



BECKER BÜTTNER HELD

## The Legal Helpdesk

### Application Package

#### How to design tendering procedures for renewable electricity

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#### I. Introduction

On July 1, 2014, the new Guidelines for environmental and energy aid 2014-2020<sup>1</sup> (Guidelines) entered into force. As regards operating aid for renewable electricity, the Guidelines provide that the Member States - shall as a rule transition towards supporting such renewable electricity based on a competitive bidding process, where possible and at least in the longer term. Some Member States, such as the United Kingdom (UK) and Germany have already implemented such competitive bidding procedures into their national legislation. In February 2015, the UK has published the results of the first bidding round and Germany will hold the first round in April 2015. Poland has just introduced a new law as well, and France and Denmark for examples have already been using bidding procedures for certain technologies such as offshore wind.

However, such competitive bidding processes are relatively new and based on little experience in Europe, while there is some experience from e.g. the United States and Brazil. Studies suggest that their success generally depends on the concrete design features which need to meet the requirements of the specific market of a given country.<sup>2</sup>

It is therefore the purpose of this paper to discuss how the provisions of the Guidelines as regards operating aid to renewable electricity, i.e. competitive bidding processes, can be implemented in a meaningful way. Therefore, first the respective provisions of the Guidelines will be presented, and their applicability briefly explained. Then the UK

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<sup>1</sup> Official Journal (O.J.) of the European Union C 200/1, 28.6.2014 – Communication from the Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01)

<sup>2</sup> Eg. Ecofys, Fraunhofer ISI, TU Wien, Becker Büttner Held et. al., "Design features of support schemes for renewable electricity", available at: <http://www.ecofys.com/files/files/ec-fraunhofer-isi-ecofys-2014-design-features-of-support-schemes.pdf>; German Cooperation, GIZ, ECOFYS, "Lessons for the tendering system for renewable electricity in South Africa from international experience in Brazil, Morocco and Peru", September 2013, available at: <http://www.ecofys.com/files/files/ecofys-giz-2013-international-experience-res-tendering.pdf>.

and the German implementations of those provisions will be discussed, followed by the design chosen in Poland. In a third part, critical issues will be addressed and where possible reference will be made to the respective solutions the UK, Germany and Poland have chosen. Instead of a conclusion, thus, a summary of the different aspects to be considered will be presented, rather than presenting a “one size fits all” system.

## II. The Guidelines

On operating aid for renewable electricity, the Guidelines provide for the following:

*“(124) In order to incentivise the market integration of electricity from renewable sources, it is important that beneficiaries sell their electricity directly in the market and are subject to market obligations. The following cumulative conditions apply from 1 January 2016 to all new aid schemes and measures:*

*(a) aid is granted as a premium in addition to the market price (premium) whereby the generators sell its electricity directly in the market;*

*(b) beneficiaries (66) are subject to standard balancing responsibilities, unless no liquid intra-day markets exist; and*

*(c) measures are put in place to ensure that generators have no incentive to generate electricity under negative prices.*

*(125) The conditions established in paragraph (124) do not apply to installations with an installed electricity capacity of less than 500 kW or demonstration projects, except for electricity from wind energy where an installed electricity capacity of 3 MW or 3 generation units applies.*

*(126) In a transitional phase covering the years 2015 and 2016, aid for at least 5 % of the planned new electricity capacity from renewable energy sources should be granted in a competitive bidding process on the basis of clear, transparent and non-discriminatory criteria.*

*From 1 January 2017, the following requirements apply: Aid is granted in a competitive bidding process on the basis of clear, transparent and non-discriminatory criteria (67), unless:*



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*(a) Member States demonstrate that only one or a very limited number of projects or sites could be eligible; or*

*(b) Member States demonstrate that a competitive bidding process would lead to higher support levels (for example to avoid strategic bidding); or*

*(c) Member States demonstrate that a competitive bidding process would result in low project realisation rates (avoid underbidding).*

*If such competitive bidding processes are open to all generators producing electricity from renewable energy sources on a non-discriminatory basis, the Commission will presume that the aid is proportionate and does not distort competition to an extent contrary to the internal market.*

*The bidding process can be limited to specific technologies where a process open to all generators would lead to a suboptimal result which cannot be addressed in the process design in view of, in particular:*

*(a) the longer-term potential of a given new and innovative technology; or*

*(b) the need to achieve diversification; or*

*(c) network constraints and grid stability; or*

*(d) system (integration) costs; or*

*(e) the need to avoid distortions on the raw material markets from biomass support (68).*

*(127) Aid may be granted without a competitive bidding process as described in paragraph (126) to installations with an installed electricity capacity of less than 1 MW, or demonstration projects, except for electricity from wind energy, for installations with an installed electricity capacity of up to 6 MW or 6 generation units.*

*(128) In the absence of a competitive bidding process, the conditions of paragraphs (124) and (125) and the conditions for operating aid to energy from re-*



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*newable energy sources other than electricity as set out in paragraph (131) are applicable.*

*(129) The aid is only granted until the plant has been fully depreciated according to normal accounting rules and any investment aid previously received must be deducted from the operating aid.*

