



RES Act 2017: New auction system with specific reference to onshore wind



RES Act 2017: New auction system with specific reference to onshore wind

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Preface to the second updated edition

Dear readers,

Several amendments to the Renewable Energy Sources Act (RES Act) in recent years have introduced the direct sale of electricity generated by installations based on renewable energy sources, bringing the installations closer to the market as a result. The revisions to the Renewable Energy Sources Act that entered into force on 1 January 2017 put an end to the entitlement to funding rates fixed by the state, and instead introduce a system whereby the entitlement to payment is determined through competitive auction systems. In general, operators of renewable energy installations will now only receive compensation for the electricity they produce if they have successfully taken part in an auction.

This move to an auction-based system not only constitutes a paradigm shift in the way funding is provided, but also brings with it many additional changes and developments. This is particularly true of the complex auction procedure, which can prove challenging for the bidder – not least due to the strict rules that apply with regard to the bidding format and deadlines.

By taking a closer look at the relevant rules and regulations, our aim at FA Wind is to make the auction procedure easier for all stakeholders involved. This publication is designed as a useful guide to the new auction-related developments

in the RES Act 2017 specifically for onshore wind. It aims to provide guidance to anyone interested in taking part in the auction process, and is intended as an easy-to-follow reference for all stakeholders.

New practical developments are taken into consideration in this second updated edition. For example, this edition has incorporated the advisory opinion of the EEG clearing house, which provides a position statement on the impact of approval changes on the funding entitlement of »interim installations«. In addition, it also describes the partial suspension of the special rules for citizens' energy companies in the first two auctioning rounds in 2018. Lastly, the legal framework for joint auctions for onshore wind energy and solar installations is also presented. The publication takes into account the state of legislation through to mid-August 2017.

We would especially like to thank Hanna Schumacher at the Federal Ministry for Economic Affairs and Energy and Dr Philipp Leander Wolfshohl and Simon Walenzik at the Federal Network Agency for the many helpful suggestions and professional advice they provided during the preparation of this publication.

I hope you find this document informative and I wish you every success in the bidding process!

Yours,



Axel Tscherniak
Managing Director
FA Wind

1. Summary

The amendment to the Renewable Energy Sources Act fundamentally has transformed the system of funding renewable electricity generation in Germany: it has largely put an end to the entitlement to legally established funding levels, which had applied up to now. Instead, operators of wind energy installations will generally need to bid for the payment entitlement in a competitive auction system. Funding is only awarded to those operators that can produce a kilowatt hour of electricity at the lowest price.

The RES Act 2017 has also signalled a paradigm shift in the control of the expansion of renewable energy: while renewable expansion in the past two decades has been primarily influenced by the level of financial support provided, the new RES Act sets out maximum volumes to be put up for auction each year for individual technologies, thereby essentially setting a cap on the installation of new electricity generation capacities in the wind energy sector. Additional restrictions apply to the further construction of wind energy installations in areas in which the transmission system is particularly overloaded or in areas that place such a load on the transmission system.

For bids for onshore wind installations to even be admitted to the auction process, bidders must have approval pursuant to the Federal Immission Control Act. In addition, bidders must comply strictly with all the regulations for submitting a bid (bid format and deadlines) as the bid is automatically rejected otherwise.

Under the Act, more relaxed conditions apply for locally established citizens' energy companies to take part in auctions in the onshore wind energy sector. By allowing citizens' energy companies to participate in the auction system at an early stage – even before the costly and time-consuming approval process is completed – the aim is for the companies to receive price certainty for their wind energy projects. In addition, early participation in the auction procedure reduces the risk of the company failing to secure funding in the auction with a project that is already far advanced. What is more, if citizens' energy companies are successful with their bids in the auction, they receive the value of the highest bid to still be awarded funding. By introducing these special rules – which many citizens' energy companies took advantage of in the first auctioning round – legislators hope to maintain stakeholder diversity despite the switch to an auction-based system.

The RES Act 2017 contains provisions for a range of transitional rules, including transitional rules for wind energy installations that were approved under the Federal Immission Control Act by the end of 2016 and will go into operation before 2019. Such installations will continue to receive compensation under the support scheme currently in place but the rates of remuneration set by the state will be reduced considerably with a series of reductions in 2017 and 2018.

This background paper seeks to highlight these fundamental developments and explain them in greater detail.

2. Introduction

The Act to Introduce Auction Systems for Renewable Electricity and Additional Amendments to Renewable Energy Law, as amended by the resolution proposal of the Bundestag Committee on Economic Affairs and Energy, entered into force on 1 January 2017.¹ The legislative package comprises 25 articles in total. Article 1 amends the Renewable Energy Sources Act (*Erneuerbare-Energien-Gesetz* or *EEG*) to »EEG 2017« (RES Act 2017) with the primary goals of determining the values to be applied for renewable electricity through competitive auction procedures, and of defining the mechanism for precisely controlling the rate of additional expansion. Legislators had already adopted initial amendments to these rules before the RES Act 2017 entered into force;² the rules have also applied since 1 January 2017. Article 2 introduces the Act to Develop and Promote Offshore Wind (*Gesetz zur Entwicklung und Förderung der Windenergie auf See*). As the name suggests, this addresses the expansion of sea-based wind energy installations and the necessary offshore connection lines. Twenty-two more articles align numerous existing laws and ordinances to the new rules set out in the RES Act 2017 and the Act to Develop and Promote Offshore Wind, including

amendments to the Energy Industry Act (*Energiewirtschaftsgesetz*), the Environmental Impact Assessment Act (*Gesetz über die Umweltverträglichkeitsprüfung*) and the Combined Heat and Power Act (*Kraft-Wärme-Kopplungsgesetz*).

This paper seeks to explain the auction-specific rules in the RES Act 2017 that govern the funding of electricity from onshore wind energy installations. An overview of the various funding options is first presented. This is followed by an explanation of the auction procedure for determining the level of support for electricity from onshore wind installations, with particular attention given to the various steps in the procedure, the requirements to be met by the bids and the consequences if funding is awarded or a bid is not considered. A substantial part is dedicated to explaining the special auction rules for citizens' energy companies. This is followed by a chapter dealing with possibilities for funding outside the auction procedure framework. The paper concludes with an overview of key dates and deadlines in 2017 and 2018.

3. Aim of the auction system

The political commitment to determine payment entitlements for electricity derived from renewable sources (renewable electricity) in the future through an auction system was already made in the RES Act 2014. The competition-based determination of payment entitlements was introduced with the RES Act 2017; under Section 22 (2) of the Act, participation in auc-

tions is compulsory for onshore wind installations with a capacity in excess of 750 kilowatts (kW). With payment entitlements determined through a competitive process, the aim is to continue the expansion of renewable energy in a »steady and cost-effective« manner, while

¹ Act to Introduce Auction Systems for Renewable Electricity and Additional Amendments to Renewable Energy Law (*Gesetz zur Einführung von Ausschreibungen für Strom aus erneuerbaren Energien und zu weiteren Änderungen des Rechts der erneuerbaren Energien*) of 13 October 2016 (Federal Law Gazette I P. 2276). The bill of 21 June 2016 put forward by the CDU/CSU and SPD parliamentary groups (Bundestag printed paper 18/8860) was revised again by the Economic Affairs Committee with the recommendation of 6 July 2016 (Bundestag printed paper 18/9096). In this context, the official abbreviation of the Act was changed to »EEG 2017«. An overview of the parliamentary legislative process, along with the corresponding legislative texts, is

provided on the website of the EEG clearing house, <https://www.clearingstelle-eeg.de/eeg2016/urfassung/material>.

² Act to Amend the Rules Governing Electricity Generation from Combined Heat and Power and Governing Self Supply (*Gesetz zur Änderung der Bestimmungen zur Stromerzeugung aus Kraft-Wärme-Kopplung und zur Eigenversorgung*) of 22 December 2016 (Federal Law Gazette I P. 3106).

also ensuring acceptance for the energy transition.³ In addition, the auctions are intended to make the funding system for renewable energy »more competitive and bring it closer to the market« by ensuring that the »amount of funding paid« for electricity generated in renewable energy installations »does not exceed the amount that is needed to operate the installation in an economically viable manner«.⁴

The introduction of auctions also aims to ensure compliance with the expansion goal set down in the coalition treaty, which stipulates that 40-45% of national gross electricity consumption is to be derived from renewable energy sources by 2025, and 55-60% by 2035.⁵ Deployment corridors for individual energy sources had already been defined in the RES Act 2014, and compliance with these corridors was to be guaranteed by raising or lowering the funding rates – a concept known as the flexible cap. Onshore wind significantly exceeded the annual deployment corridor of 2.5 gigawatt (GW) net in both 2014 (with 4.4 GW) and 2015 (with 3.6 GW). At 4.4 GW (gross), the expansion of onshore wind in 2016 also far exceeded the deployment corridor.⁶

Specific expansion goals for the individual technologies are also defined in the RES Act 2017 (Section 4 of the RES Act 2017). However, as funding approval is only granted in the auctioning rounds to the projects that are needed to meet the annual expansion goal, it is now possible to specifically limit the additional construction of installations.

Furthermore, control of the new electricity production capacity to be installed – in terms of the volumes up for auction as set down in Section 28 (1) and (1a) of the RES Act 2017 – and the regional control of such expansion by iden-

tifying a grid expansion area pursuant to Section 36c of the RES Act 2017, is also designed to help »synchronise« the expansion of renewable energy and the expansion of the grid. The RES Act 2017 has also marked a paradigm shift in this respect as it limits the regional growth of renewable electricity production plants until the grids that are needed to transport the electricity produced in the region have been expanded sufficiently.

Stakeholder diversity is another guiding principle that has shaped the design of the auction system. The auction system should give all stakeholders a »fair chance«. Legislators have recognised the fact that »small and medium-sized stakeholders have [thus far] been responsible for a large percentage of the new renewable capacity added« and »have made a strong contribution to acceptance for the energy transition«.⁷ According to the Federal Ministry for Economic Affairs and Energy, strong diversity of stakeholders increases competition and also indirectly reduces costs. In addition, the Ministry says, small stakeholders »are often particularly innovative«, which is why their participation in the future funding system is of »great value«.⁸ In Section 2 (3), the RES Act 2017 specifically states that in auctions »stakeholder diversity in the generation of electricity from renewable sources [should] be maintained«.

Furthermore, with the introduction of an auction system for determining payment entitlements for renewable electricity, the Federal Government is also complying with European regulations. In its Guidelines on State Aid for Environmental Protection and Energy, the European Commission stipulated that support for renewable energy must, in general, be determined through a competitive bidding process

³ Federal Ministry for Economic Affairs and Energy, RES Act 2016 – Key Issues Paper (revised) of 15 February 2016, P. 2, <http://www.erneuerbare-energien.de/EE/Redaktion/DE/Downloads/eeg-2016-ausschreibungsvolumen-wind-land-eckpunkt Papier.html>

⁴ Federal Ministry for Economic Affairs and Energy, Auctions for the Funding of Renewable Energy Plants – Key Issues Paper, July 2015, P. 2, <https://www.bmwi.de/BMWi/Redaktion/PDF/Publikationen/ausschreibungen-foerderung-erneuerbare-energien-anlage.pdf>.

⁵ Coalition agreement between CDU, CSU and SPD for the 18th legislative term (2013 – 2017), P. 37, <https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf>.

⁶ cf. FA Wind, analysis of the expansion of onshore wind in 2016, http://www.fachagentur-windenergie.de/fileadmin/files/Veroeffentlichungen/FA_Wind_Zubauanalyse_Wind-an-Land_Gesamtjahr_2016.pdf.

⁷ Federal Ministry for Economic Affairs and Energy, Auctions for the Funding of Renewable Energy Plants – Key Issues Paper, July 2015, P. 2.

⁸ Federal Ministry for Economic Affairs and Energy, Auctions for the Funding of Renewable Energy Plants – Key Issues Paper, July 2015, P. 2.

(auction) from 1 January 2017 onwards.⁹ With regard to wind energy, the Guidelines make exceptions for installations with up to six MW or six generation units.¹⁰ The Federal Government did not fully exploit the *de minimis* rule in the RES Act 2017, as only installations with a capacity of up to 750 kW are exempted from taking part in the auction process.¹¹

Given that both the European Commission¹² and the General Court¹³ consider support for renewable energy through the EEG surcharge to be aid, it was necessary to notify the RES Act 2017 to the European Commission. On 20 December 2016, the European Commission confirmed that the RES Act 2017 complies with rules on state aid.

4. Possibilities for funding under the RES Act 2017

Under the provisions of the RES Act 2017, renewable electricity can be funded through the market premium or the feed-in tariff. In this respect, legislators remain committed to established funding instruments. What is new is that under the RES Act 2017, operators must – at least as a general rule – successfully take part in the auction procedure before they are entitled to funding. Only those issued an award for their bid can claim payment of the market premium from the grid system operator (Section 22 (1) sentence 1 of the RES Act 2017). Payment of the market premium based on a le-

gally established value to be applied, or payment of the feed-in tariff, is only possible as an alternative funding option in exceptional circumstances (Section 22, (2) sentence 2 of the RES Act 2017).

The RES Act 2017 does not require plant operators to claim the market premium or feed-in tariff. Rather, every operator is free to choose the »other direct selling« option and independently pass on the electricity produced in their plants to a third party that consumes or sells the electricity (Section 21a of the RES Act 2017).

4.1 Market premium

The RES Act 2017 – like the RES Act 2014 before it – sets forth direct selling as the primary funding format (Section 19 (1) no. 1 of the RES Act 2017). In the case of funded direct selling, the plant operator or a third party sells the generated electricity themselves. The price received is merely »topped up« by the market premium, which must be calculated as described in Annex 1 to the RES Act 2017 (see Section 5.10 for information on how the premium is calculated).

The »value to be applied« is the basis for calculating the market premium. The value to be applied is defined in Section 3 no. 3 of the RES Act 2017 as

»the value which the Federal Network Agency determines in the context of an auction pursuant to Section 22 in conjunction with Sections 28 to 39j or which is determined by statute by Sections 40 to 49 and which is the basis for the calculation of the market premium or the feed-in tariff.«

Generally, therefore, the value to be applied is determined by auction. This means that, in principle, every installation has an individual value to be applied, i.e. the value that the operator bid and for which the operator was awarded funding. The legally established values to be applied for onshore wind installations that only apply in exceptional circumstances

⁹ European Commission, Guidelines on State Aid for Environmental Protection and Energy 2014-2020, (2014/C 200/01), OJEU of 28 June 2014, C 200/1, point 126.

¹⁰ European Commission, Guidelines on State Aid for Environmental Protection and Energy 2014-2020, (2014/C 200/01), OJEU of 28 June 2014, C 200/1, point 127; cf. also the clarification provided by the European Commission of 6 January 2016, which states that the calculation is based on an average generation capacity of 2.5 – 3 MW per installation and, consequently, the maximum capacity limit is to be set at 18 MW, <https://www.wind-energie.de/system/files/attachments/artikel/2016/ausschreibungen-eu-wettbewerbsskommissarin-zum-thema-de-minimis/160106-antwortschreiben-eu-wettbewerbsskommission-den-bwe.pdf>.

¹¹ Legislators do, however, draw on the *de minimis* rule for the criteria for the application of the special rules for citizens' energy companies (Section 36g (1) of the RES Act 2017).

¹² Decision of the European Commission of 25 November 2014 (EU 2015/1585).

¹³ General Court, ruling of 10 May 2016 – case T-47/15.

are defined in Sections 46 to 46b of the RES Act 2017 (see Section 6.1.2).

4.2 Feed-in tariff

In the case of the feed-in tariff, the installation operators do not sell the electricity themselves. Instead, they provide the electricity to the transmission system operator which, in turn, sells the electricity on the exchange. The installation operator receives the legally established feed-in tariff irrespective of the price the transmission system operator gets for the electricity on the wholesale market.

Operators are only entitled to receive the feed-in tariff in clearly defined exceptional circumstances (Section 21 of the RES Act 2017). As already set forth in the RES Act 2014, the feed-in tariff is only designed for very small-scale installations with an installed capacity of up to 100 kW or as remuneration granted by way of exception if the direct marketing option is temporarily unavailable (shortfall remuneration), (see Section 6.2).

5. Auction procedure

The RES Act 2017 defines an auction as a »transparent, non-discriminatory and competitive procedure to determine the entitled party and the value to be applied« for funding the electricity generated from renewable energy sources (Section 3 no. 4 of the RES Act 2017). Even though legislators have opted for a com-

paratively simple auction design, the – inevitable – requirements are broad and complex. When participating in the auction procedure, particular attention should be paid to the formal requirements, as bids might be disqualified if they fail to meet the specifications.

5.1 Responsibility of the Federal Network Agency for holding the auctions

The auctions are held by the Federal Network Agency (Section 22 (1) of the RES Act 2017). The Agency was also responsible for the pilot project to tender the level of funding for ground-mounted PV installations. In addition, the Federal Network Agency also maintains the register of installations to which the approval

and commissioning of new wind energy installations must be notified (Section 6 (1) of the RES Act 2017). The register of installations and the PV registration portal are to be merged into the Core Market Data Register in the second half of 2017.¹⁴

5.2 Annual auction volumes and deadlines

The auction volumes for the individual energy sources are set out in Section 28 of the RES Act 2017. Under the provisions of Section 28, 2,800 MW of wind energy installation capacity to be installed will be put up for auction each year from 2017 through to 2019. The auction volume for onshore wind will increase to 2,900 MW per year from 2020 onwards. The

capacity volumes are gross amounts, i.e. generation capacities that are shut down during the same period are not taken into consideration.

The auction volume for onshore wind is spread over three specific bid deadlines in 2017. The first auction with a volume of 800 MW was held on 1 May¹⁵. On 1 August, the second auction with a volume of 1,000 MW took place.

¹⁴ Ordinance on the Registration of Energy Industry Data of 10 April 2017, Federal Law Gazette I 2017, P. 842, which, pursuant to Article 2, entered into force on 1 July 2017.

¹⁵ The Federal Network Agency publishes the results of the auctioning rounds online at: https://www.bundesnetzagentur.de/DE/Sachgebiete/ElektrizitaetundGas/Unternehmen_Institutionen/Ausschreibungen/Wind_Onshore/Wind_Onshore_node.html

The same volume of wind energy capacity to be installed will be put up for auction on 1 November.

Four auctioning rounds are planned each year in 2018 and 2019, namely on 1 February, 1 May, 1 August and 1 October. 700 MW of capacity will be auctioned on each date.

From 2020 onwards, three bid deadlines will apply each year, with 1,000 MW of wind energy capacity up for auction on 1 February, and 950 MW auctioned on both 1 June and 1 October.

