



The promotion system for renewable energy sources in Germany - basic principles and its correction needs

M A S L A T O N

Rechtsanwaltsgesellschaft mbH

Leipzig · Munich · Cologne

Hinrichsenstraße 16, 04105 Leipzig, Germany

lawyer Dr. Martin Maslaton, specialised in administrative law,

assistant lecturer (law of renewable energy sources)

TU Chemnitz / TU Bergakademie Freiberg

www.maslaton.de



Structure

I. Introduction

II. Aspects of planning law concerning choice of location in the external area

- 1. **Basic principle**
- 2. **Privileged element according to § 35 section 1 number 5 Building Code**
- 3. **Privileged element according to § 35 section 1 number 6 Building Code**
- 4. **Missing privilege for photovoltaic plants**
- 5. **Deconstruction duty according to § 35 sentence 2 Building Code**
- 6. **Situation of remuneration**

III. The Renewable Energy Sources Act (EEG)

- 1. **Purpose**
- 2. **Scope of application**
 - a) **Obligation to connect plants and purchase electricity of energy supply companies, §§ 4,5 EEG**
 - b) **size of remuneration, §§ 6-11 EEG**
 - c) **distribution of grid costs, § 13 EEG**
- 3. **Problems in practise**

IV. Suggestions for a solution for New Zealand

V. Summary



www.maslaton.de

I. Introduction



www.maslaton.de

I. Introduction

The use of renewable energy sources has experienced a huge increase during the last years in Germany.

Material to this development was particularly the creation of some adequate legal basic conditions to reach the European goals of climate protection, both regarding planning law and obtaining competitiveness with ordinary energy sources.

Therefore, the Renewable Energy Sources Act (EEG), as the central regulation for the support of renewable energy sources, as well as the Building Code, that standardizes all important questions concerning the choice of location, are of a great importance.



www.maslaton.de

II. Aspects of planning law concerning choice of location in the so called external area

II. Aspects of planning law concerning choice of location in the so called external area



www.maslaton.de

Until plants for the use of renewable energy sources – no matter what kind – can be realised, the question of a possible location has to be settled.

Relating to this, the most important set of rules in Germany is the so called Building Code. At first, it distinguishes between different areas of organisation. These are:

- areas with building plans: that means all areas, for which specific plans concerning the structural use on the part of the local authority are available,
- the internal area, that means all areas, which are build in connection and
- the external area, that means all areas, which are build in connection and for which no plans are existing.

The external area – beside of B-plan-areas - is of significant importance for the use of renewable energy sources.

II. Aspects of planning law concerning choice of location in the so called external area



www.maslaton.de

1. Basic principle

Following the concept of the legislator, the external area – missing municipal planning – has to be free of any kind of buildings. Meanwhile, some special projects are dependent on the fact to be constructed in the external area because of their specific qualities.

Such projects are permissible in the external area according to § 35 section 1 Building Code if nothing of public importance stands in their way. They assert themselves regularly against other things of public importance, they are consequently permissible in a privileged way .

Concerning the use of renewable energy sources, the legislator has standardised such a privilege for:

- wind-driven power stations (§ 35 section 1 number 5 Building Code)
- biomass plants (§ 35 section 1 number 6 Building Code).

II. Aspects of planning law concerning choice of location in the so called external area



www.maslaton.de

2. The privileged element according to § 35 section 1 number 5 Building Code

According to § 35 section 1 number 5 Building Code wind-driven power stations in the external area are permissible if

- nothing of public importance stands in their way and
- their tapping is ensured.

In these areas, an “allocation similar to the plan” of plants to the external area takes place (Federal Administrative Court, decision of 25 October 1967, 4 C 86.66) through the Federal legislator itself.

Wind-driven power stations in the external area are consequently permissible in a privileged way.

