upgrading and feed-in plants. Unfortunately, the new regulations were not extended to existing plants.

The EEG brings another positive change for the follow-up support of biogas plants. Those who are awarded a contract in the tender for existing plants now have five years (instead of the previous three years) to switch to follow-up support. This gives plant operators a wider choice of possible tender dates and allows them to be sure about the follow-up subsidy at an early stage.

3. Changes due to the EnSiG Amendment Act

In response to the extreme price increases on the electricity market, the legislator added a transitional provision on the maximum rated output to Section 100 (16) EEG 2021 in October 2022. According to this provision, in 2022 and 2023, the subsidy entitlement will apply not only to the maximum rated output, but to the entire amount of electricity generated. Operators of biogas plants should thus have an incentive to produce more electricity in order to contribute to easing the situation on the electricity market. However, any additional revenue generated by exceeding the maximum rated output is partially offset

against the entitlement to the flexibility premium. The regulation is therefore unlikely to have an incentive effect. The legislator also overlooks the fact that the high market prices alone were already sufficient to make "overproduction" attractive.

A further "worsening" is to be found in Section 100 (17) EEG 2021: According to this, the manure bonus is not to be definitively discontinued if the minimum proportion of manure has not been complied with from October 13, 2022 to April 30, 2023. However, this legal consequence is actually self-evident, because the EEG 2009 does not provide for a final discontinuation of the manure bonus anyway. The legislator's wording consolidates a contrary, restrictive interpretation of the law.

Both amendments are no longer reflected in the EEG 2023. However, they are likely to continue to apply via the transitional provisions for all plants that were commissioned before January 1, 2023 or that received an award before January 1, 2023.

Assessment on the changes for biomass, biogas and biomethane:

The changes for biomass, biogas and biomethane through the EEG 2023 are manageable. The subsidy focuses on highly flexible "biomethane peakers" that have to manage with a maximum rated output of only 10 percent. In some cases, this could make sensible heat utilization impossible.

The EEG 2023 brings improvements for small-scale liquid manure plants, which no longer have to be built over.

Unfortunately, the legislature has overlooked correcting the continuation of the so-called flex cap for plants that have already flexibilized for the first time before January 1, 2021.

Supposed relief in the transitional provisions to the EEG 2021 is also likely to be rather counterproductive: The production of additional electricity by biogas plants will be inhibited rather than promoted; the regulation on the manure bonus consolidates an overly restrictive interpretation of the law.

III. Wind energy

1. Changes to the tender rules

a) Tender volume

§ Section 28 EEG 2023 again provides for four bidding dates per year for onshore wind energy (February 1, May 1, August 1, and November 1), to which the annually determined bidding volumes are evenly distributed. In 2023, 12,840 megawatts will be put out to bid. For the subsequent years 2024 to 2028, the tender volume will be 10,000 megawatts per year, resulting in a total installed capacity of 62,840 megawatts by 2028.

However, the specific tender volume may change according to various regulations:

- Section 28 (3) EEG 2023 provides for an increase rule. According to this rule, from 2024 onwards, the quantity put out to tender is to be increased in each case by the quantities for which no awards were made in the previous year in the tenders for onshore wind turbines.

- However, the tender volume may also be reduced - and to a greater extent than under the EEG 2021: Not only the awards from international tenders and the total output of the pilot wind turbines promoted for the first time in the previous year result in a reduction in the tender volume. The reduction must also take into account onshore wind turbines that were reported as commissioned in the previous year and for which no applicable value has been determined or for which an applicable value has at least not been determined through tenders. The same applies to innovation tenders pursuant to Section 39n EEG 2023 and tenders for innovative concepts with hydrogen-based electricity storage pursuant to Section 39o EEG 2023. In the future, by March 15 of each year, the Federal Network Agency will determine the quantity to be added (or also to be deducted for international tenders or pilot wind turbines) and distribute it evenly over the following three tender rounds.

- A real innovation is a cross-technology consideration of the expansion progress: If the expansion path for the installed capacity of solar plants (§ 4 number 3 EEG 2023) has been undercut, the Federal Network Agency can increase the tender volume for wind energy by up to 30%, cf. § 28 paragraph 3a EEG 2023. The Federal Network Agency can also make such an increase in the case of an undercut of the electricity volume path according to § 4a EEG 2023. The third case of the possible 30 % increase

is a gross electricity consumption that has increased more than that on which § 1 (2) EEG 2023 is based.

