



Arbitrating Energy Disputes: Hot Topics

International Arbitration, Energy and Environmental Commissions

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National Report of Germany

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1. ARBITRATING LONG-TERM CONTRACTS IN THE ENERGY SECTOR

There are no arbitration institutions in Germany that are specialised in dealing with energy matters. Since the above named institutions are generally able to deal with all sorts of commercial disputes, they are also used in energy related disputes. Parties have the opportunity to appoint one or more technical or legal experts from the energy sector as arbitrators, thereby influencing the level of expertise of the tribunal.

1.1 In your jurisdiction: Is arbitration a widely accepted and used dispute resolution method in the energy sector when long-term contracts are in dispute? Do you see arbitration clauses in the agreements executed in the development of power plants? Do you normally include arbitration clauses in EPC and O&M Contracts? Do banks accept introducing arbitration clauses in credit agreements with the SPV and in the security package? What are the reasons for choosing arbitration as a preferred dispute resolution method over proceedings before state courts?¹

1.2 Do parties choose ad hoc or rather institutional arbitration for disputes regarding the revision of long-term contracts? What are the reasons?

1.3 Expertise and Multiple Appointment of Arbitrators

1.3.1 Do arbitrators have the necessary legal, technical and economic expertise to decide on the revision of long-term contracts? Should technical experts be appointed as arbitrators in order to bring the required know-how to the panel?

1.3.2 Multiple appointments of arbitrators: The number of arbitrators having the necessary legal, economic and commercial expertise for these kinds of disputes might be limited in certain jurisdictions. Accordingly, the potential arbitrators are drawn from a smaller or specialized pool of arbitrators. However, Part II, Article 3.1.5 IBA Guidelines on Conflicts of Interest in International Arbitration 2014 (“IBA Guidelines 2014”) states: The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties” Further, Part II, Article 3.1.3 IBA Guidelines 2014 states that “The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate

¹ Maximum flexibility? That parties can choose arbitrators experienced in the energy sector? That they can choose the venue? That they can agree on confidentiality and privacy? That it is easier to enforce an award in the international context than judgments in foreign jurisdictions? The neutrality of the arbitration proceedings? Any other considerations?

of one of the parties.” Both provisions are listed in the Orange List of the IBA Guidelines 2014. A potential arbitrator has to disclose any circumstances constituting these two grounds. Have these grounds been used by recalcitrant parties to object to the appointment of an arbitrator?

1.3.3 Does the nationality of arbitrators play a more important role in arbitrations regarding the revision of long-term contracts than in other commercial arbitrations?

1.4 Do parties to long-term contracts favor a settlement over an award in which the arbitral tribunal decides on the revision of the price formulae or even ascertains a new price formula? If so, for which reasons?

1.5 “Price Review Clause” or Price Re-Opener Clauses”

1.5.1 Were (and are) price formulae usually indexed directly or indirectly to alternative competing fuels, e.g. oil, coal products? What are the (historical) reasons for this indexation?

1.5.2 What is the difference between a “Price Review Clause” or a “Price Re-Opener Clause” in contrast to a “loyalty”-or “hardship-clause”? In your jurisdiction: Is the “Price Review Clause” a provision specialis in contrast to a general hardship clause?

1.6 “Trigger events”/Significant Change of Circumstances

1.6.1 Please give examples of a simple² and of more complex³ trigger mechanism.

1.6.2 Does any definition of the term “significantly” exist in your jurisdiction? If not, how is the term interpreted if the curial law is that of your jurisdiction?

1.6.3 Please list facts/circumstances that a claimant has to adduce evidence for in order to prove that the circumstances have significantly changed⁴:

² E.g. that the parties agree that the passage of a certain timeframe will automatically trigger the price review.

³ E.g. that the claimant has to prove firstly the occurrence of circumstances beyond the control of either party and secondly that the circumstance results in a significant change to the energy market of the buyer compared to a specified date.

⁴ E.g. the growing liberalization, the liquidity and transparency in Europe, too much contracted/committed supply; excess of supply of natural gas; that the price of alternative competing fuels, such as oil or other oil products to which the price formulae are usually indexed, has changed etc.

- 1.6.4 Whether the requirement of a significant change of circumstances if fulfilled is a question of law and fact: Do you agree with this statement if the curial law is the substantive law of your jurisdiction and/or if the place of arbitration is in your jurisdiction?
- 1.6.5 According to Articles 5 and 6 of the IBA Rules on the Taking of Evidence in International Arbitration dated 29 May 2010 (“**IBA Rules**”) a party may rely on a “Party-Appointed Expert” or the arbitral tribunal may appoint an independent “Tribunal-Appointed Expert”. What is the preference in your jurisdiction: Do counsel, parties and arbitrators rather favor Party-Appointed Experts or Tribunal-Appointed Experts?
- 1.6.6 Is the use/appointment of consultants by the arbitral tribunal regarding the “translation” of a decision into a new price formula possible/desirable?