II. Aspects of planning law concerning choice of location in the so called external area



www.maslaton.de

3. The privileged element according to § 35 section 1 number 6 Building Code

According to § 35 section 1 number 6 Building Code biomass plants in the external area are permissible if

- the project is spatial and functional connected to a farm of a forestry,
- the used biomass is taken from the farm/forestry or from farms/forestries next to the plant,
- per farmyard or company location only one plant is carried on
- the electrical capacity does not exceed 0,5 MW.

II. Aspects of planning law concerning choice of location in the external area



www.maslaton.de

3. The privileged element according to § 35 section 1 number 6 Building Code

Despite the desirable privilege of biomass plants, it is currently in numerous ways too limited and inconsistent:

- The rule limits the privilege to only one plant per farm/forestry and excludes to economically appropriate possibilities to run several (and also different) plants. But it can be of practical sense to run several different plants (biomass plants, block-type thermal power stations with rape oil and bio diesel as its basic, heating systems with straw, grain or wood as its basic) because of the numerous ways how to use biological energy.
- The requirement of a functional connection of the plant to a farm/forestry hinders operators in searching a location for their plant, where biomass is logistically available.

II. Aspects of planning law concerning choice of location in the external area



www.maslaton.de

3. The privileged element according to § 35 section 1 number 6 Building Code

Despite the desirable privilege of biomass plants, it is currently in numerous ways too limited and inconsistent:

- The restrictions of the privilege to plants with an electrical capacity of up to 0,5 MW proves themselves to be a big problem. Consequently, nearly all capability of development is taken away from the generation of energy out of biomass in the external area. The capacity of a plant is no meaningful criteria concerning intensity of demands of the external area, because it is at least imaginable that, with a progressive technical development, plants will arise, which are similar in their form and size to our plants today, but which can produce more energy.

II. Aspects of planning law concerning choice of location in the external area



www.maslaton.de

4. Missing privilege for photovoltaic plants

The missing of an own privileged element for photovoltaic plants proofs itself to be extremely unsatisfactorily.

Photovoltaic plants are currently only permissible in the external area if nothing of public importance is spoiled which will hardly be the case.

The German legislator thinks that the potential of photovoltaic plants is limited to only a small kind of use and to buildings.

This is based on the incorrect idea that an extensive use of solar energy means an inevitable and wide-spread sealing of natural areas. But modern solar modules are able to limit the necessary sealing of natural areas to a minimum so that it is possible to run them without a wide-spread influence to landscape and nature.

II. Aspects of planning law concerning choice of location in the external area



www.maslaton.de

5. Deconstruction duty according to § 35 section 5 sentence 2 Building Code

In § 35 section 5 sentence 2 Building Code you can find a deconstruction duty after the definitive end of use as the precondition to the authorisation of projects in the external area. Relating to this the authorisation department can demand appropriate security.

On the one hand a deconstruction duty, which means the greatest possible care for the external area, has to be welcomed, but on the other hand the German way of realisation is partly questionable:

- The deconstruction duty should only arise if no other good-natured way of using the project in the external area is possible.
- The missing standardisation of rules for the security allows the department to work in great parts in their own. That is why unified and foreseeable administrative channels are not existing.



www.maslaton.de

III. The Renewable Energy Sources Act (EEG)



www.maslaton.de

III. The Renewable Energy Sources Act (EEG)

1. Purpose

The importance of energy generated for renewable energy sources has increased constantly during the last years. At first, a legal regulation was fixed in the so called “Stromeinspeisegesetz” (StrEG). Unfortunately, this was not only limited to renewable energy sources so that it had caused considerable lacks of clarity in its use. At 01.04.2000 the Act on granting priority to renewable energy sources (EEG) came into force as the successor of the “Stromeinspeisegesetz”. Its purpose is written down in § 1 EEG:

According to this, the intension of the legislator is “to facilitate a sustainable development of energy supply, particularly for the sake of protecting our climate, nature and the environment, to reduce the costs of energy supply to the national economy, also by incorporating long-term external effects, to protect nature and the environment, to contribute to avoiding conflicts over fossil fuels and promote the further development of technologies for the generation of electricity from renewable energy sources.”



