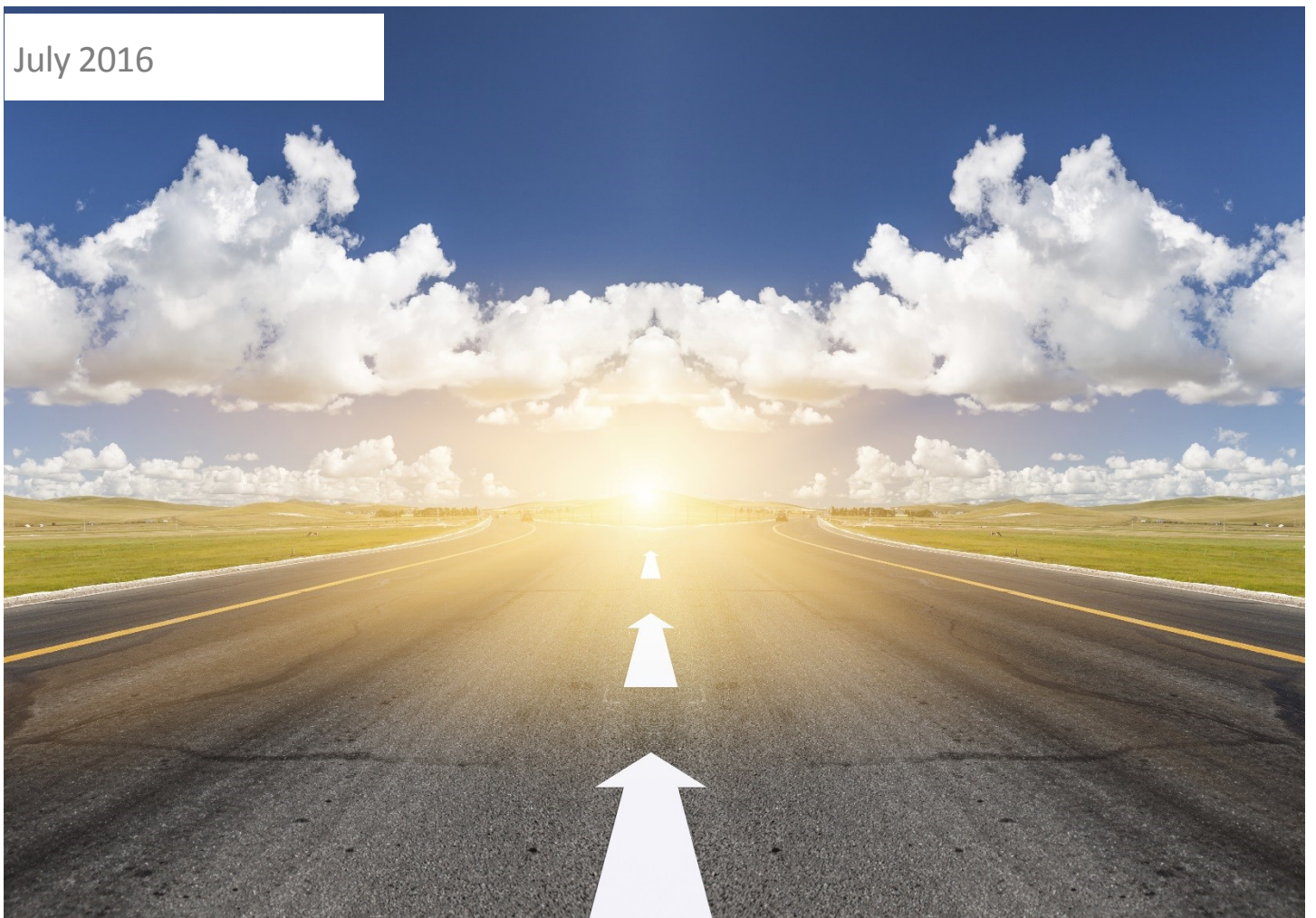


Energy Briefing

Opening the German tendering process to other EU member states

July 2016



Pilot cross-border tenders in Germany

New legislation

As provided for in § 2(6) of the German Renewable Energy Sources Act (*Erneuerbare-Energien-Gesetz*; "EEG") 2014, as from 2017, five (5) per cent of new renewables capacity installed each year shall be open for electricity being produced by renewable energy installations located in other EU member states. This was agreed between the German Federal Government and the European Commission when gaining the state aid approval of the EEG 2014. Similar conditions have been determined for some other EU member states, such as Denmark and Luxembourg.