1.7 If the “Price Review Clause” or the “Price Re-Opener Clause” does not require a trigger event: Under what requirements can a party also request revision/review of the price formula if the curial law is the substantive law of your jurisdiction?

1.8 Confidentiality

- 1.8.1 Does a claimant have to substantiate sensitive business secrets in order to prove that the price formula needs adapting? For example, does a claimant have to submit the prices that its customers pay? Does a claimant have to submit what kind of prices the respondent charges to its customers?
- 1.8.2 Do parties usually agree on a Request to Produce phase according to Article 3 IBA Rules? If a party objects to the production of documents invoking commercial confidentiality: Do arbitral tribunals adopt arrangements to ensure a suitable confidentiality protection (Article 9(4) IBA Rules) or do they rather dismiss a party’s request to produce?

1.9 Scope of arbitral tribunal’s mandate to revise the price formulae

- 1.9.1 What are the available remedies in your jurisdiction: Does an arbitral tribunal have the power to amend the contract terms? Does an arbitral tribunal have the power to replace e.g. unreasonable contract terms? Must the arbitral tribunal’s power to change/revise the price formula be specifically mentioned in the contract? If not, can

arbitrators resort to statutory provisions of the curial law? Or is the power limited to contract interpretation?

1.9.2 If an arbitral tribunal is only mandated to amend an existing price formula, how are the price formulae usually worded? What are the potential risks, but also advantages if an arbitral tribunal has only this limited mandate?

1.9.3 If an arbitral tribunal is mandated to ascertain an entirely new price formula, how is the existing price formula then worded? What are the potential risks, but also advantages if an arbitral tribunal has such a broad mandate? What are the necessary “tools” (see 1.3.1/1.76, 1.7.7 – expert arbitrators, appointed experts, consultants or the like) in order for the arbitral tribunal to draft a new price formula? What parts of the award have “res judicata effect”?

2. ARBITRATING ENERGY DISPUTES UNDER ISDS

2.1 How many BITs has your country signed and how many of them are in force?

Circa 140 to date exist and are not terminated, from Afganistan to Zimbabwe. Of these, Brazil, Congo, Iraq and Pakistan were only signed, sometimes replacing older versions. The remainder, approximately 130 treaties are in force.

2.2 What mechanisms of dispute resolution method does your country favor in its BITs? Do investors have the choice to sue a host state in the state courts and in arbitration? Do investors have to choose between suing the host state either in the state courts or in arbitration (fork-in-the-road provision)?

2.2.1 If investors can choose proceedings before state courts in your jurisdiction: Are there any cases in the last five years in which state courts in your jurisdiction had to decide on claims of (foreign) investors against your state?

Vattenfall, but this is still pending and the proceedings are parallel in the constitutional court and in Energy Charter Treaty Arbitration.

2.2.2 If so, were the decisions in favor of the country/host state or were they in favor of the investor?

Vattenfall, but this is still pending and the proceedings are parallel in the constitutional court and in Energy Charter Treaty Arbitration.

2.2.3 Has your country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and nationals of other States (1968) (the

ICSID Convention)? If not, does your state intend to accede to/ratify the ICSID Convention soon?

Yes, signed. 1966, in force 1969.

2.3 If an investor can choose (only) arbitration as dispute resolution method:

2.3.1 If an investor can choose arbitration as dispute resolution method, are there conditions attached to it, such as a requirement to resort to state courts for a certain period of time or a requirement to attempt to arrive at amicable settlement within a certain period of time?

2.3.2 If an investor can choose not only ICSID, but also other institutional rules such as SCC, ICC or ad hoc proceedings, or between various institutions in case the ICSID Convention is not signed/ratified by your country, which advantages or disadvantages do investors take into consideration in choosing between these arbitration rules?

2.4 Is your country a member state of the ECT? If not, has your country signed, but never (or not yet) ratified the ECT? If so, has your country exempted the ECT's provisional application prior to its ratification?

Yes. However, Germany was one of the countries objecting to provisional application. The only states listed in Annex PA doing so included The Czech Republic, Germany, Hungary, Lithuania, Poland, and Slovakia.

2.4.1 If your country is not a member state to the ECT or has recently withdrawn from the ECT: What are the reasons?

Not applicable

2.4.2 According to Article 26 ECT an investor can choose arbitration either under (i) the ICSID Convention, (ii) the ICSID's Additional Facility Rules, (iii) under the arbitration rules of the SCC or (iv) ad hoc arbitration under the UNCITRAL Arbitration Rules. Do investors in your jurisdiction have any preference? If so, for what reasons?

