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## PUBLIC LAW

# GERMANY'S "EASTER PACKAGE" – AN OVERVIEW OF THE LATEST CHANGES TO ENERGY REGULATION

The German energy reform bill – known as the "Easter Package" – has finally been adopted and gives shape to the coalition's political aspirations. Recent developments mean that renewables are no longer important simply in terms of climate policy but are also a matter of national security. The reform is aimed boosting the transformation of the energy industry.

### Gleiss Lutz commentary

The Easter Package is set to reshape German energy law, triggering extensive changes to the German Energy Industry Act (*Energiewirtschaftsgesetz*, EnWG), the German Renewable Energy Sources Act (*Erneuerbare-Energien-Gesetz*, EEG) and the German Offshore Wind Energy Act (*Windenergie-auf-See-Gesetz*, WindSeeG). It is the biggest energy policy reform in decades, with the following **aims and anticipated impact**:

- › Greater renewables capacity will be put up for tender, increasing the number of development projects. The country's renewables capacity is expected to double.
- › A commitment to dedicate 2% of land mass to onshore wind capacity will provide more space for wind power generation. Approval procedures for new wind turbines will be simplified and accelerated.
- › Harmonisation of surcharges will simplify district and on-site supply models.
- › Prequalification of bidders in offshore auctions and the requirements of the special equalisation scheme will strengthen the power purchase agreement (PPA) market.
- › Eliminating the EEG surcharge will reduce the burden on businesses and consumers.
- › Conditions for energy-intensive users under the special equalisation scheme will be simplified. However, the elimination of the EEG surcharge means this will play a less important role.
- › Financial support for green hydrogen power generation and hydrogen-based electricity storage will be increased.
- › Non-EU investors should coordinate in advance with the Federal Network Agency to determine their eligibility to bid on renewables.

## Expansion of renewable energies

The Easter Package focusses on the expansion of renewables. The targets for renewables have been increased, with at least 80% of Germany's gross electricity consumption to stem from renewables by 2030. Early drafts of the legislation went so far as to include a renewables target of 100% for electricity by 2035, but this was scrapped during the final rounds of deliberations.

The target of generating at least 80% of Germany's gross electricity consumption from renewables by 2030 is highly ambitious. With the current share standing at about 49%, virtually as much renewable capacity will have to be added in the next eight years as during the last 30 years. Increasing electrification means that demand for electricity will also continue to rise – the German government expects demand for renewable electricity to reach 600 TWh by 2030.

In pursuit of the 80%, auction volumes have been adjusted:

- › Capacity from **solar installations** is to be gradually increased from 59 GW at the end of 2021 to 400 GW by 2040. The auction volumes for solar installations on buildings and noise barriers are 650 MW for 2023, 900 MW for 2024 and 1,100 MW annually from 2025 to 2029. For freestanding installations and installations on other structures, the volumes are 5,850 MW for 2023, 8,100 MW for 2024 and 9,900 MW annually from 2025 to 2029. The previous EEG 2021 provided for volumes of 1,650 MW (2023-2025) and 1,550 MW (2026-2028), meaning that the new volumes indicate a yet more definite shift towards solar energy.
- › The auction volumes for **offshore wind energy** now range between 8,000 and 9,000 MW for 2023 and 2024 and between 3,000 and 5,000 MW for 2025 and 2026. From 2027, the annual volume is to be 4,000 MW. The WindSeeG previously set a volume of 700 MW for 2023 to 2025.
- › The auction volume for **onshore wind energy** has also been increased to 12,840 MW for 2023 and 10,000 MW annually from 2024 to 2028. Auction quantities not awarded from 2023 onwards will be put out to tender again the following year. The volumes under the EEG 2021 were 3,000 MW (2023), 3,100 MW (2024), 3,200 MW (2025), 4,000 MW (2026), 4,800 MW (2027) and 5,800 MW (2028).
- › The bidding volumes for **biomass** are now 600 MW for 2023, 500 MW for 2024, 400 MW for 2025 and 300 MW annually from 2026 to 2028. Biomethane plants also now have a dedicated capacity target of 600 MW annually from 2023 to 2028. Previously, an annual volume of 800 MW was stipulated but without distinguishing between biomass and biomethane installations.
- › The **innovation auction** is to be retained. The Easter Package allows for 800 MW to be auctioned in 2023, 850 MW in 2024, 900 MW in 2025, 950 MW in 2026, 1,000 MW in 2027 and 1,050 MW in 2028. These volumes were increased to the stated values in the committee phase, with each representing a 200 MW increase over the volumes in the EEG 2021.
- › Final parliamentary deliberations also led to an auction segment for **electricity from green hydrogen**: In 2023, 800 MW of capacity is to be put out to tender on the 15 December bidding date; further bidding dates are planned for 2024 to 2026 with 1,000 to 1,400 MW of capacity annually.

