vonBredow Valentin Herz

Partnerschaft von Rechtsanwälten mbB

vBVH newsletter

on the EEG 2021

Note on this newsletter

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Dear readers,

Now the time has come: In addition to the New Year, we also welcomed the EEG 2021 on 1 January. The legislative process took place under great time pressure until the very end, which of course may also have been due to this highly unusual year: While the draft law - which had been expected much earlier in the industry - was only leaked in mid-September 2020 and then introduced into the official legislative process after an extremely tight "hearing" of associations (for which only three days were granted), another two months passed before the law finally passed the Bundesrat on 18 December. On 28 December 2020, the law was published in the Federal Law Gazette so that it could enter into force just in time for 1 January 2021. You can find an overview of the legislative process here.

The fact that legislative procedures for the EEG take place under great time pressure and are driven by external influences, not infrequently European law, is nothing new for those who accompany this law. However, the hectic pace of this year's amendment was unprecedented. Literally "at the very last minute", far-reaching changes were made to the draft law, especially in the Bundestag Committee for Economic Affairs and Energy. These were numerous minor changes compared to the first draft law, but in some cases entire blocks of regulations were newly inserted (e.g. with regard to the EEG surcharge for hydrogen projects) or far-reaching changes were made (e.g. within the framework of promotion for solar systems or for self-supply). Critical voices note that this procedure, by which important steps of the parliamentary legislative procedure were "omitted" for some essential parts of the law, certainly raises constitutional questions. In any case, it is obvious that such a hectic legislative procedure with multiple interventions in an already highly complex structure such as the EEG, with numerous amendments and re-amendments and systematic reorganisations, is very unlikely to be conducive to the quality of the law. This is already evident in some places in the new law, which certainly raise questions. As is so often the case, it is now up to practice to find a way to deal with this and to further advance the energy transition with the new regulations. The EEG 2021 certainly contains some positive approaches to this...

With this in mind, we are pleased to present the EEG 2021 - now in its final version - to you in this special newsletter and to support you in your next projects!

Your lawyers at the law firm von Bredow Valentin Herz

About vBVH

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

With a highly qualified team of currently ten 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. Of course, we also represent our clients' interests before courts and authorities.

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Content

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A. Preliminary remark: An outlook towards Europe - How does the EEG 2021 implement the European legal requirements?

I. Implementation of the EU's Clean Energy Package

According to a footnote to its title and various passages in the explanatory memorandum, the amendment to the EEG 2021 also serves to implement EU Directive 2018/2001 of 11 December 2018, i.e. the Renewable Energy Directive (hereinafter: RES Directive).Whether and to what extent the EEG 2021 actually already implements the European legal requirements is disputed. In order to classify the discussions in this regard somewhat, we provide you below with a brief overview of the most important key points of the current influences of European law on the EEG 2021.

The RES Directive, also known as Renewable Energy Directive II (RED II), is part of the so-called "Clean Energy for All Europeans" package (also: "Clean Energy Package", in short: CEP). The Clean Energy Package is a package of measures of the EU consisting of several directives and regulations in the areas of internal electricity market regulation, renewable energies and energy efficiency.

The RES Directive replaces the previous Directive 2009/28/EC. Its aim is to increase the **share of energy from renewable sources in the gross final energy consumption of the Union to at least 32 percent in 2030.** According to its Article 1, the purpose of the RES Directive is to create a common framework for the promotion of energy from renewable sources. It contains numerous rules for the financial support of electricity from renewable sources and the self-supply of such electricity, for the use of energy from renewable sources in the heating and cooling sector and in the transport sector, for regional cooperation between Member States and between Member States and third countries, for guarantees of origin, administrative procedures and information and training. Furthermore, criteria for sustainability and greenhouse gas savings for biofuels, bioliquids and biomass fuels are prescribed. With regard to the **EEG 2021,** Articles 3 (Binding overall Union target for 2030), 4 (Support schemes for energy from renewable sources), 19 (Guarantees of origin for energy from renewable sources), 20 (Access to and operation of the grids), 21 (Renewables self-consumers) and 22 (Renewable energy communities) of the RES Directive are of particular interest.

The provisions of the RES Directive are not directly effective in the Member States, first they need to be transposed into national law. This is precisely the purpose of the EEG 2021. The **deadline for transposition of the RES Directive is 30 June 2021**. After this point in time, member states can be accused of violating the Directive, or the Directive can even have direct effect within certain limits if it has not been adequately transposed. However, discussions are already in full swing as to whether and to what extent the provisions of the EEG 2021 actually implement the requirements of the RES Directive completely and correctly or whether there is still a need for further improvements. From the perspective of the renewable sector, the concrete implementation of Articles 4, 21 and 22 of the RES Directive is particularly relevant:

- **Article 4 of the RES Directive** states, among other things, that **national support schemes** for the maximum integration of electricity from renewable sources into the electricity market should provide incentives for a *"market-based and market-responsive integration of electricity from renewable sources into the electricity market"*. These should also lead to renewable energy producers *"responding to market price signals and maximising their market revenues"*. Floating or fixed premiums are mentioned as possible instruments. Electricity from renewable sources shall also be *"promoted in an open, transparent, competitive, non-discriminatory and cost-effective manner"*. Article 4 does not finally prescribe the use of **auction procedures.** However, tendering procedures are mentioned several times in the recitals as well as in Article 4 as a standard case of implementation. Exceptions may still be made for small-scale installations (although it remains unclear exactly what is meant by this) and demonstration projects. If the standard of Article 4 of the RES Directive is applied to the EEG 2021, it can be seen that national latitudes with regard to possible exemptions from tendering is still not being used. However, this is of course not a violation of the Directive. According to our current assessment, the EEG 2021 is rather in line with Article 4 of the RES Directive.

- This is different, however, with regard to **Article 21 of the RES Directive,** which for the first time makes explicit European legal provisions with regard to the regulations of the Member States on **self-supply** and here reveals a remarkably prosumer basic orientation. According to Article 21 of the RES Directive, Member States shall ensure that consumers have the right to become self-suppliers of renewable electricity. In detail, Article 21 contains a long list of rights for self-suppliers and guidelines for the Member States on how the legal framework for self-suppliers should look. This also concerns, for example, the **exemption from charges and levies,** which should only be permissible for self-suppliers in narrowly defined exceptional cases. **Joint self-supply** should also be possible in principle. If Article 21 of the RES Directive is applied consistently to the EEG 2021, in our view there are various **violations of the RES Directive,** which are likely to continue to be hotly debated even after the conclusion of the legislative process (see in detail below D.). However, one main point of contention, the burdening of self-supply from small-scale EEG installations with the EEG surcharge, has been significantly defused by the extension of the so-called de minimis rule to installations with a capacity of up to 30 kW.

- Particularly interesting from the perspective of European law in the course of the discussions on the EEG 2021 is **Article 22 of the RES Directive,** which explicitly provides that renewable energy communities of end customers should be possible and that they should have certain rights to jointly generate, purchase and use green electricity. In the EEG 2021, however, this approach of renewable energy communities has not been mentioned so far, nor has the joint self-supply provided for in Article 21 of the RES Directive.

Closely related to Article 21 of the RES Directive are the provisions on **storage and active customers (prosumers)** in the Electricity Market Directive (hereinafter: "EM Directive", also referred to as Market Design Directive or MDD). Among other things, the EM Directive provides for a **definition of energy storage in** Article 2 (59) and formulates clear requirements for the national legal framework for prosumers and storage operators in Article 15. Here, too, it is currently highly controversial whether and to what extent these regulations have been sufficiently addressed in the EEG 2021 (see D. below).

II. Reservation of approval under state aid law in the EEG 2021

An interesting new provision in the EEG 2021, which is also closely related to European law requirements, is Section 105 EEG 2021. The provision is entitled **"State aid approval reservation"**. According to this provision, the provisions of the EEG 2021 for electricity from installations for which a claim under this Act is established after 31 December 2020 may only be applied after approval under state aid law by the European Commission and in accordance with this approval.

Some people may now be listening with irritation - after all, the ECJ had recently ruled that the support mechanism of the EEG does not constitute a typical subsidy and is therefore not subject to the strict law on state aid (we reported). The main reason for this was that the EEG compensation mechanism is ultimately handled exclusively between private actors (grid operators, end consumers, installation operators) and is not financed by the state budget or directly controlled by public authorities.

However, the inclusion of such a reservation had now become necessary as a result of the decision of the Federal Government within the framework of the climate protection package to cap the EEG surcharge and to provide the necessary funds for this from the state budget. As a result of this (planned) **payment of state funds into the EEG surcharge account,** it must now be assumed that the EEG is to be regarded as aid within the meaning of the restrictions under European law, which is why a corresponding reservation of approval was included.

The reservation has - as feared in advance - already had a direct impact on practice. Due to the short notice of the legislative procedure, the **Commission's approval** has not been received by the time this newsletter is sent out, so that grid operators are currently confronted with the question of whether they may make payments at all on the basis of the EEG 2021 and installation operators are facing liquidity bottlenecks due to the withholding of payments. For the **transitional period,** the Federal Ministry for Economic Affairs and Energy has published **answers to some of the currently most urgent practical questions** in this context on its website (available here): In particular for the follow-up support for Ü20 wind energy installations , restrictions currently still apply here because the support cannot be paid out without approval. For this reason, only the market value is to be passed on for the time being, as is also the case with smaller old installations. The promotion can only be paid out once approval under state aid law has been obtained. The same applies to the statutory "fixed

remuneration" provided for in the EEG 2021 for new installations outside of the auction procedures. This can also only be paid out after approval. Until approval has been granted, installation operators are to receive the remuneration provided for in the EEG 2017. For new installations in the auction procedure, awards are to be made in accordance with the provisions of the EEG 2021, but subject to the condition precedent of approval being granted. As soon as approval has been granted, the promotion is then to be paid out. If the EEG 2021, or even individual parts and provisions thereof, are not approved by the Commission, these regulations may not be applied. The Federal Ministry for Economic Affairs and Energy also explicitly admits this possibility on the website linked above. It is therefore to be hoped that the Commission's approval will be received as soon as possible and that this phase of uncertainty will thus come to an end.

B. General changes with effects for all energy sources

I. Transitional provisions: To whom does the EEG 2021 apply?

When a new EEG comes into force, the first question is always to whom it should apply: Only for new installations? Also for the entire stock? Or only in parts? This, in turn, determines how complicated the transitional provisions will be. Whereas the EEG 2014 and EEG 2017 were almost frighteningly confusing and complex, the reader of the EEG 2021 almost breathes a sigh of relief. The transitional provisions in the EEG 2021 seem relatively lean at first (at least by EEG standards).

This is also due to the transitional system itself: **The EEG 2021 only applies directly to new installations**, i.e. those that are **commissioned from 1 January 2021** or whose **value to be applied has been determined in an auction from 1 January 2021.** For all older installations and for research pilot wind energy installations whose status was already determined before 1 January 2021, the EEG 2017 remains applicable (and according to its transitional system, the EEG 2014 for installations commissioned before 1 August 2014 - so in the future, three different EEG versions will ultimately apply "side by side"). It should be emphasised that the transitional provisions of the EEG 2021 - in contrast to the EEG 2017 - are not only based on the **commissioning date** of the installations, as was previously the case, but also on the **bid deadline** in which an award was received, if applicable. For operators who successfully participated in an auction with their installations before January 2021, the EEG 2017 will therefore continue to apply.

In addition, however, the EEG contains a whole series of regulations whose effect is also to be extended to existing installations. This is explicitly stipulated in the transitional provisions (cf. Section 100 (2) ff. EEG 2021). Unfortunately, it is not quite so easy to identify the right regulations for one's own installation in each individual case. In the future, one will therefore always have to check - in addition to the continuing regulations in the EEG 2017 or EEG 2014 (depending on the commissioning of one's

own installation) - whether the EEG 2021 contains a new regulation whose effect is extended to one's own installation.

Ultimately, it remains the same as always with the EEG: operators of existing installations are well advised to observe the amendment process closely and, once it is completed, to inform themselves thoroughly about which of the new regulations will affect their installations and how. If particularly relevant, we will discuss the regulations for existing installations below, if the new regulations apply to them.

II. Quantity structure and development corridor

The target to be achieved by 2030 was already laid down in the EEG 2017 and will be adopted unchanged in the EEG 2021: In the next ten years, the share of electricity generated from renewable energies in gross electricity consumption is to increase to 65 percent. New is the explicit **long-term goal of greenhouse gas neutrality** by "before" the year 2050. The explanatory memorandum to the Act explicitly states that this goal should already be achieved in the electricity sector in the course of the 2040s.

There is much criticism of the fact that, according to the explanatory memorandum, a gross electricity consumption of 580 TWh was assumed for the achievement of the 65 percent target in 2030. From this, a required electricity generation from renewable energies of 377 TWh was derived. It is often noted that the projected future electricity consumption is likely to be significantly too low, at least if the requirements of increasing sector coupling for the rapid decarbonisation of the entire energy system and industry are taken into account. At the latest when considerable amounts of electricity also have to be used to make electromobility, green hydrogen production and other power-to-X applications possible on a large scale, it may be questionable whether the electricity demand on which the statutory expansion targets are based in the EEG 2021 is not too low. However, according to the explanatory memorandum, this is to be **reviewed on an ongoing basis** and the expansion targets adjusted if necessary - especially with regard to the development of sector coupling.

In order to be able to check whether this overall target can be achieved, the legislator has now also specified concrete electricity quantity-related annual **interim targets** for the next nine years in the new Section 4a EEG 2021. In this way, it is to be constantly checked on the basis of the specific quantities of electricity generated from renewable energies whether the overall target is being achieved (the fact that the overall target is quite controversial and could well be readjusted in the future has already been mentioned). In 2021, a total of 259 TWh of electricity is to be generated from renewable energies. This amount is then to increase continuously each year in predefined steps. By 2029, the targeted 376 TWh from renewable energies should be reached.

To achieve the statutory targets, Section 4 EEG 2021 prescribes **new development corridors** for individual energy sources. The following increase in installed capacity is envisaged for onshore wind energy installations:

- to 57 gigawatts in 2022,
- to 62 gigawatts in 2024,
- to 65 gigawatts in 2026,
- to 68 gigawatts in 2028
- and to 71 gigawatts in 2030.

The expansion of offshore wind energy installations continues to be governed by the Offshore Wind Energy Act. This provides for a total of 15 gigawatts of installed capacity to be connected to the grid by 2030.

The following development corridor is envisaged for solar installations:

- to 63 gigawatts in 2022,
- to 73 gigawatts in 2024,
- to 83 gigawatts in 2026,
- to 95 gigawatts in 2028
- and to 100 gigawatts in 2030.

An installed capacity of 8,400 megawatts is planned for biomass installations in 2030.

As in the EEG 2017, Section 5 of the EEG 2021 provides for the possibility of **receiving an award with installations constructed abroad**. While it was previously provided that 5 percent of the total annual installed capacity could also receive an award in another member state of the European Union, the provision in Section 5 EEG 2021 stipulates that this amount can be exceeded through the cross-border expansion of offshore wind energy installations. This is intended to promote cooperation with neighbouring states for the cross-border expansion of offshore wind energy. 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.

Assessment:

However, as the last few years have shown, the expansion targets laid down in the law and the auction volumes derived from them alone are no guarantee that the corresponding expansion will actually proceed at the required pace. The "bottleneck" for many projects - especially in the wind sector, but increasingly also for large-scale ground-mounted solar projects - is more likely to be due to the shortage of land and the difficult situation with regard to planning permission. For example, since the EEG 2017 came into force, it is well known that the auction for onshore wind energy installations have been widely below the bid quantity. In some cases, the bids submitted covered less than 50 percent of the auction volume. In order to actually drive forward the expansion of onshore wind energy installations, accompanying measures are still urgently needed to address the shortage of space caused by planning and the long duration of the approval procedures. Also, the basis for further expansion planning remains highly controversial with the forecast future electricity demand. All in all, however, the law does show the political will to push ahead more energetically with the energy transition in the electricity sector. It is to be hoped that the measures now envisaged in the EEG 2021 can contribute to this - but they will certainly not be enough.

III. Clause on public safety and interest Section 1 (5) E-EEG 2021)

The provision of Section 1 (5) E-EEG 2021, which was still envisaged in the first draft of the EEG 2021, was deleted during the legislative process and is no longer included in the EEG 2021 that finally came into force.

In the latter, the legislative statement was intended 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. 11), it is stated that this assessment has already been adequately legislated and is therefore not necessary in the EEG 2021. This may be true, especially due to the provisions in the Climate Protection Act (CPA), but the regulation in the EEG 2021 would still have been desirable - to avoid legal uncertainty. However, the deletion will not have any practical consequences, as the intended regulation was in fact only suitable to develop clarifying significance.

IV. Follow-up support for systems that have already been supported

From the legislator's point of view, one of the most pressing issues of the current EEG amendment was the future of the so-called **Ü20 installations**. It was eagerly awaited how the legislator intended to

treat installations whose 20-year support period had expired, i.e. all installations commissioned in 2000 or before. According to the legal situation applicable in the EEG 2017, the only way to continue operation of these installations was to sell the electricity generated in the non-supported **other direct marketing** (i.e. via so-called **PPAs**). However, it was also clear that the other privileges provided for in the EEG, in particular feed-in priority, compensation for lost revenue in the case of EinsMan measures, etc., would continue to apply to these installations.

In particular for **small-scale old installations, which in** many cases have no chance of obtaining meaningful direct marketing contracts under the current market conditions, there was still the prospect of disconnection or disconnection from the grid at the end of 2020, unless connection arrangements were made quickly. After all, they would not have been allowed to "wildly" feed into the grid from 1 January 2021 - when the grid operator no longer has to buy the electricity from them in return for the feed-in tariff. However, even **larger old installations** sometimes had poor (continued) operating prospects for the post-EEG phase, since in connection with the Corona crisis the "free" marketing options were simply difficult from an economic point of view.

