International Briefing

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Editorial

Dear Reader,

We are very pleased to present the first edition of our International Briefing. This regular briefing will provide a broad overview of current legal developments, combining sector specific news and general trends that we consider relevant for our international clients doing business or acquiring companies in Germany.

This briefing contains articles on energy and medical law developments, as well as data protection in the context of M&A transactions.

We hope you enjoy this update.

Best regards,

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Content

I. Energy Law: The German Electricity Market Act

The new German Electricity Market (StrommarktG) entered into force end of July 2016 and six months into its existence we would like to give an overview of its most important features. The draft bills had been tabled in Autumn 2015 and were the subject of much debate. These discussions focused on the conditions for the withdrawal from lignite-based generation and remuneration for redispatch measures, as well as complex regimes for capacity and grid reserves and related cost issues. Various last minute amendments were introduced late in the legislative procedure in response to some of the issues raised by industry.

Strengthening the security of supply and of the system

The Electricity Market Act introduced various mechanisms into the German Energy Act (*Energiewirtschaftsgesetz*, EnWG) designed to strengthen the security of supply. The transmission system operators' (TSO) tasks have become even more complex and detailed with respect to their responsibilities for the electricity system. TSOs are now largely responsible for establishing and using capacity and grid reserves. The latter is made up of those power plants that are to be decommissioned, but have been deemed system-relevant; this was previously called the power plant reserve and was regulated by the German Reserve Power Plants Ordinance (*Reservekraftwerksverordnung*) (section 13d EnWG). This grid reserve will now be maintained beyond the period originally intended in order to cover network congestion problems and ensure the operational security of the network. At the same time, the German Reserve Power Plants Ordinance has become the German Grid Reserve Ordinance (*Netzreserveverordnung*).

The Electricity Market Act also introduces a capacity reserve (section 13h EnWG), which applies when there are shortages in supply at the electricity exchange, despite the fact that price formation is unregulated. In addition to existing generating capacity, supplementary generating capacity will be maintained outside of the electricity market and utilised where necessary. TSOs will procure this capacity in a competitive tendering procedure. Details will be laid down in the new German Capacity Reserve Ordinance (*Kapazitätsreserveverordnung*), which has not entered into force yet.

Other measures

The Electricity Market Act also introduces so-called units for grid stability (section 13k EnWG). This provision was a last minute addition to the Act. Grid stability units will ensure that TSOs have sufficient grid stability unit services available, in particular redispatch measures, to fall back on during the transition period between nuclear power phase-out and the completed grid expansion. Existing lignite-

fired power plants will be used to create a security reserve. Accordingly, as of 1 October 2016, (certain) lignite-fuelled plants will gradually be put in standby mode (section 13g EnWG) and used to ensure electricity supply in unpredictable circumstances, such as extreme weather conditions. From 2020 on, those coal-fired power plants will be decommissioned. The operators of such power plants will receive remuneration for their willingness to put the plant in standby mode and for the subsequent closure. The European Commission has also approved the underlying financial aid scheme.

New regulation for redispatch remuneration

Section 13a EnWG now provides an independent regulation for the remuneration of redispatch services. This issue which was the subject of much debate during the legislative process. Section 13 EnWG establishes the principle that remuneration for redispatch measures is reasonable if it does not put the operator of the requested plant in a better or worse position economically than the operator would have been without the measures. In particular, remuneration will cover actual generation expenses and pro-rata depreciation, as well as potential lost proceeds to the extent that these exceed the sum of actual generating expenses and pro-rata depreciation. Expenses necessary for the creation of operational availability or the postponement of a planned revision may also be compensated. In general, however, costs may only be reimbursed if they are caused by the respective redispatch measure. Any costs beyond those set out above, which the operator would have to bear even without a redispatch request, in particular interest for tied-up capital will not be compensated. The amendment applies retroactively to all redispatch measures taken after 1 January 2013, unless remuneration under these new rules would put plant operators in a worse situation than they are in with the level of remuneration that TSOs actually paid for this period. It still remains to be seen whether the amendments have quelled all disputes about the reasonable remuneration of redispatch services.