- Mirroring the 30% increase, the Federal Network Agency can reduce the tender volume for wind energy by up to 30% if the expansion path for solar energy has been exceeded, the electricity volume path has been exceeded, or gross electricity consumption has increased at a slower rate.
- The "catch-up" of unrealized surcharges from the previous rounds (Section 28(5) EEG 2023) continues to exist and now refers to the bid quantity of surcharges issued after December 31, 2022 and cancelled before the announcement of the respective bid date.
- The reduction in the event of imminent signature pursuant to Section 28 (6) EEG 2023 remains essentially unchanged, but now also takes into account citizen energy companies.

b) Tender rules in detail

As with the solar tenders, the basic legal framework for the wind tenders remains largely unchanged - the changes in the EEG 2023 relate more to details. Thus, an entitlement to support outside of the tenders continues to exist only for small onshore plants (whereby the capacity limit was raised by one third to an installed capacity of up to and including 1 MW), continues to exist for pilot wind energy plants (for onshore plants up to a total capacity of 125 MW per year) and, more recently, for wind energy plants of citizens' energy companies with an installed capacity of a maximum of 18 MW.

Shortly before the end of the year, the Federal Network Agency made use of its authority to set the maximum value for wind tenders in 2023, as regulated in Section 85a of the Renewable Energy Sources Act (EEG), and set it at 7.35 ct/kWh. The adjustment of the maximum value was made as a reaction of the Federal Network Agency to the increased costs in the area of the construction and operation of plants as well as to increased interest costs in the financing of plants.

2. Other changes

In addition, there have been some changes to the wind tenders. The most important ones at a glance:

- The so-called "southern bonus" (§ 36d EEG 2021) is omitted in the EEG 2023. Some support for the south is now provided via the general instruments of quality factor and correction factor (§ 36h EEG 2023). Thus, only for the South region another level, namely a quality factor of 50 %, has been introduced. With a quality factor of 50 % or below, the correction factor in the southern region is 1.55.

- When calculating the value to be applied for the specific plant on the basis of the surcharge value, a further correction level will in future only be introduced for particularly low-wind locations in the southern region (see the preceding paragraph). For plants in other regions, a quality factor of 60 % will continue to apply as the lowest level. For a quality factor of 60 % and below, the correction factor for the calculation is now 1.42 (see § 36h EEG 2023). Until now, the lowest correction level here was a quality factor of 60 % with a correction factor of 1.35. According to the explanatory memorandum, the amendment is intended to provide a further incentive to also develop low-wind sites in order to also "strengthen the approval dynamics" and increase the "overall competitive intensity required for the tenders". However, there are some doubts as to whether this can be achieved effectively with such a regulation.

- § Section 24 (2) EEG 2023, the previous plant aggregation regulation for ground-mounted solar plants, is also to apply to wind energy plants in the future. This means that wind turbines are to be combined in terms of output (also across operators) if they are commissioned within the same municipality responsible for planning within 24 calendar months at a distance of up to 2 km as the crow flies (measured from the center of the tower). In the case of wind turbines, however, this provision is to apply expressly only for the purpose of determining the power threshold pursuant to Section 22 (2) No. 3 EEG 2023 (18 MW threshold for citizen energy projects, see below).

- In the definition of pilot wind turbines in the form of so-called prototype turbines, the power limit of 6 MW - which is already outdated for prototypes - is to be abolished in future in line with the amended requirements under state aid law, cf. section 3 no. 37 EEG 2023. Larger plants, which are the first two plants of their type to be commissioned and reported to the market master data register and which contain significant technical innovations and still require a type test or unit certification, can

thus in future be operated without tendering or claim a legally defined subsidy in accordance with § 46 EEG 2023.

- The EnSiG Amendment Act introduced a new Section 31k of the Federal Immission Control Act (BImSchG). Upon application by the operator, the competent authority is to allow deviations from individual requirements contained in the permit with regard to noise at night and shadow flicker from the wind turbine in order to increase the wind turbine's electricity generation. This regulation is limited in time until April 15, 2023. If the lifting of the alarm or emergency level gas occurs before this date, the approval of the deviations already ends at the end of the last day of the quarter following the lifting. The immission values from the permit then apply again.