Probably not least for this reason, the legislator fundamentally changed the regulations on so-called follow-up support literally at the last minute, and the EEG 2021 now opens up the possibility of being able to claim (initially adequate) follow-up support with certain installations that have been subsidised, thus creating an economic basis for the continued operation of many installations. For onshore wind energy installations that have been subsidised, it was also decided "at the last moment", i.e. shortly before the EEG 2021 was passed, that a special auction system would be introduced in the first half of 2021.

The new regulations of the EEG 2021 differentiate between onshore wind energy installations and all other installations with regard to follow-up support. Thus, the EEG 2021 introduces the following - time-limited - special regulations for all **installations whose support ended** exception of onshore wind energy installations:

- Operators of installations whose support ended **with an installed capacity of up to 100 kilowatts** can sell the electricity generated in their installations under the **new feed-in tariff for installations whose support ended** after the end of the support period. This even occurred automatically - provided the installations had previously been marketed under the feed-in tariff - if the installation operators did not make another permissible allocation of the electricity generated (such as to other direct marketing) in good time (i.e. by 18 December 2020, cf. Section 100 (5) sentence 2 EEG 2021).
- Within the framework of the new feed-in tariff for installations whose support ended, the electricity will continue to be purchased and remunerated by the grid operator.

- The entitlement to the follow-up funding outlined above exists **until 31 December 2027.**

- The value to be applied for these installations is the (energy carrier-specific) annual market value, from which the **electricity marketing costs of the** grid operator assumed by the legislator in the amount of 0.4 ct/kWh are to be deducted in 2021. From 2022 onwards, the marketing costs to be deducted shall be the value determined by the transmission system operators as the costs for marketing the electricity from installations whose support ended in accordance with the Renewable Energy Sources Ordinance and published on their website. If the extracted installations are equipped with **intelligent metering systems**, the deduction from the value to be applied is reduced by half in both cases.

- Contrary to the regulations still contained in the first drafts of the EEG 2021, the operators of installations whose support ended do **not have** to make the entire electricity generated in the installation available to the grid operator. This means that **self-supply or on-site supply to third parties from these installations is** also **permitted** without jeopardising eligibility for follow-up support.

- Operators of installations whose support ended with an installed capacity of **more than 100 kilowatts** do not receive any follow-up support. For these installations, the only option is still to sell electricity in other direct marketing (PPA).

The following special regulations - also limited in time - apply to **onshore wind energy installations that have been supported:**

- The entitlement to the follow-up support exists for all onshore wind energy installations whose support ended **until 31 December 2021.**

- The value to be applied for these installations is the (energy carrier-specific) **monthly market value**, i.e. the monthly average price for electricity from onshore wind energy on the electricity exchange, **plus**

  - 1.0 ct/kWh for electricity generated before 1 July 2021,
  - 0.5 ct/kWh for electricity generated after 30 June 2021 and before 1 October 2021, and
  - 0.25 ct/kWh for electricity generated after 30 September 2021 and before 1 January 2022

- A **flat rate of 0.4 ct/kWh** for the grid operator's electricity marketing costs is also **deducted from** this applicable value for onshore wind energy installations (Section 53 (1) number 2 EEG 2021). Unlike the follow-up support for all (other) installations up to 100 kW, there is no reduction here if a smart metering system is installed.

- In addition, an **auction system for wind energy installations whose support ended** is to be introduced in the first half of 2021. Operators of installations whose support endedwill then be able to receive a financial support in the form of an awardfrom auctions. The amount of the promotion will be based on the price offered and awarded, as is the case for new installations. The details of the auction system are not yet regulated in the EEG 2021. Section 95 no. 3a EEG 2021 merely contains an authorisation to issue an ordinance, according to which the Federal Government is to determine the details of the auction system for wind energy installations whose support ended in an ordinance. However, according to the legislator's wishes, the ordinance is to be issued as soon as possible, by 30 June 2021 at the latest. With regard to the exact form of the ordinance, the EEG 2021 provides for the following key points in particular:

  - Only wind energy installations whose support ended and are located on sites where **repowering** is **not** permitted under planning law are to be eligible for participation.
  - **Volume of auctions** to be 1,500 MW in 2021 and 1,000 MW in 2022
  - The **maximum value is** to be between 3 and 3.8 ct/kWh
  - There is to be a **limit on awards to** 80% of the bid volume in the event of a bidding round being below the auction volume.

- The entitlement to the follow-up suppport will exist **until 31 December 2022** for onshore wind energy installations whose support ended and have been **awarded a contract in an auction.**

Before (successful) participation in such an auction, wind energy installations can claim the general follow-up support for wind energy installations. The value awarded in the auction then applies from the beginning of the second calendar month following the bid deadline of the auction.

Assessment:

For **small-scale solar installations whose support ended**, the new regulations on continued financial support represent a minimum safeguard for revenues from the electricity fed into the grid and ensure the balance sheet acceptance of the surplus electricity. Especially for systems with a high self-consumption rate, a viable solution has been found.

The higher continued financial support for **wind energy installations** introduced "at the last moment" before the adoption of the EEG 2021 is certainly to be welcomed, especially from the point of view of operators of smaller wind farms or individual installations. At this point, however, it must be pointed out that these are precisely the regulations (follow-up auctions and increase in the value to be applied above the monthly market value) that have always been rejected by the legislator in recent years despite corresponding demands by market players. It was also against this background that many operators had long since concluded binding PPA contracts, which in retrospect proved to be less economically attractive, at the time when the continued financial support for wind energy installations was first announced in this form. The result of the legislator's about-turn is therefore that precisely those operators who had taken care of continued operation in good time are now being economically penalised. This could certainly have been prevented by a more transparent approach to the amendment and with more lead time.

The "losers" from this amendment on 17 December are again all **other installation** with an installed capacity of more than 100 kW, for which there will be no follow-up support despite the low electricity prices caused by the COVID 19 pandemic. Thus, the fundamental question of ensuring continued operation for these installations through the development of appropriate marketing models remains open.

V. Smart meters and installation control: Smart metering systems and stepless remote control for all?

1. Background and aim of the planned changes

The new Section 9 of the EEG 2021 will further promote the **digitalisation of the energy system in the** renewable energy segment by regulating the gradual introduction of **intelligent metering systems**, so-called **smart meter gateways, for** new installations and for all old installations after the corresponding market declaration by the Federal Office for Information Security (BSI) has been issued.

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 possibly also 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 installations as possible are controlled remotely in an interoperable and secure manner exclusively via certified smart meter gateways.

Hint:

The provisions of the Renewable Energy Sources **Act are, to** a certain extent, **"alongside" the already applicable provisions of the Metering Point Operation Act** (Mess**stellenbetriebsgesetz,** MsbG). In principle, the provisions on the obligation to equip with smart meters under the MsbG remain decisive for an obligation to equip under the EEG. In the MsbG, however, these equipment obligations are essentially directed at the grid operators as base-operated metering point operators. The main difference to the new regulations in the EEG 2021 is that the new regulations are **clear requirements for the system operators**, which can also be **sanctioned.** For this reason, it was also necessary to align the EEG with the MsbG in order to avoid a contradictory "coexistence" of the EEG 2021 and the MsbG. In principle, the legislator also took this into account with the last adjustments shortly before the EEG 2021 came into force and finally implemented it - at least to a greater extent than in the draft regulations initially contained in the government bill. Since the equipment obligations also affect existing installations, all installation operators are advised to **keep a close eye on the** issue and to keep themselves informed about who has to retrofit what and when.

2. New technical equipment obligations according to Section 9 EEG 2021: What applies to whom?

The date of the **announcement by the Federal Office for Information Security (BSI) that it is** technically possible to equip renewable energy systems with a smart metering system in accordance with the Metering Point Operation Act for the corresponding installation group is still decisive for the obligation to equip renewable energy systems with a smart metering system after the EEG 2021. This is the so-called **market declaration** (or somewhat casually formulated: the starting signal for the installation obligation for the respective installation group concerned). In addition to pure metering, it is also planned that in future - at least for certain installations - the control of the installations will also be carried out via the smart meter gateway. Therefore, the new regulations also contain differentiated specifications in this regard.

Hint:

The combination of the new provisions in Section 9 of the EEG 2021 for new installations and the associated transitional provision in Section 100 (4) and (4a) of the EEG 2021 for existing installations results in a relatively **complex overall picture** regarding the question of who has to do what exactly and when. In addition, further provisions relating to measurement and control can also be found in other regulatory contexts (e.g. with regard to direct marketing, self-supply or installations whose support ended). In the following, we provide an **initial overview of** the most important framework conditions. In individual cases, however, one must always look very carefully!

Thus, a distinction must always be made according to the size of the respective installation and when it was commissioned.

In summary, the following will apply here in future for **new installations** (commissioning or auction participation since 1 January 2021):

- Operators of installations (including CHP installations) with an installed capacity of **more than 25 kW** with a commissioning date **prior to the market declaration of the BSI** must equip their installations with technical devices until the installation of a smart metering system, with which the grid operator can at any time reduce the feed-in power completely or partially, at least in the event of grid overload, by remote control.

  The express obligation to equip the system with a measuring device to retrieve the actual feed-in is not explicitly required for this system segment, as was provided for in the 2017 EEG, at least for systems over 100 kW. Whether this is a deliberate change or an editorial oversight by the legislator remains unclear. In any case, the explanatory memorandum to the Act assumes that the legal framework from the EEG 2017 is being continued.

- Operators of **solar systems** with an installed capacity of **25 kW or less** with a commissioning date **prior to the market declaration of the BSI** must keep their systems in operation until the installation of a smart metering system.

  - be equipped with technical devices that enable the grid operator to reduce the feed-in power completely or partially at any time, at least in the event of grid overload, by remote control

  - or limit the maximum active power feed-in to 70 percent of the installed power at the point of connection of the installation to the grid.

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As we understand it, it is not clear from the legal provisions what applies to the above installations after the installation of a smart metering system. However, as we understand it, it is the legislative intention to subject these installations to the same requirements from the installation of a smart metering system as installations with commissioning after the market declaration and existing installations with commissioning before the entry into force of the EEG 2021 (see below).

- For all systems with an installed capacity of **more than 25 kW** with a commissioning date **after the market declaration of the BSI, the** obligation to be equipped with a smart meter gateway applies
  - for calling up the actual feed-in and
  - for stepped or (as soon as technically possible) stepless remote control.
- For all installations with an installed capacity of **more than 7 kW and no more than 25 kW** with a commissioning date **after the market declaration of the BSI that** are not operated behind a grid connection behind which at least one controllable consumption device pursuant to Section 14a of the Energy Industry Act is also operated, the obligation to equip with a smart meter gateway applies
  - to retrieve the actual feed-in.
- Installations (irrespective of size) with a commissioning date **after the market declaration of the BSI that are** operated behind a grid connection behind which at least one **controllable consumption device** pursuant to Section 14a of the Energy Industry Act is also operated are again subject to the obligation to be equipped with a smart meter gateway.
  - for calling up the actual feed-in and
  - for stepped or (as soon as technically possible) stepless remote control.

For **existing installations** (commissioning or auction participation before 1 January 2021), the following applies:

- For
  - installations and CHP installations with an installed capacity of **more than 25 kW**,
  - for installations (irrespective of size) which, according to the **previous version of the EEG applicable to them,** must be equipped with a technical device with which the grid operator can remotely reduce the feed-in power at any time in the event of a grid overload, as well as

- for installations that are operated downstream of the same grid connection as a **controllable consumption device** pursuant to Section 14a of the Energy Industry Act (Energiewirtschaftsgesetz)

After the installation of a smart metering system, the obligation to equip it with a smart meter gateway applies.

- for calling up the actual feed-in and
- for stepped or (as soon as technically possible) stepless remote control.

- For the first two aforementioned installation categories, until the installation of the smart metering system, the possible **equipment obligation for remote control** by the grid operator according to the relevant previous version of the EEG is also deemed to be fulfilled if the technical equipment is only suitable for this purpose,
  - to gradually reduce the feed-in power remotely in the event of grid overload,
  - shut down the installation or the CHP installation completely remotely, or
  - comply with the requirements communicated by the grid system operator to the system operator or the operator of the cogeneration installation for the fulfilment of the obligation prior to the commissioning of the installation.

- For installations with an installed capacity of **more than 7 kW and no** more than **25 kW that** are not operated behind a grid connection behind which at least one controllable consumption device pursuant to Section 14a of the Energy Industry Act is also operated, and **CHP installations** with an installed capacity of more than 7 kW and no more than 25 kW, the obligation to equip them with a smart **meter** gateway for retrieving the actual feed-in (not for remote control) applies **after the installation of a** smart **metering system.** Until then, the obligations to be complied with so far shall continue to apply.

As I said: As complicated as the new regulations may seem at first, it is important to know them well. This is because there is a threat of severe sanctions: Violations of the equipment obligations regulated in Section 9 EEG 2021 will continue to be sanctioned - as in the previous versions of the EEG - with a **reduction of the value to be applied to the market value.**

Excursus I: Correction of the BGH case law on on/off control?

For existing installations that can already be controlled and have a commissioning date or award **prior to 1 January 2021,** the EEG 2021 creates a transitional provision (cf. Section 100 (4) and (4a) EEG 2021) that allows for transitionally lower technical requirements for the technical equipment for remote control than currently required by supreme court rulings. This takes into account the conflict between a current **ruling of the Federal Supreme Court** (BGH) of 14 January 2020 (ref. XIII ZR 5/19) and the protection of installation operators' legitimate expectations with regard to the **requirements for remote control** of installation.

The Federal Supreme Court has postulated here that remote control by the grid operators, in order to meet the requirements of the Renewable Energy Sources Act, must in principle not only allow the system to be switched on and off, but at least a step-by-step control. However, since in practice this is not technically possible in many cases and the entire practice has so far been based on other premises, the legislator wants to re-establish a more legally secure situation. Thus, according to the planned regulation, the mere suitability of the technical device for **gradual reduction** or for complete shutdown ("on"/"off") as well as the fulfilment of the **requirement that the grid operator has communicated to** the system operator for the fulfilment of the obligation prior to the commissioning of the system shall be sufficient for a transitional period.

In the future, however, stepwise or even stepless control is to be the standard for all systems as soon as this is technically possible (see above).

Excursus II: What does "stepless" remote control mean?

It is still not conclusively clarified how the term **"stepless", which is** used several times in the draft bill, is to be understood, since in principle every - also dynamic - control is associated with minimal steps. The original statement of the legislator in the first known draft bill of the EEG 2021, according to which "remote control must be made possible independently of predetermined variables depending on demand", is no longer found in the now present EEG 2021. In our view, it is convincing in this respect that remote control must take place in **1 percent steps, as is** also provided for in the relevant technical connection rules. It should be noted, however, that for technical reasons, **deviations of up to five percent** may occur when setting the setpoint, which are also acceptable according to the current status.

3. New requirements for remote control in direct marketing (Section 10b EEG 2021)

Section 10b EEG 2021 newly regulates the **technical requirements for remote control to** be fulfilled in direct marketing. It is important to note from the outset that the new requirements apply to **both new and existing installations** (cf. Section 100 (2) number 3 EEG 2021).

In addition, the regulation on remote control, which was previously located in Section 20 EEG 2017 and regulated the specific requirements in supported direct marketing with the use of the market premium, has been pulled "in front of the bracket". This means that the remote control requirements are to apply in future both to **installations in supported direct marketing and to installations in other direct marketing.** This should now make it clear that installations that do not receive financial support but are marketed via so-called PPAs are also subject to the specific direct marketing remote control requirements of the EEG.

Specifically, the new regulations provide for the following:

- In principle, all installations in direct marketing must be equipped with a technical device via which the direct marketer (or another person marketing the electricity) can
  - can call up the respective **actual feed-in** and
  - can regulate the feed-in power in **stages** or, as soon as the technical possibility exists, **continuously** by remote control.

- In the case of installations that are commissioned **after the end of the next calendar month since the market declaration by the Federal Office for Information Security (BSI)**, the corresponding remote control and metering data transmission must be carried out via a **smart meter gateway right** from the start. The market declaration of the BSI, which is highly relevant in this context, is issued pursuant to Section 30 MsbG if the technical possibility of equipping the corresponding installation group with a smart metering system exists in principle and as soon as a secure and interoperable remote control technology that is compatible with the smart metering system and meets the minimum requirements for direct marketing is actually available on the market (Section 84a number 3 EEG 2021).

- For systems with commissioning **before the end of the next calendar month since the market declaration of** the BSI, according to our understanding of the new regulations, the retrieval of the actual feed-in and the stepwise/step-less control must only take place from the installation of a smart metering system via a smart meter gateway. Until then, it is sufficient to equip the system with a state-of-the-art system for retrieving the actual feed-in and for remote control at the time of commissioning.

- For **installations whose support ended and for installations with an installed capacity of up to 100 kW** that are operated and billed in full feed-in, a deviation from the obligations to call up the actual feed-in and to remotely control the feed-in capacity steplessly is possible via contractual agreements with the direct marketing company, but only as long as the installations are not equipped with a smart metering system. In the case of such installations (with an installed capacity of up to 100 kW and full feed-in), the requirements for quarter-hourly measurement and balancing of the electricity generated do not have to be met for a transitional period.

- The previously envisaged **"grace period"** at the beginning of operation, according to which newly commissioned installations only have to fulfil the requirement of remote controllability from the beginning of the second calendar month following the commissioning of the installation, has been dropped altogether in the EEG 2021. The applicable equipment obligations must therefore already be fulfilled at the time of commissioning.

Here, too, it must be emphasised that the corresponding equipment obligations must be taken seriously: **Violations of the** equipment obligations regulated in Section 10b EEG 2021 for the control of the installations by the direct marketer will be sanctioned according to Section 52 (1) sentence 1 number 2a EEG 2021 with a **reduction of the value to be applied to zero**!