As of 1 June 2016, the German Federal Government adopted a new Cross-Border Renewable Energy Regulation¹ (the "GEEV"), following the key features paper on the partial opening of the pilot auctions for ground-mounted photovoltaic ("PV") installations to bidders from other European member states published by the German Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*, "BMWi") as of 4 March 2016² (the "Key Features Paper") and based on the legal framework and the authorisation as provided for in the EEG 2014³.

The GEEV introduces the cross-border tendering procedures for the ground-mounted PV installations. It is expected that the first two pilot cross-border tenders with two other EU member states shall be implemented by autumn 2016 as trial runs, however, conditional on the respective cooperation agreements with these EU member states to be concluded by then. As provided for by the GEEV, the tender volume in 2016 may not exceed 100 MW. According to the information published by the BMWi⁴ so far, negotiations with Denmark are being conducted at the moment. The cooperation with Luxembourg is also being discussed.

Based on the pilot projects for the ground-mounted PV installations in 2016, as from 2017 the cross-border tendering procedure shall be implemented for other technologies and the tender volume shall be limited to the above mentioned five (5) per cent threshold of the total German tendering volume per year. The EEG 2016⁵, which shall come into force as from 1 January 2017, includes the entitlement of the German Federal Government to enact and to implement a respective regulation.

This briefing summarizes the main features of the pilot cross-border tendering procedures for ground-mounted PV installations as set out in the GEEV and gives a short overview of the cross-border tenders for the PV installations to be carried out in Denmark in the near future, as published so far.



Basic features of the pilot cross-border tenders in Germany

Two models to be implemented

The GEEV introduces the following two models of the European cross-border tendering procedure: (i) mutually open tenders to be implemented by each EU member state separately, which are then accessible for the projects located in the other EU member state on the reciprocal basis (*gegenseitig geöffnete Ausschreibungen*); and (ii) common tenders to be implemented in cooperation between the EU member states involved (*gemeinsame Ausschreibung*). In both cases, the projects located in Germany and in the other EU member state will compete. Generally, the tender design according to the GEEV is based on the tender design as provided for in the currently applicable regulation governing the tendering procedure for ground-mounted PV installations in Germany (*Freiflächenausschreibungsverordnung*; "FFAV")⁶.

(i) In the case of the mutually open tender, the subsidy systems of the EU member states shall be open to a certain extent for the installations located in the territory of the other country. Each EU member state shall implement its own tender design and determine its own tender requirements such as the maximum amount of the bid price (cent per kWh) and the maximum bid size to be accepted. However, the requirements of the country, where the installation is located, should apply to the location-related issues, such as the required permissions, the grid connection or the real estate related requirements. The mutually open tenders do not necessarily need to be carried out simultaneously.

¹Verordnung zur grenzüberschreitenden Ausschreibung der Förderung für Strom aus erneuerbaren Energien sowie zur Änderung weiterer Verordnungen zur Förderung der erneuerbaren Energien (Grenzüberschreitende-Erneuerbare-Energien-Verordnung bzw. Europäische Freiflächenausschreibungsverordnung, GEEV) (<http://bmwi.de/DE/Presse/pressemitteilungen,did=769362.html>)

²Eckpunktepapier "Öffnung des EEG für Strom aus anderen EU-Mitgliedstaaten im Rahmen der Pilot-Ausschreibung für Photovoltaik-Freiflächenanlagen" (<http://www.bmwi.de/DE/Themen/Energie/Erneuerbare-Energien/pilot-oeffnung-fuer-eu-staaten.html>)

³§ 2(6) and § 88(2)-(4) EEG 2014

⁴<http://www.bmwi.de/DE/Themen/Energie/Erneuerbare-Energien/pilot-oeffnung-fuer-eu-staaten.html>

⁵<http://www.bmwi.de/DE/Themen/Energie/Erneuerbare-Energien/eeg-2017-wettbewerbliche-verguetung.html>

⁶<https://www.gesetze-im-internet.de/ffav/BJNR010810015.html>

(ii) In the second case, only one common tender shall be implemented by the participating EU member states, which is then open for installations located in the countries involved. Once the bids have been accepted, the subsidized installations shall be allocated to the existing support scheme of one of the participating EU member states according to a specific key defined in the cooperation agreement between the EU member states in advance. Consequently, although all tender conditions must be announced to the bidder in advance, it will not be clear by the time of the bidding, the payment scheme of which country shall apply to the project. In this case, all tender conditions must be clearly determined by the cooperation agreement. The requirements of the country where the installation is located should most likely apply to the site-related issues.