**Foreign investors** should note that the EEG now includes a new provision that allows the Federal Network Agency – in agreement with the Federal Ministry of Economics and Climate Protection – to exclude non-EU bidders from tender procedures if the operation of the installation is likely to pose a threat to Germany's public order or security. The Federal Network Agency can also revoke awards or payments that have already been authorised. The Act stipulates that a bidder must provide information on its shareholding structure and business activities if asked by the Federal Network Agency to do so. The purpose is to enable the Agency to deal at any early stage with any dependencies that may pose a future threat to public order or security. This extends the – already broad – control over investment, which will now also include cases where foreign investors intends to set up their own (energy) business in Germany.

Increased auction volumes aside, a **large number of individual measures** are planned to **promote the expansion of renewables**:

### Solar Power

**Solar installations** of up to 1 MW capacity are to receive a set feed-in tariff (e.g. up to 6.2 ct/kWh for rooftop systems, depending on capacity). A bonus is available where an installation feeds in to the general grid all

electricity the installation generates in a calendar year and the grid operator is notified in good time. Factoring in this bonus – and depending on the capacity of the solar installation – remuneration is between 13.4 ct/kWh (installations up to 10 kW) and 8.1 ct/kWh (installations up to 1 MW). Adjustments are also to be made to the areas available for freestanding installations and solar installations are to be added on agricultural land, unused expanses of water and marshland.

## Onshore Wind Energy

The **expansion of onshore wind energy** is being hampered mainly by obstacles in the approval process. Whilst the Easter Package contains a number of regulatory incentives to accelerate onshore wind energy (e.g. a broadening of the “reference yield model” (used to make sites comparable with respect to given wind power and estimated subsidy amounts to include a new category tailored to the south of Germany), the key step has been to enshrine in the EEG the principle that use of renewable energies is “*in the overriding public interest and serves public security*”. This principle should be especially relevant when weighing protected interests during approval procedures. The Federal Government’s idea is for it to provide a basis for the approval of wind turbines even where they may negatively impact private or other public interests.

The newly created Wind Energy Area Demand Act (*Windenergieflächenbedarfsgesetz*, WindBG) provides for binding, quantitative targets for the identification of wind energy sites. These area targets implement the 2% goal for onshore wind energy agreed in the coalition agreement and are intended to reflect the energy industry’s needs. The federal states are given an overall target for the end of 2032, coupled with an interim target for the end of 2027, the purpose of which is to ensure a continuously increasing allocation of land consistent with the expansion volumes set out in the EEG 2023. The WindBG also specifies obligations to act that allow monitoring as early as 2024. The special rules on onshore wind energy in the German Building Code (*Baugesetzbuch*, BauG) are adapted to the WindBG, in particular to the area targets.

## Offshore wind energy

With regard to **offshore wind energy**, not only fully pre-surveyed but now also areas that have not been pre-surveyed are to be put out to tender. Bidders on non-pre-surveyed areas must meet specific quality criteria, e.g. by demonstrating that power purchase agreements (PPAs) are used to market the electricity, and offer a supplementary payment. The aim of this is to boost the German PPA market.

There are also plans to accelerate the procedure for the approval of offshore wind turbines. Environmental assessments and rights of participation will be more closely linked. In addition, the planning consent process for areas that have already been centrally pre-surveyed has been expedited by removing the requirement for an environmental impact assessment and public consultation. The repowering of wind farms – the replacement of older wind turbines with more powerful ones – should benefit from a relaxation of species protection requirements.

## Biomass and hydropower

In **biomass and hydropower**, the focus is to be on certain specific energy market factors. The **original plan to discontinue support for hydropower plants under 500 kilowatts** was dropped at committee stage. These will now continue to receive a (slightly reduced) EEG remuneration rate of 12.03 ct/kWh. The other rates, also slightly reduced, are 7.93 (up to 2 MW), 6.07 (up to 5 MW), 5.32 (up to 10 MW), 5.13 (up to 20 MW), 4.12 (up to 50 MW) and 3.37 ct/kWh (more than 50 MW).