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II. Renewable Energy Act (EEG 2017) and Combined Heat and Power Act (KWKG 2017): New Legislature introduces competitive bidding

On 8 July 2016, the German Parliament and the German Federal Council adopted an amendment to the Renewable Energy Act 2014 (*Erneuerbare-Energie-Gesetz*, EEG 2014). The new EEG 2017 introduces an auction scheme for renewable energy generation, in addition to other changes to the renewable energy regime. An entirely new Offshore Wind Energy Act (*WindSeeG*) also establishes an integrated approach to both planning procedures and reimbursement provisions.

Even before it entered into force on 1 January 2017, the EEG 2017 was subject to further amendments, especially regarding self-supply (a model of self-generation; self-consumption that may be privileged in terms of EEG cost bearing). This later legislative initiative also addressed the Combined Heat and Power Generation Act (*Kraft-Wärme-Kopplungsgesetz*, KWKG) and made a fundamental change to this reimbursement system, too.

Both renewed acts entered into force on 1 January 2017.

1. Renewable Energy Act (EEG 2017)

Background

The EEG 2017 (and the WindSeeG for offshore wind installations) introduces a competitive tendering scheme for the reimbursement of electricity generation from wind, solar energy and biomass. The law determines the volumes of installed generation capacity, depending on the type of technology used. This quality control mechanism links grid expansion with the expansion of renewable energy generation capacity under the EEG, together with new rules on power-to-heat, on regional regulation and on energy storage technologies.

A closer look on a variety of new rules

First cross-technology approach

At the European Commission's insistence, there will be two new tender categories as an exception to the general rule of technology specific tendering. First, there will be joint tenders for onshore wind installations and solar installations pursuant to section 39i EEG 2017. Each year, 400 MW will be tendered; a statute adopted in line with section 88c EEG 2017 will establish the necessary modalities. Second, there will be tenders for all types of renewable technologies – initially for an annual volume of 50 MW – for installations that are particularly innovative or serve the system or the grid. A statute will be adopted under section 88d and will set out the details of tenders for such innovations, pursuant to section 39j EEG 2017.

Gradual reductions for onshore wind energy exempted from tender scheme

New onshore wind installations are not subject to the tender requirement for a transitional period. The original draft law proposed a one-off reduction of 5% of the assumable value, but this proposal was later discarded in favour of a progressive reduction in six steps of 1.05% each. As a result, the burden for new plants in accordance with section 46a EEG 2017 will be even higher. Various actors have raised the possibility of bringing legal proceeding based on constitutional law about this issue.

Good and bad news for Power-to-X Solutions

Amendments were also made to the new regulation, which allows TSOs to contract with CHP-operators for the withdrawal of electricity from the grid in order to avoid congestion (section 13 (6a) EnWG). This provision is now more restrictive, as the respective CHP-plant must be situated in a grid expansion area pursuant to section 36c EEG

2017. However, there is room for increased flexibility in the future: should it not be possible to withdraw electricity by approx. 2 GW, a statute will be immediately implemented with respect to expansion to other Power-to-X technologies.

New Hardship Scheme for large electricity-consuming enterprises

Section 64 (1) lit. a) EEG 2017 introduces a new hardship scheme to complement the special equalisation scheme ("*Besondere Ausgleichsregelung*"). This new scheme provides that companies, which have an electricity cost intensity exceeding 17% must only pay 20% of the EEG surcharge, instead of the full amount.

Tenant electricity schemes

New section 95 (1) No. 2 EEG 2017 allows for the introduction of so-called tenant electricity schemes. Such schemes allow operators of solar installations to only pay a reduced EEG surcharge for their electricity, even if the solar power is generated in connection with a residential unit and consumed by third parties. Such third party supplies are now dealt with in the same way as the self-supply models that are currently privileged.

Self-supply and electricity storage

As the Federal Government and the European Commission only reached an agreement on a self-supply system that complies with state aid provisions in August 2016, a separate legislative initiative was required to implement this system. The legislator focused on ensuring better harmonisation between the EEG and the KWKG regime.