2.4.3 Has your country declared a reservation under Article 26(3)(b)(i) ECT? If the answer is in the negative: Are there cases in which an investor has sued your country in parallel before the state courts and in arbitration? Did the parallel proceedings result in conflicting decisions?]

ANNEX ID “LIST OF CONTRACTING PARTIES NOT ALLOWING AN INVESTOR TO RESUBMIT THE SAME DISPUTE TO INTERNATIONAL ARBITRATION AT A LATER STAGE UNDER ARTICLE 26” lists the countries that have done so. Germany is not among them.⁵

2.5 What are the key features in relation to the concept of “Investor” and “Investment” in your country’s BITs? Is a “denial of benefits” clause usual in your country’s BITs?

2.6 In light of the EU position on this matter: Is your country planning on withdrawing from the BITs signed in the past? If this is the case: What are the motives for doing so?

2.7 In the context of the intra-EU treaties conflict: How is this issue affecting the commercial relationships between your State and others when it comes to choosing an effective dispute resolution mechanism?

2.7.1 What approach would you take when seeking enforcement of a favorable award resulting from an intra-EU dispute? Would you counsel to seek enforcement in the courts of an EU member state or outside the EU? Have your national courts ever ruled on this issue?

2.8 Does your country have a history of voluntary compliance with adverse investment treaty awards?

2.9 To what extent have local courts been supportive of investment treaty arbitration?

⁵ Australia, Azerbaijan, Bulgaria, Canada, Croatia, Cyprus, The Czech Republic, European Union and EURATOM, Finland, Greece, Hungary, Ireland, Italy, Japan, Kazakhstan, Norway, Poland, Portugal, Romania, The Russian Federation, Slovenia, Spain, Sweden, United States of America

3. ARBITRATING DISPUTES IN CONNECTION WITH RENEWABLE ENERGIES (WIND, SOLAR, WATER)

3.1 Legal Framework

3.1.1 What is the legal framework for renewable energies in your jurisdiction? Can investors take advantage of certain incentives such e.g. premium tariffs, very low taxes on power generators' revenues, subsidies for renewable energy producers etc?

In Germany, as part of the European Union, the legal framework for renewable energies is first governed by European Union law as well as German national.

Given the context of this national report, this author will limit herself to German law and how European law and regulation was transferred into Germany into German law.

a. Overview German Energy Law

German energy law is dispersed over a variety of laws and thus not as neatly codified as one would expect. German energy law can be found in various statutes, ordinances and other provisions, which are heavily influenced by European energy law.

The task of regulating Germany's electricity and gas markets has primarily been assigned to the Federal Network Agency (Bundesnetzagentur - BNetzA). For utilities with less than 100,000 customers in only one federal state, the competent authorities are the state regulatory offices.

Two main laws cover Energy Law, the Renewable Energy Sources Act (Erneuerbare-Energien-Gesetz – EEG) and the Energy Economy Act (Gesetz über die Elektrizitäts- und Gasversorgung – Energiewirtschaftsgesetz – EnWG).

The EEG – in its 2014 version – is widely know for its renewable energy support regime. However, core provisions of German energy law are contained in the EnWG's main objectives are laid down in § 1 EnWG. The EnWG aims at ensuring a supply of power and gas as well as efficient and unrestricted competition and the safeguarding of an effective and reliable operation of power grids.

The EnWG regulates network operators and access to networks. It does not regulate trade with energy but sets fundamental parameters for the price which has to be paid by the consumer. The price for Energy consists of the trading price the price for the use of the network concession fees and the additional taxes and fees. It further regulates and prescribes that most energy providers have to organize their networks as separate legal entities. The EnWG forms the legal basis for numerous ordinances that provide further detail.

As the EnWG and its supporting ordinances address mostly grid providers, this author will briefly summarize some of the most pertinent features of the obligations.

- According to § 4 EnWG, the operation of a power grid requires a permit. Distribution is only subject to a notification to the regulatory authority by

the operator prior to the start of operations.

- The Incentive Regulation Ordinance (Anreizregulierungsverordnung – ARegV), which provides for a revenue-cap regulation regarding the operation of the grid.
- The Electricity Grid Access Ordinance (Stromnetzzugangsverordnung – StromNZV) and the Gas Grid Access Ordinance (Gasnetzzugangsverordnung – GasNVZ) regulate access to the grid, and the Electricity Grid Charges Ordinance (Stromnetzentgeltverordnung – StromNEV) and the Gas Grid Charges Ordinance (Gasnetzentgeltverordnung GasNEV) regulate the fees.
- §§ 6 ff. EnBW requires an unbundling of vertically integrated utilities (cf. §§ 6 et seqq), to promote competition.