Assessment:

The regulations contained in the EEG 2021 on the obligation to equip all installations with smart metering systems (iMSys) fundamentally serve to digitise the electricity market and are **not to be demonised per se**. Following the criticism of the first draft bill, which regulated comprehensive iMSys obligations for installations from 1 kW, the legislator has now taken better account of the fact that the equipment obligations have a **different weight for the** respective installation categories, i.e. in particular that the costs associated with the equipment and the metering point operation as well as the associated administrative effort represent a considerable burden for operators of smaller installations. The same applies to the regulation on **stepless remote control**, whereby the **usefulness of** this obligation in terms **of network technology** is also **questioned** by several market participants.

Overall, it is to be welcomed that the final version of the EEG 2021 has improved many of the regulations on technical equipment (even if at the last moment). However, there are still regulations and formulations that are misleading or unfortunate, such as the statement that the equipment must be equipped with a "stepless remote control" "as soon as the technical possibility exists". It would be urgently advisable to have an independent body determine this **day X in** concrete terms - comparable to the market declaration on smart metering systems by the BSI. Furthermore, a transitional regulation should be provided for, since for practical reasons alone, not all directly marketed systems can be converted to stepless remote control by the market players at the same time. **Without such a readjustment** - and the requirement of stepless remote control is a support requirement, the non-fulfilment of which results in a reduction of the value to be applied to 0 - countless **(legal) disputes** between installation operators, grid operators and direct marketers are basically already **pre-programmed**.

(continued on the next page)

Assessment (continued)**:**

It is also regrettable that there is still a lack of clear specifications on the appropriateness and the bearing of costs in connection with the installation and operation of smart metering systems and control technology.

As there was a 180-degree turnaround in the relevant technical specifications shortly before the new EEG was passed, the legislator combined the new regulations with an ordinance authorisation in Section 95 number 2 EEG 2021. This enables the extension of the obligations under Section 9 (1) or (1a) EEG 2021 to new installations with an installed capacity of up to and including 25 kW. By means of an ordinance, both visibility and controllability via smart meter gateways can be prescribed for installations below 25 kW as well as visibility (equipment with smart metering systems) for installations below 7 kW, for example. The ordinance can also provide for regulations on the lower threshold value and cost-protective price caps.

It is also not entirely clear what the legislator's aim is in including installations in other direct marketing (**all installations marketed via PPAs**) in the regulations on remote control. Under the 2017 EEG, these did not have to fulfil any requirements in this context. Now they must comply with the same requirements as supported installations, but - if they have an installed capacity of up to 100 kW and if all the electricity generated is fed into the grid - they can make contractual arrangements with their direct marketer that deviate from the statutory requirements for a transitional phase. And even if they do not do so, they will not be adversely affected by the sanction - the reduction of the value to be applied (to which there is no entitlement anyway) to zero. According to the explanatory memorandum, the aim of the regulation is to make the installations "visible" to the grid operator. It may be doubted that a regulation serving this goal is correctly located in Section 10b EEG 2021. Furthermore, it remains unclear why the legislator does not consider the provisions in Section 9 EEG 2021 to be sufficient to achieve this goal.

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Assessment (continued)**:**

Finally, it remains unclear for what reason the **transitional regulation for the start of operation of new installations,** which was only reintroduced into the law after a lengthy back and forth in the last EEG amendment, should now be **dropped once again.** Since this regulation is ultimately due to the fact that it is often not possible to install and test the remote control equipment before commissioning for purely practical reasons, this regulation should find its way back into the EEG - the effects on the "marketability" of the installations concerned should be very manageable due to the only very short duration of the transition period of a maximum of two months.

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

In future, the method of calculating the market premium is to change fundamentally. Thus, the market value, which as a deduction item from the value to be applied determines the amount of the market premium to be paid by the grid operator, will no longer be determined and deducted as a monthly **market value,** but as an **annual market value**. This annual market value is determined from the actual (energy carrier-specific) annual average spot market price in a calendar year. In short: The basic method of determining the (energy carrier-specific) market value remains the same in principle, but in **future it will no longer be** determined **every month, but for every year**.

However, this change will not take effect immediately: For electricity from installations with a commissioning date or award **before 1 January 2023,** the amount of the market premium will continue to be calculated on the basis of the energy carrier-specific monthly market value. Only for installations commissioned or that have received an award at a later date will the amount of the market premium be calculated once a year on the basis of the energy carrier-specific annual market value. For the latter, the twelve monthly settlements of a calendar year are to be adjusted retrospectively on the basis of the determined annual market value.

Assessment:

According to the explanatory memorandum to the EEG 2021, this change is intended to encourage the optimisation of installation design, maintenance and marketing strategy within one year. However, it is already being pointed out by all market participants (installation operators, grid operators and direct marketers) that this **regulation may miss its purpose**, as 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. Furthermore, the fear is expressed that the legal regulations will be **unnecessarily complicated with** this two-stage model to be carried out in parallel when determining and processing the EEG payments. Furthermore, due to the inevitably retroactive calculation of the annual market value and the possible correction of payments made during the year, there is a risk for all market participants that they may have to form provisions, which in turn may also be relevant for tax purposes.

VII. Goodbye to the 6-hour rule: support stop already after four hours of negative prices

The previous regulation on support reduction in the case of negative electricity prices according to Section 51 EEG 2017 (so-called **six-hour regulation**) will be replaced by a **four-hour regulation** with the EEG 2021. This is probably one of the most hotly debated new regulations in the course of the legislative process (the first drafts still provided for a one-hour rule).

According to Section 51 (1) of the EEG 2021, the value to be applied will be reduced **to zero** if the spot market price is **negative for four consecutive hours.** According to Section 3 number 42a EEG 2021, the **spot market price in** this sense is the electricity price resulting from the coupling of the order books of all electricity exchanges in the previous day's auction of hourly electricity contracts. Apparently, in future not only the spot market price on EPEX Spot is to be used as a reference but, according to the will of the legislator, other power exchanges are also to be included in the price determination. However, it remains to be seen to what extent this will have practical consequences. In addition, the **scope of** the regulation will be extended to all new installations with an installed capacity of 500 kW or more.

However, pilot onshore wind energy installations according to Section 3 number 37 letter b (so-called research and development pilot wind energy installations) are still excluded.

However, all **existing installations commissioned** before 1 January 2021 and installations that were awarded a contract in an auction before 1 January 2021 are excluded from the scope of this new regulation.

For existing installations that already fell within the scope of Section 51 EEG 2017 or Section 24 EEG 2014 due to their installed capacity (wind energy installations with a capacity of 3 MW or more or 500 kW or more for all other energy sources), the six-hour rule is to remain in place. In this respect, the current **BGH ruling of** 14 July 2020 (Ref. XIII ZR 12/19), which deals intensively with the aggregation of installations pursuant to Section 24 EEG 2017 in connection with the six-hour rule, also remains highly relevant. According to this ruling, the installed capacity of onshore wind energy installations that use a common technical infrastructure to feed electricity into the grid must generally be aggregated for the purposes of Section 51 EEG 2017 (we reported).

However, in the course of tightening Section 51 EEG 2021, the legislator introduced a new Section 51a EEG 2021 with the aim of compensating for hardships that may occur due to the support freeze in the event of negative electricity prices. According to this regulation - which is, however, only applicable to new installations and bidding installations - the support period of the installations is extended by the times in which the installation operators have not received support for at least four consecutive hours due to negative electricity prices. In this way, system operators are given the opportunity to catch up on the electricity feed-in with support after the regular 20-year support end date and to at least partially compensate for the losses in times of negative prices. When determining the extension of the support period, no individual case is considered for the respective installation. Instead, all periods in which electricity prices were negative for at least four consecutive hours are added together (e.g. solar installations are also "credited" with periods of negative prices during the night), and the number of these hours is added to the regular support period of the installations.

Assessment:

According to the explanatory memorandum, although still referring to the introduction of a "one-hour rule", the tightening of the regulation on negative electricity prices serves to improve the market integration of renewable energies. The aim is to create an incentive for installation operators to protect themselves against negative price phases and the associated support freeze, for example by entering into cooperation with storage operators, using new installation technology or hedging transactions on the electricity market (cf. justification on page 137 of the Federal Government's draft bill (BR-Drs. 569/20)).

In recent years, however, the periods in which the spot market price is negative have steadily increased and, according to most electricity market forecasts, this trend will also continue. In this respect, the announcement of the amendment to Section 51 of the Renewable Energy Sources Act (EEG) 2017 has caused **great uncertainty among many market participants**, especially with regard to financial viability.

The federal government has partly taken these concerns into account. On the one hand, the new Section 51 EEG 2021 has been "relaxed" so that the support stop only takes place after four hours of negative electricity prices. Secondly, Section 51a EEG 2021 was introduced, which allows the periods of negative exchange prices to be made up for after the end of the support period.

However, the new Section 51a EEG 2021 only applies to installations subject to tendering, so that the loss of smaller installations, such as installations with an installed capacity of 500 kW, which are affected by Section 51 EEG 2021 but do not have an award from an auction, is not compensated at all.
Incidentally, it is open for how long the new four-hour rule will last, since the government coalition has already announced with the motion for a resolution (see also Section G. below) that it will review this rule again and tighten it if necessary. The issue, which has a noticeable influence on the financing conditions of new installations, thus remains open.

VIII. What's new with measurement and reporting obligations?

Unfortunately, the answer to this can be very short: Not really much. Compared to the uproar caused by the discussions on the topic of **measuring, reporting and accounting for electricity volumes subject to the EEG surcharge in the** last few years in the entire industry - i.e. far beyond the renewables sector - the legislative reaction has so far been rather meagre and has essentially been limited to repeatedly postponing the "setting" of the implementation deadlines.

Thus, from the point of view of many affected parties, it is gratifying that the **deadline for retrofitting an EEG-compliant measurement and billing concept, usually based on calibrated meters, in** connection with the highly complex requirements for measuring and delimiting electricity quantities subject to the EEG surcharge, has now been **extended** "once again and for the last time" (according to the justification for the standard) **by one year** (cf. Section 104 (10) and (11) EEG 2021). Estimates may therefore be made again for 2021, but only if an EEG-compliant metering concept is installed by the end of this year that meets the requirements of Sections 62a, 62b EEG 2021. Operators and planners of **decentralised energy supply concepts (self-supply and direct supply)** as well as companies that claim other EEG surcharge reductions for their electricity (e.g. via the **special equalisation scheme for electricity-cost-intensive companies or railways**) are therefore urgently recommended - if they have not already done so - to now really deal with the topic in depth and to use the year 2021 to implement an appropriate measurement concept. The guide "Messen und Schätzen bei EEG-Umlagepflichten" (Measurement and Estimation of EEG Surcharge Obligations) published by the Federal Network Agency in autumn 2020 can help here (available here).

The simplifications for recording quantities do not fundamentally change the basic reporting obligations in connection with the EEG surcharge (cf. e.g. Sections 74a, 74 EEG 2021): Even if you are allowed to estimate your EEG surcharge-relevant electricity quantities again this year, you must of course also report these to the responsible grid operator in due time - as every year. However, there is a small and quite welcome clarification in this context in the EEG 2021, namely a new Section 74 (2) sentence 4 EEG 2021:

> *"In the case of joint billing of energy quantities with the same EEG-surcharge rate, a notification of the energy quantities to be jointly billed by the party paying the EEG-surcharge with fulfilling effect for the total quantity shall be sufficient."*

Behind this is ultimately a clarification that a simplified handling of the EEG surcharge obligations is possible in so-called **"forwarding cases".** If, for example, a company purchases electricity from the grid and does not consume all of it itself, but passes some of it on to third parties (e.g. to tenants of a company flat, to subsidiaries or sister companies operating at the site, to commercial tenants of office space or to private users of electric charging points set up in the company yard), the company would

actually have to pay the EEG surcharge for this passed-on electricity to the transmission system operator responsible in this respect. The same also applies, for example, in very many **"pooled" installation parks,** in which an infrastructure company or an operating company obtains the grid electricity for all connected installation operators and then passes it on to the other operators and charges them. Here, too, the infrastructure company, due to its capacity as an "intermediary", would often be obliged to report and pay the EEG surcharge itself for the grid electricity that is passed on.

However, since this procedure does not happen in thousands of cases, but instead the electricity is usually purchased from the "external" grid electricity supplier with an EEG surcharge and the supplier pays the EEG surcharge for this electricity (often without knowing that he is not actually doing this for himself, but for the supplier), the Federal Network Agency clarified a few years ago that under certain conditions in such cases the construct of **"performance and notification on behalf of a third party"** can be applied. This means that the supplier and the "redistributor" agree with each other that the electricity is to continue to be purchased subject to the EEG surcharge and that the supplier, acting on behalf of the redistributor, reports and pays the EEG surcharge to the transmission system operator. For these cases, the new regulation now clarifies that the electricity supplier does not have to differentiate again in his report to what extent his delivered electricity should actually have been reported by someone else, but that he can simply make a uniform report of the electricity quantities delivered by him.

In the future, the new regulation may also provide relief in complex generation and consumption structures by allowing quantities subject to the EEG surcharge to be recorded and reported jointly by different persons. However, as is so often the case, this ultimately depends on the individual case. The new regulation therefore does not change the fact that participants in complex supply and consumption constellations would do well to thoroughly "sort through" their energy law relationships and, if necessary, make clear and transparent contractual arrangements among themselves as to who is to be responsible for what.

Assessment:

Although the entire topic of measurement and reporting obligations in connection with the EEG surcharge has been one of the "evergreens" of the EEG discussions for some time, unfortunately the EEG 2021 does not really bring any resounding relief, but merely a further extension of the grace period for the beleaguered practice. In terms of content, the currently highly controversial regulations on the measurement, delimitation and estimation of electricity consumption subject to the EEG levy remain unchanged. The final version of the Federal Network Agency's "Measuring and Estimating" guidelines (available here), recently published after a long and highly controversial consultation phase, offers numerous proposals for interpretation, which are intended to provide those affected with more legal certainty and practical implementation aids. However, as these guidelines are not legally binding, legal uncertainties remain in many cases, which only the legislator could clear up. From the point of view of a deeply insecure practice confronted with enormous administrative and economic expenses, this would undoubtedly be highly desirable.

IX. Innovation auctions

The innovation auctions are to be further expanded and tested in the future. The joint calls for proposals are to be fully integrated into the innovation calls for proposals.

After the **Innovation Auction Regulation** only came into force on 30 January 2020 (we reported), an innovation auction was held for the first time ever in September 2020. Unlike other auctions, innovation auctions have a **fixed market premium,** and **installation combinations** can also participate. This involves a combination of several installations from the various renewable energy sources, e.g. wind power and biomass or photovoltaics and hydropower, which can also be combined with storage. The volume of the innovation auction so far has been 650 megawatts, albeit including the made-up auction for 2019. In the first and only **round of auctions** conducted so far, solar and solar storage projects dominated (results available here). As part of the amendment to the EEG, the relatively new Innovation Auction Ordinance (hereinafter: **InnAusV**) was also amended.

Various changes have been made to the auction design of the Innovation Auction Regulation:

- The first thing that comes as little surprise is the **abolition of the joint auctions for** wind and solar energy, which will be completely "integrated" into the innovation auction. The past has shown that this form of auction was completely unsuitable for achieving the expansion targets. All awards in these auctions went to photovoltaic projects. In the end, wind energy installation operators did not even participate in the auctions (we reported). The joint auctions will therefore now be merged into the innovation auction, the volumes of which will be "increased" by 50 megawatts per year (from 500 MW in 2021 to 850 MW in 2028).

- In future, only **installation combinations** will be able to participate in innovation auctions. The **maximum value will** continue to be a relatively attractive 7.5 cents per kilowatt hour. However, the ordinance now provides for a degression of 1 percent per calendar year from 1 January 2022.

- Pursuant to Section 28c EEG 2021, the innovation auctions will in future always take place on **1 April** and **1 August of** each year.

- The ordinance was also amended in other places. Changes concern, among other things, the **realisation period** (30 months after public announcement of the award), the invalidation of awards and the reimbursement of securities. Also, some references to the **general auction rules,** which had caused some confusion for installation combinations in the first auction round, have now been deleted, hopefully creating a little more clarity about the applicable rules for installation combinations in future auction rounds.

- Furthermore, clarifying regulations on the requirements for **storage facilities as part of installation combinations were** added. Section 13 (2) InnAusV now requires that the installed capacity of the storage facility is not "disproportionate to the capacity provided". Such a disproportion shall not exist if the storage capacity of the system combination allows for at least two hours of injection at the nominal capacity of the respective storage. This specification of the requirements in this regard was included because, according to the explanatory memorandum to the standard, the legislator fears that system operators will install the lowest possible storage capacity for cost reasons, thus "wasting" actual utilisation potential. However, these stricter requirements do not apply to installation combinations that have already been awarded a contract in the first round in 2020 (Section 19 InnAusV),

- Furthermore, at the end of the legislative process, an additional segment for system combinations with so-called **special solar systems was** created in the InnAusV as part of the committee deliberations. According to Section 2 (1a) InnAusV, these "special solar installations" are to be **solar installations on bodies of water (so-called floating PV), car parks and cultivated farmland (so-called agro-PV)**. In future, these will also be included in the innovation auctions. How exactly the scope of these terms is to be defined and to what extent

they are to be distinguished from solar installations on the aforementioned types of land that are already eligible under the "normal" auction rules has not yet been spelled out in more detail, however. Rather, the exact conceptual requirements are to be defined by the Federal Network Agency by 1 October 2021. Section 16 (1) InnAusV provides that bids of between 100 kW and 2 MW can be submitted for special solar installations. This is intended to give the broadest possible field of applicants the opportunity to participate in the auctions. In the auction round for 1 April 2022, a volume of 50 MW was also reserved primarily for installation combinations with special solar installations (Section 17 InnAusV). Apart from this, the auction design does not differ from the other innovation auctions: Only a financial and no material prequalification is required and the same maximum value applies as for the regular bids. In addition, the installations are tied to the bid location, which must be reported in advance in the market master data register.

