***Authors' note**: Following the publication of this article, amendments were made to the Offshore Wind Act. Notably, the auction rounds in the transitional period will now take place on 1 April 2017 and 1 April 2018, respectively. The duration of permits will now be 25 years and may be extended once by five years.*

GERMANY'S OFFSHORE WIND TENDER SYSTEM

THE GERMAN OFFSHORE WIND ACT (WINDSEEG) WILL ENTER INTO FORCE ON JANUARY 1 2017. IT PROVIDES FOR A TENDER SYSTEM. THE FIRST AUCTION IS SCHEDULED FOR MARCH 1 2017. **DR STEFAN KILGUS** AND **DR CHRISTINE BADER**, PARTNERS IN THE HAMBURG OFFICE OF **WATSON FARLEY & WILLIAMS**, GIVE AN OVERVIEW OF THE NEW REGIME.

The German Offshore Wind Act is part of a wider reform of the renewable energy law. It was passed by the Federal Parliament (Bundestag) in July 2016 and formally issued on October 13 2016, together with a reform of the Renewable Energy Act (EEG 2017).

It has been a core component of Germany's energy transition (Energiewende) that the share of power generated by renewable energy sources is continuously increased. Accordingly, the EEG 2017 stipulates an increase in the annual gross electricity consumption from the current 33% to 40%–45% by 2025, to 55%–60% by 2035 and to at least 80% by 2050.

The new legislation introduces a competitive auction system for most renewable energy technologies, with an aim to reduce costs while maintaining the growth of renewable energy. The implementation of auctions is in line with the European Commission's environmental protection and energy subsidies guidelines, which stipulate that, as of 2017, subsidies have to be awarded in an auction system in order to remain admissible as state aid.

The EEG 2017 provides for technology-specific auctions and sets out the details for onshore wind as well as for larger photovoltaic and biomass installations. The Offshore Wind Act contains the details for auctions for offshore wind projects.

The Offshore Wind Act provides for a transitional regime for offshore wind installations to be commissioned between 2021 and 2025. For projects to be commissioned from 2026 onwards, the new central auctioning concept will apply.

Exempted projects

The auction system does not apply to offshore wind turbines that will be commissioned prior to January 1 2021 provided that they received an unconditional grid access confirmation or an allocation of connection capacity prior to January 1 2017.

These projects will continue to benefit from a market premium system without auction, as under the EEG 2014. Therefore, commissioning these projects on time will be extremely important. For this purpose, certain wording in the EEG 2017 indicates that if the grid connection is delayed, it should be sufficient that the turbine itself is technically available. However, such language is not included in the relevant transitory provisions of the EEG 2017 and the Offshore Wind Act, so that the position is unfortunately not entirely clear.

Projects commissioned from 2026

For offshore wind farms to be commissioned from 2026, the Offshore Wind Act provides for a complete system change to the so-called central model, according to which governmental authorities will pre-select appropriate sites and perform a preliminary investigation on them. During the auctions, bidders will then apply for the right to develop offshore wind farms on those pre-selected sites (and to receive EEG remuneration).

The sites will be determined under an Area Development Plan (Flächenentwicklungsplan), which will be prepared by the Federal Maritime and Hydrographic Agency (BSH) in collaboration with the Federal Network Agency (BNetzA). That plan will cover the sites for offshore wind farms, their order within the auctions process and their respective capacity, as well as the location of converter platforms, substations locations and grid connection cable routes.

The new legislation intends to ensure that projects and the respective grid connections will be implemented concurrently and accordingly the chronological order of their expected commissioning will be specified in the Area Development Plan. The respective sites and the maximum capacity to be installed pursuant to the Area Development Plan as well as the respective grid connections and their completion dates will be published at least six months prior to the relevant auction.

As the federal jurisdiction is limited to the Exclusive Economic Zone, the Area Development Plan will initially be limited to those waters. However, coastal waters, which fall into state jurisdiction, may be added under agreements with the relevant states.

The preliminary investigations for future project sites will be performed by the BSH or, with respect to coastal waters, by the competent state authority. The purpose of such preliminary investigations is to provide information on the respective areas in order to (i) enable potential bidders to determine the bid amount, and (ii) to

determine the sites' general suitability in order to accelerate the subsequent permitting procedure.

This preliminary investigation will include environmental surveys, a preliminary exploration of the subsoil as well as a preliminary analysis of wind and oceanographic conditions, but not a search for ship wrecks and unexploded ordnance.