Pursuant to Section 28 (1a) of the RES Act 2017, starting in 2018 the capacity of pilot wind energy installations that claimed funding for the first time in the preceding year will be deducted from the annual volume to be auctioned. In this context, the funded capacity volume for prototypes is limited to 125 MW per year (Section 22a of the RES Act 2017). In addition, the annual volume to be auctioned is also reduced by the wind energy capacity that was awarded funding in the preceding year through joint auctions. This comprises joint auctions for wind energy and solar installations (see Section 5.12) as well as joint auctions with one or more EU states (Section 5 (2) sentence 2 of the RES Act 2017), wherein only the volume awarded in the federal territory is counted. With regard to the organisation of joint auctions, the RES Act 2017 contains appropriate authorisations to issue ordinances in Sections 88a and 88c. Section 88c no. 1 of the RES Act

2017 specifies a capacity volume of 400 MW that must be put up for joint auction annually for solar and wind energy installations from 2018 onwards. The annual amount of cross-border auctions must be determined by ordinance and incorporated into the relevant international agreements, but may not exceed 5% of the generation capacity to be installed annually (Section 5 (1) sentence 1 of the RES Act 2017).

Starting in 2018, auction volumes for which funding could not be awarded in a calendar year due to the lack of sufficient bids will be distributed over the first three auctioning rounds in the subsequent year (Section 28 (1a) sentence 2 of the RES Act 2017). Solar installation capacity for which no funding was awarded is »credited« to the auction volume for onshore wind the following year (Section 28 (2a) sentence 3 of the RES Act 2017). This is not the case with regard to capacity bids that have been awarded funding and are not implemented: approved funding is forfeited if the project is not implemented; the volumes are not added to future auctioning rounds.

The auctions are announced on the website of the Federal Network Agency five to eight weeks before the bid deadline for the specific form of energy. The announcement specifically contains information on the bid deadline, the volume to be auctioned, the maximum value that can be achieved (Section 29 (1) of the RES Act 2017) and the maximum volume to be awarded in the grid expansion area.

Table 1: Overview of bid deadlines, capacity volumes and notification deadlines for auctions in the period 2017 through to 2020.

Auction bid deadline	Auction volume	Notification deadline for installation approval
1 May 2017*	800 MW	10 April 2017
1 August 2017	1,000 MW	11 July 2017
1 November 2017	1,000 MW	11 October 2017
1 February 2018	700 MW	11 January 2018
1 May 2018*	700 MW	10 April 2018
1 August 2018	700 MW	11 July 2018
1 October 2018	700 MW	10 September 2018
1 February 2019	700 MW	11 January 2019

Auction bid deadline	Auction volume	Notification deadline for installation approval
1 May 2019*	700 MW	10 April 2019
1 August 2019	700 MW	11 July 2019
1 October 2019	700 MW	10 September 2019
1 February 2020	1,000 MW	11 January 2020
1 June 2020	950 MW	11 May 2020
1 October 2020	950 MW	10 September 2020

*) *Note: As 1 May is a national holiday in Germany, the bid deadline for this particular date expires on the following business day, i.e. at midnight on 2 May.*

Illustrative example: how the volume to be auctioned is reduced

Scenario: In 2018, financial support is granted to pilot wind energy installations with a total capacity of 90 MW. The first joint auction for wind and solar installations is also held in the same year, with funding awarded for 240 MW from wind energy installations and to solar installations with a total capacity of 160 MW.

The volume to be auctioned for onshore wind energy installations in 2019 is 2,800 MW of capacity. This amount is reduced by 90 MW of capacity from funded pilot wind energy installations from the previous year and by 240 MW of capacity from installations that were awarded funding in the joint auction in 2018. Consequently, the volume to be auctioned for 2019 is reduced by 330 MW to 2,470 MW. The capacity volume to be deducted is distributed equally over the next three auctions that are yet to be announced by the Federal Network Agency. Presuming that the first auctioning round (bid deadline 1 February 2019) was already underway when the volume reduction was announced, the volume for the 1 February 2019 deadline remains unchanged at 700 MW. In the three subsequent auctioning rounds (1 May, 1 August, 1 October), the volumes up for auction would then be reduced each time from 700 MW to 590 MW.

5.3 Subject of the auctions

Each auction is centred on a volume of generation capacity that is defined by statute for a specific source of energy. The annual capacity volumes for onshore wind are defined in Section 28 (1) and (1a) of the RES Act 2017. Several auctioning rounds are held each calendar year and a previously defined capacity volume is put up for auction each round. A bid is submitted for the electrical capacity (in kilowatts) of one or more electricity production installation(s) – defined specifically by the approval pursuant to the Federal Immission Control Act – at a certain price (bid value). This bid price or value is how the bidders compete with one another for the cheapest generation of one kilowatt hour of renewable electricity.

The bid value must be indicated in cents per kilowatt-hour and must be calculated in relation to the reference site (Section 30 (1) no. 5 of the RES Act 2017). This means that rather than submitting a bid with the price actually calculated for their installations, bidders must base their bid on the reference yield model defined in Section 36h of the RES Act 2017 and scale the price up or down in relation to the reference site that corresponds to a 100% site using the corrective factor. By requiring bidders to bid in relation to the reference site, it is possible to compare the bids for different wind energy sites in the auction. Funding is awarded to the lowest bids until the volume to be auctioned is reached.

Each bidder must calculate the bid value independently. Price fixing among bidders is not permitted, and can result in the disqualification of the bids (Section 34 (1b) of the RES

Act 2017) and potentially also in the payment of financial penalties pursuant to the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*).

5.4 The reference yield model: a closer look

Ever since the introduction of the RES Act 2000, the reference yield model ensures that the construction and operation of wind energy installations is also economically viable even in areas with less favourable wind conditions, and that installations are therefore built nationwide across the country and not only at very windy locations. Essentially as a result of the reference yield model, plant operators at locations with less favourable wind conditions receive more funding per kilowatt-hour of generated electricity, and operators at sites with more favourable wind conditions receive less funding.

While the RES Act 2017 retains this location-specific funding scheme, it has revised the previous two-phase reference yield model that provided for higher initial remuneration at least in the first five years of operation, followed by a lower basic level of remuneration over the remaining funding period.

The RES Act 2017 now makes provisions for a single-phase reference yield model in Section 36h. Under this model, the value to be applied

increases depending on the quality factor of the site based on what is dubbed the »corrective factor«. As a higher corrective factor applies for less wind-intensive sites, the value to be applied increases for these areas. Similarly, the value to be applied at very wind-intensive sites is reduced as a lower corrective factor applies here. The payment entitlement determined in this way applies continuously (single-phase) throughout the entire funding period. It is necessary to convert the value to be applied at two points in the auction procedure using the corrective factor that applies for the specific installation site: First of all the calculated value to be applied must be scaled up or down to the reference site for the submission of the bid. Once funding has been awarded, the grid system operator uses the corrective factor to calculate the award value back to the actual value to be applied for the specific installation site.

The parameters to be used to determine the reference yield as per Annex 2 (to Section 36h of the RES Act 2017) were also revised with the introduction of the single-phase model.¹⁶

5.4.1 Determining the quality and corrective factors

To scale the calculated value to be applied up or down to the reference site, proceed as follows:

The first step is to determine the quality factor for the planned installation site. It is important to remember that the planned type of installation must be taken into account here, as both the site yield and the reference yield must be determined specifically for the installation. The quality factor is defined in Section 36h (1) sentence 4 of the RES Act 2017 as the »ratio of the site yield of an installation to the reference

yield in percent«. Therefore, to determine the quality factor it is necessary to start with the site yield and the reference yield of the planned type of installation.

The site yield is the amount of electricity that an installation actually can feed in or could have fed in at a specific site over a defined period of time (Annex 2 no. 7 sentence 2 of the RES Act 2017).¹⁷ The site yield is therefore essentially determined by the suitability of the site for the economic use of wind energy for

¹⁶ For more information, see Schorer, Determination and Importance of Site Quality in the Context of the New Auction System and in the Operation of Wind Turbine Generators, *DEWI Magazine No. 49*, P. 44 ff.

¹⁷ The site yield prior to commissioning is determined from the gross electricity yield minus certain loss factors, wherein the gross electricity yield is the average expected electricity yield of an onshore wind energy installation, derived from

the wind potential ascertained at the hub height with a specific output curve without deductions; cf. Annex 2, no. 7.1 of the RES Act 2017.

the production of electricity, in other words the quality of the site. This yield must be determined for the planned installation at the envisaged installation site.

Pursuant to Annex 2 no. 2 of the RES Act 2017, the reference yield is the quantity of electricity determined for each type of wind energy installation, including the respective hub height, which this type would arithmetically produce if erected at the reference site, on the basis of a measured P-V curve, in five years of operation.¹⁸ The reference site itself is a hypothetical site that is determined for every type of installation according to the parameters set out in Annex 2, no. 4 of the RES Act 2017. Simply put, the reference yield is a notional amount of electricity that a certain type of installation generates at a hypothetical installation site, calculated using predefined parameters.

As the quality factor describes the ratio of the site yield to the reference yield, it indicates the percentage surplus yield/yield shortfall that the installation delivers at the actual site compared with the reference site. Under the provisions of the Act, a site with the same yield situation as the reference site is deemed a 100% site, and accordingly is assigned the quality factor of 100%; in this case the corrective factor is 1.00.

The project developer must have the quality factor of the planned installation site assessed

by an accredited institute in the form of a wind survey in line with the procedure for determining wind potential and energy yields as set down in the Technical Guidelines, Part 6, of the Society for the Promotion of Wind Energy and Other Distributed Energy Sources (FGW).

The second step involves assigning a certain corrective factor to the quality factor pursuant to Section 36h (1) of the RES Act 2017. The corrective factor is 1.29 for sites with a quality factor up to and including 70%, and 0.79 for any sites with a quality factor in excess of 150%. The corrective factors indicated in Table 2 (known as interpolation values) are assigned to sites with quality factors between 70 and 150%.

To be able to bid in relation to the reference site, the calculated value to be applied must be multiplied by the determined corrective factor when submitting the bid. The grid system operator converts the award value back to the individual value to be applied in the same way when the installation is commissioned.

To illustrate the values to be applied that are derived from the award value in relation to the reference site (100%), the bottom section of the table contains the corresponding values to be applied for the quality factors 70 to 150% with sample award values of 6.00 cent/kWh, 6.25 cent/kWh, 6.50 cent/kWh, 6.75 cent/kWh and 7.00 cent/kWh.

Table 2: Interpolation values for quality and corrective factors to determine the value to be applied pursuant to Section 36h (1) of the RES Act 2017

Quality factor	70 %	80 %	90 %	100 %	110 %	120 %	130 %	140 %	150 %
Corrective factor	1.29	1.16	1.07	1.00	0.94	0.89	0.85	0.81	0.79
Award value									
Value to be applied in cent/kWh	7.74	6.96	6.42	6.00	5.64	5.34	5.10	4.86	4.74
	8.06	7.25	6.69	6.25	5.88	5.56	5.31	5.06	4.94
	8.39	7.54	6.96	6.50	6.11	5.79	5.53	5.27	5.14
	8.71	7.83	7.22	6.75	6.35	6.01	5.74	5.47	5.33
	9.03	8.12	7.49	7.00	6.58	6.23	5.95	5.67	5.53

¹⁸ Reference yields for individual types of installations with different hub heights are available from the manufacturers and from the FGW. The FGW publishes reference yields for individual types of installations online (as at April 2017), http://www.wind-fgw.de/eeg_referenzertrag.htm.

5.4.2 Determining corrective factors between the interpolation values

Corrective factors between the interpolation values listed in Section 36h (1) of the RES Act

2017 must be determined by linear interpolation.¹⁹

The following formula applies in this case:

$$\text{Corrective factor}_{[\text{target}]} = \text{CF}_{[\text{left}]} + \frac{\text{CF}_{[\text{right}]} - \text{CF}_{[\text{left}]}}{\text{QF}_{[\text{right}]} - \text{QF}_{[\text{left}]}} \times (\text{QF}_{[\text{target}]} - \text{QF}_{[\text{left}]})$$

Note: »CF« stands for corrective factor and »QF« for quality factor. »Target« refers to the quality factor for which the corresponding corrective factor is sought. The terms »left« and »right« refer to the two interpolation values between

which the desired corrective factor is located. In this context, »left« refers to the factors in the column to the left of the desired corrective factor and »right« to the factors in the column to the right of the desired corrective factor.

Illustrative example: converting the award value

A wind farm project developer determines a quality of 78% for the site of a planned wind farm. In the auction, the project developer offers a value to be applied of 6.75 cent/kWh, in relation to the reference site of 100%. The bid is awarded funding. By performing linear interpolation between the interpolation values for 70% and 80%, a corrective factor of 1.186 is calculated for the quality factor of 78% using the following formula:

$$\text{Corrective factor}_{[78 \%]} = \text{CF}_{[70 \%]} + \frac{\text{CF}_{[80 \%]} - \text{CF}_{[70 \%]}}{\text{QF}_{[80 \%]} - \text{QF}_{[70 \%]}} \times (\text{QF}_{[78 \%]} - \text{QF}_{[70 \%]})$$

$$\text{Corrective factor}_{[78 \%]} = 1.29 + \frac{1.16 - 1.29}{0.8 - 0.7} \times (0.78 - 0.7) = 1.186$$

If the wind farm is completed on schedule and the quality factor is documented, the project developer can claim a value to be applied of 6.75 cent/kWh x 1.186 = 8.00 cent/kWh from the grid system operator. Presuming that the same bid value is offered but this time the planned installation site has a quality factor of 115%, the project developer would be entitled to a value to be applied of 6.75 cent/kWh x 0.915 = 6.17625 cent/kWh. *Note:* Given that no rounding rules were specified in Section 36h, the number of decimal places to be applied when calculating the values determined is unclear.

¹⁹ A tool for calculating corrective factors between two interpolation values is available on the [FA Wind web-site](#).

This tool can also be used to convert award values to the site-specific value to be applied.

Helpful pointers on the determination of payment entitlements in the auction

Determining the bid

- The bidder determines the quality factor of the planned installation site based on a wind survey
- The bidder calculates the level of remuneration required (value to be applied)
- The bidder converts the bid to the 100% reference site by multiplying the value to be applied by the corrective factor
- The bidder submits its bid in relation to the reference site to the Federal Network Agency

Awarding of funding

- The Federal Network Agency awards funding to the lowest bids, wherein the award value refers to the reference site

Calculating the actual amount of payment entitlement

- The grid system operator uses the corrective factor to be applied for the installation site to calculate the value to be applied for the bid quantity that has been awarded funding
- The grid system operator pays the market premium (each month with retroactive effect) – i.e. the difference between the revenue generated on the electricity exchange (monthly market value) and the value to be applied – to the installation operator for the electricity generated

5.5 Requirements to be met by bids

For bids to be included in the auction procedure, they must meet the requirements set forth in Sections 30 and 36 of the RES Act 2017. Pursuant to Section 36g of the RES Act 2017, slightly modified requirements apply for citizens' energy companies (see Section 5.9 below). Strict compliance with the requirements

regarding the bid format and deadlines is mandatory – failure to comply with these requirements will invariably result in the disqualification of the bids. While the Federal Network Agency is permitted to switch to an electronic auction process – either in part or in full – it is not doing so for the time being.

5.5.1 General requirements to be met by bids

The general requirements to be met when submitting a bid are outlined in Section 30 of the RES Act 2017. Accordingly, a bid must contain the following information:

- The bidder's name, address, telephone number and e-mail address (Section 30 (1) no. 1 of the RES Act 2017)

Bidders may be natural persons, partnerships with legal capacity or legal entities. If the bidder is a partnership with legal capacity or a legal entity, it is also necessary to indicate the registered office of the business and provide the name of a natural person who is to act as the authorised agent in communications with the Federal Network Agency and the representative in all actions pursuant to the RES Act. There is no need to produce a document of power of attorney, as was required for the auction for ground-mounted PV installations. The

authorised agent can be changed at all times; this must be communicated to the Federal Network Agency immediately. If at least 25% of the voting rights or capital of the partnership or legal entity reside with other partnerships with legal capacity or legal entities, their name and registered office must be indicated when bidding.

- The form of energy for which the bid is submitted (Section 30 (1) no. 2 of the RES Act 2017)

The Federal Network Agency has created technology-specific bidding forms so there is no need to explicitly indicate the form of energy any more.

- The bid deadline of the auction for which the bid is submitted (Section 30 (1) no. 3 of the RES Act 2017)

The exact bid deadline for which the capacity is offered must be specified in the bid so that the bid can be allocated to the correct auctioning round. In this context, bidders must ensure they always use the current forms, which contain the relevant bid deadline in the header.

- The bid quantity in kilowatts (Section 30 (1) no. 4 of the RES Act 2017)

The generation capacity offered must be indicated in kilowatts (kW), expressed as a whole number without decimal places. The minimum bid capacity for onshore wind energy installations is 750 kW. If the minimum amount is not offered, the bid is disqualified from the award process. Smaller-scale wind energy installations can only take part in auctions if they exceed the 750 kW limit as a result of the grouping of installations pursuant to Section 24 of the RES Act 2017 (Section 22 (6) of the RES Act 2017). The Act does not require the bid quantity to be identical to the capacity (amount) of the approved installation. With a view to potential changes in the capacity of the installation, it is therefore permitted to offer a higher capacity (amount), which only gains legal certainty within the context of a change notification/approval following the awarding of funding. The change in capacity must be delivered within the implementation deadline set down in Section 30 (1) of the RES Act 2017, however, as otherwise penalties will apply, which could even culminate in the loss of the award.

A bidder may submit multiple bids for different installations in an auctioning round (Section 30 (3) of the RES Act 2017). In this case, the bids must be numbered and distinctly marked so that it is absolutely clear which information, payments and documents belong to which particular bid. It is also possible to combine several installations in one bid

- The bid value in cents per kilowatt-hour, which must refer to the reference site in the case of wind energy installations (Section 30 (1) no. 5 of the RES Act 2017)

A bid is made for the value to be applied for the electricity generated in the installation in

cents per kilowatt-hour (cent/kWh). The bid value must be indicated to two decimal places. In the case of onshore wind energy installations, the bid value must refer to the reference site defined in Annex 2, no. 4 of the RES Act 2017, and not to the specific installation site (see Section 5.4 above). Otherwise it would not be possible to compare the bid values.

In addition, the maximum permissible value for a bid may not be exceeded. The maximum value for bids is defined in Section 36b of the RES Act 2017. This is set at 7.00 cents/kWh for the 100% site in the rounds of auctions in 2017. As described in the explanatory memorandum to the Act, this value »roughly corresponds to the remuneration structure in 2015, i.e. a maximum value of 8.9 cents/kWh at an 82.5% site«. ²⁰ From 2018 onwards, the maximum price for every auctioning round will derive from the average of the bid values of the highest bids awarded funding from the last three auctions, plus a security surcharge of 8% (Section 36b (2) of the RES Act 2017). This means that the maximum price could increase or decrease in 2018.

- The site of the installation to which the bid refers, citing the *Land*, district, municipality, local sub-district and cadastral parcels (Section 30 (1) no. 6 of the RES Act 2017)

The exact location of the installation must be indicated in the bid. In addition to the *Land*, district, municipality and local sub-district, the bid documents must also contain the parcel numbers and lot numbers as indicated in the real estate cadastre.

- The regular transmission system operator responsible for the grid to which the installation will be connected (Section 30 (1) no. 7 of the RES Act 2017)

The Federal Network Agency needs the information concerning the transmission system operator (TSO) that operates the grid to which the installation is to be connected so that it can notify the TSO if the installation is awarded funding.

²⁰ Rationale for Section 36b, Bundestag printed paper 18/8860, P. 210.