- Finally, there is another change that, although not included in the EEG 2023, will have an effect in the period from January 1, 2023: For onshore wind turbines that have been awarded a contract in a tender before July 29, 2022, a newly inserted Section 100 (15) EEG 2021 provides for the possibility of the Federal Network Agency extending the realization period once by six months upon (informal) application. This is intended in particular to take account of pandemic and war-related supply bottlenecks in plant construction. It should be noted, however, that only the implementation period in the narrower sense has been extended, after which the contract expires. However, the deadline for the start of the remuneration period (cf. Section 36i EEG 2021) and the penalty periods (cf. Section 55 (1) EEG 2021) have not been extended, which is why there is still a strong economic incentive to implement the plants as quickly as possible.

3. Citizen energy companies

For the privilege of exemption from the obligation to participate in the invitation to tender pursuant to Section 22 (2) No. 3 EEG 2023, further requirements must be met in addition to the requirements for citizen energy companies described in III. 3. above.

For example, the citizens' energy society must notify the Federal Network Agency no later than three weeks after the BImSchG permit has been issued, stating the registration number, that the (planned) onshore wind turbines are installations of a citizens' energy society. This means, among other things, that the citizens' energy society must already have at least 50 natural persons as voting members/shareholders at the time of notification.

Some relief was provided with regard to the blocking periods with respect to other project participations: In order to benefit from the privilege for citizen energy companies, neither the citizen energy company nor its voting members/shareholders - if they are legal entities, so this restriction does not apply to natural persons! - or the companies associated with them, have operated or will operate onshore wind turbines for a period of three years. This averts a tightening that was initially included in the draft bill of the EEG 2023. There, it was envisaged that the lock-in period would be five years and the restriction to legal entities was also not clear. This would have become a major obstacle, so the abandonment of this idea is very welcome.

The exemption from the obligation to participate in the tendering process applies only to those wind citizen energy companies that have an installed capacity of no more than 18 MW. It must be taken into account that the plant aggregation pursuant to Section 24 (2) EEG 2023 is to be applied for this purpose. According to the wording, this does not exclude the inclusion of other, i.e. non-citizen wind energy plants. However, this goes beyond the effort to prevent an artificial splitting and is probably not intended. In accordance with the meaning and purpose of the regulation, we therefore consider it necessary to include only those wind turbines under Section 24 (2) EEG 2023 that are themselves operated by a citizen energy company.

The existence of the requirements for the existence of a citizens' energy company within the meaning of section 3 number 15 EEG 2023 (see above C. IX.) must also be proven to the grid operator upon commissioning and every five years thereafter. If the proof is not provided in due time and not subsequently submitted within two months, the entitlement to support shall lapse (cf. Section 22b (4) EEG 2023).

4. Municipal participation model in the wind sector

In addition to the general regulations for the participation of municipalities (see generally above C. XII), it must be specified for wind energy which municipalities are "affected" and which are not. This involves a radius of 2,500 meters around the wind turbine, measured from the center of the tower. Municipalities whose municipal area lies - at least in part - within this radius are considered to be affected, cf. § 6 Paragraph 2 Sentence 2 EEG 2023. In the case of areas that are not assigned to a municipality (municipality-free areas), the corresponding district is considered to be affected.

Assessment on the changes in the wind energy sector:

The EEG 2023 basically brings selective changes and improvements to the legal situation for onshore wind energy, which are to be welcomed, but cannot contribute sufficiently to the expansion of wind energy. The increase of the maximum values in the tenders - already from the first tender in February - is a correct reaction of the Federal Network Agency. However, the legislator should do the same for wind turbines with a legally defined value to be applied.

Moreover, with regard to the regulations on citizens' energy companies, the distrust of the legislator is more than obvious in view of the experience gained from the implementation of the first BEG regulations from 2017: The strict requirements and the associated increase in bureaucratic effort as well as legal uncertainty in the realization of citizens' energy projects may lead to citizens' energy becoming less attractive for small and medium-sized market players in the future. A typical example of such requirements is the very short deadline of three weeks for notifying the Federal Network Agency pursuant to Section 22b (1) No. 2 of the Renewable Energy Sources Act 2023, which, in connection with the prospectus requirement generally imposed on citizen energy companies, represents a major hurdle in project development.

Measures to improve the approval situation remain crucial for the faster expansion of onshore wind energy, which is urgently needed to achieve the climate targets. These should be taken as quickly as possible.