As the successful bidder is free to determine the exact location, type and technology of the turbines and their respective foundations, successful bidders will have to perform further investigations. This will be necessary to obtain the permit, but also for its own projections of the wind yield.

On each September 1 from 2021 onwards, auctions will be held in accordance with the Area Development Plan. The capacity per auction will range from 700MW to 900MW per year, but will not exceed 840MW on average.

Participants will bid on the reference value (anzulegender Wert) within the meaning of the EEG, ie the amount relevant for the calculation of the market premium in the mandatory direct selling regime. The maximum value for such bids is set by the lowest successful bid amount (Gebotswert) of the second round of auctions for projects subject to the transitional system (see below).

The bidder with the lowest bid will be successful. The bid amount corresponds to the reference value for 20 years from the commissioning. The Offshore Wind Act foresees a five-year period between the successful auction and commissioning; for example, the 2021 auctions refer to projects scheduled for commissioning in 2026.

Once the award has been issued, the successful bidder obtains the exclusive right to apply for plan approval, ie the permit to construct and operate the wind farm, on the basis of the preliminary investigation's results. The procedure will be governed by the Offshore Wind Act for projects in the Exclusive Economic Zone essentially on an unchanged basis. Projects in coastal waters are still permitted on the basis of the BImSchG (Federal Immission Control Act).

An award cannot be transferred to another project, but it is possible to transfer the award (together with the project) to a third party. In this case, the project's permit is transferred together with the award. Also, project rights can be indirectly transferred by sale of shares in the relevant project company.

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

The term of the permit of offshore wind farms will be limited to the duration of the market premium payments, ie 20 years from commissioning. As most turbines are designed for an operating life of 25 years, a longer permitted operational period appears technically possible.

Once the 20-year term has expired, the federal authorities may announce the re-auctioning of the respective area for wind use or may stipulate a different purpose for the area. To obtain the permit, the future wind farm operator will be obliged to issue a declaration that at the end of the permitted operating time, all offshore installations are to be transferred to a potential subsequent user without compensation, should such a provision be introduced by law in the future.

To be eligible for participation in the auction each bidder has to provide a security to the Federal Network Agency in an amount of €200/kW, ie €80m for a 400MW project. The security may be provided in the form of a cash deposit or a bank guarantee, but not in the form of a group guarantee.

The purpose of this security is to ensure compliance with certain construction milestones. If any milestones are missed, the successful bidder faces penalties up to the entire amount of the security provided to the Federal Network Agency. Thus, among others, the documents for the permitting procedure have to be submitted to the permitting authority within 12 months of the award being issued.

Binding contracts for the turbines, the foundations, the substation and the inner array grid have to be concluded at least two years before the binding completion date. The technical availability of turbines (at least 95% of the awarded capacity) must be achieved no later than 18 months after the binding completion date.

Failure to achieve these deadlines will also trigger a mandatory revocation of the award by the Federal Network Agency (except in case of a partial completion, in which case, the revocation only applies to the delayed part of the project). These sanctions will not apply to the extent the project company can prove that it is not responsible for the delay. However, the project company is fully liable for its contractors and subcontractors.

Transitional period, 2021 to 2025

A special transitional auction regime applies for certain projects that have achieved an advanced stage in the planning procedure or are already approved, which are scheduled to be commissioned between 2021 and 2025. This applies to an offshore wind project, each an "existing project", if prior to August 1 2016:

(i) A permit under the Marine Facilities Ordinance (SeeAnlV) (or for coastal waters under the BImSchG) had been issued; or

(ii) A public hearing in the course of the permit procedure had been held.

Projects within the EEZ are eligible only if the project is located in the North Sea clusters 1-8 or the Baltic Sea clusters 1-3, in each case as defined in the current Spatial Offshore Grid Plan (Bundesfachplan Offshore). The BSH has recently published a list of projects that meet the August 1 2016 deadline. The list does not imply a final statement on eligibility for the auctions, however.

There will be two auction rounds for existing projects, on March 1 2017 and March 1, 2018, each offering a capacity of 1,550MW

For example, the projects must not hold a grid access confirmation or an allocation of grid connection capacity in order to participate. On the other hand, the list includes projects that are likely to be exempted from the auctions (as described above).