- The innovation auctions will initially be extended until the **end of 2028.** After that, the regulation as a whole is to expire.

X. Changes to the clearing house "defence", Section 57

With the EEG 2017, the legislator attempted to enhance the value of decisions and recommendations of the **EEG|KWKG Clearingstelle** and to better protect the trust of installation operators in this regard. Installation operators who have received an EEG support in accordance with a decision of the Clearingstelle should be protected from having to pay it back to the respective grid operator due to contrary case law. However, this defence, which is granted to the system operators, has never gained much practical relevance, also because it is very narrowly defined and requires that the grid operator bases its recovery on a Supreme Court decision in another matter - which is by no means always the case.

The defence introduced with the EEG 2017 will now be further devalued with the EEG 2021. The same applies to the agreement procedure at the Clearing House, which is popular with installation operators and grid operators because it is relatively fast and effective. It is now no longer possible for installation operators to base their defence on the fact that the payment was made in accordance with an agreement reached between the installation operator and the grid operator in the course of a settlement procedure, a voting procedure or an arbitration award. In this respect, it can be inferred from the explanatory memorandum to the Act that the legislator assumes that the "binding effect of the individual case results is unlimited in time" anyway and therefore sees no need for the defence in these cases. However, whether this applies to an agreement reached within the framework of a settlement procedure seems unclear and depends on the concrete content of the agreement. In many cases, network operators already expressly reserve the right to change their payment practice again in the event of a deviating (Supreme Court) ruling. In the future, the "clearing office defence" can only be

based on the results of proceedings that go beyond the individual case (currently: recommendation and reference proceedings).

C. The most important changes for the individual energy sources and the auctions

I. Solar systems and tenant electricity - overview

For the PV sector, the EEG 2021 brings in particular the **introduction of a separate auction segment for rooftop systems** and a limitation of the entitlement to support for rooftop systems in the 300 to 750 kW segment.

Furthermore, the permissible **bid size for participation in the auctions** was raised to 20 MW (for ground-mounted installations) or lowered (for solar installations on other buildings) and minor changes to the formal requirements for participation in the auctions bring some relief.

In addition, the permissible **distance from the edge of the road** for solar installations on so-called verges was increased from 110 m to 200 m, whereby in future a 15 m wide corridor must always be kept free within these 200 m.

Finally, the **tenant electricity award** is now designed as a support case with its own value to be applied, which means that a development like the last one - when the tenant electricity award moved ever faster towards 0 cents/kWh - will not occur in the future. In addition, it was clarified that there is also an entitlement to the tenant electricity award in the case of so-called supply chain models. The scope of the tenant electricity award was also expanded, as in future there will also be an entitlement to it in the event of the supply of final consumers in the same neighbourhood and no longer only in the event of the supply of final consumers in the same building or in residential buildings or ancillary facilities in the immediate spatial context.

1. News on the auctions for solar installations

Probably the most significant change for the PV sector resulting from the EEG 2021 is that in future the Federal Network Agency will invite auctions for two different installation segments: The **first segment** includes **ground-mounted systems and solar systems on (other) buildings,** and the **second segment includes solar systems on buildings or noise barriers**. This means that in future there will be a separate auction segment for rooftop solar installations, whereby the legal requirements with regard to participation in the auction and the further process up to commissioning differ in detail from the regulations already known from the EEG 2017. The most significant change is that in future the segment of large rooftop systems will again account for a significant share of total new construction.

In addition, so-called **"special solar installations" are** to be given priority in the **innovation auction in the** future and thus the further development and realisation of such innovative PV projects is to be

promoted. In this context, "special solar installations" are solar installations on bodies of water, car parks and arable land with simultaneous cultivation of crops (for a detailed description of these new regulations, see B.IX. on innovation auctions).

a) Auctions for rooftop systems

The background to the introduction of separate **auctions for rooftop** systems (in future: solar systems of the second segment) is - according to the explanatory memorandum - firstly that it has become apparent that rooftop systems were not competitive due to the higher production costs in the rounds of auctions carried out so far: In fact, since 2015 - not surprisingly - only two rooftop projects have been received an award.

In contrast to the government's draft bill on the EEG 2021 (cf. Federal Government's draft bill of 25 September 2020, BR-Drs. 569/20), there is no **obligation to participate** in the auctions from an installed capacity of 500 kW, but only from **750 kW,** whereby Section 22 (6) EEG 2021 allows voluntary participation from an installed capacity of more than 300 kW. Operators of solar systems with an installed capacity of more than 300 kW up to and including 750 kW can therefore choose whether they want to participate in the auction process or claim the statutory tariff, whereby it must be borne in mind that the prohibition of self-supply under Section 27a EEG 2021 applies to the "auction systems" (see also C.I.3. below on the limitation of the amount of electricity that can be paid for under the statutory tariff in the 300 to 750 kW segment).

The **maximum bid size for** rooftop installations - as well as in future for ground-mounted installations and solar installations on other buildings - is 20 MW. The **minimum bid size** is only 100 kW, cf. Section 30(2) number 2 EEG 2021. Against the background that the right to participate only exists from 300 kW installed capacity, this seems contradictory at first, but the legislator probably had constellations in mind in which the relevant threshold of 750 kW (or 300 kW) is exceeded overall due to an aggregation of installations pursuant to Section 24 (1) EEG 2021, but the part of the solar installation subject to tendering is smaller, for example because a solar installation with an installed capacity of 750 kW was initially commissioned and a further solar installation with e.g. 250 kW was added to this - within 12 months.e.g. 250 kW is to be added. In this case, it would be possible to generate an entitlement to support for the later addition by participating in the tendering process.

The total **volume of auction** for rooftop systems is 300 MW in 2021 and 2022, 350 MW in 2023 and 2024 and 400 MW from 2025. The volume of auction is always divided between two **auction dates** - 1 June and 1 December. This represents an increase in the volume of auction by 50 MW in each case compared to the government's draft of the EEG 2021. However, the volume of auction for solar installations in the first segment (ground-mounted and other structural installations) was reduced accordingly.

For the actual auction participation and the further process - in particular the issuing of the payment authorisation - the EEG 2021 essentially provides the same regulations, processes and participation conditions for rooftop installations as known from the previous auctions for solar installations, but with the following differences:

- The **maximum value** is 9.0 ct/kWh and will decrease annually by 1 per cent from 1 January 2022 compared to the maximum value applicable in the previous year.
- The amount of the **security** shall be 70 euros per kW, whereby there shall be no subdivision into first and second securities. The full amount of the security must therefore already be provided at the time of bidding.
- The award expires if the solar installation has not been commissioned within 12 months (**realisation period**) or the payment entitlement has not been applied for within 14 months after the public announcement of the award, Section 38f EEG 2021. However, a penalty in the form of a reduction of the award value by 0.3 ct/kWh already takes effect after 8 months, cf. Section 54a paragraph 1 EEG 2021.
- No explicit **declaration by the bidder** that he is the owner of the project area or that he is submitting the bid with the owner's consent is required.

In addition, it should be noted that the general **prohibition of self-supply in** Section 27a EEG 2021 for auction systems also applies to rooftop systems. Therefore, as long as a corresponding support is received for a rooftop installation, self-supply is excluded.

b) Auctions for ground-mounted systems and solar systems on buildings

For **ground-mounted installations and solar installations on buildings** (in future: installations in the first segment), there are only minor changes to the auction procedure - apart from a few simplifications with regard to the documents to be submitted.

A significant change, however, is certainly that the **maximum** permissible **bid amount** has been raised to 20 MW (for ground-mounted systems) or lowered (for solar systems on other buildings).

In addition, the following minor and major changes are planned:

- The **volume of auction** will be 1,850 MW in 2021, 1,600 MW in 2022, 1,650 MW in the years 2023 to 2025 and 1,550 MW in the years 2026 to 2028. This will be divided into three auction dates per year (1 March, 1 June and 1 November).
- The permissible distance from motorways or railways for **solar installations on so-called verges** was increased from 110 m to 200 m, whereby in future a 15 m wide corridor along the

carriageway "*shall*" be kept free within this distance. According to the justification, this serves the purpose of keeping paths free for animal migration. This corridor does not necessarily have to be directly adjacent to the roadway, but only within the 200 m distance.

- In future, bidders for solar installations on other structural facilities must also submit a declaration that they are the **owner of the project area** or are participating in the auction with the consent of this owner.

- In contrast, the submission of a **copy of the land-use plan** or, more precisely, the decision on the preparation of the land-use plan, the decision on the disclosure of the land-use plan or the adopted land-use plan will no longer be mandatory for the submission of bids for ground-mounted installations. The background to this is that in the past this formal participation requirement had repeatedly led to the exclusion of bids due to the formal requirements to be met for corresponding official proof. For this reason, the EEG 2021 now only provides that the submission of a copy of an approved development plan for ground-mounted installations as well as for solar installations on buildings can be made on a voluntary basis if the **secondary security is** only to be provided in the amount of 20 euros instead of 45 euros, but this is no longer mandatory. However, this administrative simplification should not be confused with a change in the general conditions for participation: Pursuant to Section 37 (1) EEG 2021, it is still a condition of participation for ground-mounted installations that the relevant planning law requirements (at least a decision on the development of the site) are in place at the time of bidding, but they no longer have to be proven by submitting a corresponding copy.

- The **maximum value** was lowered from 7.5 ct/kWh (EEG 2017) to 5.9 ct/kWh, although the effects of this change will hardly be noticeable, as the new maximum value would never have been reached in the 2020 auctions. However, unlike in the past, the maximum value will be adjusted dynamically in future, in that from 2022 the average price of the last three auction rounds plus 8 percent will always form the new maximum value. This is probably intended to lead to (even) more competition, although it remains somewhat unclear why such an intervention in free price formation was necessary at all in the auction segment for solar installations, which has been characterised by strong competition up to now.

- The possibility of **returning awards** was deleted without replacement, both for new awards and for awards from the previous auction rounds, cf. Section 100 (2) number 6 and Section 37d EEG 2021. According to the explanatory memorandum, this is intended to clarify the law, since in the past almost no use was made of this option and a return was no longer associated with any benefits. Here, however, the question remains - which already arises in a similar way with wind energy installations - how to proceed if a bidder wants to get rid of an award - actually a legal position favouring him. Specifically, whether this is possible according to the general procedural

principles of administrative law or excluded from the outset in the EEG. In future, there will also be no clear legal regulation on this for solar installations, although this question may well be relevant in practice, e.g. if a renewed participation with the same or at least a comparable project is being considered due to changed framework conditions in a project. Therefore, the amendment is likely to serve less to clarify the law than to increase legal uncertainty.

- As before, the award expires if the solar installation has not been commissioned within 24 months (**implementation period**). However, the period for applying for payment entitlement is extended to 26 months after the public announcement of the award, cf. Section 37d number 2 EEG 2021. Penalties in the form of a reduction of the award value by 0.3 ct/kWh still apply after 18 months calculated from the public announcement of the award.

2. What's new with tenant electricity

The regulations on the **tenant electricity award** introduced in summer 2017 were also adjusted. The background to this is probably that the tenant electricity segment - although it has now had its own support facts for more than three years - is still in the starting blocks. However, the adjustments are rather cosmetic in nature. Unfortunately, the aspects that are decisive for practice have not been addressed, and in this respect it is to be feared that tenant electricity will continue to be denied the big breakthrough in 2021 and the following years.

First of all, it is pleasing that a minor amendment to Section 21 (3) EEG 2021 has now clearly clarified that there is also an entitlement to the tenant electricity award in so-called "**supply chain models**". The background to this is that since the introduction of the tenant electricity award, it has been disputed whether the prerequisite for entitlement to the tenant electricity award is that the electricity is supplied directly by the system operator to the tenants or whether an energy service provider may also be interposed who then supplies the electricity generated on site to the tenants. The latter, the so-called "supply chain model", is quite relevant in practice, as this arrangement allows an energy service provider familiar with the regulatory obligations to take on the market role of electricity supplier, and it is precisely the concern of not being able to fulfil these obligations properly or only at excessive expense that has made many building owners shy away from implementing a tenant electricity model.

In addition, it will apply in future that the prerequisite for entitlement to tenant electricity is no longer a supply and consumption in the same building or in residential buildings in the immediate spatial context, but that supply and consumption in the same **"neighbourhood" is** sufficient. However, the term "neighbourhood" has not been defined by law. In this respect, it can be deduced from the history of the law that it must be understood more broadly than the direct spatial connection. Furthermore, the explanatory memorandum to the law states that a neighbourhood should be a coherent complex of buildings that gives the impression of a uniform ensemble, whereby a crossing by roads or a

location of the buildings on different plots of land should be harmless (cf. Report of the Committee on Economic Affairs and Energy of 16 December 2020, BT-Drs. 19/25326, page 13). In this respect, the term "neighbourhood" can be sufficiently specified for practical purposes by interpreting the law.

The introduction of a **separate applicable value for the tenant electricity award** in Section 48a EEG 2021 is more of a legal systemic nature. Nevertheless, this change is significant for practice, as it is in fact accompanied by a "new introduction" of the tenant electricity award. In the past months, this had been moving ever faster towards 0 due to the previous calculation method (deduction of 8.5 ct/kWh or 8 ct/kWh from the value to be applied for rooftop systems). The introduction of a separate applicable value for the tenant electricity award prevents this development - which is certainly not conducive to the tenant electricity segment - from repeating itself.

A rather marginal change with regard to the **grouping of installations in** connection with the entitlement to the tenant electricity award is brought about by the new Section 24 (1) sentence 4 EEG 2021, according to which tenant electricity installations that are not operated at the same (grid) connection point will no longer be grouped in terms of remuneration. The background to this change is that according to Section 24 (1) sentence 1 EEG - regardless of the operator or grid connection point - solar installations that are located on the same property, the same building, the same business premises or otherwise in the immediate vicinity of each other are to be considered as one overall installation for remuneration purposes. Therefore, if, for example, a tenant electricity provider commissions a 40 kW solar system on one building and a 60 kW solar system on another building located on the same property, the solar system will be assessed as a 100 kW solar system for remuneration purposes - with the consequence of a correspondingly lower overall remuneration entitlement under Section 48a EEG 2021 (tenant electricity award). As a result of the new regulation, in future - with regard to the tenant electricity award - if the respective buildings have their own grid connections, both solar installations will be assessed as "individual installations" for remuneration law purposes, so that the tenant electricity provider will receive the higher remuneration rate for an output of up to 10 kW and up to 30 kW for both installations in each case. However, the exception only applies to the tenant electricity award. With regard to the electricity fed into the grid, the system is still combined and the value to be applied is correspondingly lower. Unfortunately, however, it was neglected to restrict the aggregation of installations with regard to the **direct marketing obligation,** so that in the example described above, the direct marketing obligation - which is difficult to implement in practice with an installation size of 100 kW - remains in place.

3. Further changes for solar installations

In addition to the larger "thematic blocks", the EEG 2021 also provides for the following further changes - especially for solar installations that claim a statutory remuneration entitlement:

- For rooftop solar systems with an installed capacity of more than 300 kW up to and including 750 kW, a (statutory) entitlement to remuneration will in future only exist for 50 percent of the electricity generated, according to Section 48 (5) EEG 2021. As a result of this new regulation - which has met with considerable criticism in the industry - operators of solar installations in this installation segment will in future have to ensure that at least 50 percent of the electricity generated is consumed on site, either in the context of self-supply or supply to third parties, unless the electricity generated is to be fed into the grid unsubsidised, whereby it is unclear according to the statutory regulation to which period (quarter of an hour? Hour? Day? Week? Month? Year?) this 50 percent criterion is to refer at all. The regulation is also likely to pose considerable practical difficulties with regard to the direct marketing of the electricity fed into the grid, since it is completely unclear how a metrological delimitation and balancing of the eligible (direct marketing in the market premium model) and ineligible (other direct marketing) electricity fed into the grid could be carried out if too much electricity were to be fed into the grid. Nevertheless, installation operators from this installation segment will have to decide in future whether they want to obtain support for all the electricity generated by participating in the auctions (and are then subject to the ban on self-supply under Section 27a EEG 2021 - see also C.I.1. above on the possibility of participating in the auctions) or whether they want to take advantage of the limited statutory support. However, this regulation does not apply immediately; instead, the legislator has provided for a (relatively short) transitional period until 1 April 2021, cf. Section 100(9) of the EEG 2021. All solar installations commissioned before this date are still entitled to unlimited remuneration.

- The permissible distance from motorways or railways is also increased from 110 m to 200 m for **ground-mounted systems with a statutory entitlement to remuneration on verges,** i.e. systems with an installed capacity of up to 750 kW, whereby in future a 15 m wide corridor along the roadway "*shall*" be kept free within this distance. According to the explanatory memorandum, this serves the purpose of keeping paths free for animal migration. This corridor does not necessarily have to be directly adjacent to the roadway, but only within the 200 m distance.

- A rather technical change in Section 8 (5) EEG 2021 is intended to make it somewhat easier for operators of small-scale solar installations to connect to the **grid**. According to this, "connection applicants" of renewable energy systems with an installed capacity of up to 10.8 kW may in future connect their systems to the grid themselves or, strictly speaking, have them connected by a competent third party, cf. Section 10 (1) EEG 2021, if the grid operator does not provide them with a schedule for processing the grid connection application within one month of receiving it. The background to this new regulation is Article 17 RED II, which stipulates that the EU member states must create a simplified registration and connection procedure for the grid connection of

such small-scale installations. However, it remains to be seen whether the new regulation will bring about a significant acceleration in the - often rather hesitant - connection of small-scale solar installations, as in practice (considerable) delays often occur not in the processing of the grid connection application, but rather in the technical connection of the installations to the grid.