Parallel to the EnWG the Renewable Energy Act (Erneuerbare Energien Gesetz, EEG) exists. The EEG and the ENWG coexist and mostly regulate different aspects of Energy law. In case the two laws collide the EEG prevails as more specialized (*lex specialis*).

b. Renewable Energy Sources Act

The Renewable Energy Sources Act (Erneuerbare Energien Gesetz – EEG) promotes renewable energy sources. The EEG is amended frequently, with the EEG version (EEG 2014) applicable as of 1 August 2014, and contains 104 sections and 4 annexes. This latest incarnation was strongly influenced by EU law.

The purpose of the law (§ 1 para. 1 EEG 2014) is to facilitate the sustainable development of energy supply, reduce the costs of energy supply to the national economy (also by incorporating external long-term effects), conserve fossil fuels and promote technological progress for renewable energy sources. Goals for renewable energy are

- 40% to 45% of the share in the gross electricity consumption by 2025
- 55% to 60% by 2035 and
- 80% by 2050.

The center piece of the EEG are feed-in tariffs for power stemming from renewable energy sources, which are prescribed and fixed for the duration⁶ based on the date of first connection to the grid, source and size of the energy provider. Tariffs for new installation are subject to annual, quarterly or monthly degression (Absenkung der Förderung) which shall reflect technical progress and cost reductions. In other words, the applicable feed-in tariff/support depends on when an installation is put into service. It remains the same for 20 years plus the year of installation. The later an installation starts operating, the lower the applicable support is. A connected pillar of the EEG is the right to be connected to the local power grid and have ones power purchased at the above mentioned rates. Cost allocation of the price-regulated feed in tariffs forms an ingenious part of the EEG.⁷ Instead

⁶ The financial support is provided for a period of 20 years plus the year the power plant went into operation (§ 22 EEG 2014).

⁷ Details of this reallocation can be found in the 2010 Equalisation Scheme Ordinance (Verordnung zur Weiterentwicklung des bundesweiten Ausgleichsmechanismus – AusglMechV) and the Equalisation Scheme Execution Ordinance

of having a governmental source for such price or forcing the grid providers to pay the price without recourse, a reallocation system exists. This reallocation of system costs is managed by the transmission system operators using a sophisticated so-called EEG surcharge (EEG-Umlage) for electricity consumers. Last but not least, the system is supplemented by a special equalization scheme for certain consumer groups.

In order to foster the use of renewable energy, the transmission and production of such energy is supposed to be aided by new expansion corridors (Ausbaupfade). The EEG 2014 provides detailed figures on the planned increase of installed power for the different energy sources. § 3 EEG 2014 targets are as follows:

- Onshore wind power: net annual growth corridor target of 2500 MW
- Offshore wind power: reduction of the national targets for offshore wind power from 10 GW to 6.5 GW by 2020 and from 25 GW to 15 GW by 2030
- Solar power: gross annual growth corridor target of 2500 MW
- Biomass: gross annual growth corridor target of 100 MW

To ensure compliance with the corridors, flexible caps (“atmende Deckel”) were introduced for onshore wind and biomass energy production, modeled on the previously introduced flexible caps for solar power.

The cap means that financial support for onshore wind power and biomass under the new EEG is reduced quarterly (not annually) as of 2016 and can increase or decrease if growth exceeds or falls below the corridor targets. The existing cap for solar power is modified with regard to the thresholds and the applicable additional support reductions or increases. Monthly solar support level adjustments started in 1 September 2014.

To ensure that all sources of renewable energy are connected, each grid operator has to take all necessary steps to ensure that the grid is optimized and electricity from renewables or mine gas can be fed into the grid. Limitations of this obligation are

- when a network expansion is economically unreasonable, § 12 para. 3 EEG 2014
- when certain grid congestion situations arise § 14 EEG 2014⁸.

Pursuant to § 61 EEG 2014, transmission system operators have a right to claim the EEG surcharge directly from end consumers. For electricity supplied by electricity suppliers, the surcharge is claimed via the electricity suppliers. The EEG surcharge is in principle uniform per kWh of electricity consumed by an end consumer. In 2016 the EEG surcharge will increase to 6.354 ct/kWh, up 3% from 6.17 ct/kWh.

Under the EEG 2014, a reduced EEG surcharge applies for so-called self supply at a rate

(Verordnung zur Ausführung der bundesweiten Ausgleichsmechanismus (Ausgleichsmechanismus-Ausführungsverordnung – AusglMechAV). Under the AusglMechV, transmission system operators have to take the power from the distribution system operators and have to sell it at the spot market (financial equalisation).

⁸ leads to compensation obligations for the grid operator (Section 15 EEG 2014).

of 30% for electricity consumed after 31 July 2014 and before 1 January 2016, 35% for electricity consumed after 31 December 2015 and before 1 January 2017, and 40% for electricity consumed after 1 January 2017.

Consequently, supply structures falling under the self-supply exemption provide considerable commercial advantage, mainly due to the fact of surcharges and fees not having to be paid.