5.5.2 Specific requirements to be met by bids for onshore wind energy projects

Pursuant to Section 36 of the RES Act 2017, additional requirements apply for the submission of bids for onshore wind energy projects:

- Approval pursuant to the Federal Immission Control Act (Section 36 (1) no. 1 of the RES Act 2017)

To take part in the auction, proof of approval pursuant to the Federal Immission Control Act must be provided with the submission of the bid. To this end, the file number of the approval pursuant to the Federal Immission Control Act and the name and address of the approval authority must be indicated.

If the bidder has been issued an approval for multiple installations, the bid can be submitted for only some of the approved installations. These installations must be clearly indicated in the bid. In this case, a bid for the remaining installations can be submitted at a later date.

If separate approvals have been issued for the individual installations in a wind farm, it was previously not possible to group several installations into a single bid. Instead, in the first two auctioning rounds a separate bid had to be submitted, and a separate security lodged, for each individually approved wind energy installation. With the Act to Support Tenant Energy Supply Models and to Amend Additional Provisions of the Renewable Energy Sources Act,²¹ legislators amended the rules in Section 36 (1) no. 1 of the RES Act 2017 such that bidders can now submit a common bid for multiple installations even if these have been approved in different approvals. However, the approvals must have been issued by the same authority.

The approval must have been issued for all the installations that form part of the bid at least three weeks before the auction deadline. To comply with this deadline, the date that counts is the date the approval was received, not the date notification was issued. Pursuant to Section 41 (1) sentence 1 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*),

the approval only becomes effective once it has been individually announced to the addressee. Prior to that the approval does not yet exist in law. In addition, if the approval is not received, it is not possible to notify the installation to the register as approved within the specified time limit as defined in Section 36 (1) no. 2 of the RES Act 2017.

To take part in the auction procedure, the approval does not need to have gained legal validity, i.e. third parties can no longer take action against the approval as the period to make an objection or bring an appeal has expired. By the same token, if a legal remedy is already being sought against the approval this does not preclude participation in the auction procedure. However, it must be noted that penalties apply even if a project that has been awarded funding cannot be executed on account of a successful claim against the approval (see Section 5.8 below).

- The number under which the installation covered by the approval pursuant to the Federal Immission Control Act has been notified to the register, or a copy of the notification to the register (Section 36 (1) no. 2 of the RES Act 2017)

The approval must have been notified to the register three weeks before the bid deadline at the very latest. Specifics on the information to be communicated are derived from Section 6 of the Ordinance on the Core Market Data Register (*Marktstammdatenregisterverordnung*).²² Notifications to the register of installations are only possible using the form provided by the Federal Network Agency and must be sent no later than three weeks following the announcement of the approval.²³ Once it goes into operation, notifications to the core market data register may only be submitted through the online portal of the Federal Network Agency.

- Declaration by the bidder that the approval has been issued for the bidder, or that the bid is being submitted with the agreement

²¹ Act to Support Tenant Energy Supply Models and to Amend Additional Provisions of the Renewable Energy Sources Act (*Gesetz zur Förderung von Mieterstrom und zur Änderung weiterer Vorschriften des Erneuerbare-Energien-Gesetzes*) of 17 July 2017 (Federal Law Gazette I 2017, P. 2532).

²² Ordinance on the Central Electronic Register of Energy-Related Data (Ordinance on the Core Market Data Register

(*Marktstammdatenregisterverordnung*)) of 10 April 2017 (Federal Law Gazette I 2017, P. 842).

²³ The notification form is available on the website of the Federal Network Agency, http://www.bundesnetzagentur.de/cdn_1422/DE/Sachgebiete/ElektrizitaetundGas/Unternehmen_Institutionen/ErneuerbareEnergien/Anlagenregister/Anlagenregister_node.html.

of the approval holder (Section 36 (3) no. 1 of the RES Act 2017)

With the declaration, the bidder guarantees that the approval has been issued for the bidder or that the bid is being submitted with the agreement of the approval holder.

- Declaration by the holder of the approval that no valid award exists from a previous auction for the installations in the bid (Section 36 (3) no. 2 of the RES Act 2017)

The submission of a bid is inadmissible if the Federal Network Agency has already issued an award for a wind energy installation cited in the bid (Section 36d of the RES Act 2017). This is designed to prevent operators from making a »second attempt« to get a better award.

The Federal Network Agency has incorporated the necessary self-declarations into the bid form itself or in the other forms and makes these available online.

5.5.3 Depositing a security

Bidders are required to deposit a security (bond) with the Federal Network Agency with the bid (Section 31 of the RES Act 2017). This acts as security for penalties pursuant to Section 55 of the RES Act 2017 that apply if the project that is awarded funding is not implemented at all or by the specific deadline. The threat of penalty payments is designed to ensure that the majority of the installation capacity that has been awarded funding is also actually implemented.

The amount of the security to be deposited for onshore wind energy installations is €30 per kW of capacity offered (Section 36a of the RES Act 2017). For example, if a bid is submitted for three wind turbines with 2.4 MW of electrical capacity per turbine a security of €216,000 (three installations with 2,400 kW per installation x 30 €/kW) must be deposited with the Federal Network Agency by the bid deadline at the latest.

The security must be deposited in the form of an »irrevocable, unconditional and permanent guarantee« issued by a bank or a credit insurer

If the requirements and format specifications are not fully respected, the Federal Network Agency will disqualify the bid from the auction procedure (Section 33 (1) of the RES Act 2017). The same applies if the bid value exceeds the maximum value set for the particular auction, or if the bid contains conditions, time limits or incidental provisions.

Furthermore, the Federal Network Agency has the power to disqualify bids from the auction procedure if abuse is suspected, particularly if there is reason to suspect that the bidder is not planning any installation on the site indicated in the bid.

In addition to making provisions for the disqualification of certain bids, the Act also contains provisions for the disqualification of bidders. These reasons for the disqualification of bidders set forth in Section 34 of the RES Act 2017 specifically aim to exclude strategic bidders from the process and to prevent price fixing.

in favour of the transmission system operator in whose balancing zone the installation is planned, or by the payment of the sum of money to a custodial account of the Federal Network Agency by the bid deadline (Section 31 (3) of the RES Act 2017). The form provided by the Federal Network Agency must be used for the declaration of surety pursuant to Section 31 (4) of the RES Act 2017. Other certificates of surety will not be accepted by the Federal Network Agency.

If the security is provided by transferring the amount to a custodial account of the Federal Network Agency, the purpose of the transfer must be communicated when submitting the bid so that the Federal Network Agency can unambiguously allocate the bid to the corresponding money transfer. The Federal Network Agency discloses the Federal Treasury payment reference number when the auction is announced²⁴. If it is not possible to clearly allocate the bid to the transfer, this can result in the disqualification of the bid.

²⁴ See https://www.bundesnetzagentur.de/DE/Sachgebiete/ElektrizitaetundGas/Unternehmen_Institutionen/Ausschreibungen/Wind_Onshore/Ausschreibungsverfahren/Ausschr_WindOnshore_node.html

It is important to note that a separate security must be deposited for each bid. If one bidder submits multiple bids, a corresponding number of securities must be deposited.

If the security has not been paid at all or in full by the bid deadline, the bid is disqualified from the auction process (Section 33 (1) no. 1 of the RES Act 2017). For the purpose of this provision, the date of timely payment of the security is deemed to be the date when the amount is credited to the Federal Network Agency.

The conditions for the reimbursement of the deposited security are set down in Section 55a of the RES Act 2017. Under the provisions of paragraph 1 no. 1, the security must be returned to the bidder »without delay« if the bidder withdraws his bid before the bid deadline expires. However, it is only permissible to withdraw bids up until the bid deadline. As soon as the deadline expires, the bidder is bound to his bid until the Federal Network

Agency announces that funding has not been awarded for the bid (Section 30a (4) of the RES Act 2017). If the bidder is not awarded funding, the Federal Network Agency is also obliged to release the deposited security without delay (Section 55a (1) no. 2 of the RES Act 2017).

If the bidder has been awarded funding, the security is only returned once the grid system operator confirms to the Federal Network Agency the registration of the commissioning of the funded wind energy installation(s) and capacity in the register (Section 55a (2) no. 2 of the RES Act 2017). The security is also returned in full if the capacity commissioned does not fall short of the bid quantity by more than 5% (Section 55a (2) sentence 2 of the RES Act 2017).

Furthermore, the security is also returned if the bidder has paid a specific penalty to the transmission system operator for the bid (Section 55a (1) no. 3 of the RES Act 2017).

5.5.4 Procedural fee

The timely payment of the procedural fee of €522 per bid to the Federal Network Agency is another precondition for participation in the auction procedure (no. 3 of the Annex to Section 1 (2) of the Ordinance on Auction Fees (*Ausschreibungsgebührenverordnung*)).²⁵ If several bids are submitted, the fee must be paid for each bid. The date the fee is credited to the Federal Network Agency is decisive in determining the timely payment of the fee.

The bid must be indicated clearly on the transfer form. It is also imperative to enter the payment reference number for the purpose of the transfer. The bidder is also asked for the transfer data in the bid form. A copy of the remittance slip can be enclosed with the bid on an optional basis.

If the bid is withdrawn, rejected or not awarded funding, the fee is reduced by one quarter (Section 2 (1) of the Ordinance on Auction Fees).

²⁵ Article 16 of the Act to Introduce Auction Systems for Electricity from Renewable Sources and Further Amendments to Renewable Energy Law amended the Ordinance on Auction Fees for Ground-Mounted Installations and re-

named it the »Ordinance on Fees and Expenses of the Federal Network Agency in Connection with Auctions under the RES Act (Ordinance on Auction Fees (*Ausschreibungsgebührenverordnung*))«.

Checklist: requirements to be met by bids

The following conditions must be met when submitting a bid for onshore wind energy installations:

- ✓ Specify the **contact information** for the bidder (bidder name, address, telephone number, e-mail); if the bidder is a legal entity, also indicate the registered office and an authorised agent of the business; name and registered office of the company/companies that have at least 25% of the voting rights/shares in the company submitting the bid
- ✓ Specify the **bid deadline** or use the latest bidding forms for the auction date in question
- ✓ Specify the **form of energy** for the installation in the bid or use the corresponding form
- ✓ Specify the **capacity bid quantity** in kilowatts (no decimal places)
- ✓ Specify the **bid value** (with reference to the reference site) in cents per kilowatt-hour to two decimal places
- ✓ Specify the **site** of the **installation(s)** in the bid, including the *Land*, district, municipality, local sub-district and parcel and plot number(s)
- ✓ Demonstrate that **approval has been granted and registered in a timely manner** by
 - citing the file number of the notification of approval and the address of the authority
 - providing the register number of the approved wind energy installation or a copy of the notification to the register
- ✓ Provide a **self-declaration** that the **approval has been issued for the bidder**, or that the bidder is making the bid with the agreement of the approval holder
- ✓ Provide a **self-declaration that no valid award exists** for the installation in the bid
- ✓ Demonstrate that **security has been provided** (amounting to the capacity in the bid x €30/kW) in the form of a surety or the payment of the amount

Pay the **procedural fee** no later than the auction deadline. The date the payment is credited to the Federal Network Agency is the date that is authoritative for determining the timely payment of the procedural fee.

5.5.5 Receipt of bids

The bids must be received by the Federal Network Agency by no later than the bid deadline (Section 30a (2) of the RES Act 2017). With the announcement of the bid deadline, the Federal Network Agency specifies on its website that *»bids [...] can be submitted until midnight (24:00) on this day at the gate of the Federal Network Agency in Bonn, Tulpenfeld 4, 53113 Bonn«*.²⁶ As the Federal Network Agency does not confirm receipt of the bids and does not provide any information in this regard, it is advisable to send the bid with a proof of delivery option. It is not possible to submit the bid by e-mail or fax; bids submitted in this way will be disregarded.

Note that the bids must be submitted to the Federal Network Agency in a sealed envelope. In this context, the bid must be placed in a separate envelope to avoid the bid being opened accidentally by mailroom personnel. This is the only way to ensure that the bid values can only be examined on the bid deadline and that the Federal Network Agency remains objective.

A bid can be withdrawn up until the bid deadline only via an unconditional written declaration on the part of the bidder (Section 30a (3) of the RES Act 2017).

²⁶ cf. Federal Network Agency, auction announcement pursuant to Section 29 (1) of the RES Act 2017, www.bundesnetzagentur.de/windausschreibungen.

5.6 Awarding of funding

Once the bid deadline expires, all the bids that have been received in time and comply with formal requirements are sorted by the Federal Network Agency in ascending order by the bid value, starting with the bid with the lowest value. Bids with the same bid value are sorted in ascending order of bid quantity, starting with the lowest capacity amount. If the bid value and bid quantity of several bids are identical, the order is decided by lottery. The Federal Network Agency verifies the admissibility of the bids and, in each auctioning round, issues an award to the admitted bids in the or-

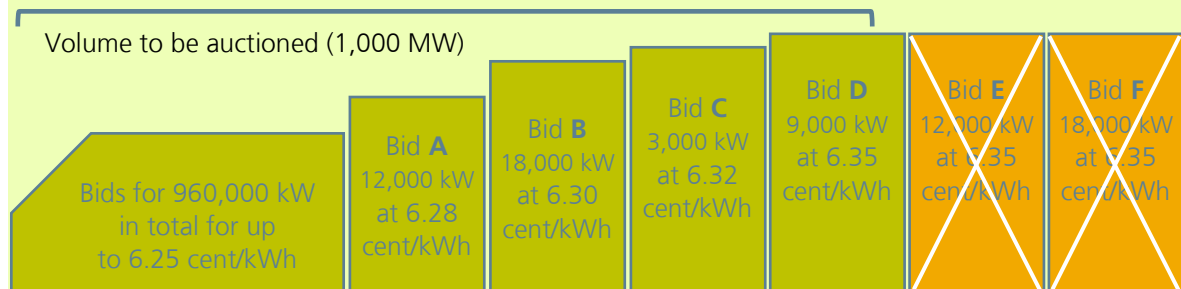
der indicated above until the award limit defined by the volume to be auctioned is reached or – depending on the size of the last bid to be awarded funding – is exceeded.

The bidders that are awarded funding receive the value to be applied corresponding to the value of their bid (pay as bid procedure), Section 3 no. 51 of the RES Act 2017. Exceptions apply for citizens' energy companies: rather than receiving their bid value, citizens' energy companies receive the value of the highest bid to be awarded funding (see Section 5.9.4 below).

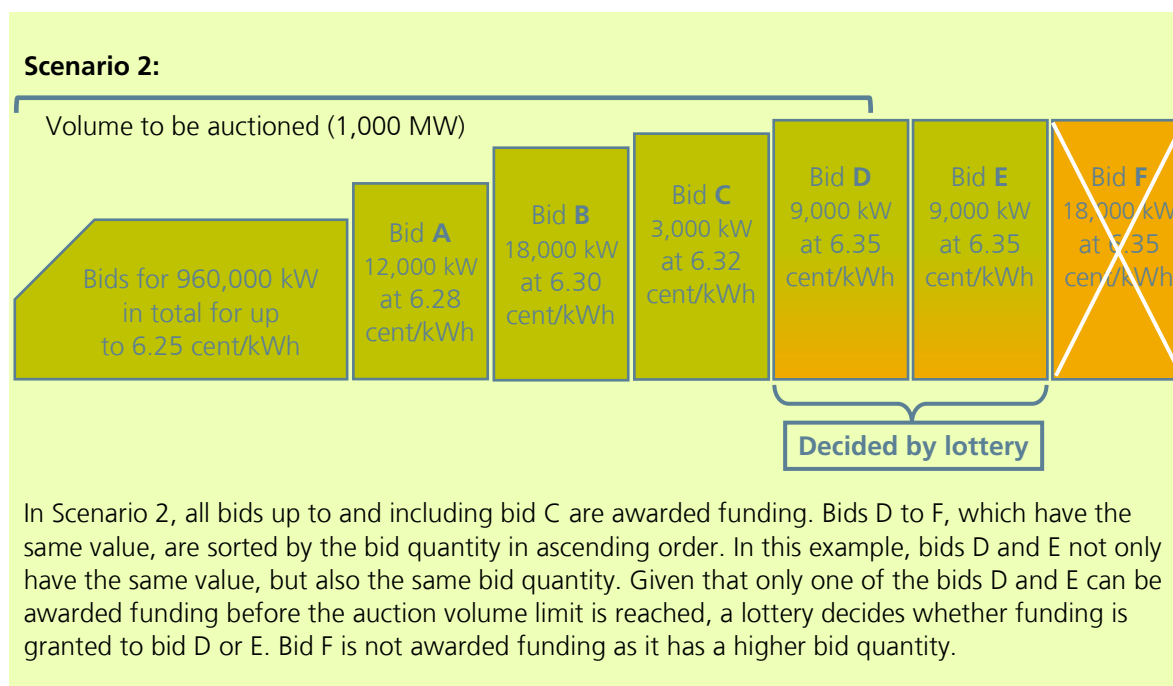
Illustrative example: how funding is awarded at the volume limit

The volume to be auctioned at one bid deadline is 1,000 MW. Bids amounting to 960 MW with a bid value of up to 6.25 cent/kWh have been submitted in due time and in the correct format. In addition, six bids (A to F) with a value of between 6.28 and 6.35 cent/kWh have also been submitted.

Scenario 1:



In Scenario 1, bids up to and including bid C are awarded funding. Bids D to F, which are bidding at the same bid value, are sorted by bid quantity in ascending order. With bid D also awarded funding (has the lowest bid quantity) the volume limit in this auctioning round is reached. Although bids E and F have the same bid value as D, they are not awarded funding on account of the higher bid quantities.



5.6.1 Special regulations concerning bids in the grid expansion area

When determining the awards, special conditions apply for bids for wind energy installations that are to be implemented in the grid expansion area. The grid expansion area is stipulated by ordinance (Sections 36c and 88b of the RES Act 2017). The Federal Ministry for Economic Affairs and Energy has conferred its authority to stipulate the grid expansion area to the Federal Network Agency (Section 13 no. 7 of the Renewable Energy Ordinance (*Erneuerbare-Energien-Verordnung*)).

The geographical perimeters of the grid expansion area are defined on the basis of the annual system analysis performed by the transmission system operators for the grid reserve pursuant to Section 3 (2) of the Grid Reserve Ordinance (*Netzreserveverordnung*)²⁷ and the joint forecast pursuant to the recently introduced Section 13 (10) of the Energy Industry Act. In this context, the grid expansion area must be *one* coherent, spatially connected geographical area, covering no more than 20% of the federal territory. In addition, the area limits must be stipulated at the level of individual grid

areas or districts. The grid expansion area was stipulated for the first time on 1 March 2017.

The amendment to the Renewable Energy Implementation Ordinance (*Erneuerbare-Energien-Ausführungsverordnung*)²⁸, which the Federal Network Agency adopted on 20 February 2017, contains provisions in Section 10 that, geographically, the grid expansion area comprises the *Länder* of Bremen, Hamburg, Mecklenburg-Western Pomerania, Schleswig-Holstein as well as 16 districts and four independent urban municipalities in northern Lower Saxony (see Figure 1).