- Finally, the **degression mechanism** is to undergo a change within the framework of the EEG 2021. In future, the value to be applied will only be reduced by 0.4 percent per month instead of 0.5 percent as previously under the EEG 2017 (basic degression). Furthermore, in order to better reflect the current expansion figures and thus make the degression more flexible, the reference period for the period relevant for calculating the degression will be shortened from 6 to 3 months. In particular, however, the target corridor - i.e. the annual amount of new capacity added on which a possible reduction in the tariff rates is measured - is increased from 1,900 MW (EEG 2017) to 2,500 MW, whereby the annual volume of auction for rooftop systems exceeding the value of 250 MW (2023 and 2024: exceeding by 100 MW and from 2025 exceeding by 150 MW) is deducted from this 2,500 MW from 2023 onwards. The new capacity that is relevant for an increase in the tariff rates will also be increased, but only from 1,900 MW (EEG 2017) to 2,100 MW, whereby the annual auction volumes for solar installations exceeding 250 MW will also be deducted here from 2023. Ultimately, these adjustments will raise the overall development corridor, which is why a reduction in the tariff rates will only take place from a higher expansion, but at the same time the additional auction volumes for rooftop systems and thus their contribution to achieving the expansion targets will be taken into account through corresponding deductions. As a result, however, the tariff rates for solar installations with a statutory entitlement to support will only be reduced if the number of new installations is higher than before.

Assessment:

After the first drafts of the law stipulated that the threshold for **mandatory auctions** for **rooftop systems** should be 500 kW and in the medium term even 100 kW, the known 750 kW has now been retained, which means that with the auctions for rooftop systems, fortunately, an entire system segment could actually be revived without directly making the realisation of smaller systems significantly more difficult. However, the ban on self-sufficiency is likely to be a considerable drawback for many operators, making sensible decentralised use in projects subject to tendering difficult or impossible. However, the new regulation limiting remuneration to 50 % of the amount of electricity generated for rooftop systems between 300 and 750 kW is to be regarded as problematic and is likely to make the realisation of such systems significantly more difficult - not least because of the ambiguities in connection with the practical implementation of this regulation.

On the other hand, the increase in the permissible **bid amount for ground-mounted systems** to 20 MW can provide an additional impetus for large solar systems, whereby PPAs will play an increasingly important role in the next few years, or are already playing a role now, particularly in the large solar systems segment.

The adjustments for the **tenant electricity segment** are - apart from the increase in support rates - rather disappointing and will probably only marginally address the many administrative problems with which these projects usually struggle. We will therefore have to wait for the big breakthrough of the tenant electricity segment.

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II. Biomass, biogas, biomethane

In the area of biomass, there have been a few welcome changes in the EEG 2021. For example, a new expansion target for biomass installations of 8.4 GW is planned and separate auctions for biomethane in the southern region will be introduced. The maximum bid prices will rise by 2.0 ct/kWh and the flexibility supplement will be increased from 40 euros per kilowatt to 65 euros per kilowatt and also extended to liquid manure installations. Despite all the joy about these improvements, however, there is also an extremely problematic regulation to complain about, which found its way into the law at the last moment: The entitlement to the flexibility supplement is to be dropped for existing installations that have already taken advantage of the flexibility premium and are switching to the follow-up

support. In doing so, the legislator is depriving numerous already initiated or planned flexibility concepts of their economic basis in a constitutionally questionable manner.

1. Funding outside of auctions

For electricity from **biomass, for which the value to be applied is determined by law**, a support rate of 12.80 ct/kWh applies up to and including a rated output of 150 kW (Section 42 EEG 2021), which decreases annually by 0.5 percent from 1 July 2022 compared to the value from the previous year.

In addition, a new authorisation to issue ordinances was included in Section 88b EEG 2021. The Federal Ministry for Economic Affairs and Energy (BMWi) will then be authorised to introduce a follow-up support for **small-scale liquid manure installations** (and those that want to become **small-scale liquid manure installations** after the cut-off date...). The prerequisite is that the entitlement to support under the original version of the EEG has already ended and that the installed capacity of the installation is no more than 150 kW. As of the cut-off date, it must be ensured that an average share of liquid manure of at least 80 mass percent is used in the installation in the calendar year. In this case, liquid manure primarily means liquid manure, such as cattle or pig manure. Dry poultry manure and poultry dung are explicitly excluded.

However, it is not a prerequisite that the biogas installation has already been operated with liquid manure in the past. The **follow-up support** could therefore possibly also be something for operators of current NawaRo installations who have sufficient liquid manure, reduce their installation capacity on the deadline date and then largely do without the use of NawaRo.

However, as far as can be seen, no draft of the ordinance is yet available. It therefore remains to be seen how the details will be structured. The question of which **maximum bid price** will be set is likely to be particularly exciting.

2. Auctions

a) Volume of auction

The volume of auction was significantly increased compared to the expansion targets in the EEG 2017. Thus, 600 MW of capacity to be installed per year will be distributed evenly over the two auction dates. In addition, there is a new auction segment for biomethane installations with an annual auction volume of 150 MW. From 2022, bids for biomethane installations must be realised in the **"southern region"**, cf. Section 39k EEG 2021 (on the term "southern region" see below). Also from 2022, 50 percent of the auction volume for biomass installations is to be realised in the southern region (**southern quota**).

From 2024 onwards, the auction volume will increase by the amount that was not awarded in the third preceding calendar year. Unlike in the case of photovoltaics, corresponding "unused" quantities are therefore to be awarded here only with a three-year delay (cf. Section 28b (2) number 1 EEG 2021). The aim is to prevent rapidly growing quantities in the auctions in view of the under-subscription that has always existed up to now.

At the same time, the auction volume shall be reduced by the amount of installed capacity realised in the previous calendar year by biomass installations, the value of which is determined by law, and by the sum of the installed capacity that received support in the previous calendar year on the basis of a statutory order in accordance with the newly formulated authorisation under Section 88b of the EEG 2021 (follow-up support for small-scale **liquid manure installations**).

The auction volume for biomethane installations in the southern region will already increase from 2022 by the amount not awarded in the respective previous year (cf. Section 28b (4) EEG 2021).

b) General amendments and changes for new installations

The minimum size for (mandatory) participation in the auctions remains at 150 kW for both biomass installations and biomethane installations in the southern region (Section 30 (2) (3) EEG 2021). The auction dates have now been set for 1 March and 1 September of each year (Section 28b (1) EEG 2021).

It is particularly pleasing that the **maximum bid price for** new biomass installations was increased by a full 2.0 ct to 16.4 ct/kWh from the current 14.4 ct/kWh (originally 14.88 ct/kWh, after deduction of degression currently still 14.4 ct/kWh) (see below for the changes for existing installations). In the past, the excessively low maximum bid prices have proved to be the greatest obstacle to participation in the auctions. With the planned significant increase of 2.0 ct/kWh, the construction of new biogas installations should become more attractive for many potential installation operators, especially since the **flexibility supplement** has been raised from currently 40 euros per kilowatt of installed capacity to 65 euros/kW in the future (cf. Section 50a (1) EEG 2021). From 1 January 2022, the bid value will decrease by 1 percent per year.

The legislator has introduced a novelty for **smaller-scaled biomass installations up to 500 kW.** Here, the "value of award", i.e. the support rate determined in the award notice and to be paid by the grid operator, is always to be 0.5 ct/kWh above the bid value until 2025 (Section 39i (6) EEG 2021). As a result, a installation operator who bid 16.3 ct/kWh, for example, and received an award will then receive 16.8 ct/kWh. This also applies to existing installations (see below). This higher value of award is intended to compensate somewhat for the competitive disadvantages of smaller installations.

The **realisation period for** new biomass installations is extended from 24 to 36 months with the EEG 2021 (Section 39e (1) EEG 2021). However, a possible extension period may not exceed 48 months. In

addition, the requirement was introduced that bidders for biomass installations must submit a **self-declaration that there** is no cost-effective option for use as a high-efficiency CHP installation if it is not a CHP installation. Corresponding special features are also to apply to installations with a total rated thermal input of more than 50 MW (cf. Section 39 (3) number 3ff. EEG 2021). At the last moment, the (here so-called) **80-20 rule**, an award limitation in the award procedure for biomass installations in Section 39d (1) EEG 2021, was added. According to this, if the tendered quantity is undercut, only the most favourable 80 percent of the submitted bid quantity for new and existing installations (after these have been separated) will be awarded. This means that 20 percent of the bids are always left without an award, which results in auctions that have already been below the auction volume being further reduced. Only in the third year after the auction, the quantity not awarded will be tendered again in accordance with Section 28b (2) number 1 EEG 2021.

Assessment:

According to the explanatory memorandum, this regulation is intended to ensure that no increased bids are submitted despite the lack of competition, thus maintaining price competition. However, this seems superfluous in view of the existing tight price ceilings and also has the undesirable effect of an even lower expansion. Instead, competition should be stimulated through improved revenue opportunities. This regulation thus represents a problematic obstacle to the expansion of bioenergy.

A separate **southern quota** will be introduced for auctions for biomass (Section 39d (2) EEG 2021). This quota provides that from 2022, 50 percent of the auction volume will be realised in the southern region if the submitted bid quantity is at least equal to the tendered quantity. If the submitted bid quantity is below the auction volumes, preference will be given to installations in the southern region up to a quota of 20 percent of the volume of auction (Section 39d (3) EEG 2021).

The term **"southern region"** is defined in Section 3 number 43c EEG in accordance with the KWKG. The regional authorities belonging to the southern region are listed in Annex 5 to the EEG 2021. The regional authorities are located in Baden-Württemberg, Bavaria, Hesse, Rhineland-Palatinate and Saarland. According to the explanatory memorandum to the draft, the purpose of this quota is to ensure more secure power in the south and thus improve system security. Unlike for wind energy, quantities not allocated in the south are not to be transferred to the other locations in the north in order to ensure that existing **grid bottlenecks** do not worsen.

3. Changes for existing installations and installations in follow-up promotion

The most important change here is certainly that the **maximum bid value** for existing installations that participate in an auction and want to switch to the ten-year so-called follow-up support will be raised significantly. The maximum bid value is now 18.4 ct/kWh (instead of the originally applicable 16.9 ct/kWh) and will decrease by 1 percent per year from 1 January 2022 (Section 39g (5) number 3 EEG 2021). It also applies to existing installations that the **value of award** be paid out by the grid operator **for smaller biomass installations** up to 500 kW is always 0.5 ct/kWh above the bid value until 2025 (Section 39g (1) sentence 3 EEG 2021). It should also be emphasised that operators of existing biogas installations will also benefit from the **increase in the flexibility supplement** from currently 40 euros per kilowatt of installed capacity to 65 euros/kW in the future (see C.II. 5. below).

In addition, a number of smaller, mainly merely clarifying amendments were made regarding the participation of existing installations in the auctions. First of all, it has been clarified that existing biomass installations can participate in auctions even if the biomass originally used is no longer subject to the Ordinance on the Generation of Electricity from Biomass (**Biomass Ordinance**) (Section 39g (1) sentence 1 EEG). However, the existing installation only receives the support after the award of the contract if it uses biomass as defined in the current Biomass Ordinance. In this respect, the Act also clarifies that such installations are also considered "installations whose support ended" after the expiry of the support period and continue to benefit from the feed-in priority.

There is an important innovation for existing **biowaste fermentation** installations. In the EEG 2017, it was still unclear whether the limitation of the value to be applied to the values applicable to new waste fermentation installations already applies if only a small proportion of the electricity is generated from biowaste. It was also unclear whether this legal consequence would then apply to the entire electricity generated in the respective installation or not. The legislator has now taken up a suggestion from the commentary literature: The value of award will only be limited for the **electricity generated from biowaste** (Section 39i (3) EEG 2021). This also clarifies that the legal consequence should also apply if only a small proportion of biowaste is used.

A new time window for the cut-off date to be chosen by the installation operator has been defined for the point in time from which the existing installation is deemed to be newly commissioned after the award has been received (Section 39g (2) and (3) EEG 2021). Instead of the previously applicable one to three years, the installation operator can now claim the award after only three months to three years.

4. Special auctions for biomethane installations

The new special auction for biomethane installations (Sections 39j ff. EEG 2021) - this term does not refer to biogas upgrading installations, but to biomethane-fuelled electricity generation units, such as CHPs - will take place only once a year on 1 December (Section 28b (4) EEG 2021). The volume of auction

is 150 MW per year, with an increase from 2022 by the amount for which no award could be made in the previous calendar year. The maximum bid value is 19.0 ct/kWh and will decrease annually by 1 percent from 1 January 2022 compared to the applicable maximum value in the previous year. Installations of 100 kW or more participating in this separate auction must meet special flexibility requirements, as the maximum permissible rated output is only 15 percent of the installed capacity. Existing installations remain excluded from this auction segment.

In 2021, the separate auction will be open to all biomethane installations. From 2022, only biomethane installations located in the southern region will be allowed to participate. However, biomethane installations outside the southern region will then be able to participate in the general auction. Even if the wording has become somewhat muddled due to the changes made in the course of the legislative process, the clearly overriding reasons argue that this option should remain.

5. Redesign of the flexibility premium

There are far-reaching innovations in the **flexibility premium**. The EEG 2021 takes up some, but by no means all, of the demands of the biogas industry. First of all, it is important that the quantitative limitation to initially 1,350 and later only 1,000 megawatts, also known as the **"flexibility cap",** has been consigned to history. However, this is also accompanied by an increase in the requirements to be met by the installation operator.

Pursuant to Section 50 (3) EEG 2021, the payment entitlement only exists if an electricity quantity of at least 85 percent of the installed capacity is generated on at least 4,000 quarter hours. For biomethane installations in the southern region, this requirement must be met for at least 2,000 quarter hours. In the first and last year of the use of the flexibility premium, the required quarter hours are reduced proportionally to the full calendar months. Periods in which no electricity can be generated due to maintenance or technical defects are also deducted - but only if this affects more than 672 consecutive quarter hours (for biomethane installations in the southern region: 336 consecutive quarter hours). On the one hand, this means that installation operators who have made their biogas installation more flexible by installing an additional CHP unit **must operate both CHP units in parallel for at least about 12 percent of the annual hours**. Of course, this presupposes that the older CHP unit is still fully functional and is actually used to generate electricity. The aim of the regulation is to no longer merely encourage flexible electricity generation, but to enforce it to a certain extent. The previously applicable regulations, on the other hand, grant the flexibility premium even if the installation operator simply leaves one of his CHPs permanently switched off.

According to the **transitional provisions,** the new requirements only apply to **existing installations if** the operator *"has submitted the additional installed capacity [...] for claiming the flexibility premium to the register for the first time after 31 December 2020"* (Section 100 (2) number 12 EEG 2021).

Reporting of the additional installed capacity could also be permissible **prior to commissioning** of a flexible CHP unit delivered as late as the beginning of 2021.

The **"compression model"** favoured by parts of the biogas industry has not been taken up by the federal government in the draft of the EEG 2021. The compression model aims to offer a sufficient economic incentive for flexibilisation even for installations with a short residual term. To this end, installation operators should be given the option of drawing the full amount of the flexibility premium, which is normally extended to ten years, within a shorter period of time if particularly demanding requirements are met.

6. Changes to the flexibility supplement

As already explained, the **flexibility supplement** has been increased from 40 euros per kilowatt of installed capacity to 65 euros/kW (Section 50a EEG 2021). Operators of existing installations also benefit from the increase if they switch to the follow-up support. This also applies if the installation operators already participated in an auction before the EEG 2021 came into force and they have already been awarded a contract. However, those who have already switched to the **follow-up support** as of 1 October 2020, for example, are at a disadvantage: This is because if the flexibility supplement was already claimed before 31 December 2020, the previous financial support of 40 euros/kW will remain in place, in accordance with Section 100 (2) number (11) of the EEG 2021. Those who commissioned their biogas installation under the EEG 2014 will also only receive **the increased flexibility supplement** if they have not yet claimed any flexibility supplement at all (Section 100 (2) number 11 EEG 2021).

Following the insertion of the second sentence in Section 50a (1) EEG 2021 on 18 December 2020, **the flexibility supplement** for the addition of capacity in the follow-up support, for which the flexibility premium has already been claimed, will **no longer apply.** According to the explanatory memorandum, this is intended to prevent windfall profits and double financial support. However, it remains completely unclear how the share of output for which the flexibility supplement does not apply is to be determined. The legislator has apparently overlooked the fact that the flexibility premium is only paid for the "additional capacity", i.e. the difference between the installed capacity and the rated capacity (to be determined annually) multiplied by the correction factor, while the entitlement to the flexibility supplement exists for the entire installed capacity.

Assessment:

The aim of the regulation is obviously to exclude "double financial support". However, for a whole range of reasons, there is no reason to fear that double financial support might occur in contravention of state aid law. This is already shown by the comparison between the twenty-year flexibility supplement for new installations and the maximum ten-year support via the flexibility premium supplemented by the maximum ten-year follow-up support. In addition, installation operators rarely receive a ten-year suppport via the flexibility premium for the flexibility measures carried out in recent years. In most cases, the changeover to the follow-up suppport takes place before the end of this period. The economic efficiency calculation is based on the fact that after a few years of flexibility premium, the flexibility supplement can be claimed in the so-called follow-up support. The new regulation is also questionable from a constitutional point of view, as the installation operators concerned were entitled to rely on the fact that they would also receive the flexibility supplement as of the cut-off date when they made their investment decision - in some cases only after the award had been received. Operators who had counted on such financing may be affected existentially by this change. For this reason, many associations are already calling for the previous entitlement of 40 €/kW flexibility supplement to be retained.