IV. Hydropower

For hydropower plants, the EEG 2023 - like the previous amendments - brings hardly any innovations. In particular, the support for so-called "small hydropower" (hydropower plants with an output of up to 500 kW) will be retained in the EEG 2023, after initial drafts in the

legislative process of the Easter package still provided for the removal of support for these plants.

The only change compared to the EEG 2021 is that the value to be applied for hydropower plants is reduced as follows (cf. § 40 (1) EEG 2023):

- from 12.15 cents to 12.03 cents (rated power up to and including 50 kW)
- from 8.01 cents to 7.93 cents (rated output up to and including 2 MW)
- from 6.13 cents to 6.07 cents (rated output up to and including 5 MW)
- from 5.37 cents to 5.32 cents (rated output up to and including 10 MW)
- from 5.18 cents to 5.13 cents (rated output up to and including 20 MW)
- from 4.16 cents to 4.12 cents (rated output up to and including 50 MW)
- from 3.4 cents to 3.37 cents (rated output of more than 50 MW)

E. Storage and sector coupling in the EEG 2023 and the EnFG

There are also some changes in the EEG for storage and sector coupling technologies, but unfortunately some urgent changes are still missing:

I. Charges and levies on electricity storage systems

The regulation on the burdening of storage electricity with end consumer levies has been outsourced to the newly created EnFG. With the abolition of the EEG levy, the topic as a whole and the various legal uncertainties and ambiguities discussed in this regard in the context of Section 61l EEG 2021 have become massively less important. The fact that the EnFG only requires levies to be paid on grid electricity makes things easier. In the case of decentralized concepts, no levies are payable at all - and not only for storage facilities. Previously, it was often not possible to meet the metering obligations, so that there was effectively a double burden. In view of the elimination of the EEG surcharge, this can no longer happen, and for other end-consumer levies, this can only happen in the case of concepts in which electricity is drawn from a general supply network and fed back into it. Without renewed feed-in into such a network, there is no second network withdrawal that could be the starting point for the incurrence of end-consumer levies.

The fundamental problem that the storage of electricity qualifies as final consumption under the currently applicable situation of energy law and that there is a risk of double charging with levies and surcharges if the electricity is later "genuinely" consumed, still exists. This consequence should continue to be avoided by the balancing concept now regulated in § 21 EnFG, although some legal questions raised by § 61l EEG 2021 remain. Among other things, it remains completely unclear for the time being which technical components are still to be attributed to the storage facility (e.g. cooling?).

II. Exclusivity principle persists

Furthermore, the storage-related exclusivity principle (still to be found in the unchanged § 3 number 1 2nd half-sentence EEG 2023) continues to lead to the fact that each stored kWh of gray electricity causes the entire green electricity contained in the storage facility to "gray out". It remains to be seen whether the legislator will also establish this term in the EEG in the course of the new definition of "energy storage facility" in § 3 number 15d EnWG (moving away from storage as "end consumer and producer" to an independent meaning as an element of the temporal shift in the use of energy), which will come into force on July 1, 2023, and in the course of this will provide for coherent legal consequences for energy storage facilities.

III. Hydrogen : Definition and two new tender segments

The regulations on hydrogen projects have been further expanded in the EEG 2023, although again - as with the EEG 2021 - far-reaching regulations were only added at the end of the legislative process in committee.

On the one hand, a definition for "Green Hydrogen" has been included in § 3 number 27a EEG 2023, whereby this definition ultimately refers to the requirements of the legal ordinance according to § 93 EEG. Secondly, two new tender segments have been created:

1. Call for tenders for innovative concepts with hydrogen-based electricity storage

The new regulations in §§ 28f, 39o and 88e EEG 2023 contain requirements for tenders for plant combinations of generation plants with a chemical electricity storage system that uses hydrogen as the storage gas. Specifically, innovative concepts are generally understood to be plant combinations of onshore wind turbines or solar plants with hydrogen as the storage

gas. However, according to the far-reaching authorization to issue ordinances under Section 88e of the Renewable Energy Sources Act 2023, it is also possible to specify, for example, that plant combinations may also include plants of different renewable energies.