Furthermore, in line with the specifications of Section 36c (4) of the RES Act 2017, the Ordinance also stipulates an upper limit on the level of capacity to be installed for which awards may be issued in the grid expansion area. This upper limit is 58% of the installed capacity which was commissioned as an annual average in the grid expansion area in the period 2013 to 2015. The limit applies in relation to the gross amount of capacity added. Wind energy capacity that has been decommissioned in the

²⁷ The Federal Network Agency publishes the results of the annual system analysis of the transmission system operators online at, http://www.bundesnetzagentur.de/DE/Sachgebiete/ElektrizitaetundGas/Unternehmen_Institutionen/Versorgungssicherheit/Netzreserve/netzreserve-node.html.

²⁸ Ordinance to Amend the Renewable Energy Implementation Ordinance of 20 February 2017 (Federal Law Gazette I P. 294); <http://www.gesetze-im-internet.de/ausglmechav/>.

reference period is not taken into consideration. Section 11 of the Renewable Energy Implementation Ordinance defines an upper limit of 902 MW per calendar year. From 2018 onwards, the upper limit will be reduced by the total wind energy capacity that was issued an award in cross-border auctions the preceding calendar year (Section 36c (6) of the RES Act 2017). The resulting maximum award quantity for a calendar year in the grid expansion area is distributed equally over all the auctioning rounds held in that calendar year, and is announced online by the Federal Network Agency prior to every auctioning round. Any quantity that is not issued an award in the grid expansion area in an auctioning round is treated as an additional quota in the remaining auctioning rounds in the grid expansion area in that calendar year (Section 12 of the Renewable Energy Implementation Ordinance).

Bids for wind energy installations in the grid expansion area are arranged in order of priority

with all the other bids. However, awards are issued for these bids up to the set upper limit at most. Any bids for sites in the grid expansion area beyond this limit are not considered. Instead, the Federal Network Agency awards funding to the next highest bids for installations not located in this area until the volume to be auctioned is reached.

The grid expansion area and the upper limit for the capacity to be installed will be evaluated by the Federal Network Agency by 31 July 2019. After this, the demarcation of the grid expansion area will be reviewed every two years, taking into consideration progress in the planning and construction of the electricity grids and the upper limit. The Ordinance can only be amended for the first time by the Federal Network Agency on 1 January 2020, and every two years thereafter on 1 January (Section 36c (7) of the RES Act 2017).

Illustrative example: award volume in the grid expansion area

Pursuant to Section 10 of the Renewable Energy Implementation Ordinance, the grid expansion area comprises the *Länder* of Schleswig-Holstein, Mecklenburg-Western Pomerania, 16 districts and four independent urban municipalities in Lower Saxony as well as the city states of Bremen and Hamburg. The grid expansion area extends over a total of 33 counties and districts as well as 13 independent urban municipalities and city states. According to the explanatory memorandum to the Ordinance, the defined area covers 16.9% of the federal territory and is therefore below the 20% limit set forth in Section 36c (3) no. 1 of the RES Act 2017. According to calculations of the Federal Network Agency, gross capacity added in the grid expansion area in the years 2013 through to 2015 was as follows:

Annual wind energy capacity added	2013	2014	2015	Ø 2013-2015
Grid expansion area (Bremen, Hamburg, Mecklenburg-Western Pomerania, Schleswig-Holstein and parts of Lower Saxony)	1,130 MW	2,071 MW	1,465 MW	1,555 MW

58% of which = 902 MW

Pursuant to Section 11 of the Renewable Energy Implementation Ordinance, the award volume in the grid expansion area is limited to 902 MW per calendar year. The maximum annual amount is distributed over the auctioning rounds for a calendar year in proportion to the total volume. In 2017, therefore, up to 258 MW can be awarded funding in the grid expansion area on 1 May, and up to 322 MW on both 1 August and 1 November. This does not alter the total capacity volume put up for auction in 2017 (2,800 MW): on the 1 May deadline, awards were issued for 548 MW outside the grid expansion area due to a volume surplus of 6 MW in the last bid to be awarded funding, and awards can be issued for at least 678 MW of wind energy capacity outside the area on each of the auction deadlines 1 August and 1 November.

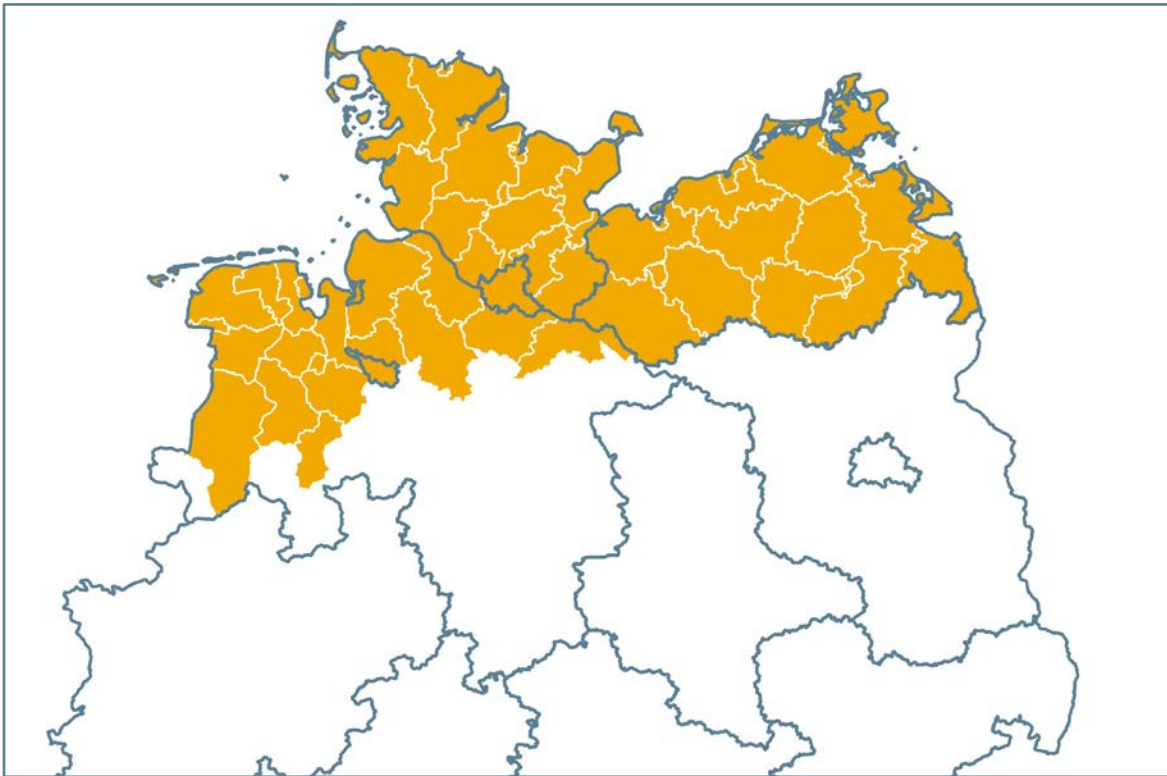


Diagram 1: Geographical demarcation of the grid expansion area pursuant to Section 10 of the Renewable Energy Implementation Ordinance; map: FA Wind based on © GeoBasis-DE / [BKG](#) 2015 (data modified)

5.6.2 Announcement of awards

Funding can be expected to be awarded around two weeks after the bid deadline. The Federal Network Agency announces the successful bids on its website (Section 35 (1) of the RES Act 2017).²⁹ Further to this, successful bidders are also notified by post that they have been awarded funding (Section 35 (3) of the RES Act 2017).

Awards are deemed to have been announced one week after their publication on the website (Section 35 (2) of the RES Act 2017). This default rule is important with regard to certain deadlines: For one, the 30-month deadline for implementing the installation which has been awarded funding commences on this date. Further to this, the announcement date is also the authoritative date for calculating any deadline

5.6.3 Transferability of awards

Once issued, an award is tied to the approved installation (capacity) that forms the subject of the bid (Section 36f (1) of the RES Act 2017). It

extensions for projects that have been awarded funding and are the subject of a law suit. The general rules pursuant to Section 31 of the Administrative Procedure Act in connection with Sections 187-193 of the German Civil Code apply when calculating the deadlines.

In contrast to awards for solar installations, awards for wind energy installations cannot be returned. A wind energy installation that has been awarded funding can take part in an auction again at the earliest following the cancellation of the award, such as when the award expires (Section 35 (1) no. 4 of the RES Act 2017).

Any bids that have not been awarded funding can take part again in the subsequent auctioning rounds.

is not possible to transfer awards to other approvals. Even though the award itself cannot be transferred, the sale of a project that has

²⁹ See the »Completed auctions« category on the website of the Federal Network Agency, [https://www.bundesnetzagentur.de/DE/Sachgebiete/ElektrizitaetundGas/Unternehmen](https://www.bundesnetzagentur.de/DE/Sachgebiete/ElektrizitaetundGas/Unternehmen_Institutionen/ErneuerbareEnergien/Ausschreibungen/Wind_Onshore/BeendeteAusschreibungen/BeendeteAusschreibungen_node.html)

[men_Institutionen/ErneuerbareEnergien/Ausschreibungen/Wind_Onshore/BeendeteAusschreibungen/BeendeteAusschreibungen_node.html](https://www.bundesnetzagentur.de/DE/Sachgebiete/ElektrizitaetundGas/Unternehmen_Institutionen/ErneuerbareEnergien/Ausschreibungen/Wind_Onshore/BeendeteAusschreibungen/BeendeteAusschreibungen_node.html).

been awarded funding is possible at all times. In such situations, the award is also transferred to the new approval holder.

However, if installations are sold prior to their implementation, responsibility for penalty payments remains with the bidder as set out under Section 55 (1, 2) of the RES Act 2017. Therefore, even in the event of a sale, the bidder is responsible to the grid system operator for the

timely implementation of the installations even though the bidder no longer has any influence on the construction and commissioning of the installations.

Installations can be sold without issue following their implementation. As is the case today, in such situations the grid system operator must be notified of the change of operator of the installations in question.

5.6.4 Changing an approval following the issuing of an award

The fact that an award is tied to a specific installation is a separate issue from the question as to whether the approval granted under the Federal Immission Control Act can be altered once funding has been awarded. This matter is regulated by Section 36f (2) of the RES Act 2017, which states that it is possible to alter the approval after funding has been awarded. In such instances, the award then applies to the altered approval. The scope of the award – i.e. the installed capacity for which the award is granted – does not change as a result, however.

The Federal Immission Control Act makes provisions for a tiered system when it comes to alterations to an installation: Notification suffices if the alteration is not a material alteration and can only have a marginal impact on the resources protected under Section 1 of the Federal Immission Control Act (Section 15 of the Federal Immission Control Act). A change approval is required (Section 16 of the Federal Immission Control Act) if the alteration has negative impacts which may be relevant for the examination pursuant to Section 6 (1) no. 1 of the Federal Immission Control Act (material alteration). A new approval is required if the installation is largely or entirely altered at its core and this affects the nature of the entire installation.³⁰

If a change approval is granted, this is added to the approval previously granted and together

both form a single approval.³¹ Given that Section 36f (2) of the RES Act 2017 specifically refers to the alteration of an approval, the award granted is still likely to apply to an approval altered pursuant to Section 16 of the Federal Immission Control Act. If, on the other hand, the planned alteration affects the nature of the installation, a new approval must be obtained; the award then no longer applies for this approval (Section 36f (1) of the RES Act 2017) and consequently expires. This is the case even where »all the parameters are identical to the original approval«. ³²

Therefore, to ensure that the award remains valid, it is important to ensure that the planned alterations are still covered by a change approval and that a new approval is not required.³³ However, the problem here is that case law varies for substantively identical situations. Take a change of type, for instance: while sometimes a new approval is deemed necessary, other times a change approval – and in certain cases even a change notification – is considered sufficient. For example, in established case law a type change involving comparable installation specifications (capacity, hub height, rotor diameter, total height) is regularly considered to be a (material) alteration and a new approval is not deemed necessary.³⁴ However, in 2015 the Higher Administrative Court of Münster ruled that the erection and operation of another performance-optimized type of

³⁰ Reidt/Schiller, in: Landmann/Rohmer, Environmental Law, supplement 80, May 2016, Section 16 point 32.

³¹ Jarass, Federal Immission Control Act, 11th Edition 2015, Section 16, point 65.

³² Rationale for Section 36f (2), Bundestag printed paper 18/8860, P. 212.

³³ As also stated by the EEG clearing house, advisory opinion 2017/6 on the interpretation and application of Section 22 (2) sentence 2 no. 2 of the RES Act 2017 of 30 May, point 20, <https://www.clearingstelle-eeg.de/hinww/2017/6>

³⁴ Higher Administrative Court of Koblenz, ruling of 3 August 2016 – 8 A 10377/16, Higher Administrative Court of Koblenz, ruling of 12 May 2011 – 1 A 11186/08; Higher Administrative Court of Munich, decision of 15 October 2012 – 22 CS 12.2110, 22 CS 12.2111; cf. also Agatz, Windenergiehandbuch (Wind Energy Manual), 13th edition 2016, P. 10 ff.

installation is not covered by a change approval. Rather, it was explained, the replacement of an approved installation with another type of installation is equivalent to a new approval, since the failure to implement the previous type of installation means that grandfathering arrangements associated with this installation are also forfeited.³⁵ The Higher Administrative Court of Munich arrived at a different conclusion in August 2016: Under this ruling, even a notification pursuant to Section 15 of the Federal Immission Control Act is deemed sufficient for a change to an installation provided that the change of type does not have negative impacts in the sense of Section 16 (1) sentence 1 of the Federal Immission Control Act. In particular, the court ruled, a change in the type of installation does not necessarily imply evidence of a material alteration. However, it must be noted that the claimant in this lawsuit was able to demonstrate that the modified installations (Enercon E 115 with a nominal capacity of 3 MW and a total height of 195 meters) complied to an even greater extent with the approval requirements than the installations originally approved (Nordex N117 with a nominal capacity of 2.4 MW and a total height of 199 meters).³⁶ In light of this, there is much to suggest that an assessment of the need for a new approval should be based on uniform criteria of the RES Act rather than on the criteria of the Federal Immission Control Act.³⁷

However, an established body of case law does not yet exist in this regard.

Given that an approval change does not result in a change in the award, the payment entitlement does not increase as a result of the change in the installed capacity, i.e. there is no payment entitlement for the increased capacity. Electricity from the »excess« capacity of the installation can be sold by the installation operators themselves. The payment entitlement then only concerns the percentage share of the installed capacity that was awarded funding (Section 23c of the RES Act 2017). The installation operators may not use the generated electricity themselves, as self-supply with electricity from installations whose payment entitlement has been granted through an auction system is prohibited (with some exceptions) for the entire funding period (Section 27a of the RES Act 2017).

If the operator erects an installation – on the basis of an approval change – with a capacity that is less than 5% below the capacity for which an award has been issued, the award also remains unchanged. If more than 5% of the capacity that has received funding is not commissioned, the award is cancelled for this amount. In addition, relevant penalties also apply (see Section 5.8.1 below).

Helpful pointers on an approval change

Considering that an award for a project ceases to apply in the event of a new approval, if changes to an installation are planned it is advisable to contact the competent approval authority at an early stage – also in light of current case law – to clarify whether these changes are still covered by a change approval. In addition, it is also advisable to consult with the installation manufacturer to clarify the actual availability of the planned type of installation at the time of construction in order to prevent approval changes deriving from bottlenecks in supply.

³⁵ Higher Administrative Court of Münster, ruling of 25 February 2015 – 8 A 959/10. In the case in question, the court considers the erection of several type E-70 installations (2.0 MW, rotor diameter 71 meters, hub height 98 meters) instead of the Enercon E-66 type of installation originally approved (1.8 MW, rotor diameter 70 meters, hub height 85 meters) to be a new approval.

³⁶ Higher Administrative Court of Munich, decision of 11 August 2016 – 22 CS 16.1052 inter alia.

³⁷ As also stated by the EEG clearing house, advisory opinion 2017/6 on the interpretation and application of Section 22 (2) sentence 2 no. 2 of the RES Act 2017 of 30 Mai 2017, point 49.

5.7 Implementation deadlines

The implementation deadline for onshore wind energy installations is 30 months from the public announcement of the award; different deadlines apply for citizens' energy companies (see Section 5.9.7 below). If a project is not commissioned by this time, the award for funding shall expire (Section 36e (1) of the RES Act 2017). Progressive penalties for delayed commissioning apply if the installation is not commissioned within 24 months.

The implementation deadline can be extended one time only if a third party filed a legal remedy against the installation approval following the submission of the bid (Section 36e (2) of the RES Act 2017). This rule encompasses both actions and appeals against the approval pursuant to the Federal Immission Control Act.³⁸

Another precondition for a deadline extension is that the immediate enforceability of the approval has been ordered by the competent authority or by a court following the filing of a legal remedy (Section 36 (2) no. 2 of the RES Act 2017). If a third party files an objection or takes an action against an approval, this initially means that the force of the approval – i.e. the right to erect and operate an installation – is suspended until the decision on the legal remedy. However, it is possible to apply to the competent authority or court for the immediate enforceability of the approval. In such cases, the authority or court decides whether the interests of the installation operator outweigh those of the third party or vice versa. This is based on the prospects of success, considered in total, of the objection or action. The authority or court will only order the immediate enforceability of the approval if it is of the opinion that the installation operator has better prospects of success than the third party.

The deadline extension shall be granted at most for the duration of the validity of the approval (Section 36e (2) sentence 2 of the RES Act 2017). An approval expires if work on the erection or operation of the installation has not

begun by a deadline set by the approval authority (Section 18 (1) no. 1 of the Federal Immission Control Act). In practice this period is often limited to three years. The deadline extension pursuant to Section 36e (2) of the RES Act 2017 may not exceed this period. However, it must be noted that the deadline set pursuant to Section 18 (1) no. 1 of the Federal Immission Control Act can be extended if an objection or action is filed.

Section 36e (2) of the RES Act 2017 only makes provisions for one extension to the deadline. This could raise problems, however, particularly considering that legal proceedings surrounding the approval of wind energy installations are often lengthy and the outcome is often difficult to predict. Therefore, operators should always apply for the maximum deadline extension – i.e. the deadline by which work on the erection or commissioning of the installation must begin as defined in the approval notice. This does not preclude the earlier commissioning of the installation.

It is important to note that pursuant to Section 36i of the RES Act 2017, the 20-year funding period commences at the latest 30 months following the announcement of the award. This is also the case if a deadline extension has been granted for the implementation of the installation. Therefore the period of entitlement to the market premium under Section 25 of the RES Act 2017 is reduced by the deadline extension period claimed by the operator. In addition, penalties also apply despite a deadline extension. This approach is designed to increase the pressure on the project developer to implement the installation as quickly as possible.³⁹

Against this backdrop, it is worth considering whether – in the event of a legal dispute – it makes more economic sense to forfeit the award and participate in the auction again at a later date. Bear in mind, however, that penalties would still apply in this case.

³⁸ Rationale for Section 36e (2), Bundestag printed paper 18/8860, P. 212.

³⁹ Rationale for Section 36i, Bundestag printed paper. 18/8860, P. 215.