Finally, it is extremely gratifying that the flexibility supplement will also be extended to small-scale **liquid manure installations** with the EEG 2021. This was not originally envisaged, as according to the original version of the law, small-scale liquid manure installations were only allowed to have an installed electrical output of a maximum of 75 kW anyway and the entitlement to the flexibility supplement for installations with a statutory entitlement to support only exists from an output of more than 100 kW. When raising the permissible installed capacity for small-scale slurry systems to 150 kW, the legislator then overlooked including a reference to Section 44 EEG 2017, which regulates the remuneration for small-scale slurry systems, in Section 50a (2) EEG 2017 at the same time. This error has now been corrected. It should also be noted that the maximum rated output is no longer 75 kW. In the case of installations with an output of up to 100 kW, the entitlement to support will in future apply to the entire amount of electricity generated, whereas for installations with an output of more than 100 kW, it will only apply to 50 percent of the installed output. Existing installations will also receive the flexibility supplement in future. However, the maximum rated output of 75 kW will remain.

Assessment:

Compared to the cabinet decision and the first draft bill, the legislator has made significant improvements and taken up numerous **demands from associations.** After all the hardships that the biomass, biogas and biomethane sector has had to endure since the EEG 2014 came into force more than six years ago, the present result is in part very pleasing. On the other hand, the adjustments made at the last moment resulted in very problematic changes that have now entered into force as law.

Both the development corridors and the annual volume of auction were increased significantly. Since all biomass auctions carried out so far had fewer awards than auction volumes, the maximum bid prices also rise sharply, by a whopping 2.0 ct/kWh. However, those who were early and have already been awarded a contract do not benefit from this. The situation is different for the flexibility supplement. Here, operators of existing biogas installations are also to benefit from the fact that the flexibility supplement will be raised from currently 40 euros per kW of installed capacity to 65 euros/kW in future. The fact that the flexibility supplement will no longer be paid out when the flexibility premium is claimed is one of the most problematic changes. Many operators had trusted that they would receive the flexibility bonus and factored it into their investment decision. In addition, the flexibilisation of existing biogas installations will no longer be worthwhile in many cases.

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Assessment (continued)**:**

With the so-called **80-20 rule,** another sustainable brake for biomass found its way into the law at the last moment. Instead of maintaining competition, this will inhibit the expansion of biomass installations, as very few operators will be able to bid noticeably below the still low maximum bid prices. Whether the new regulations will ensure that electricity generation from biomass will finally pick up again after many years of stagnation seems doubtful. At least, however, the EEG 2021 - unlike the EEG 2014 and the EEG 2017 - shows a somewhat timid **commitment to biomass** and its importance for flexible electricity generation. It is obvious that the federal government did not want to address all the concerns of the biomass and especially the biogas sector. Nevertheless, there is now **light at the end of the tunnel** - not least because there are also encouraging developments outside the EEG, for example in the fuel sector.

III. Wind energy

1. Changes to the rules of auction

a) Volume of auction

Section 28 EEG 2021 provides for only **three bidding dates per year** for onshore wind energy (1 February, 1 May and 1 September), to which the annually determined bidding volumes are evenly distributed. In 2021, 4,500 megawatts will be put out to auction, of which 1,600 megawatts will be put out to auction in additional special auctions, which were already planned for 2021 in the EEG 2017. For the following years, the volume of auction will increase annually (2,900, 3,000, 3,100, 3,200, 4,000, 4,800 and 5,800 megawatts) to a total capacity of 31,300 megawatts to be installed by 2028.

However, the concrete volume of auction can change according to various regulations:

- Section 28 (3) EEG 2021 provides for an **increase rule,** which will, however, only take effect **from 2024.** According to this rule, the volume put out to auction will increase from 2024 onwards by the amount for which no awards were awarded in the third previous year in the auctions for onshore wind energy installations. However, the auction volume may also decrease, namely by the awards from **international auctions** and the total capacity of the **pilot wind energy installations** promoted for the first time in the previous year. In future, by 15 March of each year, the Federal Network Agency will determine the volume to be added (or deducted for

international auctions or pilot wind energy installations) and distribute it evenly over the following three auction rounds.

- In addition, from 2021 onwards, there will be a **"catch-up" of unrealised awards** from the previous rounds (Section 28 (5) EEG 2021): The volume of auction of a bidding date will be increased by the bid volume of awards that were issued after 31 December 2020 and cancelled before the announcement of the respective bidding date.

- Finally, as part of the short-term amendments at the end of the legislative process, a new Section 28 (6) EEG 2021 was added, according to which the auction volumes are to be **reduced by** the Federal Network Agency in the event of **imminent signature no later than two weeks before the bidding deadline**. In the explanatory memorandum, the fine-sounding term "endogenous quantity control" is introduced for this artificial shortage. A threatening signature is to be assumed in particular if the registered new approvals since the last bid deadline and the non-approved quantities of the last bid deadline together correspond to a smaller capacity than the auction volumes of the new bid deadline and, in addition, there was already a signature in the previous bid deadline. In order for the Federal Network Agency to be able to detect an impending signature in good time, the **deadline** by which the approval must be available and reported to the register has also been **extended from three to four weeks** (Section 36 (1) EEG 2021). If the Federal Network Agency detects an impending signature, the volume of auction is to be reduced to the summed output of the conceivable participants (registered approvals and non-approved bids of the preliminary round).

b) Rules of auction in detail

As with the solar auctions, the basic legal framework for the wind auctions remains largely unchanged - the changes in the EEG 2021 relate more to details. For example, only small-scale onshore installations (installed capacity up to and including 750 kW) and pilot wind energy installations (for onshore installations up to a total capacity of 125 MW per year) are still eligible **for support outside of the auctions.** Nevertheless, some changes have been made to the wind auctions.

The most important changes at a glance:

- What is new is that the **approval** under the Federal Immission Control Act for participation in the auction must now **have been granted and registered in the market master data register four weeks before the bid deadline,** instead of three weeks before as previously (Section 36 (1) EEG 2021). This change is related to the new regulation on the reduction of the volume of auction in the event of imminent signature, which was also included in the Act at short notice (see Section a) above). The change in the deadline meant that the corresponding registration for the first

auction round in February 2021 had to be completed by 4 January 2021. Since this change was only incorporated into the law shortly before the end of the year, it is to be feared that not all industry participants were aware of this in time. It remains to be seen whether and how this will have an effect in the February 2021 round.

- In Section 36 (2) EEG 2021, the obligation to name in the bid the installations that are covered by a permit but to which the bid does not relate has been abolished. Instead, the bid **quantity per installation** must be specifically stated in the bid in future. According to the explanatory memorandum, these changes are ultimately intended to improve the administrability of the bidding regulations, especially in connection with the new regulations on subsequent power increases (see below).

- In future, the auctions will take better account of the fact that the **installation capacity** planned when participating in the auction can change in the course of implementation or that a more efficient site yield can be achieved through subsequent measures (e.g. through an interim type change or a capacity upgrade). Therefore, in future, **up to 15 percent of the supported installed capacity** will be **additionally supported** (Section 22 (2) EEG 2021). If the installed capacity increases by up to 15 percent in the course of realisation, the share of electricity attributable to this will in future be "automatically" remunerated at the same applicable value as the remaining electricity. If the installed capacity increases by more than 15 percent, it is also possible to participate once again in the tendering process for the share of capacity exceeding 15 percent (so-called additional bids, cf. Section 36j EEG 2021) - however, only after commissioning of the installation, not already during the realisation process. The bid value of such an additional bid may not exceed either the applicable maximum value or the award value of the award originally obtained for the installation. The remuneration period of the supplementary bid is also synchronised with the original "main bid". The new regulations on capacity increases will also apply to existing installations in future.

- In Section 36b EEG 2021, the **maximum value** has now been lowered to **6.0 cents/kWh as of 2021,** as this corresponds to the current supporting costs for wind energy projects according to the explanatory memorandum. From 1 January 2022, the maximum value will then decrease **annually by 2 percent.** A "dynamic" calculation based on previous auction rounds will therefore no longer take place. However, should the need for corrective action arise again in the future, the Federal Network Agency can continue to make any determinations in this regard, as has already happened in the past.

- There are no changes to the **security for wind energy installations** in the tendering process. For citizens' energy companies, the abolition of the first and second security, which was already

implemented in May 2020, remains in place. The full amount of the security must therefore continue to be paid by the citizen energy companies on the bid deadline.

- The regulations on the **grid expansion area** (Section 36c EEG 2017) were deleted without replacement and replaced by a new so-called **"southern bonus"** (Section 36d EEG 2021). A similar preferential treatment of the so-called southern region - the districts in Baden-Württemberg, Bavaria, Hesse, Rhineland-Palatinate and Saarland listed in Annex 5 of the EEG 2021 - is now also found in the regulations on biomass support (cf. Section C. II.). The southern bonus will have the following effect in the tendering process - but only from 2022 onwards: The bids from the so-called southern region are first separated from all other bids and sorted by amount. Then these bids are initially awarded a contract until a certain amount of the auction volume to be distributed in the respective deadline is reached (2022 and 2023: 15 percent; from 2024: 20 percent). Then, in a second step, the Federal Network Agency sorts through all remaining bids from the auction round that have not been awarded and awards the remaining bids that are still eligible for award up to the award limit of the auction. According to the explanatory memorandum to the law, an even higher proportion of priority allocation to projects located in the south is not expedient at this point in time, as the approval situation does not allow for this anyway. However, according to the legislator, project developers and approval authorities should have enough time until 2024 to develop a sufficient number of projects in the southern region.

- The regulations on the **extension of the realisation period** were also adjusted (Section 36e EEG 2021): Thus, although the restriction to a "*one-time*" extension in the case of third-party appeals was deleted, a maximum duration for the extension period of 18 calendar months was introduced. The reference to the order of immediate enforceability of the permit, which is required for an extension, was also deleted, since, due to a change in permit law, third-party legal remedies against the permit of a wind energy installation no longer have a suspensive effect as a rule anyway. In addition, an **extension option** was introduced - also for existing installations - in **the event of insolvency of the installation manufacturer** (or the generator or other essential component). This also requires an application to the Federal Network Agency and the extension period is also a maximum of 18 calendar months (whereby the extension is to be issued at most for the duration of the validity of the permit). It was also clarified here that the two extension options can also be asserted "cumulatively" if delays occur in a project due to both third-party legal remedies and manufacturer insolvency. Thus, extensions of up to 36 months in total can be granted. However, even in the case of an extended realisation period due to manufacturer insolvency, the **funding period** already begins to run from the 30th month after the award notice (cf. Section 36i EEG 2021). However, a very welcome new provision in this context is contained in a new Section 55 (5a) EEG 2021: According to this, in the event of an

extension of the deadline pursuant to Section 36e EEG 2021, the deadlines for the payment of the **penalties** will also be extended accordingly. However, there is still no provision in the transitional regulations that this provision also applies to existing installations. However, this may also be a legislative oversight that still needs to be rectified.

- In connection with the option to extend the implementation period, the government's explanatory memorandum also contains an interesting reference to a problem that already exists occasionally at present, namely that there can also be constellations in which it is certainly *desirable to get* rid of an existing award prematurely and to participate again in an auction with the same project. In this case, it was disputed in the past whether and to what extent this was possible with awards from the wind auction. The explanatory memorandum to the law contains statements on this, in which it is assumed that it should **not be possible to prematurely detach oneself from an existing award** - although in our opinion there are very good arguments for this being possible. It was precisely with this problem in mind that it was decided to introduce a maximum limit of 18 months for the extension of the realisation period in certain cases, since in this case a renewed participation could often be desired anyway due to the already expiring funding period (although it should of course be noted that this problem could also have been solved differently, e.g. by extending the funding period in accordance with the period of time of the existing award).In addition, the justification is not conclusive overall, since the operator is also free not to apply for an extension if he wants to withdraw from his award).

- Another important change is found in Section 36f EEG 2021 and relates to **amendments** or, in future, explicitly also to **new versions of the approval** after the award, as they occur time and again in project practice. It has now been expressly clarified that not only in the case of an amendment to a permit, but also in the case of a new permit, the surcharge remains related to the amended or newly issued permit. The prerequisite for this is, however, that the location of the wind energy installation does not deviate by more than twice the length of the rotor blades.

- No significant changes were made for **citizens' energy companies** (cf. Section 36g EEG 2021). After the elimination of the main tendering privileges, the last applicable regulations (i.e. essentially the *uniform pricing advantage*) remain in place.

- When **calculating the value to be applied for** the specific installation on the basis of the value of award, a further correction level for particularly low-wind locations will be introduced in future. In future, a correction factor of 1.35 will apply for a quality factor of 60 percent and below (cf. Section 36h EEG 2021). Until now, the lowest correction level here was a quality factor of 70 percent with a correction factor of 1.29. According to the explanatory memorandum, the amendment is intended to provide a further incentive to also develop low-wind sites in order to *"strengthen the approval dynamic"* and to increase the *"overall intensity of competition*

required for the auctions *".* Whether this can be achieved effectively with such a regulation is, however, doubted in some quarters.

2. Municipal participation model (Section 36k EEG 2021)

For some time now, there has been a discussion about the measures that can be taken to maintain and increase **public acceptance** of the further expansion of wind energy. A wide variety of models have been considered for a long time on how local citizens can participate directly in the value creation associated with wind energy - whether directly or via the local communities. At the same time, in practice this has often given rise to quite delicate questions of municipal economic law, and in some cases even criminal law, since flows of money between project developers and municipalities can of course quickly come close to "bribery" and "taking advantage".

A new Section 36k EEG 2021 now provides for the **voluntary possibility of a payment** of up to 0.2 cents per kilowatt hour of fed-in or fictitious support-relevant electricity quantities within the meaning of Section 7.2 of Annex 2 to the EEG 2021 by wind energy installation operators in the sense of a "unilateral contribution without consideration" to "affected municipalities". Affected municipalities are all those whose municipal area is at least partially located within a radius of 2,500 metres around the wind energy installation. If several municipalities are affected, the amount of the payment offered per municipality shall be divided on the basis of the share of their respective municipal area in the area of the perimeter, so that in total no more than the electricity quantity-related amount of 0.2 cents may be offered.

Agreements between operators and municipalities that include the payment of the electricity-related amount permitted under Section 36k (1) of the EEG 2021 are subject to the written form and can be concluded even before the immission control permit for the wind energy installations is granted. The legislator further stipulates that such agreements or offers by operators to municipalities to conclude them do not constitute an "advantage" within the meaning of the criminal law on corruption (Sections 331 to 334 of the Criminal Code, StGB). In addition, the operators can demand corresponding payments as reimbursement from the grid operator; the loophole in the EEV that still existed in this respect during the draft version of the EEG 2021 has been closed.

In contrast to the draft version, the regulation creates further clarity, which is to be welcomed, by excluding the realisation of the offence of corruption through the offer or conclusion of agreements on municipal participation. However, uncertainties remain here as well. Furthermore, the statutory provision requires that an offer of payment be made "without consideration". In practice, however, this is precisely where a factor of uncertainty lies, because even the demand of a municipality that the surcharge must be paid in accordance with Section 36k EEG 2021 and the - possibly even only conclusive - promise of not concluding an urban development agreement in the event of the

developer's refusal precludes unilaterality. Due to the envisaged roll-over, the developer is unlikely to have any relevant interest of his own in the non-payment of the surcharge, but on closer inspection "unilateralism" is more likely to be the exception - even if no consideration is expressly included in the contractual agreement. However, if there is no unilaterality, the exclusion of punishability provided for by law does not apply.

We recall that already the "general cultivation of public opinion" or the goal of municipal goodwill on the part of the developer can link payments or offers of payment to a criminally relevant unlawful agreement in the sense of the corruption offences ("[...]it is therefore sufficient if the will of the benefactor is directed towards a general goodwill related to future professional decisions, which can be activated on occasion.", BGH, judgement of 14 October 2008 - 1 StR 260/08, marginal no. 32). Admittedly, there are of course in this respect, also taken up by case law, not inconsiderable difficulties of proof and evidence (the risk of prosecution). Nevertheless, direct payments to the public sector must always be seen as problematic for good reason. The fact that payments are made entirely without the expectation of something in return, even if this only lies in the goodwill of the municipality, is probably rare in practice. Internal intentions are part of the relevant intention of a possible perpetrator and thus part of a criminal offence and, according to the now implemented regulation of Section 36k EEG, an important aspect of the intervention of the exclusion of criminal liability (see above).

Therefore, in our view, it would have been more obvious to declare the "unilateral performance" of a grant to municipalities as permissible, i.e. to simply dispense with the requirement of an offer or an agreement. Already the necessity of an "offer" and an "agreement" leads in purely practical legal terms to the fact that the unilateral grant again acquires a two-sided component and thus itself lowers the threshold for consideration, if not exceeded, then at least considerably. We therefore further recommend that the payment of the municipal surcharge should not be concluded as an integral part of another (urban development) contract with a municipality, but that the payment agreement should either be outsourced to a separate agreement or in any case to as independent an annex as possible, as otherwise the risk of an impermissible linkage is high. We do not consider this risk to be of a purely academic nature, but dangerous on several levels, especially in the increasing competition.

The relationship of the surcharge according to Section 36k EEG 2021 to state regulations is not regulated. This is because Brandenburg has the **Wind Energy Installation Levy Act (BbgWindAbgG)**, according to which obligatory levies must be paid for wind energy installations to municipalities within a radius of 3 kilometres around the wind energy installations. Apart from the fact that, in our opinion, there are major concerns about the constitutional admissibility of that law, practice must now clarify how this levy will relate to the possibilities provided by Section 36k EEG 2021. Is the Brandenburg wind levy to be counted towards or added to the **"quota"** of the envisaged Section 36k EEG 2021? In

our opinion, the latter should be the case, as the payment obligation of the BbgWindAbgG and the payment authorisation of Section 36k EEG 2021 are based on different legal foundations.