General requirements for the cross-border tenders

According to the EEG 2014 and the GEEV, the EU cross-border tendering procedure shall be subject to the following three (3) conditions: (i) Germany and the other EU member state shall have entered into a cooperation agreement specifying further details of the tender design; (ii) the cooperation with the EU member state must be based on the principle of reciprocity; and (iii) the electricity being produced in the subsidized installation abroad must be actually imported to Germany or there must be comparable effect on the German electricity market as if the installation would be located in Germany and connected to the grid in Germany.

Regarding the first condition, the existing cooperation agreement, the GEEV provides for a series of alternative arrangement options which are applicable depending on which of the two models will be implemented in each case. The governments of the EU member states must agree on the exact conditions of the cross-border tendering procedure in advance in the cooperation agreement.

The principle of the reciprocity means that the cross-border tender may only be implemented if the other EU member state also opens its support scheme for installations in Germany, either by way of mutually open tenders or by way of common tenders.

With respect to the third requirement, the GEEV does not determine how to prove that the electricity has been imported to Germany or if there is a comparable effect on the German electricity market. The evidence of the "physical import" to Germany is actually not possible, unless there is a direct electricity line between the installation located in the other EU member state and Germany. In any case, a proof through virtual deduction only is not sufficient. Based on the explanatory memorandum to the GEEV (*Gesetzesbegründung*), in relation to ground-mounted

PV installations, the evidence of the "physical import" of the electricity to Germany or of the effect on the German electricity market is not necessary. It remains to be seen how this issue will be implemented for the tenders to be carried out as from 2017.

Tendering authority

The tender rounds shall be carried out by the Federal Grid Agency (*Bundesnetzagentur*; the "BNetzA"). In case of the common tender, the tendering authority of the other EU member state or the foreign authority together with the BNetzA may be appointed as the tendering office if so determined by the cooperation agreement.

The BNetzA shall announce the respective tender on its website six (6) to nine (9) weeks in advance specifying thereby the maximum tender capacity, the maximum allowed price level for the bids and publishing all other parameters of the tender round. The common tenders may be, in addition thereto, announced on the website of the tendering office of the other EU member state as far as determined in the cooperation agreement. The accepted bids shall be announced on the website of the tendering authority as well.

Bid size

The GEEV provides for a de-minimis threshold of 100 kW per installation; the maximum bid size of 10 MW per installation shall continue to apply. This means that PV installations with an installed capacity of less than 100 kW and more than 10 MW may not take part in the cross-border tendering procedure. However, the cooperation agreement may determine that a de-minimis threshold of less or more than 100 kW and a maximum bid size of less than 10 MW shall apply.

Security

As provided for in the tendering procedure under the FFAV, a security shall be submitted to the BNetzA or to the other foreign tendering authority, as the case may be, as of the tender deadline at the latest in order to secure the payment of penalties in case of non-realisation of the project. The bid shall not be accepted if the security has not been submitted in due time.

In contrary to the FFAV, according to which an initial security amounting to EUR 4 per kW of the bid size shall be submitted first and will then be replaced by the second security amounting to EUR 50 per kW of the bid size after the tender award, the GEEV stipulates that in case of cross-border tenders only one initial security amounting to EUR 70 per kW of the bid size shall be submitted to the competent authority. For a project with an installed capacity of 10 MW, the security therefore amounts to EUR 700,000. The BNetzA or the cooperation agreement may also determine a different amount of the security, which may not exceed EUR 100 per kW of the bid size.

The security may be rendered either through a directly enforceable bank guarantee (*selbstschuldnerische Bürgschaft*) or cash payment on a separate bank account. The guarantor must be a bank accredited in the EU or within the European Economic Area (EEA). The BNetzA or the cooperation agreement may stipulate further requirements on the bank guarantee. The security once submitted may still be replaced by the alternative security in the corresponding amount.

Tender design

The tender is open for sealed bids, which are binding and may not be modified once submitted to the respective authority. The bids may be revoked prior to the tender deadline. The bids are aimed at achieving a specific market premium (*Marktprämie*) for each kWh of energy produced by the installation, as provided for in the EEG 2014. The maximum bid price (*Höchstwert*), which must not be exceeded, shall be announced by the tendering authority in advance.

The pricing shall be the criterion used in order to decide which bids are accepted. As far as the sum of the bid sizes of all bids placed in the tender exceeds the announced maximum tender capacity, the bids starting with the lowest bid price shall be accepted until the maximum tender capacity is reached. If the bid prices are the same, the decision shall be taken by lot. For the projects awarded in the tender the "uniform pricing" principle shall apply, which means that the amount of the subsidy granted to all projects shall be equal to the maximum bid price of all bids which have been accepted. In contrary thereto, if the sum of all bid sizes is lower than the announced maximum tender capacity, all bids shall be accepted. In this case, the bidder shall receive the maximum allowed bid price (*Höchstwert*) announced by the tendering authority in advance. Nevertheless the foregoing, it may be determined in case of a mutually open tender that a "pay-as-bid" principle applies, which means that the bidder receives the subsidy as placed in the bid.