According to the tender requirements pursuant to Section 39o (2) EEG 2021/2023, operation that serves the electricity or gas grid is not possible. This follows from the fact that the plant combination must feed in electricity via a common grid interconnection point, the stored hydrogen must have been produced exclusively by electrolysis from the electricity of the other plants in the plant combination, the hydrogen must not have been fed into the grid beforehand, the hydrogen must be used exclusively for the generation of electricity, and only the hydrogen produced and stored in the chemical storage facility must be used for the generation of electricity.

Since there is no hydrogen grid so far, hydrogen-based electricity storage and hydrogen reconversion are initially to be tested on a site-specific basis. According to the explanatory memorandum, the chemical electricity storage system is to consist of separate plants for hydrogen electrolysis, hydrogen storage and hydrogen reconversion, in order to test the technologies for the later planned spatially separated generation and reconversion of hydrogen. However, one searches in vain for these technical requirements in the law (so far).

In the course of the future expansion of a hydrogen network, the existing plants are to be developed, Section 39o (2) Sentence 3 EEG 2021/2023. As soon as such a hydrogen network exists, there will no longer be a need for tenders in this form, so that the last bidding date is scheduled for 2028. The bidding volume is to increase from 400 MW to 1000 MW during these years.

There has been much criticism of this implementation, since the importance of hydrogen lies in its cross-sectoral use, which is not covered by this tender design. In view of the considerable energy losses during the interim storage and subsequent reconversion of hydrogen into electricity, the question of economic viability also arises. A not inconsiderable maximum value is likely to be required in the tenders so that operators can submit an economically viable bid. In this respect, the draft of the ordinance pursuant to Section 88e EEG can be awaited with bated breath.

2. Tenders for the generation of electricity from green hydrogen

The tenders provided for under the new regulations in § 28g, 39p and 88f EEG 2023 do not address combinations of generation and storage plants; instead, only electricity generation from hydrogen is promoted.

The decisive requirements for green hydrogen and for the tenders themselves will be defined in ordinances, cf. the comprehensive ordinance authorizations in §§ 88f and 93 EEG 2023.

The tenders are limited with annually increasing volumes from 800 MW to 1400 MW until 2026.

The privileges for hydrogen previously contained in the EEG with regard to the EEG surcharge and other final consumer charges are now largely obsolete with the abolition of the EEG surcharge. The former sections 64a, 69b EEG 2021 have been transferred to the EnFG, but will in future only affect the KWKG levy and the offshore grid levy. In the EnFG, both the special equalization scheme for - quality-independent - hydrogen projects in electricity-cost-intensive companies, which was previously regulated in the EEG, are to be continued in principle (§ 36 EnFG) and the special equalization scheme for - quality-independent - hydrogen projects in electricity-cost-intensive companies, which was previously regulated in § 69b EEG 2021 in conjunction with §§ 12h ff. §§ 12h ff. EEV for decidedly green hydrogen projects (§§ 25 ff. EnFG). The precise requirements for green hydrogen in this sense are to be specified by the German government in an ordinance (section 26(2) EnFG). However, it can be assumed that the German government will currently await developments at the European level, where a so-called delegated act of the EU Commission is currently being prepared to specify the requirements for green hydrogen to be taken into account in the context of greenhouse gas reductions in the fuel sector. It can be assumed that the German government will then also use the criteria for green hydrogen defined there as a basis for the EnFG and the ordinance to be drafted.

Assessment on the changes in the area of storage and sector coupling:
The assessment of the EEG 2023 from the perspective of storage and sector coupling is mixed:

The EEG 2023 brings some specific improvements for storage and sector coupling. In addition, storage operators, like other industry players, will also benefit from the elimination of the EEG surcharge and the associated - considerable - reduction in the complexity of decentralized energy concepts.

However, the legal situation for storage facilities in Germany, which is unclear in many respects, has not yet been fundamentally addressed by the EEG 2023. Urgently needed changes such as the amendment or abolition of the exclusivity principle for storage facilities are sought in vain. At least a uniform definition of electricity storage in section 3 number 15d EnWG will come into force on July 1, 2023. It is to be hoped that the storage strategy announced for this date will also include the overdue clarifications in the EEG.

For hydrogen, it will only be possible to draw an interim conclusion once the regulations on the new tender segments are available. This will determine the economic opportunities that are likely to arise. In addition, the requirements for "green hydrogen" have not yet been specified at EU level, nor have they been implemented in the German legal framework. In any case, the hanging game in the field of hydrogen will continue for a while yet.

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