So far, the regulation on municipal participation only applies to wind energy installations. However, Section 95 number 3 EEG 2021 provides for an ordinance authorisation to extend the regulations on municipal participation of Section 36k EEG to other renewable generation installations.

3. Wind energy installations outside the auctions

No major changes were decided for wind energy installations that do not have to participate in the auctions (**micro energy installations or pilot wind energy installations**), cf. Section 46 EEG 2021. Here, essentially only a "clean-up" of the provisions still contained in the EEG 2017 on a transitional basis until 2019 took place.

- The **value to be applied** will therefore also continue to be calculated in accordance with Section 36h EEG 2021, whereby the calculation is to be based on the average value from the highest bids awarded in the previous year instead of the award value. For installations with an installed capacity of up to 50 kW, a yield quality of 60 percent of the reference yield is assumed.

- It was also clarified that the new Section 36k EEG 2021 (**municipal participation model**, see above) also applies to pilot wind energy installations. Operators of pilot wind energy installations can therefore also involve the affected municipalities according to the regulations outlined above.

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Assessment:

Overall, there are numerous individual regulations in the amendments for the wind industry that show that the legislator is making an effort to improve the framework conditions for wind projects. In particular, the adjustments to the auction regulations, such as the possibility of co-financing or additional bids in the case of power increases, the extended implementation period in the case of manufacturer insolvencies, the clarification on new permits or the shifting of the correction threshold for low-wind sites are certainly to be welcomed overall. However, the maximum duration of 18 months for the extension of the realisation period in certain cases (legal remedies by third parties and manufacturer insolvency) continues to be met with clear criticism. This is simply too short in view of the expected duration of proceedings in practice. The argument put forward in this regard, that it is merely intended to enable the installation operator to withdraw from the award, also seems rather pretextual - the problem addressed there could have been solved differently in various ways. In any case, it remains unfortunate that the support period continues to run even though the implementation period is extended upon application. Here it would have been desirable for the legislator to transfer the new regulation on synchronising the extended realisation period with the penalty periods to the funding period as well. At present, it still seems unclear to what extent the extension of the penalty periods should also apply to existing installations, as there is still no corresponding reference in the transitional provisions. Perhaps the legislator will make improvements here. Finally, it would be desirable for the option to voluntarily return awards to be explicitly granted under certain conditions. Auction practice in recent years has shown time and again that there may be cases - especially in the case of necessary and time-consuming "re-approvals" - in which an extension of the deadlines is not in the interests of the project developer, who must be able to withdraw from an award.

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Assessment (continued)**:**

Such an option could be included in the law as an alternative to the extension option. Overall, the industry is currently repeatedly expressing the wish for more flexibility in the law with regard to implementation processes, deadlines, etc., in order to be able to react more quickly to unforeseen events, such as the Covid 19 pandemic.

The industry has also been very critical of the new regulation that was "slipped into law" at the very end of the legislative process to limit the volume of auction in the event of imminent signature. According to the explanatory memorandum, the new regulation is intended to create competition and price pressure even when an auction round has fewer awards than auction volume, as the legislator assumes that participants will de facto bid with higher capacities than previously approved due to expected increases in the capacity of their installation types. However, the new mechanism is also strongly criticised from many sides because it puts the already very sluggish wind energy expansion under further competitive pressure. In addition, such artificial shortages seem to be a foreign element in the system of auctions as a whole: if price competition is used instead of statutory support values, the basic mechanisms of competition should be taken seriously and in times of auctions with fewer awards than auction volume an incentive for new projects should be created with rather high awards - instead of forcing further price reductions with artificial shortages. Some even fear that the new regulation will lead to a real "downward spiral" in the wind auctions and to even more uncertainty and crowding out of smaller players in particular.

Other major interventions in the auction system, such as the new southern bonus or the regulations on municipal participation, will still have to prove themselves in practice and we assume that the last word will not be spoken here in the next few years.

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Assessment (continued)**:**

In view of the difficulties anchored in planning and approval law, it is of course rather unlikely that such measures alone will be able to remedy the considerable decline in wind energy (especially in southern Germany) - but the legislator is unlikely to assume this either and sees the EEG 2021 more as a (albeit central) building block here.

It is also criticised that the targeted development corridor is not sufficient to achieve the overall targets and that the catch-up of volumes not awarded or realised in preliminary rounds in 2024 is also too late. Thus, it cannot be assumed that the expansion of wind power generation is progressing sufficiently quickly. Against this background, an earlier start of the "healing mechanism" for the current years of weak expansion would have been conceivable and desirable.

Many observers also lack a coherent and economically viable strategy for continued operation and repowering in the Renewable Energy Sources Act 2021 to ensure that no more installed capacity than necessary is decommissioned in the next few years, especially in the wind sector. The "Corona grace period" of one year for installations that are to be decommissioned at the end of 2020 is not sufficient to ensure adequate continued operation for many old installations, especially at the low level envisaged. Last but not least, many stakeholders in the wind sector had hoped that the EEG 2021 would finally implement more practical regulations on the issue of the EEG levy on electricity consumption within wind farms. Here, too, there is a major gap in the EEG 2021 - the legislator only grants the practice a further extension of one year (see Section B. VIII. above).

As is so often the case, the bottom line is this: Much of what is contained in the draft EEG 2021 is in principle to be welcomed - but in many cases what has *not been* regulated so far is more problematic.

IV. Hydropower

For hydropower installations - as with the previous amendments - the EEG 2021 brings hardly any innovations.

The only change compared to the EEG 2017, which is not insignificant, is that for small (existing) hydropower installations with an installed capacity of up to and including 500 kW, the value to be applied will increase by 3 ct/kWh with effect from 1 January 2021 until the end of the support period. For small (existing) hydropower installations whose support period is not limited under the EEG, the increase applies for 10 calendar years.

D. Storage and sector coupling in the EEG 2021

The EEG 2021 was received with great disappointment by the storage industry. The legal situation for storage in Germany, which is disadvantageous and unclear in many respects, remains in place. At least the Bundestag added regulations to exempt hydrogen production from the EEG surcharge in the EEG 2021. However, it remains to be seen whether green hydrogen will benefit from this.

I. Electricity storage in the EEG 2021

From the point of view of electricity storage, the analysis of the EEG 2021 is unfortunately quickly concluded. There have been no changes in the problematic areas or other further developments in the legal framework. Among others, the following probably most important and long known and frequently discussed problems with regard to storage remain:

- The **reform of Section 61l EEG, which is urgently needed with regard to prosumers**, with regard to the requirements for the installation of metering equipment and the non-applicability of Sections 62a and 62b EEG, seems to be missing. As a result, Section 61l EEG remains de facto inapplicable for active customers in a large number of cases and the corresponding double burden with the EEG surcharge, the CHP surcharge and the offshore surcharge remains. In our legal assessment, the status quo thus continues to **contradict Article 15 (1) EBM-RL**, according to which Member States shall ensure that final customers have the right to act as active customers without being subject to disproportionate or discriminatory technical requirements, administrative requirements, procedures, surcharges and charges and non-cost-oriented network charges, and **Article 15 (5) lit. (b) EBM Directive**, which requires Member States to ensure that active customers operating storage are not subject to double charging for stored electricity that remains on site or when providing flexibility services to network operators.

- According to the draft, the application of the so-called **exclusivity principle of Section 3 number 1 and Section 19 (1) of the** EEG **to storage facilities will continue** to lead to all electricity from renewable energy sources in a storage facility becoming grey electricity when a

kilowatt hour of grey electricity is stored. On the other hand, a balance sheet consideration of the stored electricity is still not envisaged. However, this contradicts **Article 21 (2) (a) of the RES Directive**, according to which RES autoproducers are entitled to produce renewable energy, including for self-supply, and to store and sell the excess production of renewable electricity, including by means of renewable electricity purchase contracts, supply agreements with electricity suppliers and peer-to-peer business arrangements. According to **Article 15 (4) (d) EBM-RL,** active customers with storage must also be allowed to provide several services at the same time and may participate in (all) flexibility schemes (Article 15 (2) (c) EBM-RL. National regulations according to which a storage facility has to decide whether it wants to treat the stored electricity as renewable electricity or whether it wants to provide flexibility to the grid are accordingly not compatible with European law.

Assessment:

From the point of view of electricity storage (on sector coupling, see II. below), the EEG 2021 is a disappointment overall. This was not really to be expected after the EU's Clean Energy Package (see Section A. above) clearly identified energy storage, self-supply and active customers (= prosumers) as central pillars of the renewable and decentralised energy system of the future and provided them with corresponding rights. If no significant improvements are made in the first half of 2021, the conclusion can be drawn from the point of view of electricity storage:

- Once again, an opportunity is being missed to set the course in the Renewable Energy Sources Act for a regenerative future that will (inevitably) be characterised by more than storage and decentralised energy concepts.
- The hostility of the current legal framework to storage, its incongruities, ambiguities and excessive bureaucracy in the operation of storage facilities remain for the time being.

II. Sector coupling: Hydrogen in the EEG 2021

In the area of sector coupling, the regulations on **exempting electricity** for **hydrogen production from** the **EEG surcharge, which** had already been announced in the federal government's **hydrogen** strategy and the first draft laws, were eagerly awaited. On the basis of the last resolutions of the Economic Committee of 15 December 2020, a total of three paragraphs were finally included in the EEG

2021 shortly before the end of the legislative process: Thus, a regulation on the production of hydrogen in electricity-cost-intensive companies was included in Section 64a EEG 2021 and a regulation on the production of green hydrogen in a new Section 69b. The regulations are also flanked by an authorisation to issue ordinances on requirements for green hydrogen in Section 93 EEG 2021. The new regulations are of great interest for many projects and have the potential to bring green hydrogen projects a whole step forward. It is regrettable, however, that with such an important set of regulations, the extremely short notice of their inclusion in the law in the Committee for Economic Affairs and Energy meant that there was neither the possibility of an "official" statement for associations nor a reading in parliament. Whether this very hectic procedure in the last few metres does justice to a declaredly highly relevant project such as hydrogen production - also from the point of view of the rule of law - can certainly be discussed.

1. Section 64a EEG 2021: Supplementation of the Special Compensation Scheme

The previous provisions of the **special equalisation scheme** for electricity-cost-intensive companies were supplemented by Section 64a EEG 2021 with a regulation on the use of electricity for the production of hydrogen. The aim of the regulation is, according to the also new Section 63 number 1a EEG 2021, to support the technology for hydrogen production and to prevent the production of hydrogen from migrating abroad. If the conditions are met, the regulation leads to a **reduction in the EEG surcharge of up to 0.1 cents per kilowatt hour**. The extent of the limitation depends on the value added and electricity cost intensity of the company. Further prerequisites for the use of the regulation are:

- The company must be assigned to an industry with the serial number 78 according to Annex 4 to the EEG 2021 (production of industrial gases).
- The electrochemical production of hydrogen must make the largest contribution to the company's total value creation.
- Furthermore, a certified energy or environmental management system or, in the case of electricity consumption of less than 5 gigawatt hours, an alternative system for improving energy efficiency pursuant to Section 3 of the Peak Efficiency Scheme Ordinance in the last completed business year is required.

With regard to the **evidence to** be provided, the regulation refers to Section 64 (3) number 1 letters a, b, d and number 2 EEG 2021. In this respect, the following are required:

- Electricity supply contracts and electricity bills for the last completed business year;
- Indication of the quantities of electricity purchased or self-generated, self-consumed and transmitted in each of the last three completed business years;

- Proof of the company's industry classification by the statistical offices of the Länder and the company's consent that BAFA may obtain the classification from the statistical offices of the Länder;

- valid DIN EN ISO 50001 certificate, valid registration or renewal notice from the EMAS registration body regarding registration in the EMAS register or valid proof of operation of an alternative system for improving energy efficiency;

The limitation of the EEG surcharge to a maximum of 0.5 per cent of the gross value added provided for in Section 64a (2) sentence 3 EEG 2021 also requires proof pursuant to Section 64 (3) number 1 lit. c EEG 2021, i.e. an audit certificate issued by an auditor, a cooperative auditing association or a certified accountant, which contains certain information intended to prove the electricity cost intensity of the enterprise of at least 20 per cent.

In paragraph 4, Section 64a EEG 2021 also contains a provision that makes it possible for **newly established companies to** achieve a limitation of the EEG surcharge already in the first business year. Pursuant to paragraph 5, the regulation may also be applied to **independent parts of a company,** even if the company as a whole is not assigned to any of the sectors listed in Annex 4 to the EEG 2021. Finally, a limitation may also be applied to **non-independent parts of a company if** the electrolyser has measuring equipment that complies with measurement and calibration law at all withdrawal points and self-supply facilities.

Finally, a cross-reference in paragraph 7 to Section 64 (6) of the EEG 2021 stipulates that the definitions of Section 64 (6) shall also apply within the framework of Section 64a of the EEG 2021.

2. Section 69b EEG 2021: Production of green hydrogen

As a new paragraph 3, a Section on green hydrogen was included in Part 4 of the EEG 2021 (equalisation mechanism). So far, this Section contains only one paragraph, Section 69b on the **production of green hydrogen**.

According to this, the EEG surcharge is reduced to zero for electricity that a company consumes in a "**green hydrogen production facility**" for the production of green hydrogen, regardless of the intended use of the hydrogen. The law does not specify which installation parts and components are part of the "facility".

However, it is required that the "facility" is connected to the grid via **its own metering point,** provided that electricity from the grid can be consumed in the "facility".

However, the regulation will only become applicable once an **ordinance** has been issued in accordance with the likewise new regulation in Section 93 EEG 2021. This postponement of the entry

into force of the regulation is justified in the explanatory memorandum of the EEG 2021 by the fact that a legally secure definition of green hydrogen is only possible "*when corresponding national and European discussion and implementation processes have been completed, also with regard to the European Renewable Energies Directive ("RED II")*".

According to Section 69b (2) EEG 2021, the application is also limited to "hydrogen production facilities" that are commissioned **before 1 January 2030.** This limitation is justified by the fact that such a full exemption can (initially) only be justified for the period of the market ramp-up.

3. Section 93 EEG 2021: Ordinance authorisation on requirements for green hydrogen

Finally, an ordinance authorisation included in Section 93 EEG 2021 empowers the Federal Government to make various provisions on the regulations for hydrogen projects by **ordinance** without the consent of the Bundesrat. Pursuant to Section 96 (1) EEG 2021, this ordinance requires the consent of the Bundestag. However, the second sentence of Section 96 (2) of the EEG 2021 stipulates that the Bundestag's consent to the ordinance is deemed to have been granted if the Bundestag has not dealt with the ordinance within six weeks of its receipt. Pursuant to Section 96 (4) of the EEG 2021, the statutory instrument must be issued by **30 June 2021 at the latest.**

In the preliminary legislation, the Federal Government can first provide that the limitation under Section 64a EEG 2021 can only be claimed by companies that produce green hydrogen. In this respect, it should be noted that there is no mention here of companies having to produce green hydrogen "exclusively".

Furthermore, the **requirements for the production of hydrogen** can be the subject of the ordinance. (Naturally) the details remain open in the authorisation. The authorisation provides that

- content, space or time requirements are imposed to ensure that only hydrogen that has been credibly produced with electricity from renewable energy sources and that is compatible with the goal of sustainable development of energy supply is considered green hydrogen;
- it must be regulated that only electricity from renewable energies that has not claimed financial support under the EEG 2021 may be consumed for the production of hydrogen;
- that the EEG surcharge is to be paid at a certain percentage if certain requirements are met that are lower than the requirement for limiting the EEG surcharge to zero pursuant to Section 69b;
- the verification of compliance with the requirements is regulated;
- regulations are made as to how trust worthy of protection is protected prior to the enactment of the ordinance on the basis of Section 64a;

- Special provisions for demonstration and pilot projects should be possible.

Assessment:

A conclusive evaluation of the new regulations on exempting electricity quantities for the production of hydrogen from the EEG levy is difficult at this point in time, especially since essential cornerstones of the future legal situation will only be determined with the Green Hydrogen Regulation. However, the following aspects can already be noted.

- The long-demanded exemption of electricity generation for the production of hydrogen from the EEG levy is undoubtedly a - long overdue - step in the right direction. It is also pleasing that the regulation in Section 64a EEG 2021 deviates from the general special equalisation scheme in important points. For example, there is no "deductible" of 1 GWh and the exemption can already be claimed in the first business year.

- However, it remains to be seen whether the regulations will ultimately lead to the actual production of green hydrogen. This will depend to a large extent on when the ordinance is issued and what its content will be. In any case, it is to be hoped that the deadline for the enactment of the ordinance by 30 June 2021, which is explicitly stated in the law, will be taken seriously by the federal government.

- With regard to the expansion of renewable hydrogen projects, the risk is repeatedly pointed out that the new legal situation will lead to considerable electrolyser capacities being built up in the coming months, the aim of which will not be the production of green hydrogen, but rather the production of grey hydrogen in particular. In this respect, we believe it would have been entirely desirable for the legislator to regulate the definition of green hydrogen already in the EEG 2021. This is undoubtedly not an easy task, but it will not become any easier as time goes on. In view of the climate protection goals and the goals of the hydrogen strategy, greater speed would be urgently required here.