Helpful pointers on legal remedy deadlines for approvals

Third parties can only take legal action against an approval within the set deadlines for bringing an action or lodging an objection. Once these deadlines expire, the approval becomes permanent, gaining legal validity, and can no longer be contended. Depending on whether the approval is granted in a formal or simplified procedure, different timelines apply for third parties to take action against an approval. As an approval issued in a formal procedure is served, or is deemed to be served following the public announcement, a legal remedy deadline of four weeks applies in this case. The approval becomes definitive and final once this period has expired. By contrast, the simplified procedure does not contain provisions for the approval to be served or announced publicly, with the result that no deadlines for legal remedies are triggered. In this case, a third party can only lose its right to file an objection or take action if – in accordance with the provisions of Section 2 (4) of the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) and the legal rationale of Section 58 (2) of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*) – the party has been aware or must have been aware of the approval for more than one year and did not seek a legal remedy during this time. Therefore, the uncertainty of whether a party will take action against the approval persists far longer for a simplified procedure than for a formal procedure.

5.8 Penalties

Penalties apply if a bid that has been awarded funding is not implemented at all, in full and/or in time. The threat of penalty payments if the project is delayed or not implemented is designed to ensure that bidders act in earnest and are committed to the implementation of their projects.⁴⁰ Section 55 (1) of the RES Act

2017 sets forth the conditions under which a penalty must be paid for wind energy projects. The rules defined in Section 55 (2) of the RES Act 2017 apply for wind energy projects by citizens' energy companies (see Section 5.9.7 below).⁴¹

5.8.1 Capacity awarded funding is ultimately not implemented

If the bidder is awarded funding for a bid quantity and does not deliver this quantity, the bidder must pay a penalty to the transmission system operator. In this case, the penalty is €30 per kW. To avoid de minimis cases, penalty payments only apply if more than 5% of the capacity awarded funding is ultimately not implemented. If, for instance, the quantity implemented falls short of the award quantity by 8%, the penalty applies for the entire capacity shortfall, i.e. 8% in this case. The 5% share up to the de minimis limit may not be deducted in this case.⁴²

An award cannot ultimately be implemented if the Federal Network Agency »cancels« the award. The rules surrounding the cancellation

of an award are set down in Section 35a of the RES Act 2017. The most relevant scenario is that the implementation deadline passes without the installation having been commissioned by this time. The award expires once the deadline for implementation passes (Section 36e (1) of the RES Act 2017). In addition, the award is cancelled by the Federal Network Agency, and consequently the funding notification loses its validity within the sense of Section 43 of the Administrative Procedure Act. By also cancelling awards that have expired, the aim is for the Federal Network Agency to have a real-time overview of projects that are not implemented so that it can identify slippage from expansion targets early on.⁴³ Cancelled award

⁴⁰ Rationale for Section 55, Bundestag printed paper 18/8860, P. 235.

⁴¹ A tool for the non-binding calculation of penalty payments is available on the website of FA Wind, <http://www.fachagentur-windenergie.de/themen/ausschreibungen.html>

⁴² The opinion is also put forward that penalties should not apply to the de minimis amount of 5% of the total amount of capacity that received funding.

⁴³ Rationale for Section 35a, Bundestag printed paper 18/8860, P. 208.

volumes are forfeited and are not added to the volume to be auctioned the following year.

Illustrative example: penalties in the event of capacity shortfall/excess capacity

Hypothesis: In the auction, funding is awarded to a bid for three wind energy installations with an electrical capacity of 3,300 kW per installation, i.e. 9,900 kW in total.

Scenario 1: Two installations each with a capacity of 3,300 kW, and one wind turbine with a capacity of 3,000 kW – i.e. 9,600 kW in total – are commissioned within a 24-month period at the site that has been awarded funding. With notification of commissioning given, the non-implemented capacity of 300 kW is cancelled. A penalty must not be paid as the proportion of the award that has not been implemented - 300 kW in this case - is only equivalent to 3% of the total amount and therefore does not exceed the de minimis limit of 5% (Section 55 (1) no. 1 of the RES Act 2017).

Scenario 2: In this scenario, two wind turbines each with a capacity of 3,000 kW and one installation with 3,300 kW – i.e. 9,300 kW in total – are commissioned at the same site by the specified deadline. In this case, the capacity shortfall – i.e. the capacity that has not been implemented – is 600 kW, or 6% of the bid awarded funding. The Federal Network Agency cancels funding approval for these 600 kW, and a penalty of €30 per kW (600 kW x €30 per kW = €18,000) must also be paid to the transmission system operator.

Scenario 3: In this scenario, three wind turbines each with a capacity of 3,500 kW are commissioned at the site by the specified deadline. The capacity actually installed exceeds the bid quantity awarded funding by 600 kW, i.e. by 6%. In this case, a penalty must not be paid because the award has been fully implemented. The operator does not have a payment entitlement under the RES Act for the electricity produced with the »excess« plant capacity (600 kW), as support is limited to the percentage of installed capacity that was granted funding (Section 23c of the RES Act 2017). The share of electricity that does not receive funding can be sold directly. However, pursuant to Section 27a of the RES Act 2017 the operator is not permitted to use the electricity that does not receive funding for own consumption.

5.8.2 Delayed implementation of capacity awarded funding

The provisions of Section 55 (1) sentence 2 of the RES Act 2017 govern situations where a wind energy project that has been awarded funding is not commissioned within 24 months of the announcement of the award. A progressive penalty system applies in this case. The penalty amounts to €10 per kW if the installation is not commissioned until the 25th or 26th month following the announcement of the award. The penalty increases to €20 per kW if the installation is implemented in the 27th or 28th month. The full amount of €30 per kW is due in the 29th or 30th month.

The penalties must be paid to the competent grid system operator. It is not possible to offset the penalty against the security deposited with the Federal Network Agency.

If the penalty is not paid to the regular transmission system operator within two months following the cancellation of the bid quantity, the transmission system operator may use the security lodged for the bid for settlement of the penalty payment (Section 55 (7) of the RES

Act 2017). Payment receipts from penalties are credited to the EEG account as revenue.⁴⁴

5.9 Special rules for citizens' energy companies

German legislators have acknowledged that the move to an auction-based system creates new cost, price and penalty risks that pose a major challenge – particularly for small stakeholders – and can therefore impact stakeholder diversity.⁴⁵ To mitigate these risks and facilitate participation in the auction process, legislators have modified the auction conditions for locally established citizens' energy companies in Section 36g of the RES Act 2017. Under these provisions, citizens' energy companies are extended certain privileges, particularly in that they are permitted to take part in auctions without an approval pursuant to the Federal Immission Control Act. This is designed to reduce the risk of the companies failing to secure funding in the auction procedure after having gone through a costly and time-consuming approval process. In addition, by participating in the auction process in advance, citizens' energy companies also receive price certainty for their projects early on. The option for citizens' energy companies to be able to take part in the auction without an approval is revoked for the bid deadlines 1 February and 1 May 2018 as a result of the new paragraph 8 which was introduced in Section 104 of the RES Act 2017.

Furthermore, Section 36g (5) sentence 1 of the RES Act 2017 guarantees that successful bids from citizens' energy companies receive the value of the award of the highest bid awarded

funding from the same auctioning round. This is known as the uniform price. In the grid expansion area, the highest bid value to be awarded funding in this area applies, provided that the award volume for that area has been fully allotted in an auctioning round (Section 36g (5) sentence 2 of the RES Act 2017).

Alongside these facilitations, however, legislators also place demands on citizens' energy companies that go beyond the requirements that apply for »regular« bidders. In particular, citizens' energy companies are restricted in their bidding behaviour and may not have received an award for another wind energy project in the 12 months prior to submitting the bid. In addition, a citizens' energy company must allow the municipality where the site is located to hold a stake in the project, or must have made the municipality an offer to this effect.

Citizens' energy companies can also opt to only take part in the auction once an approval has been granted. In this case, they must meet the same requirements that also apply for »regular« bidders. If the special conditions for citizens' energy companies are also met – including, in particular, evidence of bidding behaviour and the offer of a municipal stake in the project – the uniform price also applies here (Section 36g (5) sentence 3 of the RES Act 2017).

5.9.1 Definition of a citizens' energy company

Pursuant to Section 3 no. 15 of the RES Act 2017, a company qualifies as a citizens' energy company if it satisfies the following conditions:

- a) The company must consist of at least 10 natural persons who are members eligible to vote or shareholders eligible to vote,
- b) At least 51% of the voting rights must be held by natural persons whose main resi-

dence has been registered pursuant to Section 21 or Section 22 of the Federal Registration Act (*Bundesmeldegesetz*) for at least one year prior to submission of the bid in the urban or rural district in which the planned onshore wind energy installation is to be erected, and

⁴⁴ This arrangement was introduced with Article 17 in Section 3 (3) no. 10 of the Equalisation Mechanism Ordinance (*Ausgleichsmechanismusverordnung*), which is now known as the »Ordinance for the Implementation of the RES Act

and the Onshore Wind Act«, or the »Renewable Energy Ordinance« (*Erneuerbare-Energien-Verordnung*) for short.

⁴⁵ cf. Federal Ministry for Economic Affairs and Energy, Auctions for the Funding of Renewable Energy Plants – Key Issues Paper, July 2015, P. 10.

- c) No member or shareholder of the company may hold more than 10% of the voting rights of the company.

The law expressly provides that several legal entities or partnerships can associate to form a citizens' energy company. The association of several legal entities or partnerships to form a citizens' energy company, however, requires all the members of this company to meet the conditions set forth in points a) to c) for the new undertaking to be recognised as a citizens' energy company.⁴⁶ This means that a citizens' energy company formed by such an »association« can also consist of just two legal entities, provided both entities meet the requirements set forth in Section 3 no. 15 points a) to c) of the RES Act 2017.

The RES Act 2017 does not impose any special requirements regarding the legal organisation and structure of a citizens' energy company,

and the law does not place any restrictions on the choice of legal form.

The conditions for a citizens' energy company must be met consistently, without interruption, from the time of the submission of the bid to the end of the second year following commissioning. If the conditions are not consistently met during this period, the highest bid value to be awarded funding no longer applies for the wind energy project. Instead, from the time the prerequisites for a citizens' energy company are no longer satisfied payment entitlements are calculated on the basis of the bid value (Section 36g (5) sentence 4 of the RES Act 2017). The bid value also applies if the declaration on the existence of the citizens' energy company is not presented to the grid system operator within two months following the end of the second year of operation (Section 36g (5) sentence 6 of the RES Act 2017).

5.9.2 Special requirements to be met by bids from citizens' energy companies

Special conditions apply in some cases for citizens' energy companies that wish to take part in the auction process under simplified conditions. These conditions apply in addition to the bid requirements set down in Sections 30 and 36 of the RES Act 2017, or modify certain aspects of these requirements.

- Expert report on the expected electricity yield (Section 36g (1) no. 1 of the RES Act 2017)

Instead of presenting evidence of the approval pursuant to the Federal Immission Control Act, it suffices to include a certified expert report on the expected electricity yield of the planned installation(s). This seeks to ensure that the bid is serious and based on reliable data.⁴⁷ The expert report must comply with the generally accepted technical rules and standards. This is assumed to be the case if the FGW Technical Guidelines for Wind Energy Installations are observed and the expert report has been drawn

up by an institution accredited for the application of these Guidelines pursuant to DIN EN ISO IEC 17025.⁴⁸

Section 104 (8) sentence 1, which was introduced in the fourth Act to Amend the RES Act 2017, declares that Section 36g (1) shall not apply in the first two auctioning rounds of 2018. As a result, it is not possible to take part in the auction process without an approval pursuant to the Federal Immission Control Act on these two dates.

This rule is the reaction of lawmakers to the results of the first two auctioning rounds in which funding was awarded almost exclusively to citizens' energy companies that did not hold an approval pursuant to the Federal Immission Control Act for the installations in the bid.⁴⁹ The success of citizens' energy companies with installations that do not have approval pursuant to the Federal Immission Control Act runs

⁴⁶ Rationale for Section 3 no. 15, Bundestag printed paper 18/8860, P. 185.

⁴⁷ Rationale for Section 36g, Bundestag printed paper 18/8860, P. 213.

⁴⁸ FGW Technical Guideline 6, Edition 9 »Determining the wind potential and energy yields« must be used to determine the electricity yields. Annex C has been added to the Guidelines for the purpose of determining the site yield and the site quality before commissioning in accordance

with the RES Act 2017. Annex C is available on the FGW website, http://wind-fgw.de/wp-content/uploads/2017/01/TR6Rev.9_Anhang_C-1.pdf

⁴⁹ cf. Federal Network Agency, press releases of 19 May 2017 and 15 August 2017, which state that 93% and 90% of funding awarded in the first and second auctioning rounds, respectively, went to citizens' energy companies which almost exclusively bid with installations that were not yet approved.

counter to the original aim, which was to ensure a high probability of the successful implementation of the wind turbines awarded funding by having a »late call for tender« system with strictly defined special rules for citizens' energy companies with special privileges.

Despite the general suspension of paragraph 1, the special rules presented below for citizens' energy companies continue to apply even in the first two auctioning rounds in 2018. This follows from Section 36g (5) sentence 3, which ties the receipt of the uniform price for wind energy installations to continued compliance with the requirements of paragraph 1, sentence 1 no. 3. This understanding is also in line with the intent and purpose of Section 104 (8) sentence 1 of the RES Act 2017 with which legislators merely sought to curb the participation of citizens' energy companies without approval pursuant to the Federal Immission Control Act for their installations. Any further restriction of the special conditions is not intended.⁵⁰

- Number of planned installations and bid quantity in kilowatts (Section 36g (1) sentence 1 no. 2 of the RES Act 2017)

A citizens' energy company can take part in the auction with up to six wind energy installations and a maximum of 18 MW of capacity to be installed. This maximum number of plants and total capacity can be spread over several bids within one auctioning round, but the citizens' energy company may not exceed these limits in total. The number of installations planned at each specific site must be specified in the bid. A specific volume quota per auctioning round, or of the annual auction volume, is not envisaged for this stakeholder group overall.

- Self-declaration on the existence of the citizens' energy company (Section 36g (1) sentence 1 no. 3 point a) of the RES Act 2017)

A self-declaration stating that the bidder meets the requirements of a citizens' energy company pursuant to Section 3 no. 15 of the RES Act 2017 must be submitted with the bid.

Further to this, it must be demonstrated that the members or shareholders of the citizens' energy company did not enter into any contracts, prior to the submission of the bid, that transfer shares or voting rights to a third party following the submission of the bid. The same applies for other agreements that solely serve as a front to establish a citizens' energy company for the purpose of submitting a bid and then revert the project back to the actual project developer that does not meet the criteria of a citizens' energy company once the bid has been submitted. This rule, which was amended with the First Act to Amend the RES Act 2017⁵¹, seeks to ensure that only citizens' energy companies actually get to benefit from the privileges – in this case specifically the uniform price.⁵² If such agreements to circumvent rules are concluded, the Federal Network Agency has the power pursuant to Sections 48 and 49 of the Administrative Procedure Act to retract awards already granted on the grounds that false information was supplied.⁵³ The entitlement to funding is withdrawn as a result, and the penalty stipulated in Section 55 (1) no. 1 of the RES Act 2017 also applies.

- Self-declaration regarding the bidding behaviour in the last 12 months prior to the submission of the bid and regarding the bid scope (Section 36g (1) sentence 1 no. 3 point b) of the RES Act 2017)

When submitting a bid, it is also necessary to demonstrate that neither the company nor one of its members eligible to vote received an award for another wind energy project in the preceding 12 months. This means that no voting member of a citizens' energy company may hold voting rights in another company of any kind that was issued an award in the last 12 months prior to the submission of the bid. On the other hand, participation as a non-voting member in other companies is not an issue. The risk associated with the bidding behaviour rule – particularly for citizens' energy companies with many voting members (e.g. cooperatives) – is that if only one member of the citizens' energy company participates with voting

⁵⁰ Rationale for Section 104 (8), Bundestag printed paper 18/12988, P. 40.

⁵¹ Act to Amend the Rules Governing Electricity Generation from Combined Heat and Power and Governing Self Supply (*Gesetz zur Änderung der Bestimmungen zur Stro-*

merzeugung aus Kraft-Wärme-Kopplung und zur Eigenversorgung) of 22 December 2016 (Federal Law Gazette I P. 3106).

⁵² Rationale for the amendment to Section 36g, Bundestag printed paper 18/10668, P. 163.

⁵³ Rationale for the amendment to Section 36g, Bundestag printed paper 18/10668, P. 163.

rights in another wind energy project awarded funding within the 12-month period prior to the submission of the bid, the entire citizens' energy company is »infected«.

The reference to the award of funding for a bid indicates that the 12-month holdback period is only triggered by participation in projects that were awarded funding within the context of the auction procedure. This means that a citizens' energy company is not barred from submitting a bid if, less than 12 months prior to the submission of the bid, it had already implemented one or more wind energy installations that are funded according to the transitional rules set down in Section 22 (2) no. 2 of the RES Act 2017, i.e. without participation in an auction.

The citizens' energy company must also declare that the upper limit of 18 MW in total is not exceeded if multiple bids are submitted. Legislators allow a citizens' energy company or its members to submit multiple bids within a single auctioning round if this upper limit is respected.

The upper limit only applies to the scope of a bid in an auctioning round. According to the wording, the rule does not refer to bidding behaviour in the 12 months prior to the submission of the bid. Consequently, a company is already excluded from the privileges for citizens' energy companies if it or one of its voting members received an award for funding for a wind energy project in the 12 months prior to the submission of the bid even if the upper limit of 18 MW had not been reached by that time. In other words, every wind energy instal-

lation awarded funding and belonging to another company in which a voting member of the citizens' energy company has voting rights triggers the 12-month holdback period for additional bids from the citizens' energy company even if the upper limit was not reached.

- Self-declaration on the availability of the site (Section 36g (1) sentence 1 no. 3 point c) of the RES Act 2017)

The citizens' energy company must present a self-declaration stating that the company is the owner of the site on which the wind energy installation is to be erected or is submitting the bid with the approval of the owner of the site. This is intended to ensure that a site is already available for the erection of the installation. The site in question must be located in the same district in which the majority of the shareholders have their primary residence. In contrast to »regular« projects, the project is not yet tied to the site at this point. The assignment to a specific site is only finalized once the approval pursuant to the Federal Immission Control Act is granted through the allocation of an award (see Section 5.9.5 below).

Templates of all the self-declarations that need to be submitted with the bid are available for download on the website of the Federal Network Agency and must be used when submitting the bid.

If false information is provided in the self-declarations, the Federal Network Agency is entitled to withdraw the award, and the penalties under Section 55 of the RES Act 2017 apply as a result. The Agency can also bar the bidder from future auctions.⁵⁴

5.9.3 Two-step security payment

More relaxed rules also apply to citizens' energy companies with regard to the payment of the security for the bid. Normally, a security of €30 per kilowatt of capacity to be installed must be lodged for bids for wind energy projects. In the case of citizens' energy companies, this security is divided into the payment of an initial security and a second security (Section 36g (2) of the RES Act 2017). The initial security of €15 per kilowatt must be paid when the bid is made. The second security must be

deposited within two months following the issuance of the approval pursuant to the Federal Immission Control Act.

