3 Legal Framework Conditions for the Licensing of Offshore Wind Farms

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3.1 The Renewable Energy Sources Act – Support Instrument for the Expansion of Renewable Energies

In Germany, generating electricity by wind-powered plants is promoted by the Act on Granting Priority to Renewable Energy Sources (Renewable Energy Sources Act - EEG). This act is an effective and efficient instrument for increasing the use of renewable energies on the road towards a sustainable energy system. The core elements of the EEG are:

- the priority connection of installations for the generation of electricity from renewable energies and from mine gas to the general electricity supply grids;
- the priority purchase and transmission of this electricity;
- a consistent fee for this electricity paid by the grid operators, generally for a 20-year period, for commissioned installations, this payment is geared around the costs, and
- the nationwide equalisation of the electricity purchased and the corresponding fees paid.

The fee paid for the electricity depends on the energy source and the size of the installation. The rate also depends on the date of commissioning; the later an installation begins operation, the lower the tariff (degression). Since the amendment of the EEG in 2004, power from offshore wind farms will be eligible for an initial rate of 9.1 cent/kWh if the plant is commissioned by 2010 (previously 2006). Wind farms are classified as offshore if they are constructed at least three nautical miles off the shoreline. The initial rate will be paid for 12 years. This period will be extended for installations built at a greater distance from the shoreline and at greater depths. The base rate which follows the initial rate is 6.19 cent/kWh. Altogether a guaranteed price is paid for 20 years.
3.2 Licensing Offshore Wind Farms in the Territorial Sea

The territorial sea, i.e. the zone of 12 nautical miles off the German coast, belongs to the territory of the Federal Republic of Germany. The same provisions of the Federation and coastal Länder apply here as on land. Hence, the Federal Immission Control Act (BImSchG) is also applicable for the licensing of wind farms in the territorial sea.

For their construction and operation wind farms require a licence pursuant to Article 4 BImSchG (cf No. 1.6 of the Annex to the Ordinance on Installations Subject to Licensing – 4th BImSchV). In principle, it is not necessary to obtain separate further authorisations from other authorities in addition to the licence under immission control law, because the latter triggers a so-called formal concentration effect under Article 13 BImSchG and incorporates other authority decisions relating to the installation.

The licensing procedure must be carried out by the competent immission control authority of the coastal Länder as a formal procedure pursuant to Article 10 BImSchG. The procedure involves an environmental impact assessment and public participation, since offshore wind farm projects regularly concern the construction and operation of more than 20 wind turbines (cf column 1 of Annex 1 to the Act on the Assessment of Environmental Impacts in conjunction with Article 2 para. 1 No. 1 (c) of the 4th BImSchV).

The licence must be granted if it is ensured inter alia that no harmful effects on the environment may be caused and no other public law provisions oppose the construction and operation of the offshore wind farm (cf Article 6 para. 1 in conjunction with Article 5 BImSchG). Prior to the licence being granted, therefore, there must be an examination into whether the project complies with the regulations of the relevant Land building code, and whether interference with the safety and easy flow of shipping as defined in the Federal Waterways Act can be ruled out. Particular importance is attached to the concerns of nature protection and landscape management. The project must be an admissible intervention in nature and landscape. In the territorial waters of the North Sea which have been designated by Land legislation as Wadden Sea National Parks, the construction and operation of an offshore wind farm is only permissible in exceptional cases.