III. The Renewable Energy Sources Act (EEG)

2. Scope of application

The EEG does not regulate the relationship between energy supply companies and the state but to the grid operators. It regulates particularly and in detail:

- a) the obligation to connect and purchase energy (§§ 4,5 EEG),
- b) the concrete size of remuneration concerning all different kinds of generation (§§ 6-11 EEG) and
- c) the distribution of grid costs between energy supply companies and grid operators (§ 13 EEG).

The act is only applicable to renewable energy sources according to the EEG. They are given in § 3 section 1 sentence 1 EEG:

“Renewable energy sources shall mean hydropower including wave power, tidal power, salt gradient and flow energy, wind energy, solar radiation, geothermal energy, energy from biomass including biogas, landfill gas and sewage treatment plant gas as well as the biodegradable fraction of municipal and industrial waste.”



III. The Renewable Energy Sources Act (EEG)

2. Scope of application

a) Obligation to connect plants and purchase energy of energy supply companies (§§ 4,5 EEG)

Central regulations of the EEG are §§ 4 and 5, which are laying down the obligation to connect plants and purchase energy of energy supply companies. Most of the people think that this is a statutory obligation. Obligation to connect and purchase means:

- the energy supply company has to connect the plant to the grid at the nearest junction,
- the electricity generated from renewable energy sources has to be purchased as a matter of priority and
- the grid operator has to convert its grid if this is economically reasonable.



III. The Renewable Energy Sources Act (EEG)

2. Scope of application

b) Size of remuneration, §§ 6-11 EEG

According to the EEG, the grid operator is obliged to pay for the electricity as laid down in the sentences of §§ 6-11.

- The size of remuneration depends on the kind of electricity generated. This distinction between the different kinds of regenerative energy generated can be explained with the considerable economic differences because of the technical development.
- Furthermore, single rules are lowering the remuneration depending on the quality of the electricity generated, that can be attributed as well as for economic reasons.



www.maslaton.de

III. The Renewable Energy Sources Act (EEG)

2. Scope of application

b) Size of remuneration, §§ 6-11 EEG

According to the EEG, the grid operator is obliged to pay for the electricity as laid down in the sentences of §§ 6-11.

- Finally, the remuneration is lowered annually (so called depression) from a special point in time onwards (often the 01.01.2005, but § 9 section 2 EEG regulates the 01.01.2010 as important for geothermal energy). This should take the lasting technical development of processes and connected increase of economy into account and should lead to more efficiency of plants.



III. The Renewable Energy Sources Act (EEG)

2. Scope of application

c) Distribution of grid costs, § 13 EEG

§ 13 EEG regulates the question who has to bear the costs that arise from the connection of a plant to the grid. The following principle is current:

- **§ 13 section 1 sentence 1 EEG : “The costs associated with connecting plants (...) to the technically and economically most suitable grid connection point (...) shall be borne by the plant operator.”**
- **§ 13 section 2 sentence 1 EEG: “The costs associated with upgrading the grid (...) that solely result from the need to accommodate new, reactivated, extended or otherwise modernised plants (...) for the purchase and transmission of electricity (...) shall be borne by the grid system operator...”**



III. The Renewable Energy Sources Act (EEG)

3. Problems in practise

Also the EEG has established itself as an important promotion tool for the extension of the use of renewable energy sources, there are numerous problems of application in practise:

- The legal regulation for the definition of grid extension and grid connection proves itself to be inadequate as far as it is adjusted to the distribution of property of plants because grid operators are moving on to communicate the property to plant operators to avoid costs.
- Consequently, more (parallel) and unnecessary cables have to be laid for every new connection of a plant into the environment, what causes economically unnecessary additional costs.