Self-supply

The changes made to the self-supply regime are now spread throughout the EEG 2017. In comparison to EEG 2014, where the relevant rules could only be found in sections 3 no. 19 and 61, the new regime is governed by the provisions in sections 3 no 19, 43b, 44a as well as sections 61 to 61k EEG 2017.

Older self-supply installations have the option to increase installed capacity by up to 30 %; this option will expire on 31 December 2017.

The renewal or replacement of an existing self-supply installation after 31 December 2017 will also generally lead to the imposition of a reduced EEG-surcharge of 20%, providing that the installation and consumption sites, as well as the installed capacity, remain unaltered. Renewed or replaced installations must fulfil one of two rather restrictive conditions in order to benefit from a full discount (100%) of the EEG-surcharge.

Section 61f EEG 2017 now allows the privileges of an existing self-supply constellation to be kept where there is a change of operator due to inherited succession.

Section 104 (4) EEG 2017 now provides for a special "*Scheibenpachtmodelle*" (special model of apportionment of the position of installation operator). Such models may, where they were established before 31 July 2014, preserve their existing privileges on the condition that they remain unaltered and comply with special notification requirements before 31 May 2017.

Notification requirements and sanctions

The EEG 2017 also contains various notification requirements for consumers and self-suppliers (section 74a EEG 2017), as well as classic electricity suppliers (section 74 EEG). Non-compliance with these requirements will be penalised in accordance with sections 61g and 61k (4) EEG 2017, and section 61k (4) EEG 2017, respectively.

No discrimination against electricity storage

Section 61k (1) to (1c) EEG 2017 contains special provisions for operators of electricity storage facilities. In essence, the EEG-surcharge will only be imposed once. This privilege also applies where part of the re-electrified energy is not consumed by the storage operator but fed back into the grid.

2. Combined Heat and Power Act (KWKG 2017)

Implementation of auctions

According to section 5 (1) no. 2 KWKG 2017, all new or modernised CHP-installations with an electric capacity of between 1 MW and 50 MW must participate in the new tender scheme.

The annual volume of the capacity to be tendered is defined in section 8c KWKG 2017 (100 MW in 2017, 200 MW p.a. by 2021).

In general, installations that have been awarded such tenders may not take part in self-supply constellations under the EEG after their KWKG-award has expired.

Reduced KWKG-surcharge for energy intensive industries

According to section 27 KWKG, the KWKG-surcharge will be reduced on an annual basis, if the respective company shows that it met conditions for a reduced EEG-surcharge pursuant sections 63 (1), 64 EEG 2017 over the course of the year in question. The regime also applies retroactively for 2016.

Reduced KWKG-surcharge for electricity storage facilities

For the first time, the KWKG now contains a special provision granting a reduced KWKG-surcharge to electricity storage facilities. Section 27b (1) KWKG 2017 makes reference to section 61k EEG 2017 with regard to electricity that has been consumed for the purpose of intermediate storage in an electrical, chemical, mechanical or physical storage facility.

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III. European Court of Justice: Price Maintenance for Prescription Drugs Is Unlawful

The European Court of Justice has ruled that the German regulation providing for standardised pharmacy sales prices for prescription drugs constitutes an unjustified limitation of the free movement of goods, and thus infringes EU law.

European Court of Justice (ECJ), Judgment of 19 October 2016 in Case C-148/15 Deutsche Parkinson Vereinigung e.V. v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.

Facts of the case

For more than ten years, various cases on the issue of price maintenance for prescription drugs had been brought before the courts at different level of jurisdiction. These disputes often involved foreign internet pharmacies, which supply medicinal products to Germany. In August 2012, the Joint Senate of the Supreme Courts of Germany decided that the German law on price maintenance for prescription drugs also applied to foreign pharmacies (file ref. GmS-OGB 1/10).

The ECJ was asked to rule on the fundamental question of whether German prescription drug pricing law also applies to foreign drug suppliers that deliver prescription drugs to customers in Germany.