The payment entitlement

The subsidy claim of the applicant in the tender only arises if the payment entitlement (*Zahlungsberechtigung*) has been issued by the tendering authority after the acceptance of the bid. In order to receive such a payment entitlement, the successful bidder must apply for it after the PV installation has been commissioned within a two-year period after the announcement of the successful bid. If the payment entitlement is not applied for within the two-year period – for at least 95 per cent of the awarded capacity – the accepted bid shall cease to be valid and the penalty amounting to EUR 70 per each kW of the accepted bid size has to be paid.

The BNetzA or the cooperation agreement may also determine another amount of the penalty to be paid in case of non-realisation of the project, which may, however, not exceed EUR 100 per kW of the accepted bid size.

The subsidy, once the payment entitlement has been issued, shall be paid for a period of 20 years upon the announcement of the

payment entitlement, or as from the start of the electricity production, which is considered up to three (3) weeks before the date of the application for the payment entitlement.

The bidders may also return the accepted bid, in which case the penalty shall be paid as well. If they do so within the first nine (9) calendar months after the capacity has been awarded, the penalty shall be reduced by 50 per cent.

The payment entitlement may be subject to certain conditions (*Auflagen*), such as a maximum cap of the yearly amount of the electricity to be remunerated, provided, however, such condition has to be announced by the BNetzA in advance.

Trade with accepted bids not allowed

The trade with the accepted bids is forbidden. The accepted bids may not be validly transferred to a third party. The payment entitlement is allocated to the concrete PV installation and may not be transferred to another PV installation either. The transfer of the PV installation, once the payment entitlement has been issued, remains hereby unaffected. Furthermore, although not specifically regulated in the GEEV, according to our understanding it should be possible to transfer the shares in the applicant.



Cross-border tenders in Denmark

Pilot tendering procedure for PV installations in 2016

Like Germany, Denmark also intends to introduce the tendering procedure in the near future and to open the tenders to other EU member states. A pilot tender for PV installations with an installed capacity of up to 20 MW is expected to be conducted in 2016, 2.4 MW of which are expected to be open to the PV installations located in Germany. The first call for tenders should be made in the second half of 2016, with the first payments of the price premium for the produced electricity as from 1 January 2017, at the earliest.

As of 22 February 2016, the Danish Energy Agency published preliminary tender specifications⁷ (the "**Draft of the Conditions for Pilot Tendering Procedure**"). The final tender documents have not yet been published.

According to the new legislation, Denmark may, in principal, conduct the pilot tenders with all EEA countries which have direct electrical connection to Denmark, i.e. Norway, Sweden and Germany, provided, however, the respective cooperation agreements including the final content of the tendering conditions shall be in place. Such cooperation agreement is currently being negotiated with Germany and shall most likely introduce separate but mutually open tenders with each country determining its own tender conditions⁸.



Bid size, tender design

The size of an individual bid in Denmark shall be limited to a maximum capacity of 2.4 MW. This is surely due to the fact that the opening of the tendering procedure for the projects located outside of Denmark is limited to such threshold and, otherwise, larger projects located outside of Denmark would be discriminated.

Like in Germany, the pricing shall be the only criterion in order to decide which bid shall be accepted. The Danish Energy Agency will accept the bids, beginning with the cheapest one, until the sum of all accepted bids reaches or exceeds the maximum limit of 20 MW. Given the fact that the maximum limit of an individual bid amounts to 2.4 MW and that the full capacity of the bid shall be accepted, even if only part of it falls within the 20 MW threshold, the sum of all winning bids may amount to 22.399 MW depending on the size of the last accepted bid.

According to the information provided by the Danish Energy Agency, 2.4 MW of the 20 MW threshold shall be open for the PV installations located in Germany. However, this does not mean

that the capacity of 2.4 MW is fully "reserved" to German projects only. The bids for projects located in Germany may still only be accepted to the extent they are competitive compared to projects located in Denmark. In other words, if the bids for projects located in Germany shall be among the bids falling within the maximum limit of 20 MW, only the cheapest bids shall be accepted until the sum of all accepted bids regarding the German projects shall reach or exceed the 2.4 MW limit. Also in this case the whole bid shall be accepted, even if only a part of it falls within the limit of 2.4 MW, so that the sum of all winning bids for projects located in Germany may increase to 4.799 MW, depending on the size of the last accepted bid. If the accepted bids for projects in Germany do not exceed the 2.4 MW limit, the remaining amount up to 2.4 MW shall be attributed to the Danish projects.