Support for biomass is to be focussed on highly flexible peak load power plants and newly approved plants with a capacity greater than 10 MW must be capable of power generation based solely on hydrogen from 2028 onwards. The remuneration rate for rated output of up to 150 kW has been reduced from 12.8 to 12.67 ct/kWh.

## Hydrogen-based electricity storage

A new auction segment has been introduced to encourage innovative concepts in **hydrogen-based electricity**

**storage.** Installations of this type combine onshore wind turbines and solar installations (as energy suppliers) with a chemical electricity storage system based on hydrogen. The aim is to store surplus electricity generated by suppliers until it can be fed back into the grid at a later point in time. Details of the auction process are to be set out in a separate regulation before the end of the year.

### Elimination of the EEG surcharge

The Energy Financing Act (*Energiefinanzierungsgesetz*, “**EnFG**” – known in draft form as the Energy Surcharge Act, **Energie-Umlagen-Gesetz**, EnUG) brings together all the energy-related surcharges, i.e. the EEG, KWKG and offshore surcharges. The draft initially contained a requirement for an annual decision on whether the Energy and Climate Fund would provide the financial resources to meet the EEG surcharge. This left room for the surcharge to potentially be levied anew in future. Section 6 EnFG now provides transmission system operators with a fixed right to compensation against the Federal Republic. In addition, only the offshore and KWKG surcharges now form part of surcharge calculations under section 7 EnFG. As a result, there is no more need for an annual political decision on how to meet the EEG financing requirement, leading to greater planning certainty for businesses and consumers who will no longer be required to subsidise it.

### The “behind the meter” principle

The new EnFG introduces the “behind the meter” principle. In future, the sole reference point for levying the surcharge will be **withdrawal from the grid**. Electricity flows upstream of the grid connection point are therefore notionally irrelevant to energy sector regulation. This should make it easier to measure electricity quantities for self-consumption and for direct supply (to tenants) within a customer installation. It remains to be seen whether this will in fact simplify things in practice. There are still cases where a distinction must be made between who consumes what electricity quantities, e.g. where there is supply within a closed distribution grid or where the special compensation scheme applies. There has also been no dovetailing with electricity and energy tax law so far. It may therefore remain necessary, for example, to isolate consumption by a third party on a company’s premises if the company itself enjoys the privileged electricity tax law treatment afforded to manufacturing industries.

### Special compensation scheme

Despite elimination of the EEG surcharge, the provisions on the **special compensation scheme** (*Besondere Ausgleichsregelung*) remain relevant – in particular in relation to the KWKG surcharge (currently: 0.378 ct/KWh) and the offshore surcharge (currently: 0.419 ct/KWh) – and have been significantly changed and carried over into the EnFG. In future, the capping of surcharges will no longer depend on a (complex) calculation of electricity cost intensity, but rather on electricity use in excess of 1 GWh/a coupled with proof that the eligible company is “energy efficient”. Energy efficiency can be demonstrated by implementing an energy management system or by using 30% unsubsidised electricity. This significantly streamlines the application procedure. The level of capping depends on the sector to which the company is assigned by an annex to the Act; a high use of renewables can produce further reliefs. These provisions are to apply in principle from the 2024 capping period onwards. Transitional and hardship provisions also apply post 2024 to businesses already in possession of a capping notice. These transitional provisions also take account of the share of renewables in electricity consumption and link higher reliefs on surcharges in 2027 and 2028 to whether companies cover their electricity consumption from renewables to a “significant extent”.

### Measures to protect household customers and extend substitute supply

The Easter Package adds provisions to the EnWG to protect household customers. Scheduled terminations of energy supply to household customers must now be notified to the Federal Network Agency three months in advance and affected household customers must be informed accordingly. The obligation to notify is subject to a fine. This provision marks the Federal Government’s reaction to recent terminations of electricity supplies, some of which have been very abrupt, in cases where flat-price and low-price suppliers have no longer been able to honour their contracts. It remains to be seen whether the duty to notify can improve contractual compliance. The new provisions also provide for a clearer separation of default and substitute supply. Default supply is now only

available for household customers; commercial customers – who can also be affected by near-term price increases or (threatened) supply stops – must rely on substitute supply.

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