Judgment of the Court

The ECJ held that the German regulation, which provides for a standardised pharmacy sales price for prescription drugs, violates EU law.

In reaching this position, the Court pointed out that the consolidation of standardised sales prices would have a much greater impact on foreign than on domestic pharmacies. In this way, products from other EU Member States would face greater impediments when accessing the German Market than are faced by domestic products. For foreign pharmacies, the mail order trade is a far more important and in some cases even the only means of direct access to the German market. Moreover, price competition could even play a more significant role for mail order businesses than it does for traditional pharmacies, the latter usually finding it easier to ensure emergency care and have local staff on site to advise customers.

The Court generally acknowledges that the protection of health and life may justify a limitation of the free movement of goods. Price maintenance, however, would not adequately achieve these targets. There is no evidence that the determination of standardised prices ensures a better geographic distribution of pharmacies in Germany. The Court even assumes that more price competition among pharmacies would further the steady supply of medications, as it would encourage the establishment of pharmacies in regions where higher prices could be charged due to the small number of pharmacies.

Assessment

The ECJ's judgment results in a situation where foreign drug suppliers, marketing their pharmaceutical products via the Internet, may grant discounts while German pharmacies remain bound by standardised sales prices for prescription drugs.

This has triggered strong reactions from the public. German pharmacists have strongly criticised the judgement and stressed that such differential treatment could endanger their very existence.

Initial Government responses considered prohibiting the mail order trade in prescription only drugs. This proposal is currently a source of fierce debate. It is not yet clear, whether and how the legislator will react.

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IV. Data Protection in M&A Transactions

Violations of data protection rights are not merely trivial, but are administrative offences, punishable by a fine of up to EUR 300,000 pursuant to section 43 BDSG (German Federal Data Protection Act) or imprisonment for up to 2 years (section 44 BDSG). This was made clear recently by the Bavarian data protection authority (Bayerisches Landesamt für Datenschutzaufsicht, BayLDA), which imposed five-digit fines on both the seller and the purchaser involved in an asset deal because customer email addresses had been sold without the customers' consent.

Basic considerations regarding data protection

The BDSG provides in section 4 (1) that the processing of personal data is lawful only if it is permitted by the Act or another law, or if the data subject has provided their consent. As far as an M&A transaction is concerned, section 28 BDSG is the only provision in the Act that could conceivably provide such authorisation. Pursuant to section (1), first sentence, No. 2 BDSG, the processing of personal data is permissible only to the extent that it is necessary to safeguard the legitimate interests of the controller (here the seller) and there is no reason to assume that the data subject has an overriding legitimate interest in excluding the transfer (here probably the employee or the customer). Section 1, first sentence, No. 2 BDSG allows the transfer of personal data to proceed to the extent that this transfer is necessary to safeguard the legitimate interests of a third party (here the acquirer) and there is no reason to assume that the subject of the data has any legitimate interest in excluding the transfer of said data. A

transfer is only necessary if the legitimate interest cannot otherwise be safeguarded at all or not adequately.

As far as the acquisition or sale of a company is concerned, it will often not be practical to reach a works council agreement or obtain consent from the data subject in order to legitimate the transfer of data, because such procedures normally require disproportionate efforts on the part of the companies involved. This will particularly be the case where confidentiality is paramount and makes the disclosure of the M&A project impossible from the outset.

The 3 phases of a company acquisition

In terms of data protection, a company acquisition can usually be divided into three phases: (1) the disclosure of personal data with regard to the target within the context of a due diligence review ("DD"); (2) the provision of personal data after signing (conclusion of asset or share deals), in preparation for closing (execution of purchase agreement); and (3) the final transfer of all personal data within the framework of closing.