However, the operator of the renewable power plant has to bear the costs for actual grid connection § 16 para. 1 EEG 2014. Further grid connection rules can be found in the EnWG.

In conformity with EU Guidelines on State Aid for Environmental Protection and Energy 2014-2020, eligible companies with high energy consumption are privileged concerning these additional costs.

Various other statutes and ordinances exist.⁹

⁹ Equalisation Scheme Ordinance (Verordnung zur Weiterentwicklung des bundesweiten Ausgleichsmechanismus – AusglMechV)
Equalisation Scheme Execution Ordinance (Verordnung zur Durchführung der Verordnung zur Weiterentwicklung des bundesweiten Ausgleichsmechanismus – AusglMechAV)
Ordinance on the Generation of Electricity from Biomass (Verordnung über die Erzeugung von Strom aus Biomasse – Biomasseverordnung – BiomasseV)
Biomass Electricity Sustainability Ordinance (Verordnung über Anforderungen an eine nachhaltige Herstellung von flüssiger Biomasse zur Stromerzeugung – Biomassestrom-Nachhaltigkeitsverordnung – BioSt-NachV)
Ordinance on System Services by Wind Energy Plants (Verordnung zu Systemdienstleistungen durch Windenergieanlagen – Systemdienstleistungsverordnung – SDLWindV)
Ordinance on the Management Premium for Electricity from Wind Power Plants and Solar Power Plants (Verordnung über die Höhe der Managementprämie für Strom aus Windenergie und solarer Strahlungsenergie – Managementprämienverordnung – MaPrV)
Ordinance on Fees and Expenses of the Federal Office of Economics and Export Control in Connection with the Limitation of the EEG Surcharge (Verordnung über Gebühren und Auslagen des Bundesamtes für Wirtschaft und Ausfuhrkontrolle im Zusammenhang mit der Begrenzung der EEG-Umlage – Besondere-Ausgleichsregelung – Gebührenverordnung – BAGebV)
Ordinance on Ensuring the Technical Safety and System Stability of the Electricity Supply Grid (Verordnung zur Gewährleistung der technischen Sicherheit und Systemstabilität des Elektrizitätsversorgungsnetzes – Systemstabilitätsverordnung – SysStabV)
Renewable Energies in the Heat Sector Promotion Act (Gesetz zur Förderung Erneuerbarer Energien im Wärmebereich – Erneuerbare-Energien-WärmeGesetz – EEWärmeG)
Greenhouse Gas Emission Trading Act (Gesetz über den Handel mit Berechtigungen zur Emission von Treibhausgasen – Treibhausgas-Emissionshandelsgesetz – TEHG)
Data Collection Ordinance 2020 (Verordnung über die Erhebung von Daten zur Einbeziehung des Luftverkehrs sowie weiterer Tätigkeiten in den Emissionshandel – Datenerhebungsverordnung – DEV 2020)
Greenhouse Gas Emission Allowances Allocation Act for the Period from 2008 to 2012 (Gesetz über den nationalen Zuteilungsplan für Treibhausgas-Emissionsberechtigungen in der Zuteilungsperiode 2008 bis 2012 – Zuteilungsgesetz 2012 – ZuG 2012)
Emissions Trading Auctioning Ordinance 2012 (Verordnung über die Versteigerung von Emissionsberechtigungen nach dem Zuteilungsgesetz 2012 – Emissionshandels-Versteigerungsverordnung 2012 – EHV 2012)
Ordinance Concerning the Allocation of Greenhouse Gas Emission Allowances in the Allocation Period 2008 to 2012 (Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Zuteilungsperiode 2008 bis 2012)
Project Mechanisms Act (Gesetz über projektbezogene Mechanismen nach dem Protokoll von Kyoto zum Rahmenübereinkommen der Vereinten Nationen über Klimaänderungen vom 11. Dezember 1997 – Projekt-Mechanismen-Gesetz – ProMechG)
Combined Heat and Power Act (Gesetz für die Erhaltung, die Modernisierung und den Ausbau der Kraft-Wärme-Kopplung – Kraft-Wärme-Kopplungsgesetz – KWKG 2002)
Atomic Energy Act (Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren – Atomgesetz – AtG); A bilingual German-English version of the AtG can be found here.
Federal Mining Act (Bundesberggesetz – BBergG)
Energy Line Extension Act (Gesetz zum Ausbau von Energieleitungen – Energieleitungsausbaugesetz – EnLAG)
Grid Expansion Acceleration Act (Netzausbaubeschleunigungsgesetz Übertragungsnetz – NABEG)

3.1.2 Has such legal framework been amended recently? If so, has it been ameliorated for investors or deteriorated?

Germany has been tinkering with its energy law for many years. The so-called energy turnaround includes the termination of the use of nuclear reactors. Part of this energy turnaround were a number of different laws.