There will be two auction rounds for existing projects, on March 1 2017 and March 1 2018, each offering a capacity of 1,550MW. The maximum price of the bids is set at €120/MWh. A pay-as-bid mechanism shall apply, ie the reference value for the successful bidder – consistently for the entire 20-year funding period – corresponds to the amount of the bid.

Existing projects also have to provide security with their bid in the form of a bank guarantee or cash deposit in an amount of €100/kW, ie €40m for a 400MW project, which is at a reduced rate compared with the central system.

During the transitional period, the award not only depends on the bid amount, but also on the availability of grid access capacity of the cluster, or via a cross-cluster connection. In this respect, the current system of grid planning pursuant to the Offshore Grid Development Plan will continue to apply.

In the light of the risk that grid capacity may not be sufficient for an award of the full desired capacity, bidders may effectively bid for a range of capacities: They can state a minimum capacity for which their bid would be valid, as well as a higher bid amount for a smaller capacity.

As the grid expansion in the North Sea has been delayed, the Offshore Wind Act has deferred the expansion in the North Sea. In 2021, the entire capacity of 500MW will be commissioned in the Baltic Sea, whereas in other years there will be no such restriction. This is to be achieved by specific awards criteria, and by issuing awards prescribing a specified commissioning year.

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

If projects do not qualify as existing projects – or if they are qualified as such, but fail in the auctions under the transitional system – the Offshore Wind Act effectively withdraws their permits or their status under application procedures.

However, there is limited redress for bidders that were unsuccessful in both auctions under the transitional system: If the location of these projects later becomes subject to an auction under the central auction system, the owner of such projects may exercise step-in rights into the bid of the otherwise successful bidder. Such step-in rights are subject to various conditions, not least the de facto abandonment of the project after the second auction of the transitional period, and may only be exercised until 2030.

Outlook

The implementation of a tender procedure for offshore wind under the Offshore Wind Act will probably lead to clear and reliable projects in the long term. In particular, the central system is structured to encourage competition among bidders and thereby reduce the cost of offshore wind in line with recent experience in the Netherlands and in Denmark.

However, the number of developers may decrease, as also seen eg in Denmark. Some owners of projects that will not benefit from the new legislative environment have already threatened to test the constitutionality of the Offshore Wind Act. If successful, we would expect this not to change the regulatory environment, but to lead to damage claims against the government. ■

TABLE 1 - PROJECTS ELIGIBLE FOR TRANSITIONAL AUCTIONS ACCORDING TO BSH

NORTH SEA

Project	Developer	Allocated connection
Borkum Riffgrund West I	Dong Energy	No
OWP West	Northern Energy OWP West (DONG Energy)	No
Borkum Riffgrund West II	Dong Energy	No
Merkur Offshore	Merkur Offshore	Yes
Borkum Riffgrund II	Dong Energy	Yes
Trianel Windpark Borkum (Phase II)	Trianel	Yes
Nordsee Two	Nordsee Two (RWE/Northland Power)	No
Nordsee Three	Nordsee Three (RWE/Northland Power)	No
Gode Wind 04	Gode Wind 04 (Dong Energy)	No
Gode Wind III	PNE	No
OWP Delta Nordsee 1	OWP Delta Nordsee (E.ON)	No
OWP Delta Nordsee 2	OWP Delta Nordsee (E.ON)	No
Kaskasi II	Innogy Kaskasi (RWE)	No
Nördlicher Grund	Nördlicher Grund (Blackstone)	No
Nördlicher Grund_Teil Sandbank	Vattenfall	No
Deutsche Bucht	British Wind Energy (Highland Group)	Yes
Atlantis I	PNE	No
EnBW He dreiht	EnBW	No
Global Tech II	Vattenfall	No
Albatros	EnBW	Yes
EnBW Hohe See	EnBW	Yes

BALTIC SEA

Project	Developer	Allocated connection
Windanker	Iberdrola	No
Arkona Becken Südost	Arkona Windpark (E.ON)	Yes
Adlergrund GAP	BEC Energie Consult	No
Adlergrund 500	BEC Energie Consult	No
Wikinger Nord	Iberdrola	No
Wikinger Süd	Iberdrola	No
Baltic Eagle	Baltic Eagle (Sea Wind Management)	No
Ostseeschatz	Financial Insurance (Windreich)	No
GICON-SOF	ESG Edelstahl und Umwelttechnik Stralsund	Yes
Arcadis Ost 1	KNK Wind	No