Data protection in the context of a due diligence review

During a DD review, the seller has an interest in being transparent and transferring personal data in order to obtain the highest possible purchase price and avoid any related guarantee in the sale and purchase agreement. The acquirer has an interest in obtaining an accurate picture of the target company in order to properly assess the risks of the purchase. These interests may conflict with the interests of the data subjects, especially those of employees and customers. In such circumstances it should be considered whether anonymisig all of the personal data that is transferred would meet the interests of the acquirer and the seller. Although the specifics of each case must be considered separately, as a general rule, in the context of the DD, the acquirer should only be provided with personal data, which has a direct and significant impact on the value of the target company. In the case of doubt, it is always preferable to transfer data in an anonymised form or using pseudonyms. Customer contracts should only be made available in an anonymised form or with the strict use of pseudonyms. The disclosure of identities to the acquirer will only be justified in absolutely exceptional cases.

Data protection before closing

At this stage, it is already clear that particular assets or shares will be transferred to the acquirer. Accordingly, the legitimate interests of seller and acquirer are no longer concerned with being able to make a realistic assessment of the target company's value and the involved risks, but are primarily focused on ensuring that the transition goes as smoothly as possible. This includes, for instance, taking actions to prepare for the integration of the target into the group structure of the acquirer or to transfer customer data so that those customers can be fully served immediately after the takeover. In principle, the acquirer has a legitimate interest in the preparation and consolidation of business processes, giving rise to the right to transfer the personal data necessary for this purpose. However this will not be the case where special personal data, e.g. health data, are involved. Therefore, for example, the seller might have the authorisation to disclose the names of the employees with important key positions within the company, but the transfer of the entire employee records, including the information concerning medical leave, would only be admissible after closing.

Data Protection at Closing

As far as the data protection rules are concerned, a distinction must be made on the basis of the legal structure used for the purchase of the company or part thereof.

In an asset deal, the assets and contractual relationships are transferred by way of a singular succession from the target company to the acquirer. In this case, the acquirer remains in the position of a "third party" (within the meaning of the German Federal Data Protection Act) during the entire process, because, even when part of a company group, every enterprise must be considered as an independent controller. Accordingly, the transfer of data is only permissible if the data subjects have given their explicit consent or if it is permissible under statute. In any case, the transfer of a contractual relationship requires the customer's consent; likewise, the transfer of personal data about customers in the context of an asset deal will normally require the customer's explicit consent. The same applies to the sale of customer data, where they are not so-called list data. The transfer of list data, which only contains the name and address of customers, is generally permissible under section 28 (3) BDSG. In contrast, in certain circumstances, an employment relationship will transfer by virtue of law. The transfer of employee data would therefore need to be assessed under section 613a BGB (German Civil Code). This allows the information necessary for the continuation of the employment relationship to be transferred to the new employer.

In the case of a share deal, personal data is not transferred to another legal entity but remains with the target company (universal succession). As there is no transfer of personal data between different legal entities, there is no action relevant under data protection law.

Summary

Data protection law-related implications should be reviewed in detail during the early stages of any M&A transaction. Failure to do so may result in administrative fines or criminal sanctions, or expose the parties to other risks, such as damage to reputation. Considering the fact that the General Data Protection Regulation, which applies from 25 May 2018, allows for the imposition of fines of up to EUR 20,000,000 or 4% of the worldwide turnover achieved during the preceding financial year in case of an enterprise, whichever is greater (see Article 83, Paragraph 5 and 6 GDPR), the economic risks involved will increase dramatically in the near future.

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V. About the Corporate / M&A practice group

Corporate

BEITEN BURKHARDT has been at the forefront of some fundamental corporate law developments, such as delistings and squeeze-outs. Our practical advice takes into account the economic aspects and provides creative solutions, without compromising on legal standards. BEITEN BURKHARDT advises listed corporations, companies and groups that are active on the international stage, medium-sized companies and family-owned partnerships. We establish and restructure companies and groups, develop stock option programmes, and provide support both during shareholders' meetings and in the case of disputes.

M&A

Mergers & Acquisitions has been a core area of expertise for BEITEN BURKHARDT since the establishment of the firm. We advise well-known listed companies, large and medium-sized companies and the public sector, as well as financial investors, on national and international mergers, public takeovers, company acquisitions or sales from private investors.

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