The bundle of laws include:

Act to Promote Energy Savings in Buildings (Gesetz zur Einsparung von Energie in Gebäuden – EnEG)
Act on Energy Services and Further Energy Efficiency Measures (Gesetz über Energiedienstleistungen und andere Energieeffizienzmaßnahmen – EDL-G)
Energy Savings Ordinance (Verordnung über energiesparenden Wärmeschutz und energiesparende Anlagentechnik bei Gebäuden – Energieeinsparverordnung – EnEV)
Act Ensuring the Safety of the Energy Supply (Gesetz zur Sicherheit der Energieversorgung – Energiesicherheitsgesetz 1975)
Low Voltage Connection Ordinance (Verordnung über Allgemeine Bedingungen für den Netzanschluss und dessen Nutzung für die Elektrizitätsversorgung in Niederspannung – Niederspannungsanschlussverordnung – NAV)
Low Pressure Connection Ordinance (Verordnung über Allgemeine Bedingungen für den Netzanschluss und dessen Nutzung für die Gasversorgung in Niederdruck – Niederdruckanschlussverordnung – NDAV)
Ordinance on General Terms Regulating the Operation of Meter Points and the Measurement in Connection with the Electricity and Gas Supply via Networks (Verordnung über Rahmenbedingungen für den Messstellenbetrieb und die Messung im Bereich der leitungsgebundenen Elektrizitäts- und Gasversorgung – Messzugangsverordnung – MessZV)
Ordinance Regulating Grid Access of Plants Generating Electricity (Verordnung zur Regelung des Netzanschlusses von Anlagen zur Erzeugung von elektrischer Energie – Kraftwerks-Netzanschlussverordnung – KraftNAV)
Ordinance on General Terms Regulating Universal Service for Household Customers and Replacement Supply via the Low Voltage Network (Verordnung über Allgemeine Bedingungen für die Grundversorgung von Haushaltskunden und die Ersatzversorgung mit Elektrizität aus dem Niederspannungsnetz – Stromgrundversorgungsverordnung – StromGVV)
Ordinance on General Terms Regulating Universal Service for Household Customers and Replacement Supply with Gas from the Low-Pressure Network (Verordnung über Allgemeine Bedingungen für die Grundversorgung von Haushaltskunden und die Ersatzversorgung mit Gas aus dem Niederdrucknetz – Gasgrundversorgungsverordnung – GasGVV)
Ordinance Regulating Concession Fees for Electricity and Gas (Verordnung über Konzessionsabgaben für Strom und Gas – Konzessionsabgabenverordnung – KAV)
Ordinance Regulating the Fees and Expenses for Official Acts by the Federal Network Agency Pursuant to the German Energy Act (Verordnung über die Gebühren und Auslagen für Amtshandlungen der Bundesnetzagentur nach dem Energiewirtschaftsgesetz – Energiewirtschaftskostenverordnung – EnWKGKostV)
Ordinance on Agreements Concerning Interruptible Loads (Verordnung über Vereinbarungen zu abschaltbaren Lasten – Verordnung zu abschaltbaren Lasten – Ablav)
Ordinance to Regulate the Procedures for the Procurement of a Network Reserve as well as to Regulate the Handling of Planned Closures of Energy Generation Installations to Ensure the Security and Reliability of the Electricity Supply System (Verordnung zur Regelung des Verfahrens der Beschaffung einer Netzreserve sowie zur Regelung des Umgangs mit geplanten Stilllegungen von Energieerzeugungsanlagen zur Gewährleistung der Sicherheit und Zuverlässigkeit des Elektrizitätsversorgungssystems – Reservekraftwerksverordnung – ResKV)
Federal Immission Control Act (Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge – Bundes-Immissionsschutzgesetz – BImSchG)
Installations Requiring a Permit Ordinance – 4th BImSchV (Vierte Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes – Verordnung über genehmigungsbedürftige Anlagen – 4. BImSchV)
Major Accidents Ordinance – 12th BImSchV (Zwölfte Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes – Störfall-Verordnung – 12. BImSchV)
Large Combustion Plants and Gas Turbine Plants Ordinance – 13th BImSchV (Dreizehnte Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes – Verordnung über Großfeuerungs- und Gasturbinenanlagen – 13. BImSchV)
Waste Incineration and Co-Incineration Ordinance – 17th BImSchV (Siebzehnte Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes – Verordnung über die Verbrennung und die Mitverbrennung von Abfällen – 17. BImSchV)
Biofuels Sustainability Ordinance (Verordnung über Anforderungen an eine nachhaltige Herstellung von Biokraftstoffen – Biokraftstoff-Nachhaltigkeitsverordnung – Biokraft-NachV)
Energy Tax Act (Energiesteuergesetz – EnergieStG)
Electricity Tax Act (Stromsteuergesetz – StromStG)
Offshore Installations Ordinance (Verordnung über Anlagen seewärts der Begrenzung des deutschen Küstenmeeres – Seeanlagenverordnung – SeeAnIV)
Ordinance on Awarding Contracts in the Areas of Transport, Drinking Water and Energy Supply (Verordnung über die Vergabe von Aufträgen im Bereich Verkehr, der Trinkwasserversorgung und der Energieversorgung – Sektorenverordnung – SektVO)