A different rule applies for the first two auctioning rounds in 2018 on account of Section 104 (8) sentence 2 of the RES Act 2017. As only installations that already have approval pursuant to the Federal Immission Control Act are permitted to take part on the bid deadlines 1 February and 1 May 2018, the timeline for depositing the second security has also been

⁵⁴ Rationale for Section 55, Bundestag printed paper 18/8860, P. 235.

changed: in these two auctioning rounds, the second security only has to be deposited within

two months following the announcement of the funding awards.

5.9.4 Determining the award value

When determining the awards, no distinction is made between bids from citizens' energy companies and »regular« bids when the bids are arranged in order of priority. The citizens' energy company only receives an award if its bid value is below the lowest values in the auctioning round. Therefore no special rules apply for the granting of awards. If the citizens' energy company was successful with its bid, Section 36g (5) of the RES Act 2017 states that the award value is to be determined using the uniform pricing method, rather than the »pay as bid method« designed for »regular« projects pursuant to Section 3 no. 51 of the RES Act 2017. This means that all bids from citizens' energy companies that are awarded funding receive the value that corresponds to the highest bid value still to be awarded funding in this round. Consequently, a citizens' energy company always receives the highest award value

in the particular auctioning round. This is also the case if a citizens' energy company only takes part in the auction once the approval pursuant to the Federal Immission Control Act has been granted.

This rule is modified for awards that are granted to citizens' energy companies within the grid expansion area: If the capacity volume that is eligible for an award in the grid expansion area is fully allotted, the value that applies is the value of the highest bid to be awarded funding in the grid expansion area, and not the highest bid value of the entire auctioning round (Section 36g (5) sentence 2 of the RES Act 2017). This rule is designed to prevent strategic bidding below a bidder's actual electricity production costs as any bid in the grid expansion area can set the limit price.⁵⁵

5.9.5 Allocation of award following receipt of the installation approval and financial stake of the municipality where the site is located

If a citizens' energy company that does not hold an approval pursuant to the Federal Immission Control Act receives an award in the auction process, the award is initially only tied to the district indicated in the bid as the site. This is logical because a site can only be specified precisely in the approval process, particularly taking into consideration the regulations deriving from the Federal Immission Control Act and species protection legislation. Therefore the award is only allocated following the issuance of the approval.

The citizens' energy company must apply to the Federal Network Agency for the allocation of the award within a period of two months from the time the approval is issued. It is essential to comply with this deadline as the award will expire otherwise. The form available on the Internet must be used for the application to the Federal Network Agency.⁵⁶ The application

must contain the following information in particular:

- Number under which the installation approved under the Federal Immission Control Act has been notified to the register or a copy of the register notification (Section 36g (3) sentence 4 no. 1 of the RES Act 2017), (see Section 5.5.2 above)
- File number of the approval(s) and the name and address of the approval authority (Section 36g (3) sentence 4 no. 1 of the RES Act 2017)
- Declaration that the installation is to be erected in the district indicated in the bid (Section 36g (3) sentence 4 no. 2 of the RES Act 2017)
- Self-declaration on the existence of the citizens' energy company (Section 36g (3) sentence 4 no. 3 point a) of the RES Act 2017)

⁵⁵ Rationale for the amendment to Section 36g, Bundestag printed paper 18/10668, P. 163, 164.

⁵⁶ The form can be downloaded at: [https://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachge-](https://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Energie/Unternehmen_Institutionen/ErneuerbareEnergien/Ausschreibungen_2017/Onshore/Formular_Zuordnung_Zuschlag_genehmigteWEAOnshore.pdf)

[bierte/Energie/Unternehmen_Institutionen/ErneuerbareEnergien/Ausschreibungen_2017/Onshore/Formular_Zuordnung_Zuschlag_genehmigteWEAOnshore.pdf](https://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Energie/Unternehmen_Institutionen/ErneuerbareEnergien/Ausschreibungen_2017/Onshore/Formular_Zuordnung_Zuschlag_genehmigteWEAOnshore.pdf).

In the self-declaration the company must state that it has been a citizens' energy company consistently, and without interruption, from the time of the submission of the bid to the time of the application. As when submitting the bid, the company must also declare that neither it nor its members or shareholders entered into any agreements prior to the application that result in a breach of the conditions for a citizens' energy company following the application. This is designed to prevent the participation of sham citizens' energy companies.

The new subsection 6 adds to the rule by essentially banning the conclusion of agreements in contracts or other arrangements prior to the commissioning of the installation if such agreements would mean that the requirements for citizens' energy companies are circumvented or no longer satisfied following the commissioning of the installation.⁵⁷ This rule is intended as a further prevention against sham transactions, as dummy partners and the actual project developer may not agree to transfer the project back to the project developer before commissioning. In the event of a sham transaction, the upshot of this rule is that the dummy partners would risk not being able to hand over the project awarded funding to the project developer behind the project. Similarly, the project developer also runs the risk of the dummy partners no longer being willing to transfer the project awarded funding back to the project developer.

- Self-declaration that the municipality in which the installation is to be erected holds, or has been offered, a financial stake in the citizens' energy company (Section 36g (3) sentence 4 no. 3 point b) of the RES Act 2017)

The financial participation of the municipalities hosting the installations was only incorporated into the wording of the law at a later stage in

the process.⁵⁸ Section 36g (3) sentence 4 no. 3 point b) of the RES Act 2017 requires citizens' energy companies to offer the municipality in which the planned wind energy installation is to be erected the opportunity to purchase a 10% stake in the company. Instead of making the offer to the municipality, the offer can also be extended to a company in which the municipality holds a 100% stake. It is not necessary to transfer voting rights in the citizens' energy company as this »would make it next to impossible to meet the requirements of cooperatives«.⁵⁹

Section 36g of the RES Act 2017 does not specify any particular requirements with regard to the format or content of the offer.⁶⁰ At the same time, it must be ensured that the rule not is ineffectual and that the citizens' energy company gives the municipality hosting the installation a serious opportunity to hold a stake in the project in a constructive manner.⁶¹ While an offer within the meaning of Section 145 of the Civil Code, already containing all the key elements for the conclusion of the contract – i.e. the parties, the financial stake and the purchase price – is probably not necessary in all cases, it would guarantee that the requirements of Section 36g (3) sentence 4 no. 3 point b) of the RES Act 2017 are definitely met.⁶² For the municipality hosting the installation to be offered a serious financial stake in the project, the offer must be economically feasible for the municipality. This is very likely the case if the offer is made at normal market conditions. In this respect, the asset value approach or the income capitalisation approach can also be the starting point for determining the purchase price, as outlined in Section 6 of the Act on Citizen and Municipal Participation (*Bürger- und Gemeindenbeteiligungsgesetz*)⁶³ in Mecklenburg-Western Pomerania.⁶⁴

⁵⁷ Rationale for the amendment to Section 36g, Bundestag printed paper 18/10668, P. 163, 164.

⁵⁸ The Bundestag Committee for Economic Affairs and Energy introduced the broader catalogue of criteria in Section 36g (3) into the draft bill with its recommendation of 6 July 2016 (Bundestag printed paper 18/9096).

⁵⁹ Rationale for Section 36g (3), Bundestag printed paper 18/9096, P. 363.

⁶⁰ Also the rationale for Section § 36g (3), Bundestag printed paper 18/9096, P. 363.

⁶¹ Hoffmann, Special Rules for Citizens' Energy Companies in the RES Act 2017 (*Die Sonderregelungen für Bürgerenergiegesellschaften im EEG 2017*), Würzburg reports on environmental energy law, no. 26, May 2017, P. 39.

⁶² Ibidem, P. 40.

⁶³ Act on the Participation of Citizens and Municipalities in Wind Parks in Mecklenburg-Western Pomerania of 18 May 2016 (*Gesetz über die Beteiligung von Bürgerinnen und Bürgern sowie Gemeinden an Windparks in Mecklenburg-Vorpommern*) (Official Gazette of the Land of Mecklenburg-Western Pomerania 2016, P. 258).

⁶⁴ Hoffmann, Special Rules for Citizens' Energy Companies in the RES Act 2017 (*Die Sonderregelungen für Bürgerenergiegesellschaften im EEG 2017*), Würzburg reports on environmental energy law, no. 26, May 2017, P. 41.

If the planned wind energy project extends over several municipal districts, in all likelihood all the host municipalities concerned would need to be offered a financial stake in the citizens' energy company. This would be the rationale if the project were divided into individual bids along borders between municipalities. In this case, each municipality would have to be offered a 10% financial stake in the installations planned in the area. The stake amounts to 10% in total even if multiple municipalities are involved. The law does not set forth how the stake is to be divided between the municipalities. A financial stake that corresponds to the capacity installed on the area of a particular municipality would appear appropriate in this context. For example, if a citizens' energy company is planning to erect wind energy installations with a total capacity of 15 MW, with 12 MW to be erected in the area of municipality A and 3 MW in the area of municipality B, it makes sense to offer municipality A a financial stake of 8% (12/15) and municipality B a stake of 2% (3/15). If the same types of installation are to be erected with an identical capacity and hub height, it would also seem appropriate to base the financial stake on the ratio of the number of installations per municipality area. Should one of the municipalities decide not to accept the offer, this should not be construed as a right of the participating municipality to acquire this share in the company. The offer to have a financial stake in the company is tied to the municipal territory in which the installations are planned. If individual installations of the wind farm are located in a neighbouring municipal district, the other municipality cannot demand to hold a stake in these installations.

The participation requirement does not apply to projects that are located in an area not incorporated into a municipality, as the law refers explicitly to sites within a municipality.

Evidence of the offer or the municipality's financial stake in the company must be provided to the Federal Network Agency in the form of a self-declaration; a template of this document is also available from the Agency. By introducing this rule, legislators hope to increase acceptance

among residents in the area of the installation site as they at least indirectly receive a financial stake in the project and therefore an additional monetary benefit.⁶⁵

If all the criteria are met, the Federal Network Agency allocates the award for the amount of the successful bid. Pursuant to Section 36 sentence 1 of the RES Act 2017, the award only becomes effective with the allocation decision of the Federal Network Agency. The payment entitlement for electricity from the wind energy project awarded funding only applies from this point in time.

If the short deadline for applying for an allocation decision is missed, the award expires (substantive exclusion deadline), Section 36g (3) sentence 2 of the RES Act 2017. The award is then cancelled by the Federal Network Agency. As a result, the payment entitlement no longer exists and a penalty corresponding to the amount of the initial security lodged must be paid to the grid system operator (Section 35a in connection with Section 55 (2) sentence 2 of the RES Act 2017).

These rules also only apply to a limited extent for the first two auctioning rounds in 2018 pursuant to Section 104 (8) sentence 1 of the RES Act 2017. It is logical that legislators suspend requirements for the allocation of an award, as there is no area to which these requirements apply. If all the bids are backed by an approval pursuant to the Federal Immission Control Act when the bids are submitted, subsequent allocation is not required.

Only the obligation to allow the local municipality to hold a financial stake in the company, or the submission of an offer to this effect, continues to apply. Section 36g (5) sentence 3 of the RES Act 2017 expressly makes compliance with the requirements set forth in Section 36g (3) sentence 4 point b) a prerequisite for receiving the uniform price. Given that paragraph 5 sentence 3 only refers to the »requirements« with regard to municipal participation in the project, there is no inconsistency between this and the blanket suspension of the rule.

⁶⁵ Rationale for Section 36g (3), Bundestag printed paper 18/9096, P. 364.

Helpful pointers on the deadline for award allocation

The two-month deadline for applying for the award allocation is comparatively short. Considering the severe legal consequences if the deadline is missed – payment entitlement is forfeited and a (reduced) penalty must be paid – this deadline must be respected. As proof of notification to the register and a self-declaration concerning the municipality's stake in the company or an offer to that effect must be included with the application for award allocation, it is absolutely essential to ensure these conditions are also met in good time.

5.9.6 Two-year post-commissioning vesting period

Section 36g includes provisions in subsection 5 sentence 4 for a vesting period for citizens' energy companies which expires at the end of two years after the commissioning of the installation. For the uniform price to apply as the award value throughout the entire funding period, a citizens' energy company must consistently meet the criteria set forth in Section 3 no. 15 of the RES Act 2017 without interruption from the time of the submission of the bid through to the end of the second year following commissioning of the installation.

If it is not possible to verify full compliance with the criteria throughout this period, the payment entitlement is only calculated on the basis

of the bid value from the point when the criteria for a citizens' energy company are no longer met for the first time. No later than two months after the end of two-year vesting period, the citizens' energy company is required to submit a self-declaration to the grid system operator documenting that it consistently met the requirements for a citizens' energy company without interruption from the time of the submission of the bid through to the end of the second year following the commissioning of the installation. If the self-declaration is not submitted in time, the level of the award value is reduced to the bid value retrospectively from the time the installation is commissioned.⁶⁶

5.9.7 Alternate implementation deadlines and penalties

Considering that in the case of Section 36g (1) of the RES Act 2017, a citizens' energy company that wins an award for a wind energy project not only needs to implement the installation but also successfully complete the approval process, German legislators make provisions for an extended implementation period of 54 months in total. Penalties become due on a gradual basis from the 49th month onwards and the payment entitlement expires after 54 months. It is important to note that the period for implementation begins with the announcement of the award, and not with the award allocation. The time needed for the approval or the implementation of the project is irrelevant in this context, and as such there are no »milestones« to be met. For example, if the installations can be built and commissioned within a period of 12 months, the citizens' energy company has

up to 42 months for the approval process before payment entitlement is at risk.

If a third party seeks a legal remedy against an approval that has been granted, citizens' energy companies – like all other bidders – may apply for an extension (see Section 5.7 above).

The penalties that apply if a project is not implemented in time follow the general rules – also with regard to the de minimis rule if the capacity awarded funding falls short of the target by up to 5%: If the citizens' wind energy installation goes into operation in the 49th or 50th month following the announcement of the award – i.e. with a delay of one or two months – a penalty of €10 per kW must be paid. The penalty increases to €20 per kW in the 51st and 52nd month. In the 53rd and 54th month, a penalty corresponding to the full amount of the security lodged – i.e. €30

⁶⁶ Rationale for Section 36g (5), Bundestag printed paper 18/10668, P. 164.

per kW – must be paid to the grid system operator.

With regard to the level of the penalty to be paid, an exception only applies in situations where a citizens' energy company does not apply for the allocation of the award by the specific deadline – possibly also owing to the lack of an approval pursuant to the Federal Immission Control Act (Section 55 (2) sentence 2 of the RES Act 2017). In this case, the penalty amount is calculated based on the initial security of €15 per kW (which was deposited when the bid was made) multiplied by the cancelled

bid quantity, and is therefore €15 per kW below the penalty amount that would otherwise need to be paid for capacity that has not been implemented.

The commissioning of the installation must be notified to the register within three weeks. In addition, with the commissioning of the installation it is also necessary to provide evidence to the grid system operator of the associated entitlement to funding and the quality factor, which is used to calculate the value to be applied for the generated electricity.

Checklist: requirements to be met by citizens' energy companies and their bids

To enjoy the special rules in auctions, a stakeholder must consistently meet the criteria of a locally established citizens' energy company without interruption from the time the bid is made through to two years following the commissioning of the installation (Section 3 no. 15 of the RES Act 2017). According to the Act, a citizens' energy company is an undertaking

- ✓ which consists of at least ten natural persons who are members eligible to vote
- ✓ in which at least 51 percent of the voting rights are held by natural persons whose main residence has been registered pursuant to Section 21 or Section 22 of the Federal Registration Act for at least one year prior to the submission of the bid in the urban or rural district in which the onshore wind energy installation is to be erected, and
- ✓ in which no member or shareholder holds more than 10 percent of the voting rights of the undertaking.

In the case of an association of several legal entities or partnerships to form an undertaking, it is sufficient if each of the members of the undertaking fulfils the preconditions pursuant to the indents above.

The law does not contain any specific requirements with regard to the choice of legal form of the undertaking.

In addition to complying with the general requirements for bids (see Section 5.5 above), bids made by citizens' energy companies must also meet additional conditions (Section 36g (1-3) of the RES Act 2017). This includes the condition that a bid

- ✓ may be for **up to six wind energy installations** with a **total electrical capacity** to be installed **of 18 MW**, wherein the installations must be planned in the same district in which the majority of the company shareholders have their primary residence,
- ✓ can be submitted without an approval pursuant to the Federal Immission Control Act for the planned installations if an **expert report on the expected electricity yield** of the installations is included with the bid instead.

Helpful pointer: It is not possible to take part in the first two auctioning rounds of 2018 without an approval pursuant to the Federal Immission Control Act, which has been registered in a timely manner.

When submitting the bid, it is also necessary to provide **self-declarations** confirming that

- ✓ the criteria for a citizens' energy company are met
- ✓ no contractual agreements have been made that would circumvent or no longer satisfy the requirements for citizens' energy companies following the submission of the bid,
- ✓ neither the company nor one of its voting members has been awarded funding for another onshore wind energy installation in the twelve months prior to the submission of the bid,
- ✓ no other bids have been submitted on the bid deadline which, together with the bid, exceed a capacity to be installed of 18 MW, and
- ✓ the company is the owner of the site on which the installations are to be erected or the bid is submitted with the agreement of the owner of the site.

When making the bid a **security** must also be deposited with the Federal Network Agency in the form of a surety or a monetary payment. This security amounts **to €15 per kW** of installation capacity offered in the case of a bid for an installation **without an approval**. If the bid is submitted for a **wind energy installation that is already approved**, the security to be lodged increases to **€30 per kW** of the planned installation capacity.

In addition, the **procedural fee** pursuant to Section 1 of the Ordinance on Auction Fees must be paid to the Federal Network Agency by the bid deadline.

Further to this, the citizens' energy company is required to demonstrate that the **municipality** in which the wind energy installation is to be erected **has a 10% stake in the company** or has been offered a stake to this effect. If the bid is made without an approval pursuant to the Federal Immission Control Act, evidence of the financial participation/offer to this effect must be provided at the time of the award allocation, i.e. within two months of receipt of the approval for the installation. If the company already holds the approval pursuant to the Federal Immission Control Act when making the bid, evidence must be provided when the bid is submitted.

5.10 Calculating the market premium after funding has been granted

If a payment entitlement has been granted by auction, funding is provided through the payment of the market premium. The value to be applied, which is determined in the auction, forms the basis for calculating the market premium. Given that the award refers to the reference site, the grid system operator converts the

award value in accordance with the corrective factors set down in Section 36h of the RES Act 2017 (see Section 5.4.1 above).

To be able to claim payment of the market premium, the installation operator must submit an

expert report to the grid system operator documenting the quality factor, which serves as the basis for determining the corrective factor.⁶⁷

The market premium is determined by the grid system operator retrospectively for each calendar month on the basis of the value to be applied. This was also the case under the RES Act 2014, and as such the amended Act has not introduced any changes in this respect. To calculate the level of the market premium, Section 23a of the RES Act 2017 refers to the calculation method set forth in Annex 1 to the RES

Act 2017. The market premium is calculated from the difference of the value to be applied minus the actual average monthly value of electricity from onshore wind energy installations for the price zone for Germany on the spot market of the electricity exchange. The transmission system operators publish average monthly values online for individual energy sources by the tenth working day of the following month on »netztransparenz.de«, a common information platform.⁶⁸

5.10.1 Regular adjustment of the value to be applied

A new element introduced in the RES Act 2017 is the regular adjustment of the value to be applied on the basis of the site yield which is subject to review. Under the provisions of Section 36h (2) of the RES Act 2017, the yield at the installation site must be reviewed every five years for the duration of funding. To this end, it is necessary to determine the actual site yield of the preceding five years of operation⁶⁹ and relate this to the reference yield of the type of installation. If the review performed after five, ten and fifteen years of operation finds that the site quality deviates by more than two per-

centage points, the value to be applied is corrected retrospectively. Overpayments received in this period must be reimbursed with interest to the grid system operator. Similarly, underpayments are reimbursed to the installation operator, but without interest in this case.