*(130) These conditions are without prejudice to the possibility for Member States to take account of spatial planning considerations, for example by requiring building permissions prior to the participation in the bidding process or requiring investment decisions within a certain period."*

The Guidelines thereby apply to all operating aid for renewable electricity, in the sense that the support scheme a Member State has implemented, first needs to fall under the definition of State aid as in accordance with Art. 107 Treaty on the Functioning of the European Union (TFEU). This means that the support scheme needs to grant a selective advantage "by the State or through State resources" that is capable of distorting competition in the internal market and hindering trade between the Member States.<sup>3</sup> Notably, while many renewable electricity support schemes fall under this heading, not all – necessarily – do.<sup>4</sup>

If the support scheme of a given Member State constitutes operating aid, then this still does not per se mean that the scheme has to be changed and adapted to the Guidelines. Rather, under par. 250, it says:

*"Where necessary, existing aid schemes within the meaning of Article 1(b) of Council Regulation (EC) No 659/1999 (105) concerning operating aid in support of energy from renewable sources and cogeneration only need to be adapted to*

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<sup>3</sup>See also: Keep on Track! The Legal Helpdesk, Understanding State aid in European law, available at: [http://www.keepontrack.eu/contents/virtualhelpdeskdocuments/update-state-aid\\_1633.pdf](http://www.keepontrack.eu/contents/virtualhelpdeskdocuments/update-state-aid_1633.pdf).

<sup>4</sup> See also: Keep on Track! The Legal Helpdesk, Support Schemes and State aid law - Which Member States' support schemes are considered State aid?, available at: <http://www.keepontrack.eu/contents/virtualhelpdeskdocuments/overview-state-aid-renewable-electricity-support-schemes.pdf>.



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*these Guidelines when Member States prolong their existing schemes, have to re-notify them after expiry of the 10 years-period or after expiry of the validity of the Commission decision or change (106) them.”*

Thus only if a Member State prolongs a scheme, has to re-notify it as the 10 year period for which aid can be granted or the approval has elapsed or when the scheme is changed anyways in a way that necessitates a re-notification. Such changes, in accordance with Art. 1a) Regulation 659/1999/EC jo. Art. 4(1) Regulation 794/2004/EC, exclude mere technical changes, so that even in case of such a change, one would need to carefully assess whether such change necessitates re-notification, before concluding that adaption to the Guidelines is required.

However, all in all, the Guidelines do generally and in the longer term require Member States to introduce competitive bidding procedures.<sup>5</sup> Thus, one should think about how this can be done. As some Member States have already done – or are in the process of – transforming their support schemes accordingly, in the following chapter, their examples will be studied.

### III. Member State experience

#### 1. The UK

The UK was among the first Member States introducing a competitive bidding procedure for the support of renewable electricity. The previous British renewable energy support schemes have been considered to be State Aid and had all been notified to and approved by the European Commission, and the government continued to follow this approach with the latest reform and the introduction of the “contracts for difference” (CfD). The CfDs are equivalent to long-term power purchase agreements and intended to secure a certain fixed income for a generator over the CfD timespan, set at an equivalent rate to the existing support schemes. However, in cases when the

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<sup>5</sup> Note that EREF (the European Renewable Energies Federation) has initiated annulment proceedings against that part of the Guidelines. The action is registered at the General Court under T-694/14; Official Journal of the European Union O.J. C 409/56, 17. 11. 2014; See also the according Press Release, available at: <http://www.eref-europe.org/wp-content/uploads/EREF-Press-Release-06-02-2015.pdf>.



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market power price is higher than the CfD price, producers will have to pay back what they made in excess of the prices fixed in the CfD.<sup>6</sup>

Originally, the CfD scheme was not intended to include a competitive bidding process. However, with entry into force of the Guidelines, the UK introduced such a component. And the UK went even further than the requirements of the Guidelines. Instead of making use of the possibility to tender only for 5% of the renewable electricity capacity to be built until 2017, the competitive bidding process started in February 2015 for all technologies in the CfD scheme.

**Budget:** As regards the budget, the UK Regulator, the Department for Energy and Climate Change (DECC), published estimates of the available overall budget up to 2020, in order to give investors an idea of how much money will be available. However, for each tendering round, the law only obliges the DECC to publish the budget for that round 10 days before the tendering round opens.<sup>7</sup>

**Tendering rounds:** The legal framework does not provide for a specific number of tendering rounds. Rather, the Secretary of State can open the procedure by issuing an “allocation round notice”.<sup>8</sup> The tendering round can be opened 10 days after the notice the earliest (whereby the allocation round notice will be issued at the same time as the budget notice and the framework notice for the specific tendering round).

**Subject of the tender:** Choosing between the amount of capacity to be built and the amount of electricity to be generated, the UK government decided to tender for capacity only. With the budget being set, the UK has chosen not to tender for a specific amount of capacity “at no matter what cost”, but only to invest a specific amount of money and “see what they get”. Thus for each tendering round, as well as for the en-

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<sup>6</sup> However, in case the market price is higher than the CfD price, producers will have to pay back what they made in excess of the prices fixed in the CfD. See also Keep on Track! The Legal Helpdesk, Dynamic Development of Support Schemes – the impact of the State aid Guidelines, available at: <http://keepontrack.eu/contents/virtualhelpdeskdocuments/update-dynamic-development.pdf>.