- The 13th law to change the nuclear energy law
- The law to change the energy economic law
- The law concerning the Expediting of networks for electricity
- The law to change the law on designated funds concerning energy and climate
- Law to strengthen the appropriate climate development in cities and
- The law concerning showcasing an application of technologies for production, And transport and for saving safeguarding carbon dioxide
- The third law for the new regulation of energy economic regulations, Which intended to accelerate the expansion of offshore Wind energy.

Another change is that contrary to the EEG 2012, the majority of new renewable power plants will not receive fixed feed-in tariffs for renewable energy for a fixed period of time under the EEG 2014. Instead, direct marketing will apply, as previously previewed only after the fixed period. Direct marketing will be supplemented by the surcharges, substantially covering the gap to the feed-in tariff amount (§ 19 EEG 2014). Until 31 December 2016 the market premiums will be determined by reference to the feed-in tariff amounts. Whether this direct marketing will work is questionable.

One exception for the direct marketing rule are small providers with plants commissioned before 1 January 2016 with an installed capacity of less than 500 kW (§ 37 para. 2 no. 1 EEG 2014) and plants commissioned after 31 December 2015 with an installed capacity of less than 100 kW (§ 37 para. 2 no. 2 EEG 2014).

According to § 2 para. 5 EEG 2014, financial support for renewable energy sources shall be determined through auctions no later than 2017. In moving towards this tender, the success of pilot projects with freestanding PV power plants will be crucial. Auctions will be organized by the BNetzA.

3.1.3 May different legal frameworks applicable to renewable energy facilities coexist within your jurisdiction? What is the criterion to benefit from one or other?

Germany maintains numerous programs incentivize renewable energies and energy conservation. A listing of such schemes can be found at

- <http://www.energiefoerderung.info/>
- <http://www.bmwi.de/DE/Themen/Energie/Erneuerbare-Energien/erneuerbare-energien-auf-einen-blick.html>
- <http://www.foerderdatenbank.de/Foerder-DB/Navigation/Foerderrecherche/suche.html?get=views;document&doc=7739>

3.1.4 If your jurisdiction grants an incentive scheme for renewable energies: Has your country notified it to the European Commission under Article 108(3) TFEU so that it can be assessed under the State aid legislation?

Germany's EEG is widely considered to be a very successful policy instrument in incentivizing the deployment of renewable energy technologies. Between 2000 and 2010, around 17 gigawatts (GW) of capacity was installed, taking annual solar PV electricity generation from 60 gigawatt-hours (GWh) in 2000 to a total of around 11.7 terawatt-hours (TWh) in 2010. Germany's main support mechanism for solar PV is a feed-in tariff, first established in 1990 with the Stromeinspeisungsgesetz. This was then replaced in 2000 by the EEG. Germany has provided a number of supplementary support mechanisms for renewable energy, including the 100,000 Solar Roofs Program.

The EEG was submitted and approved pursuant to Article 108(3) TFEU. See https://www.erneuerbare-energien.de/EE/Redaktion/DE/Gesetze-Verordnungen/genuehmigung-der-eu-kommission-zur-besonderen-ausgleichsregelung-fuer-schienebahnen-im-ee-2014.pdf?__blob=publicationFile&v=2.

3.1.5 If the answer is in the positive: Has the European Commission issued any decision on your current or former national incentive scheme? On what grounds was its ruling based?

The Commission has considered the new reductions for energy-intensive users under the EEG 2014 compatible with the EU Guidelines on State Aid for Environmental Protection and Energy 2014-2020 on competitiveness grounds, "since the sectors are both energy-intensive and exposed to international trade".

In addition, the scheme is not financed directly or indirectly by the government and thus does not qualify as state aid.

The European Commission expressed concerns about parts of the EEG. In particular, the Commission had raised concerns over the provisions regulating a partial exemption from the EEG surcharge. However, review the matter in previewed in 2017.

The accompanying justification for the proposal says that a revision has to be in compliance with EU state aid law.

- So far the European Commission has approved German support of renewable electricity mainly until 31 December 2016. Until then the market premiums shall be determined by reference to the feed-in tariffs.
- In regard to tenders determining financial support under the EEG 2014 as of 2017, the Commission points out a new law is required to introduce the tenders.
- Small installations (below 100 kW) will continue to benefit from feed-in tariffs and are not obliged to sell on the market. This part of the EEG 2014 has been approved by the Commission for 10 years.