The installation operator must demonstrate the actual quality factor in the preceding period, in the form of an expert report, to the grid system operator within four months of the end of the specific period under review (Section 36h (3) no. 2 of the RES Act 2017).

5.10.2 No self-supply with electricity that receives funding

Operators of installations whose value to be applied has been determined by auction are not permitted to use the electricity generated in the installation for self-supply throughout the entire period in which they claim payments pursuant to the RES Act (Section 27a of the RES Act 2017). This rule does not apply to electricity consumed for the operation of the installation and facilities connected with said installation or to electricity for grid system losses (Section 27a no. 1-3 of the RES Act 2017). Operators may only consume the electricity from their own installations themselves in the hours in which the wholesale price on the spot market for day-ahead auctions is negative or in

which the feed-in quantity is reduced when the grid system is overloaded pursuant to Section 14 (1) of the RES Act 2017 (Section 27a nos. 4 and 5 of the RES Act 2017).

If the ban on own consumption is violated, the value to be applied is reduced to zero (Section 52 (1) no. 4 of the RES Act 2017). This applies for the entire calendar year of the violation.

The ban on self-supply does not apply to installation operators that receive compensation for the electricity they generate on the basis of rates of funding set by statute.

⁶⁷ The quality factor of the installation site must be determined by the operator in the form of a certified expert report in accordance with the procedure for determining the wind potential and energy yields at wind energy installation sites as set down in the FGW Technical Guidelines Part 6.

⁶⁸ Information platform of the German transmission system operators, <https://www.netztransparenz.de/EEG/Marktpraemie/Marktwerte>.

⁶⁹ The calculation is explained in detail in Annex 2 no. 7.2 to the RES Act 2017.

5.11 Funding period

The period of funding for an installation awarded funding through an auction is limited to 20 years and commences with the commissioning of the installation (Section 25 of the RES Act 2017). The period commences at the latest 30 months following the announcement of the award or, in the case of a citizens' energy project, following the announcement of

the allocation decision even if the wind energy installation is commissioned at a later time due to a deadline extension pursuant to Section 36e (2) of the RES Act 2017, (Section 36i of the RES Act 2017).

5.12 Joint auctions for wind and solar installations

The first joint auctions for wind and solar installations will be held in the years from 2018 to 2020 (Section 39i (1) of the RES Act 2017). The volume to be auctioned in this context amounts to 400 MW per year. The Federal Ministry for Economic Affairs and Energy is responsible for the specific organisation of the auction procedure (Section 88c of the RES Act 2017). The Ordinance on Joint Auctions adopted by the German Bundestag on 10 August 2017⁷⁰ makes provisions for two bid deadlines each year – specifically 1 April and 1 November – with 200 MW of capacity to be installed put up for auction on each date.

The same auction conditions that apply for the technology-specific auctions will apply for the individual technologies in the joint auctions.⁷¹ In the joint auctions, therefore, bids for onshore wind energy installations must also meet the requirements of Sections 30, 36 ff of the RES Act 2017. Prerequisites for the participation of wind energy installations in the auction include the approval pursuant to the Federal Immission Control Act and timely notification to the register.⁷²

Table 3: Overview of bid deadlines, capacity volumes and notification deadlines for joint auctions in the years 2018 through to 2020

Auction bid deadline	Volume up for auction	Notification deadline for installation approval
1 April 2018*	200 MW	11 March 2018
1 November 2018	200 MW	11 October 2018
1 April 2019	200 MW	11 March 2019
1 November 2019	200 MW	11 October 2019
1 April 2020	200 MW	11 March 2020
1 November 2020*	200 MW	11 October 2020

*) *Note:* Given that 1 April 2018 and 1 November 2020 both fall on a Sunday, the bid deadline for these dates ends on the following business days, i.e. at midnight (24:00) on 2 April 2018 and 2 November 2020.

⁷⁰ Ordinance on Joint Auctions for Onshore Wind Energy and Solar Installations (*Verordnung zu den gemeinsamen Ausschreibungen für Windenergieanlagen an Land und Solaranlagen*) of 10 August 2017 (Federal Law Gazette I 2017, P. 3180), <http://www.gesetze-im-internet.de/gemav/>

⁷¹ cf. Bundestag printed paper 18/12375, P. 2.

⁷² For information on the other requirements of Section 36 of the RES Act 2017, see Section 5.5.2.

The rules for citizens' energy companies pursuant to Section 36g of the RES Act 2017 do not apply in the joint auctions. Due to the modest overall volume, legislators consider it reasonable that citizens' energy companies are allowed to participate but are not granted any special privileges.⁷³

When ranking the bids in the award process, bids for wind energy and solar installations are ranked together. An award is granted to the lowest bids until the volume to be auctioned is reached or exceeded (Section 7 (1) sentence 6 of the Ordinance on Joint Auctions for Onshore Wind Energy and Solar Installations). The reference yield model pursuant to Section 36h of the RES Act 2017 does not apply, with the result that the bid value or award value is not converted to the reference site for onshore wind energy installations. Pursuant to Section 7 (1) sentence 3 of the Ordinance on Joint Auctions for Onshore Wind Energy and Solar Installations, however, bids for installations that are erected in a distribution grid expansion area and are not connected to the ultra-high voltage grid system must be subject to a premium – known as the distribution grid component – when the bids are ranked. This rule is intended to factor in grid and system integration costs in the auction design – as required within the context of approval for the RES Act 2017 such that it complies with rules on state aid.⁷⁴ As a result, installations that are to be erected outside a distribution grid expansion area are given priority in the award procedure. The distribution grid component is calculated from the product of the capacity factor of the district in which the installation is to be erected and a base value which is set at 0.73 cent per kWh for onshore wind energy installations.⁷⁵ The »modified bid value« only applies to the bid ranking process and the determination of the award which is based on this ranking. It does not, however, apply to the actual award value which the bidder ultimately receives.

The award restrictions within the grid expansion area also apply to bids for wind energy installations in the context of joint auctions (Section 8 of the Ordinance on Joint Auctions for Onshore Wind Energy and Solar Installations). In the period 2018 to 2020, it seems likely that only around 130 MW of wind energy capacity can expect to be awarded funding per calendar year in the joint auctions in the grid expansion area⁷⁶. This is equivalent to around 14% of the upper limit (902 MW) that applies in the grid expansion area and therefore to the share of joint auctions (400 MW) in the annual auction volume for onshore wind energy installations (2,800 MW). The maximum award volume is spread evenly over the two annual bid deadlines, with the result that around 65 MW can probably be awarded funding each time within the grid expansion area.⁷⁷ With the announcement of the bid deadline, the Federal Network Agency also sets the upper limit for the deadline, i.e. the maximum amount that can be awarded funding in the grid expansion area (Section 8 (1) of the Ordinance on Joint Auctions for Onshore Wind Energy and Solar Installations).

The maximum value for solar installations pursuant to Section 37b of the RES Act 2017 applies for onshore wind energy installations in the joint auctions held in 2018 (Section 13 of the Ordinance on Joint Auctions for Onshore Wind Energy and Solar Installations). In 2019 and 2020, differentiated maximum values apply in what are termed the three maximum value areas (Section 16 (1) of the Ordinance on Joint Auctions for Onshore Wind Energy and Solar Installations). These regionally differentiated maximum values are designed to align the level of compensation at low-wind and high-wind locations, which is accomplished in the technology-specific auction using the reference yield model.⁷⁸

⁷³ Federal Ministry for Economic Affairs and Energy, Joint Auctions for Wind Energy and Solar Installations – Key Points Paper, March 2017, P. 2, <https://www.bmwi.de/Redaktion/DE/Downloads/Energie/eeg-eckpunkt Papier.pdf>.

⁷⁴ Federal Ministry for Economic Affairs and Energy, Joint Auctions for Wind Energy and Solar Installations – Key Points Paper, March 2017, P. 2.

⁷⁵ cf. Annex 1 no. 3 to the Regulation on Joint Auctions for Onshore Wind Energy and Solar Installations.

⁷⁶ cf. Bundestag printed paper 18/12375, P. 53.

⁷⁷ As also stated in the rationale for Section 8 (1), Bundestag printed paper 18/12375, P. 106.

⁷⁸ Federal Ministry for Economic Affairs and Energy, Joint Auctions for Wind Energy and Solar Installations – Key Issues Paper, March 2017, P. 4.

6. Funding regulations outside the auction system

The payment entitlement to the market premium for the electricity generated in a wind energy installation only applies as long as and to the extent that an award issued by the Fed-

eral Network Agency to the installation is effective. The law provides for exceptions, to a limited extent, to the general requirement to take part in the auction system.

6.1 Entitlement to payment of the market premium on the basis of legally established values to be applied

Pursuant to Section 22 (2) of the RES Act 2017, the payment of a market premium without previous participation in auctions is only permitted for small-scale wind turbines, pilot wind

energy installations or wind energy installations that were approved by the end of 2016 and were commissioned by the end of 2018.

6.1.1 Pilot wind energy installations and small-scale wind energy installations

Wind turbines with a specific capacity of up to 750 kW are entitled to payment of the market premium on the basis of the legally established values.

significant innovation extending well beyond the best available technology.

Similarly, pilot wind energy installations with a specific electrical capacity of up to 6 MW are not required to take part in the auction procedure. Section 3 no. 37 of the RES Act 2017 defines two types of »onshore pilot wind energy installation«:

However, the payment entitlement for such pilot installations is limited to a total annual capacity of 125 MW. The limitation encompasses all pilot wind energy installations that are erected and tested on the mainland, i.e. also such installations that are later deployed offshore but are first tested onshore.⁷⁹ Any commissioning of installations beyond this annual capacity is deducted, in the following year, from the new quota of 125 MW in the order the installations are notified to the register (Section 22 (2) no. 3 in connection with Section 22a (1) of the RES Act 2017). Funding for the last prototypes to be commissioned does not commence until the next calendar year as a result.⁸⁰

- a) the first two new types of an onshore wind energy installation with a specific capacity of up to 6 MW for which the type examination has not yet been issued at the time of commissioning, and
- b) onshore wind energy installations which are primarily erected for research and development purposes and which are used to test a

6.1.2 Transitional arrangements for wind energy installations approved before 2017

Wind energy installations that are approved before 1 January 2017 and commissioned before 1 January 2019 can claim the market premium on the basis of the values to be applied that are set by statute. Legislators primarily apply the principle of legitimate expectations to justify the exemption set forth in Section 22 (2) no. 1 of the RES Act 2017. For the exemption to apply, the »interim installation« must have

been approved no later than 31 December 2016 and commissioned no later than 31 December 2018. It has yet to be clarified, from a legal perspective, whether the approval holder must have been served the approval pursuant to Section 22 (2) sentence 2 no. 2 point a) of the RES Act 2017 before 1 January 2017 or whether it suffices if the decision by the au-

⁷⁹ Rationale for Section 22a, Bundestag printed paper 18/8860, P. 199.

⁸⁰ As stated in the rationale for Section 22a, Bundestag printed paper 18/8860, P. 199.

thority was issued before this date. In its advisory opinion 2017/6, the EEG clearing house recommends that this should be based solely on the date of issue of the approval, and that it is not necessary to have received the approval before this date.⁸¹ The approval does not need to have gained legal validity for compliance with the deadline.

It should also be noted that funding determined by statute is only granted if the installation with approval pursuant to the Federal Immission Control Act was notified, with all the necessary information, to the register of installations of the Federal Network Agency by 31 January 2017 at the very latest. In this context, it was particularly necessary to report

- the file number of the approval pursuant to the Federal Immission Control Act under which the approval of the installation was issued, and
- the name and address of the approval authority

In addition, the information required under Section 4 of the Ordinance on the Register of Installations also had to be provided with the registration.⁸² Compliance with the notification deadline was absolutely essential as the entitlement to the legally established values to be applied is forfeited if the approved installation is not notified, or is notified too late. In such cases, the only option available to the installation operator in order to obtain a payment entitlement is to participate in the auction.

Pursuant to Section 22 (2) no. 2 point c), the installation operator was free to forgo the claim to the legally established value to be applied, and to take part in the auction procedure instead. This waiving of the claim had to be communicated in writing to the Federal Network Agency before 1 March 2017. Installations with an entitlement to funding rates set by the state are excluded from auctions (Section 22 (6) of the RES Act 2017) to prevent operators from switching between different funding systems and »cherry-picking« the best system to suit their preferences.

The »interim installation« must be commissioned by 31 December 2018 at the very latest. Pursuant to Section 3 no. 30 of the RES Act 2017 commissioning is defined as:

»the first putting into operation of the installation exclusively with renewable energy sources or mine gas following the establishment of the installation's technical readiness for operation; the technical readiness for operation presupposes that the installation has been installed firmly at the place envisaged for permanent operations and is permanently furnished with the necessary equipment for the generation of alternating current; the replacement of the generator or of other technical or structural parts following initial commissioning shall not alter the time of commissioning.«

Checklist: eligibility for the transitional scheme

It is only possible to claim the values to be applied that are set by the state for a wind energy installation with a capacity of over 750 kW if:

- ✓ the installation was **approved** pursuant to the Federal Immission Control Act by **31 December 2016**
- ✓ the approved installation was **notified**, with all the necessary information, to the **register of installations** of the Federal Network Agency **by 31 January 2017**, and
- ✓ the installation is **commissioned by 31 December 2018**.

⁸¹ EEG clearing house, advisory opinion 2017/6 on the interpretation and application of Section 22 (2) sentence 2 no. 2 of the RES Act 2017 of 30 May 2017, point 42 ff.

⁸² Information and forms for notification to the register are available on the website of the Federal Network Agency,

http://www.bundesnetzagentur.de/cln_1431/DE/Sachgebiete/ElektrizitaetundGas/Unternehmen_Institutionen/ErneuerbareEnergien/Anlagenregister/Anlagenregister_node.html.

If the »interim installation« is not commissioned by the end of 2018, it can take part in auctions from 2019 onwards.

Alternatively, to be able to take part in the auction with their installation, operators had until 28 February 2017 to send written notification to the Federal Network Agency of their decision to waive the legal payment entitlement. In this case, funding approval must be obtained for the installation within an auction context for the market premium to be paid for the generated electricity. At the start of March 2017, the Federal Network Agency announced that waivers had been submitted in time for 52 approvals with a total wind energy capacity of 475 MW.⁸³

The market premium is also calculated for »interim installations« as defined in Annex 1 to the RES Act 2017. Consequently, the market premium is calculated from the difference of the legally established value to be applied mi-

nus the actual average monthly value of electricity from onshore wind energy installations on the spot market of the electricity exchange for the price zone for Germany.

Helpful pointers on changing the approval

To be entitled to the state-set funding amount outside the auction system, the »interim installation« must have been approved before 1 January 2017. If changes are made to the approved installation after this date, legal provisions do not specify whether the original approval, and therefore the conditions for entitlement to the funding rates set by law, continue to apply. In its advisory opinion 2017/6, the EEG clearing house advocated that changes that leave the installation unchanged in the sense of the RES Act do not cancel the approval and therefore the funding entitlement – irrespective of whether a change approval pursuant to Section 16 of the Federal Immission Control Act is required or not. This is to initially apply to changes that only affect the operation of the installation (such as in the case of downtimes imposed for nature conservation reasons) or infrastructure within the wind farm that does not belong to the wind energy installation (such as in the case of grid connection facilities).⁸⁴ In addition, it should also encompass changes that are common modifications in the industry and typically occur in the course of implementing a wind energy project.⁸⁵ For example, this should include the erection of a later wind energy installation model if the approved model is no longer manufactured or no longer meets/will not meet the technical requirements. Furthermore, necessary capacity changes, or capacity changes that do not require a physical change to the wind energy installation, are also to be considered minor changes within the sense of the RES Act.

An advisory opinion issued by the EEG clearing house does not have binding legal force. This means that if legal action is taken, courts are not bound by the decisions of the clearing house.

6.2 Entitlement to payment of the feed-in tariff

Small-scale wind energy installations with a specific electrical capacity of up to 100 kW are entitled to payment of the feed-in tariff.

Wind energy installations with a capacity of more than 100 kW can only claim the feed-in tariff as shortfall remuneration for a period of up to three consecutive calendar months and

⁸³ cf. https://www.bundesnetzagentur.de/DE/Sachgebiete/Elektrizitaet_undGas/Unternehmen_Institutionen/Ausschreibungen/Wind_Onshore/Wind_Onshore_node.html

⁸⁴ EEG clearing house, advisory opinion 2017/6 on the interpretation and application of Section 22 (2) sentence 2 no. 2 of the RES Act 2017 of 30 May 2017, point 67 f.

⁸⁵ Ibidem, point 57 ff.

up to a total of six calendar months per calendar year (Section 21 (1) no. 2 of the RES Act 2017).

For wind energy installations with a capacity of up to 100 kW, the feed-in tariff is 0.4 cent per kW less than the values to be applied that are set forth in Section 46 of the RES Act 2017

(Section 53 (2) of the RES Act 2017). The short-fall remuneration amounts to 80% of the value to be applied (Section 53 sentence 2 of the RES Act 2017). If the maximum period is exceeded, the value to be applied is reduced to the monthly market value (Section 52 (2) no. 3 of the RES Act 2017).

6.3 Legally established values to be applied

The legally established values to be applied are defined in Section 46 of the RES Act 2017. If these values are used, the two-phase reference yield model set forth in the RES Act 2014 can continue to be applied without modification (Section 46 (2) sentence 3 of the RES Act 2017). In addition, the definition of the reference site as set down in the RES Act 2014 is authoritative for these installations until the end of 2018. Section 46 (3) of the RES Act 2017 makes provisions for the review of the site yield and the adjustment of the deadline

for the higher initial remuneration ten years after the commissioning of an installation, but at the latest one year before the higher initial remuneration expires. If the yield value deviates by more than 2 percentage points from the last value to be calculated, any overpayment or underpayment must be reimbursed. The obligation to review the site yield after ten years also encompasses – retrospectively – existing installations that were commissioned after 1 January 2012 (Section 100 (1) sentence 3 of the RES Act 2017).

6.3.1 Legally established values to be applied up until 2018

Pursuant to Section 46 subsections 1, 2 of the RES Act 2017, the values to be applied from 1 January 2017 amount to 8.38 cent per kWh for the higher initial remuneration and 4.66 cent per kWh for basic remuneration. Between March and August 2017, the funding rates are reduced monthly by 1.05%, irrespective of the amount of capacity added. This degression is designed to counteract anticipatory effects in the transition phase until the introduction of the auction system. With effect from 1 October 2017, the »flexible cap« introduced with the RES Act 2014 will apply for onshore wind energy. From this point onwards, the quarterly degression will depend on the

preceding increase in new installation capacity, wherein installation capacity that has been decommissioned during the same period is not taken into consideration. Table 4 provides an overview of the legally established funding rates that apply from 1 January 2017. The values to be applied in the second and fourth quarter of 2018 cannot be calculated in advance as the degression rate to be applied depends on the degression level that is effective from April 2018 onwards. The corresponding figures will be updated by the Federal Network Agency and announced within the context of publications regarding the register of installations.