Price premium

The price premium to be paid under the Danish subsidy system shall be a fixed premium on top of the market price for each MWh generated and shall be paid on a monthly basis in Danish Krone (DKK). According to the information published by the Danish Energy Agency so far, the "pay-as-bid" principle should apply in order to determine the price premium. The Draft of the Conditions for Pilot Tendering Procedure dated 22 February 2016 does not include any maximum price.

The price premium shall be paid to the successful bidder by the Danish national transmission system operator for electricity, Energinet.dk, on the basis of the contract on price premium concluded between the successful bidder and the Danish Energy Agency. If the PV installation is located in Germany, the price premium shall be paid on the basis of the information on the amount of the electricity generated reported by the relevant grid company in Germany.

The contract on price premium can include price premiums for one or several PV installations for which the total installed capacity does not exceed 2.4 MW. The contract for price premium entails certain rights and obligations applicable during the support period and shall be, in principle, non-negotiable.

Support period

The price premium will be paid and guaranteed for a period of 20 years as from the grid connection of the PV installation, i.e. as from the time at which the PV installation supplies the electricity to the grid for the first time, but no longer than for a period of 23 years as from the conclusion of the contract on price premium. During this support period, the entire electricity production from the PV installation covered by the contract on price premium must be delivered to the grid and sold in the electricity market; it may not be used for self-consumption.

⁷Draft conditions for pilot tendering procedure for a price premium for electricity generated at solar photovoltaic installations dated 22 February 2016 (<http://www.ens.dk/en/solarpv>)

⁸See also the questions and answers on the Draft conditions for pilot tendering procedure for a price premium for electricity generated at solar photovoltaic installations published by the Danish Energy Agency as of 6 June 2016 (<http://www.ens.dk/en/solarpv>)

Realisation period of the project

The PV installation must be connected to the grid within a two-year period after establishing of the contract for the price premium. Such obligation is deemed to be fulfilled if 95 per cent of the installed capacity is connected to the grid. This realisation period may be extended, in particular if the non-realisation of the project has been caused by force majeure.

Retention penalty, security

If the project has not been realised and the PV installation has not been connected to the grid within the two-year period, the retention penalty amounting to DKK 180 (equal to approx. EUR 24.19) per kW of the installed capacity covered by the contract for price premium, which has not been timely connected to the grid, shall be paid.

In order to secure the payment of such penalty, the bidder must submit a financial guarantee issued by a financial institution,

insurance or a similar institution for an amount corresponding to the respective retention penalty. Once 95 per cent of the installed capacity is connected to the grid, the guarantee obligation becomes obsolete.

As already mentioned, the cooperation agreement with Germany is currently being negotiated and it remains to be seen which final conditions shall be applicable to the cross-border tenders involving projects located in Germany and Denmark.



Should you like to discuss these issues or wish to receive any further information on the subject matter described in this Energy Briefing please do not hesitate to contact us at any time.

Your Contacts



Daniel Marhewka

Partner - Corporate & Energy

E: daniel.marhewka@fieldfisher.com

T: +49 89 62030 6211

M: +49 179 3263 941



IUDr Zuzana Meinecke Fábry, LL.M. Eur.

Senior Associate - Corporate & Energy

E: zuzana.meineckefabry@fieldfisher.com

T: +49 89 62030 6223

M: +49 176 16203 062

This publication only includes general facts and explanations for general information purposes and is not a substitute for detailed advice on specific transactions and should not be taken as providing legal advice on any of the topics discussed.

All references to "Fieldfisher" and "the firm" in this publication mean Fieldfisher LLP and / or its affiliated undertakings. Any references to a "partner" means a member of Fieldfisher LLP, or a member of or partner in an affiliated undertaking of either of them, or an employee or consultant with equivalent standing and qualification. This publication is produced by Fieldfisher. It provides a summary of the legal issues, but is not intended to give specific legal advice. The situation described may not apply to your circumstances. If you require advice or have questions or comments on its subject, please speak to your usual contact at Fieldfisher.

© Copyright Fieldfisher LLP 2016. All rights reserved.

Fieldfisher LLP is a limited liability partnership registered in England and Wales with registered number OC318472, which is regulated by the Solicitors Regulation Authority. A list of members and their professional qualifications is available for inspection at its registered office, Riverbank House, 2 Swan Lane, London, EC4R 3TT. We use the word "partner" to refer to a member of Fieldfisher LLP, or an employee or consultant with equivalent standing and qualifications.