3.2 Law-making process

3.2.1 By what means may the renewable sector exert an influence on the law-making process in your country? Does the renewable sector hold a fluent relation with the national energy authorities of your country? What about foreign investors?

Lobbying.

3.2.2 Has any renewable subsector recently or in the past reached any sort of agreement(s) with your State on a particular issue concerning the applicable legal framework?

The withdrawal of nuclear energy production in Germany has been a continuous negotiation between the participants.

3.2.3 If the answer is affirmative: What are the agreed-upon terms of such agreement(s)? How is/are that/those agreement(s) regarded from a legal perspective (an administrative act, a bilateral contract, etc.)?

3.3 Development objectives

3.3.1 What policy instruments has your country implemented to meet the EU's binding 2020 renewable energy targets in the last few years (renewable action plans, incentive programs to increase installed capacity, etc.)? Will your country presumably comply with these objectives going forward?

The current status is that in 2012 Germany already reached significant improvement and it is projected that the goals are surpassed. A progress report of mid 2015 supports this assessment.¹⁰

Germany was the biggest producer of biogas heat, with 1.3 Mtoe produced in 2013. Germany, Austria and Greece are the EU's top three producers of solar thermal heat Germany, Spain and UK are the EU 's top 3 producers of wind power.

Germany, Austria and Greece are the EU's top three producers of solar thermal heat. Renewable energy use in transport has generally been lagging in most countries, except in Sweden, Finland, Austria, France and Germany. 15 Member States (Belgium, Bulgaria, Germany, Estonia, Spain, Croatia, Italy, Cyprus, Latvia, Lithuania, the Netherlands, Romania, Finland, Sweden and United Kingdom) were above their indicative trajectory shares for renewable electricity use in 2013.

¹⁰ <http://www.euractiv.com/files/comresprogressreport2015draftjune2015pdf>;

3.3.2 What kind of initiatives have been taken by your national energy authorities in order to foster the proliferation of renewable energy within your country? In contrast, what kind of restrictions have been put in place to restrict the installed capacity within your country's borders?

The 2015 Report from Germany to the EU details the measures taken in sections 2 and 3, especially pages 34 et seqq.

3.4 Grandfathering policy

3.4.1 Is there any grandfathering regulation or clause included in your jurisdiction's legal framework for renewable energies that prevents existing investors from any retroactive changes in the regulatory paradigm in the future?

Transitional provisions safeguard investments. New provisions of the EEG 2014 for the remuneration of power plants (§ 23 para. 1 EEG 2014) do not apply to previously existing plants. Instead, the EEG 2012 or earlier version of the EEG will continue to apply. Furthermore, certain grandfathering provisions allow the application of previous EEG provisions also for certain installations starting to operate for a limited period after 1 August 2014.

3.4.2 If a regulation or clause of this sort exists: How does national case law construe it? Is it applicable to every regulatory aspect or exclusively to particular ones?

Each regulation contains, if at all, its own grandfathering provision. Otherwise the latest act applies.

3.4.3 Has your country ever undergone a profound change in the legal framework for renewable energies, recently or in the past?

Germany has been tinkering with its energy law for many years. The so-called energy turnaround includes the termination of the use of nuclear reactors.

3.4.4 If the answer is positive: What were the alleged reasons by the national authorities leading to those changes? Were acquired rights respected by the new regulatory legislation? What kind of transitional rules were enacted?

See above.

3.5 Dispute resolution

3.5.1 Are there any pending claims before either the state courts or arbitral tribunals for changes in the legal framework regarding investor incentives in the renewable energy sector?

No. Not regarding renewable energy.¹¹

¹¹ Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12). The proceeding is still pending.

3.5.2 Are there any final decisions of your state courts approving/disapproving of changes in the legal framework regarding investor incentives in the renewable energy sector?

Many cases involve the exact obligations of access to the grid as well as the exact remuneration, but they are civil cases between private parties and do not concern challenges to the laws themselves.

Again, the most famous cases regarding energy investment concern the exit from nuclear power.

Based on the Energy Charter Treaty, Vattenfall is seeking compensation of losses that result from Vattenfall having to phase out its nuclear power plants in Germany. Allegedly, damages are in the billions.

Vattenfall has a history of taking Germany to arbitration, having done it before over the Moorburg power plant (ICSID Case No. ARB/09/6) in 2009, a matter that was settled in March 2011 on undisclosed terms. No doubt the issue of transparency in investor-state arbitration will be discussed more intensely in the light of the new matter, giving both the size of the claims and the political implications. In addition, Vattenfall has now joined the German nuclear operators in bringing a constitutional complaint (Verfassungsbeschwerde) and challenging the respective legislation before the Federal Constitutional Court (Bundesverfassungsgericht).

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