Table 4: Funding rates for the commissioning of installations claiming the statutory market premium

Deadline for adjusting the values to be applied (Sections 46 (1), 46a (1) RES Act 2017)	Initial value [cent/kWh]	Basic value [cent/kWh]	Degression level
1 January 2017	8.38	4.66	
Degression irrespective of the amount of new capacity added			
1 March 2017	8.29	4.61	1.05 %
1 April 2017	8.20	4.56	1.05 %
1 May 2017	8.12	4.51	1.05 %
1 June 2017	8.03	4.47	1.05 %
1 July 2017	7.95	4.42	1.05 %
1 August 2017	7.87	4.37	1.05 %
Degression due to expansion target (2,500 MW) being exceeded by more than 1,000 MW			
1 October 2017	7.68	4.27	2.40 %
1 January 2018	7.49	4.17	2.40 %
1 April 2018*	7.31	4.07	2.40%

*) In the reference period (November 2016 – October 2017) that is relevant for calculating the degression, the gross new-build – i.e. the gross capacity added – had already reached 3,520 MW at the end of June, which is why the highest level of 2.4% again applies on 1 April 2018.

The RES Act 2017 introduced an additional degression level of 2.4% for situations in which the gross new wind energy capacity built in the reference period (6th to 17th month before the reference date) exceeds 3,500 MW. For example, the gross new-build in the period from November 2016 to October 2017 is used as the basis for calculating the degression level from 1 April 2018 onwards.

Pursuant to Section 3 no. 14 of the RES Act 2017, the gross new-build in a reference period is calculated from the total of the installed capacity which has been *notified* to the register as being commissioned in this period.

In the assessment period for determining the degression level that applies from 1 October 2017, the gross new-build amounted to 4,676

MW, and thereby exceeded the expansion target set by law by more than 2,000 MW. This is why the degression value of 2.4% applies from October 2017.⁸⁶

Given the consistently high level of new capacity being added, it is already clear that the highest degression level will again apply on 1 January and 1 April 2018. This is because the gross new-build in the reference period serving as the basis for determining the degression level had already exceeded the threshold value of 3,500 MW after eight months. The resulting degression paths for the initial and basic values to be applied are illustrated in Figures 2 and 3.

From our current vantage point it appears likely that the highest degression level will also apply in the third and fourth quarters of 2018.

⁸⁶ cf. Federal Network Agency, press release of 31 May 2017; <https://www.bundesnetzagen->

[tur.de/SharedDocs/Pressemitteilungen/DE/2017/31052017_Foerdersaetze.html?nn=265778](https://www.bundesnetzagen-tur.de/SharedDocs/Pressemitteilungen/DE/2017/31052017_Foerdersaetze.html?nn=265778)

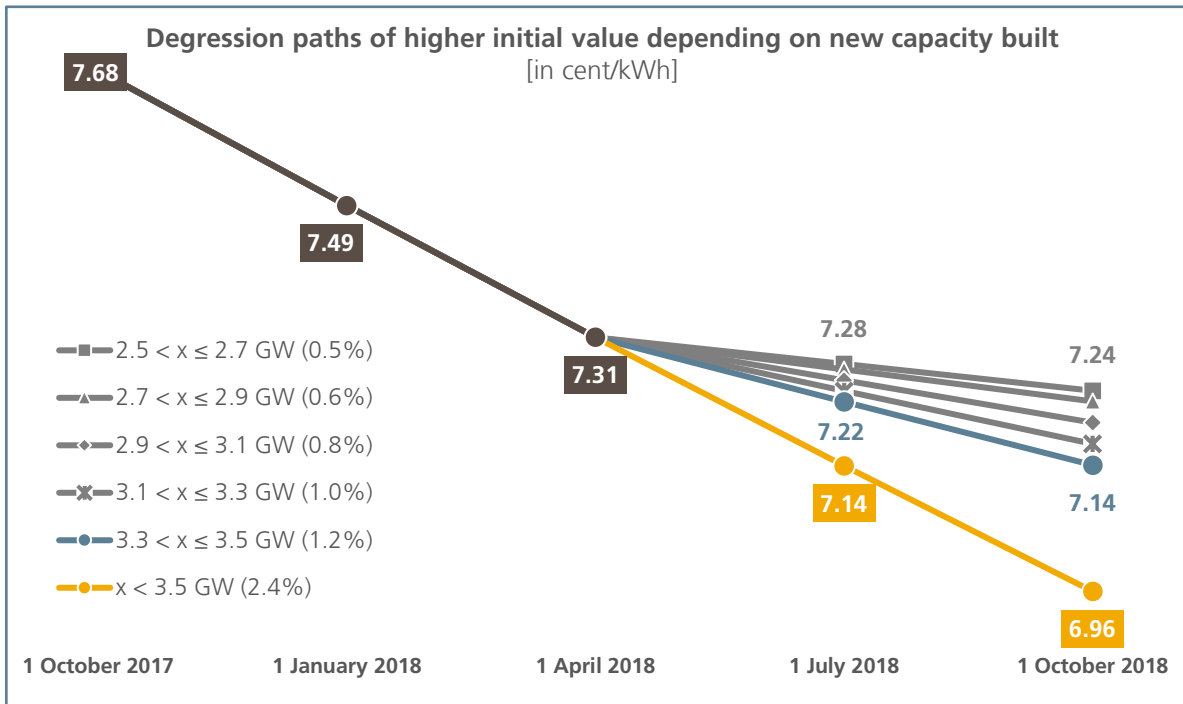


Diagram 2: Degression paths for higher initial value – depending on new capacity built – when claiming the statutory market premium; graphic: FA Wind

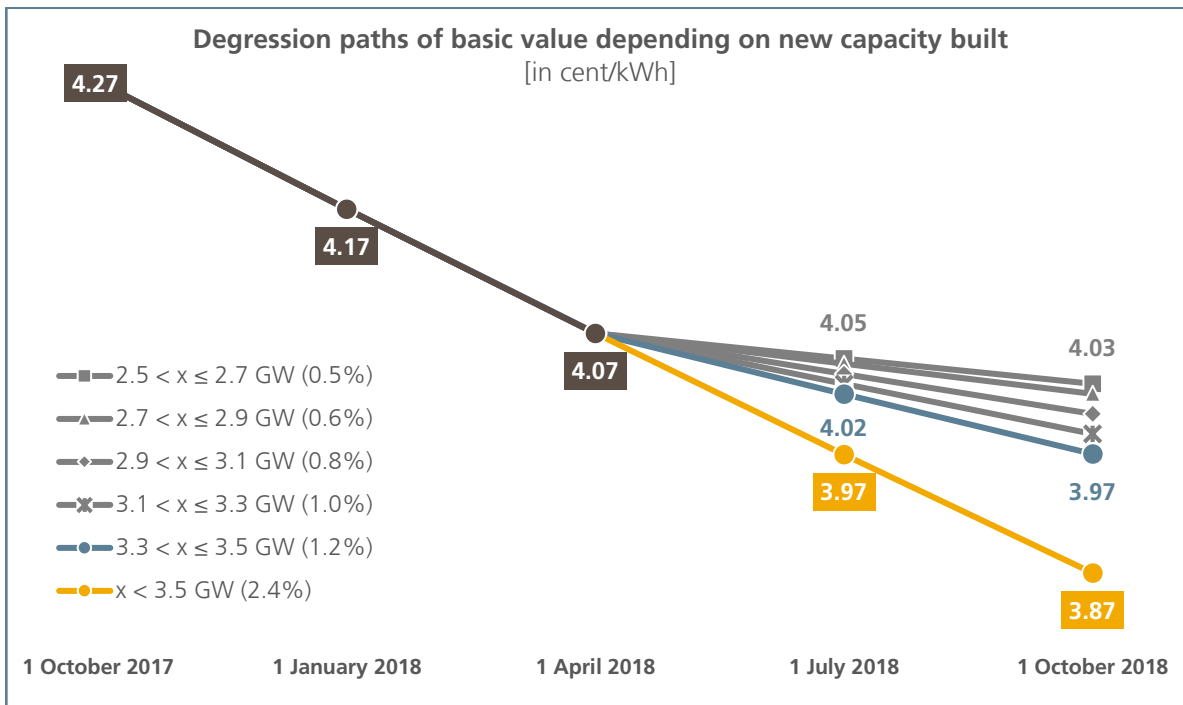


Diagram 3: Degression paths for basic value – depending on new capacity built – when claiming the statutory market premium; graphic: FA Wind

Illustrative example: calculating the new-build

Hypothesis: 350 MW of capacity are commissioned between 1 and 31 October, with 200 MW commissioned between 1 and 20 October and 150 MW between 21 and 31 October. Operators are required to notify the commissioning of the installation to the register within three weeks. In this example, installations that are commissioned between 21 and 31 October can be notified to the register in good time within the first three weeks of November. The capacity actually commissioned in October stands at 350 MW. Of these 350 MW, 200 MW are notified to the register within the calendar month. The gross new-build for October is 200 MW in this case, as only this amount of capacity was *notified* to the register within this calendar month. The amount of commissioned capacity notified to the register within the reference period, and not the capacity actually commissioned during this time, is what determines the gross new-build, which is authoritative for determining the degression level.

In the case of wind energy installations that are commissioned before 1 January 2019 and whose value to be applied is set by law, the site yield must be reviewed after 10 years of operation, but no later than one year before the extended initial remuneration ends (Section 46 (3) of the RES Act 2017). If the review finds that the initial remuneration ends before the time of the review, too much remuneration paid must be returned if the site quality deviates by more than 2 percentage points from the last quality to be calculated. If the actual site yield is below the yield for the preceding period, the duration of

the initial remuneration is extended accordingly. The rules set down in Section 46 (3) of the RES Act 2017 must be applied retrospectively for existing installations that have been commissioned since 1 January 2012 (Section 100 (1) sentence 3 of the RES Act 2017).

Installation operators are required to document the actual quality factor, in the form of an expert report, to the grid system operator within four months of the expiry of the review deadline (Section 36h (3) no. 2 of the RES Act 2017).

6.3.2 Legally regulated values to be applied from 2019 onwards

Onshore wind energy installations that are commissioned from 2019 onwards and are not required to take part in auctions receive the value to be applied that the grid system operator calculates from the average of the bid values of the highest bid still awarded funding from the bid deadlines in the year before the preceding year (Section 46b (1) of the RES Act 2017). This means that from 2019 onwards the legally regulated values to be applied will also correspond to the values identified in the auction procedure. While this rule releases small-scale installations and pilot wind energy installations from the obligation to obtain the payment entitlement by auction, the level of fund-

ing is, however, based on the average value determined in the auction process. From this time onward no distinction will be made between the higher initial value and the basic value. Instead, there will be one consistent value to be applied over the entire funding period which is adjusted to the specific site quality according to the single-phase reference yield model in Section 36h of the RES Act 2017.

This rule only applies to new installations with a specific electrical capacity of 750 kW and pilot wind energy installations, wherein the scope of research installations is limited to a total capacity of 125 MW per year.

6.4 Funding period

Wind energy installations that are not bound by an award in the auction-based system are entitled to funding for a period of 20 years up

until 31 December of the 20th year (Section 25 sentence 2 of the RES Act 2017).

7. Dates and deadlines in the RES Act 2017

Important dates and deadlines in the 1st half year of 2017

JANUARY 2017						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

Note: The information in the calendar is purely indicative. The legal regulations and the deadlines announced by the Federal Network Agency are authoritative.

The calendar does not claim to be accurate or exhaustive.

1 January 2017: The Renewable Energy Sources Act (RES Act) 2017 enters into force. The legally established values to be applied are reduced to 8.38 cent/kWh (initial value) and 4.66 cent/kWh (basic value), Section 46 subsections 1, 2 of the RES Act 2017.

31 January 2017: Deadline for notification of approvals granted by 31 December 2016 to the register of installations if the installations are to claim the market premium set by statute (rather than the market premium set through competition). (Notification deadline pursuant to the Ordinance on the Register of Installations: three weeks after the issuance of the approval)

FEBRUARY 2017						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28					

28 February 2017: Deadline for waiving the statutory market premium for installations that were approved before 1 January 2017 and will be commissioned before January 1 2019. A waiver must be sent to the Federal Network Agency in order to participate in auctions with such »interim installations«.

MARCH 2017						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

1 March 2017: Values to be applied reduced by 1.05 percent to 8.29 cent/kWh and 4.61 cent/kWh, respectively (Section 46a (1) of the RES Act 2017).

The ordinance stipulating the grid expansion area and the award upper limit enters into force on 1 March 2017 (Section 36c (2) of the RES Act 2017).

APRIL 2017						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

1 April 2017: Values to be applied reduced by 1.05 percent to 8.20 cent/kWh and 4.56 cent/kWh, respectively (Section 46a (1) of the RES Act 2017).

10 April 2017: Deadline for notification of approved installations to the register for which a bid is to be made in the 1st auction (on 1 May 2017), (Section 36 (1) no. 2 of the RES Act 2017).

MAY 2017						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

1 May 2017: Deadline for submission of bids for the 1st auction in 2017. As 1 May is a public holiday, the deadline is extended to 2 May 2017.

Values to be applied reduced by 1.05 percent to 8.12 cent/kWh and 4.51 cent/kWh, respectively (Section 46a (1) of the RES Act 2017).

JUNE 2017						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

1 June 2017: Values to be applied reduced by 1.05 percent to 8.03 cent/kWh and 4.47 cent/kWh, respectively (Section 46a (1) of the RES Act 2017).

Important dates and deadlines in the 2nd half year of 2017

JULY 2017						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

1 July 2017: Values to be applied reduced by 1.05 percent to 7.95 cent/kWh and 4.42 cent/kWh, respectively (Section 46a (1) of the RES Act 2017).

All notification obligations to the core market data register apply from 1 July onwards (Section 5 subsections 1, 5 of the Ordinance on the Core Market Data Register).

11 July 2017: Deadline for notification of approved installations to the register for which a bid is to be made in the 2nd auction (on 1 August 2017), (Section 36 (1) no. 2 of the RES Act 2017).

1 August 2017: Deadline for submission of bids for the 2nd auction in 2017.

Values to be applied reduced by 1.05 percent to 7.87 cent/kWh and 4.37 cent/kWh, respectively (Section 46a (1) of the RES Act 2017).

AUGUST 2017						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

SEPTEMBER 2017						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

1 September 2017: Ordinance on the Register of Installations ceases to be in force.

OCTOBER 2017						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

1 October 2017: Reduction in values to be applied depending on new capacity built (Section 46a (2) of the RES Act 2017) – reference period for level of degression: May 2016 to April 2017.

11 October 2017: Deadline for notification of approved installations to the register for which a bid is to be made in the 3rd auction (on 1 November 2017), (Section 36 (1) no. 2 of the RES Act 2017).

NOVEMBER 2017						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

1 November 2017: Deadline for submission of bids for the 3rd auction in 2017.

DECEMBER 2017						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

By 31 December 2017: Stipulation and publication of the distribution grid expansion areas and distribution grid components that apply for joint auctions for wind energy and solar installations up to and including April 1 2019 (Section 11 (1) of the Ordinance on Joint Auctions for On-shore Wind Energy and Solar Installations).

Important dates and deadlines in the 1st half year of 2018

JANUARY 2018						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

1 January 2018: Reduction in values to be applied depending on new capacity built (Section 46a (2) of the RES Act 2017) – reference period for level of depression: August 2016 to July 2017.

11 January 2018: Deadline for notification of approved installations to the register for which a bid is to be made in the 1st auction (on 1 February 2018), (Section 36 (1) no. 2 of the RES Act 2017).

FEBRUARY 2018						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28				

1 February 2018: Deadline for submission of bids for the 1st auction in 2018 - only bids for approved installations are permitted!

By 28 February 2018: Announcement of the volumes for pilot wind energy installations for which funding was awarded in 2017 and that are deducted from the volumes to be auctioned in 2018 (Section 28 (1a) sentence 3 of the RES Act 2017).

MARCH 2018						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

11 March 2018: Deadline for notification of approved installations to the register for which a bid is to be made in the 1st joint auction (on 1 April 2018), (Section 3 of the Ordinance on Joint Auctions for Onshore Wind Energy and Solar Installations in connection with Section 36 (1) no. 2 of the RES Act 2017).

APRIL 2018						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30						

1 April 2018: Reduction in values to be applied depending on new capacity built (Section 46a (2) of the RES Act 2017) – reference period for level of depression: November 2016 to October 2017.

Deadline for submission of bids for the first joint auction (wind and solar energy installations) in 2018.

10 April 2018: Deadline for notification of approved installations to the register for which a bid is to be made in the 2nd auction (on 1 May 2018), (Section 36 (1) no. 2 of the RES Act 2017).

MAY 2018						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

1 May 2018: Deadline for submission of bids for the 2nd auction in 2018 - only bids for approved installations are permitted! As 1 May is a public holiday, the deadline is extended to 2 May 2018.

JUNE 2018						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

No dates/deadlines

Important dates and deadlines in the 2nd half year of 2018

JULY 2018						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

1 July 2018: Reduction in values to be applied depending on new capacity built (Section 46a (2) of the RES Act 2017) – reference period for level of degression: February 2017 to January 2018.

11 July 2018: Deadline for notification of approved installations to the register for which a bid is to be made in the 3rd auction (on 1 August 2017), (Section 36 (1) no. 2 of the RES Act 2017).

AUGUST 2018						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

1 August 2018: Deadline for submission of bids for the 3rd auction in 2018.

SEPTEMBER 2018						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

10 September 2018: Deadline for notification of approved installations to the register for which a bid is to be made in the 4th auction (on 1 October 2018), (Section 36 (1) no. 2 of the RES Act 2017).

OCTOBER 2018						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

1 October 2018: Deadline for submission of bids for the 4th auction.

Reduction in values to be applied depending on new capacity built (Section 46a (2) of the RES Act 2017) – reference period for level of degression: May 2017 to April 2018.

11 October 2018: Deadline for notification of approved installations to the register for which a bid is to be made in the 2nd joint auction (on 1 November 2018) (Section 3 of the Ordinance on Joint Auctions for On-shore Wind Energy and Solar Installations in connection with Section 36 (1) no. 2 of the RES Act 2017).

NOVEMBER 2018						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

1 November 2018: Deadline for submission of bids for the second joint auction (wind and solar energy installations) in 2018.

DECEMBER 2018						
Mon	Tues	Wed	Thurs	Fri	Sat	Sun
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

31 December 2018: Deadline for the commissioning of installations applying the transitional rules of Section 22 (2) no. 2 of the RES Act 2017 (market premium set by statute instead of participation in auctions).

By December 31 2018: Publication of the value to be applied in 2019 in the case of support set by statute pursuant to Section 22 (6) of the RES Act 2017.

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