III. The Renewable Energy Sources Act (EEG)

3. Problems in practise

Also the EEG has established itself as an important promotion tool for the extension of the use of renewable energy sources, there are numerous problems of application in practise::

- For many points there are problems and disputes concerning interpretation. Some relevant points are:
 - the question, how the amended EEG could be used completely to translate an older plant into a legally new one through enlargement (particularly the kind and the time-related extent of the renewable)
 - the question which materials are belonging to the renewable resources (for the use in biomass plants) according to § 8 section 2 EEG and which have to be paid by the so called "NawaRo-Bonus" when they are used exclusively.

III. The Renewable Energy Sources Act (EEG)



www.maslaton.de

3. Problems in practise

Also the EEG has established itself as an important promotion tool for the extension of the use of renewable energy sources, there are numerous problems of application in practise:

- For many points there are problems and disputes concerning interpretation. Some relevant points are:
 - the question how the innovation bonus for the use of special techniques at combined plants has to be paid (for the entire electricity or only for the qualified part of the plant).



www.maslaton.de

III. The Renewable Energy Sources Act (EEG)

3. Problems in practise

Also the EEG has established itself as an important promotion tool for the extension of the use of renewable energy sources, there are numerous problems of application in practise:

The biggest part of the grid operators who are working at the young market of renewable energy sources are leading small and middle-sized companies.

For them, the economic expenses for the creation of a plant are an extreme economic risk, which they will only accept if they could plan with a guaranteed future concerning possible remuneration.

Because of this, it is extremely important to define clearly possible elements of promotion.



III. The Renewable Energy Sources Act (EEG)

3. Problems in practise

Also the EEG has established itself as an important promotion tool for the extension of the use of renewable energy sources, there are numerous problems of application in practise:

- The remuneration for the regulation of the innovations bonus for biomass plants proves itself to be difficult because a higher remuneration has to be paid for the use of special technologies.
- Unfortunately, some technologies are pushed back due to the lack of promotion because they are not mentioned to be “special” even though they are just as effective.
- In these cases it should be recommended to resume the additional promotion with general characteristics, such as an average degree of effectiveness, to avoid one-sided technical developments.



www.maslaton.de

IV. Suggestions for a solution for New Zealand



www.maslaton.de

IV. Suggestions for a solution for New Zealand

From all the things mentioned, some suggestions for an own legal regulation for the law of renewable energy sources in New Zealand can be deducted. Attention should be paid in particular to the facts that:

- limits concerning the planning law to the permissibility of plants should only stop negative effects of plants, possible positive technical developments should be considered sufficiently,
- the use of photovoltaic should consequently not be limited to parts integrated into a building,
- possible promotion elements should be formulated as concrete and finally as possible to ensure planning security to potential investors,
- the potential conflict between grid operators and energy supply companies should be regulated legally in consideration of economic imbalances.



www.maslaton.de

V. Summary



www.maslaton.de

V. Summary

The extreme extension of the use of renewable energy sources in Germany during the last years could be attributed to favourable legal frame conditions.

Currently, they are required to ensure particularly the competitiveness of ordinary kinds of generated energy.

Regarding to the planning law, potential effects of plants have to be taken into consideration in an adequate way. According to the current legal situation, this has happened in an inadequate way. The missing of a privilege for photovoltaic plants as well as numerous limits of the privileged element for biomass plants, where it is almost not possible to give the reduction of use of the external area, are not able to convince anyone.

V. Summary



www.maslaton.de

Plants for the generation of electricity from renewable energy sources are built and run by small and middle-sized companies at the current development stage.

For these companies, the economic expenses are a great economic weight and a high risk.

They will only invest money into their plants if this pays for itself.

An important precondition for such a planning are clear rules. The legislator should therefore be obliged to formulate possible elements of promotion in a final way.



**Thank you very much for your
attention!**

M A S L A T O N

Rechtsanwaltsgesellschaft mbH

Leipzig · Munich · Cologne

Hinrichsenstraße 16, 04105 Leipzig, Germany

lawyer Dr. Martin Maslaton, specialised in administrative law,

assistant lecturer (law of renewable energy sources)

TU Chemnitz / TU Bergakademie Freiberg

www.maslaton.de