(continued on the next page)

Assessment (continued)**:**

From a legal point of view, the following points are also striking about the regulations:

- Section 64a of the Renewable Energy Sources Act 2021 refers to the fact that only companies that are to be assigned to number 78 according to Annex 4 to the Renewable Energy Sources Act 2021 can make use of the regulation. Number 78 is the category of "production of industrial gases". However, according to the established long-standing legal interpretation of the regulation by the Federal Office of Economics and Export Control, which is responsible for this, this category is only applicable to activities in which the hydrogen is **not** fed into a pipeline network after production. This contradicts the further wording of Section 64a, according to which the limitation is to take place "irrespective of the intended use of the hydrogen produced", as well as the assertion in the explanatory memorandum to the EEG 2021 that it is "thus irrelevant whether the hydrogen is bottled or fed into a pipeline network or whether it is used for energy or material purposes." In this respect, it remains to be seen whether the Land Statistical Offices will change the classification of companies in the future, whether BAFA will deviate from the classification by the Land Statistical Office - as the explanatory memorandum to the Act suggests - or whether an amendment to the regulation will still be necessary here to ensure that it also applies to companies that feed hydrogen into the grid.
- The term "hydrogen production facility" is not defined. Therefore, in our opinion, the question arises as to which electricity quantities are actually included (i.e. only the specific electrolysis electricity, also the electricity consumption of the necessary "technical periphery" of the electrolyser, or also the electricity required e.g. in compressors, methanisation installations, cooling installations, etc.).
- It is also not entirely clear what should apply to companies that produce hydrogen but do not market it as an end product, but rather "refine" the hydrogen produced as a primary company purpose (e.g. to synthetic natural gas or liquid fuel). Thus, for the applicability of Section 64a, "the production of hydrogen must make the largest contribution to the total value added of the enterprise". In this respect, it should be clarified that the regulation also applies to companies whose end product actually produced and marketed is not hydrogen but a refined product based on it.

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E. Prosumers and self-supply in the EEG 2021

With regard to **self-supply,** the EEG 2021 contains the following new provision in Section 61b (2):

> *"(2) Notwithstanding subsection (1), the entitlement under Section 61 (1) shall not apply in the case of self-supply from installations for a maximum of 30 megawatt hours of self-consumed electricity per calendar year if*
>
> *1. the system has an installed capacity of no more than 30 kilowatts and*
>
> *2. exclusively renewable energies or mine gas have been used in the installation in the calendar year.*
>
> *Section 24 (1), first sentence, shall apply mutatis mutandis."*

In this respect, in the consultations of the Bundestag, compared to the draft of the EEG 2021 from the Federal Ministry of Economics, on the one hand the power-related limit was raised from 20 to 30 kW and on the other hand the quantity-related limit was increased from 10 megawatt hours to 30 megawatt hours per calendar year. Furthermore, a transitional provision was included in Section 100 (2) number 14a EEG 2021, which now explicitly provides for the applicability of the regulation to existing installations as well. This provision is purely a clarification, although it is to a certain extent "alien" to the system of EEG transitional provisions: According to the prevailing opinion and legal practice, the provisions relating to the compensation mechanism always apply in their most current version anyway, so that in our opinion the clarification for the new Section 61b EEG 2021 (which is quite pleasing for many operators in terms of content) was not actually needed. Another improvement compared to the draft of the EEG 2021 can be seen in Section 21 (2) EEG 2021 after the consultations of the Bundestag. The **full feed-in requirement** originally envisaged there with regard to the feed-in tariff for installations whose support ended was deleted in the Bundestag without replacement. And in the case of the provisions on remote controllability under Section 10b (2) sentence 2, 2nd half-sentence, number 2 EEG 2021, the Bundestag again removed a disadvantage for self-suppliers compared to full feed-in tariffs.

The worst fears of self-suppliers and prosumers have thus not been confirmed after the EEG 2021 was passed by parliament. Nevertheless, the EEG 2021 is far from being a major step towards the prosumer-friendly legal framework propagated by the Clean Energy Package at EU level. If the currently envisaged or still existing provisions of the EEG on self-supply are measured against the requirements of the RES Directive, some discrepancies remain:

- As before, Section 61 (1) number 1 EEG provides for a **basic burdening of self-supply with the EEG surcharge.** Exceptions to this are provided for in the subsequent provisions mainly in Section 61a number 4 and 61b (2) (new) EEG for EEG installations with a capacity of up to 30 kW

and for 30 megawatt hours per year. In addition, according to Section 61b (1) EEG, a basic reduction of the EEG surcharge for RE installations to 40 percent applies. This system is still in contrast to the principle provided for in Section 21 (2) (a) (ii), according to which self-generated electricity from renewable sources which remains on site may [neither] be subject to discriminatory or disproportionate procedures [nor] to any levies, charges or fees. This principle is still reversed by Section 61 (1) number 1 EEG 2021.

- However, after the amendments in the Bundestag, it must be stated that the legislator can refer to the exemption provision in Article 21 (3) (c) of the RES Directive with regard to the **burden on self-supply of up to 30 kW.** Insofar as a burden on the self-consumed electricity quantities is still provided for in the case of these installations - although now only from a quantity of 30 MWh per year - it remains the case, however, that justification is only possible via Article 21 (3) (a) of the RES Directive. This provision presupposes that "self-generated renewable electricity" is effectively promoted under support schemes, but only to the extent that the profitability of the project and the incentive effect of the support in question are not undermined by it. In this respect, the question arises as to whether electricity quantities in excess of 30 MWh per year from subsidised installations with a capacity of up to 30 kW may be charged with the EEG surcharge. Unfortunately, the EEG 2021 lacks any argumentation, calculation or justification in this regard. It is also not clear from the committee documents to what extent the legislator has dealt with the provisions of Article 21 of the RES Directive.

- Section 27a of the EEG still provides for a **ban on self-supply for installations in the auctions. However, such a provision cannot be reconciled with Article 21 (6) (e) of the RES Directive.** For according to this, the national legal framework must ensure that *"self-suppliers in the area of renewable electricity are not discriminated against with regard to self-generated renewable electricity fed into the grid in terms of access to existing support schemes and to all segments of the electricity market"*. Insofar as arguments have already been developed that such discrimination can be justified here, this must be rejected: On the one hand, there is no provision for justifying discrimination in this area. On the other hand, from the perspective of European law, there is clearly no legitimate reason for the discrimination. After all, according to Article 4 of the RES Directive, auctions are the prototype of a support system. Insofar as autoproducers may not be discriminated against in access to support schemes, this automatically means, according to the logic of the RES Directive, that autoproducers may not be discriminated against in auctions. Moreover, it is precisely the goal to bring about the greatest possible competition and to achieve low award values. In addition, from the perspective of the RES Directive, it is desirable that many self-supply installations are built. All these goals would be achieved through the participation of autoproducers in the auctions. The justification that a "distortion of

competition" would occur, which has so far only been considered a pretext, is not supported in any way by the RES Directive - and this is likely to be decisive in the end.

Assessment:

From the perspective of renewable self-supply, the intervention of the Bundestag is initially outweighed by relief. With the new regulation in Section 61b (2) EEG 2021, self-supply from all EEG installations with a capacity of up to 30 kW is now exempt from the EEG levy - at least for 30 MWh per year. This is an important step for a decentralised energy transition. In all other respects, however, it must be stated that significant obstacles and restrictions for prosumers remain. One point in particular stands out from a legal point of view: the ban on self-supply in Section 27a EEG is not justified in the RES Directive. On the contrary, it is diametrically opposed to the aims and purposes of the RES Directive, which - quite obviously in contrast to the federal government - regards self-supply as a central, important and eligible component of the energy system of the future.

However, it should always be noted that the transposition deadline for the RES Directive does not expire until 30 June 2021. With regard to the requirements of the RES Directive, the German legislator would therefore (theoretically) still have until the end of June to make improvements to the legal framework. However, this is not to be expected with regard to the ban on self-supply in Section 27a EEG.

F. Special equalisation scheme: Innovations in Sections 63 ff. EEG 2021

In principle, electricity-cost-intensive companies that are in international competition or are to be protected from excessive electricity price burdens for other reasons can be exempted from the EEG surcharge on a pro rata basis. The background to this exemption is always the idea of creating an appropriate balance between the expansion goals of the EEG and the competitiveness of the companies concerned. The prerequisite for this is that the electricity costs of a company are particularly important for its value creation. Therefore, the so-called "electricity cost intensity" (i.e. the ratio of electricity costs to the gross value added of a company) is of great importance for the companies concerned.

The EEG 2021 now contains **numerous innovations in** the area of special equalisation schemes. The changes in Sections 63 ff. of the EEG 2021 are primarily intended to give companies planning security in times of the Covid 19 pandemic and to prevent them from falling out of the group of privileged

companies under the special equalisation scheme due to the crisis, as is explicitly emphasised in the explanatory memorandum to the Act.

The most important changes are summarised in an overview:

- Companies that belong to List 1 in Annex 4 of the EEG 2017 previously had to prove an electricity cost intensity of at least 14 percent for the flat-rate limitation to 20 percent of the EEG surcharge to be paid. This value applies for the last time for the application year 2021. From the application year 2022 until 2025, the required **electricity cost intensity** for Schedule 1 companies will be successively **reduced** by 1 percentage point per year. In application year 2022, Schedule 1 companies will therefore only be required to have an electricity cost intensity of 13 percent, in application year 2023 only 12 percent, and so on.

- The different limitation to 15 percent or only 20 percent of the full EEG surcharge will be standardised. In future, the EEG surcharge for electricity consumption volumes above the so-called deductible of 1 GWh will be limited to a more advantageous **15 percent for all applicants,** regardless of whether they belong to the different company categories ("List 1" or "List 2"), if the requirements are met. The regulations on the so-called **cap or super-cap** remain **unaffected**, which means that the burden of the EEG surcharge is limited to a maximum of four percent of the gross value added of the respective company, or for companies with an electricity cost intensity of at least 20 percent to a maximum of 0.5 percent.

- With regard to the application and the provision of evidence, in future both the auditor's certificate and the valid energy certificate will no longer be subject to the material cut-off deadline. Rather, **only the auditor's certificate** will be **a document relevant to the exclusion period, which** means that the energy certificate no longer has to be attached to the application by the material exclusion period on 30 June of a year. Instead, "information" on the effectively operated energy certification within the scope of the electronic application in the BAFA portal "ELAN-K2" is now sufficient to meet the cut-off deadline. The regulation is intended to prevent rejection of the application solely because the complete certificate documents were not submitted by the deadline. The **background is that the certification processes have often come to a standstill due to the Covid 19 pandemic.** However, BAFA remains entitled to require the applicant to submit or subsequently submit the certification documents (certificate, audit reports, etc.).

- Until now, companies had to base their application on the relevant figures of the last three completed financial years. For the application years 2021, 2022, 2023 and 2024, the EEG 2021 now provides that companies can **only base their application on two of** the last three completed

financial years. The companies are free to choose which of these financial years they want to use as a basis for their data.

- In order to prevent companies from no longer achieving the **minimum** consumption of **1 gigawatt hour** due to the reduced electricity consumption in 2020 as a result of the Covid 19 pandemic and therefore no longer being subject to the privileges of the special equalisation scheme, companies may also use the previously completed financial year, i.e. 2019, as the basis for achieving the minimum consumption in the application year 2021 for the limitation year 2022.

- In addition, the possibility of limiting the EEG surcharge for **shore-side electricity purchased by seagoing vessels within the** framework of the special equalisation scheme was introduced for the first time. This is intended to reduce emissions from seagoing vessels in ports. Currently, the supply of shore-side electricity for ships in port is still considered technically demanding and cost-intensive. If the application for this is submitted by 31 March 2021, the limitation of the EEG surcharge will already be granted from 2021.

- Another new feature is the possibility of limiting the EEG surcharge for electricity consumed by **transport companies** themselves in **regular services with electrically powered buses.** The aim of the new regulation is to treat transport companies with electrically powered buses in regular services equally with railways in order to maintain intermodal competitiveness in the transport sector. This new regulation meets an important demand of the local public transport sector.

- The special compensation regulations of the EEG 2021 also create new incentives for the production of hydrogen. One new regulation concerns the possibility of limiting the EEG surcharge for electricity consumed by electricity-cost-intensive companies in the electrochemical production of hydrogen. The new regulations on the EEG surcharge in hydrogen projects are presented in more detail in Section D. II.

The new regulations thus essentially follow the goal of preventing numerous companies from no longer achieving the required electricity cost intensity due to the Covid 19 pandemic and the planned reduction of the EEG surcharge and thus falling out of the group of beneficiary companies. The legislator explicitly wanted to prevent such a "slippage" below the threshold values. Furthermore, the innovations are intended to strengthen and simplify the promotion of certain types of consumption and to promote the establishment of a competitive hydrogen industry in Germany.

It should be noted, however, that the regulations are subject to **approval by the European Commission under** state aid law. This means that the regulations may only be applied after approval

by the European Commission under state aid law and in accordance with this approval, cf. Section 105 (2) EEG 2021 (see also Section A.II above).

Assessment:

On the one hand, it is certainly to be welcomed that the regulations are obviously characterised by the political will to give the affected companies some "breathing space" in the current exceptional global situation. On the other hand, however, it cannot be entirely concealed that in view of the pragmatic and quick regulations that are possible here for the benefit of those affected - and "at the expense" of the EEG levy account - a certain stale aftertaste remains when one looks at the standards that are often applied in this respect in the political discourse for prosumers, storage facilities and decentralised energy concepts in general. It would be all the more desirable that the distribution of burdens across society in connection with the energy transition be considered more holistically in the future and that a genuine future model for the statutory electricity price components be developed here within the framework of a coherent overall concept - which also sufficiently takes into account topics such as sector coupling and flexibility requirements - that reconciles the various concerns of industrial consumers as well as private and commercial prosumers.

G. Motion for a resolution

With the EEG 2021, the Bundestag also passed a motion for a resolution by the governing coalition to initiate readjustments in the EEG and in other (energy law) regulations for the future. This addresses issues on which no agreement could be reached in the legislative process until the end, but which are to be clarified in this legislative period or must be clarified due to European requirements. The motion for a resolution is addressed to the federal government, which is to find solutions for the points mentioned. Ultimately, it is to be understood as a kind of work order to the federal government. Whether, when and how this work order will be implemented through corresponding draft laws and ordinances remains to be seen.

Nevertheless, a brief look at the "homework" for the federal government is of course interesting. Here's what it now has "on its plate":

- The EEG surcharge is to be gradually reduced and replaced by a budget-neutral financing model.

- The development corridors for renewable energies is to be expanded in the first quarter of 2021 in such a way that it meets the new European climate targets for 2030 and 2050. However, an associated increase in the EEG surcharge is to be ruled out.

- The government coalition assumes that the need for support for renewable energies will decrease in view of rising certificate prices in emissions trading, the European climate target 2030 and the coal phase-out. Therefore, the gradual reduction of support for renewable energies in the electricity sector as they become more established in the market will be kept in mind in future reform proposals.

- The instrument of innovation auctions is to be comprehensively further developed and the corresponding development corridors expanded. In doing so, the focus should be on the promotion of cross-country and cross-sector projects, but also on electricity storage systems and ideas for flexibilisation.

- In order to accelerate the planning and approval of projects - especially repowering projects - adjustments to the Spatial Planning Act, Construction Planning Act, Federal Immission Control Act and a standardisation of species protection requirements are to be examined. These measures are to be flanked by other approaches such as better technical and personnel resources for authorities.

- In the course of increasing the expansion quantities, the newly introduced four-hour rule (cf. B.VII. above) is also to be reviewed again in the event of negative exchange electricity prices (and the number of hours reduced if necessary). The four-hour rule, which has just been introduced with the EEG 2021 and which tightens the previously applicable six-hour rule, could therefore only have a short lifespan.

- Post-EEG installations are also being considered. The framework conditions for power purchase agreements (PPAs) are to be improved. The following options are mentioned: low-interest loans, purchase guarantees in the event of insolvency of the electricity purchaser, electricity price compensation also for industrial consumers and tax incentives.

- The acceptance of wind energy installations is to be strengthened. The instruments envisaged are civic electricity tariffs for residents and a reform of the allocation of trade tax, as a result of which the municipality where the wind energy installation is located will in future receive 90 percent of the trade tax attributable to the wind energy installation, while the municipality where the operating company is based will only receive 10 percent.

- Another tax lever is to be applied in the area of tenant electricity. In future, housing companies should not (or no longer) lose the extended reduction in trade tax if, among other things, they generate and sell tenant electricity via solar systems on their buildings.
- With regard to the own-generated electricity privilege, the coalition wants to have it examined whether models for the inclusion of energy service providers as well as for energy communities in accordance with Art. 22 of the so-called RED II are possible.
- The federal government is to propose measures to economically strengthen companies and regions affected by the phasing out of support for black liquor power generation.
- Installations for mine gas power generation that will gradually cease to be supported from 2021 onwards are to be included in the regulatory scope ofinstallations whose support ended and continue to be supported until the end of 2027.
- In view of the discontinuation of the provision on the grid expansion area from Section 36c EEG 2017, the Federal Government shall submit a proposal for the uniform continuation of the provision pursuant to Section 13 (6a) EnWG ("benefit instead of deregulation") throughout Germany.
- The Federal Government is to submit proposals for the further development of congestion management.

Assessment:

The motion for a resolution is ultimately the logical consequence of the failures of the past. Questions in need of regulation were postponed for a long time and, unsurprisingly, could not be resolved in time in a very tight legislative process. In this respect, it is positive that the points of the motion for a resolution were not hastily resolved with the EEG 2021, but carried over into the new year. In this respect, there is a chance for sensible regulations on the topics of the motion for a resolution.

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Assessment (continued)**:**

Of particular interest in terms of content is the planned departure from the EEG surcharge system with a simultaneous increase in the development corridors. It remains to be seen which "budget-neutral" alternative to the EEG surcharge will be found to be effective. In addition, many of the declared goals are welcome. Examples include simplifications in repowering and (helpful) framework conditions for PPAs.

However, the further tightening of the four-hour rule, which was already intensively discussed in the legislative process for the EEG 2021, could become problematic. The legislator seems to assume that this could promote the integration of storage facilities. Without the creation of a satisfactory legal framework for the use of storage facilities, however, this is doubtful. However, the legal framework for storage has practically not changed with the EEG 2021 and the regulatory barriers remain.

Ultimately, however, it remains to be seen when and in what form the individual points of the resolution will be implemented.

We are eagerly awaiting the things to come!

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