<sup>7</sup> Art. 11 Contracts for Difference (Allocation) Regulations 2014.

<sup>8</sup> Art. 4 Contracts for Difference (Allocation) Regulations 2014.



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tire scheme, it can only be estimated how much new renewable electricity capacity will be delivered.

**Diversification of technologies:** All technologies are subject to a competitive bidding process. However, considering the intention of the UK to diversify the renewable electricity mix and the different cost structures of the technologies, the law distinguishes between two (three) categories: a group of “established technologies” (Onshore wind > 5 MW, Solar PV > 5 MW, energy from waste with CHP, hydro > 5MW and < 50 MW, landfill gas, sewage gas) and “less established technologies” (offshore wind, wave, tidal advanced conversion, anaerobic digestion, dedicated biomass with CHP, geothermal and – though subject to a specific approval – Scottish Islands onshore wind projects). A third group has been created for biomass conversion, as the scale of those projects may differ and thus distort competition in the other two groups. Such may be considered the UK implementation of par. 125 of the Guidelines, which allows certain technology-based restrictions, e.g. for the longer-term potential of a given new and innovative technology or the need to achieve diversification. However, none of the technologies benefit from a set aside “minimum” capacity in the tender process, with the exception of wave and tidal projects. Therefore all technologies are competing against all others in their category, purely on the basis of price.

**Prices:** A so-called “administrative price” has been set for each of the technologies, taking into account the respective cost structures.<sup>9</sup> However, for the established technologies an overall budget is determined, and assuming that there will be more applications than budget available to pay the administrative prices, an auction will be held and the bidders will get the price they offered in the tendering procedure only.<sup>10</sup> Thus,

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<sup>9</sup> Such administrative strike prices are set for every tendering round and have to be published in the respective budget notice. For the first allocation round, such was done in October 2014, see: Secretary of State for Energy and Climate Change, Budget Notice for CFD Allocation Round, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/360129/CFD\\_Budget\\_Notice.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360129/CFD_Budget_Notice.pdf).

<sup>10</sup> Compare e.g. the procedure described for the first tendering round, Art. 10ff. Contract for Difference: Final Allocation Framework for the October 2014 Allocation Round, available at:



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for these projects the price will be determined based on the outcomes of the competition, which is based on a “pay as clear” bidding format, essentially the most expensive, affordable bid in a particular year is received by all projects bidding in that year (capped at each individual technologies' administrative strike price). For less established technologies, in theory, all projects receive the administrative price and will thus do not have to actually compete against each other - but this is provided that there is sufficient budget to pay for all bids. In practice this situation is extremely unlikely, as the budget will be exceeded by the bids (as was the case with the first allocation round), in which case the auction will operate exactly as for the established technologies. Successful bids will therefore receive the clearing price for the delivery year, which is capped at the level of the administrative strike price. The prices will be paid for 15 years for the entire electricity generation of a given project.

**Organization of the tenders:** After the announcement of the tendering rounds by the Secretary of State, the actual competitive bidding procedure is handled by the “Delivery Body” – which in this case is National Grid, a private company. To this body, applications have to be made, it evaluates the applications, organises auctions if case necessary and will allocate the CfDs. A different body, the Low Carbon Contracts Company, which is backed by the state, is the organisation which countersigns all contracts and manages the contracts after they have been awarded.<sup>11</sup>

**Conditions for application:** Projects to compete in the tendering procedures need to have “planning consent”, i.e. they need to have proof that their construction is approved in accordance with the respective rules.<sup>12</sup> Further, they normally need a connection agreement as well, making sure that they can get connected to the grid.<sup>13</sup>

**Specific rules for community projects:** The UK system does not address community projects specifically, e.g. there is no added support or dedicated budget for smaller projects with the participation of the local population, rather the Government has a voluntary agreement with industry for large scale schemes to include the community

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/349370/Final\\_Allocation\\_Framework.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/349370/Final_Allocation_Framework.pdf).

<sup>11</sup> Compare: Contracts for Difference (Allocation) Regulations 2014.

<sup>12</sup> Art. 23 Contracts for Difference (Allocation) Regulations 2014.

<sup>13</sup> Art. 25, Contracts for Difference (Allocation) Regulations 2014.



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as good practice, which operates across all support schemes and technologies. In general, dedicated community schemes would use another policy, such as the Feed-in Tariff scheme, because it is much simpler.

**Subject of the contracts:** The CfD is project-specific, so that it is not possible to use it for another project. This however also means that the successful winners can “trade” their projects, i.e. it is not relevant whether the same project developer who applied for the CfD will be the one to actually sign and execute it.

**Punishment in case of non-delivery:** The UK has ultimately decided not to ask applicants for a “bid bond”, i.e. a guarantee payment in order to be able to participate in the competitive bidding procedure. Rather, certain “non-delivery disincentives” are envisioned, effectively barring the project from a new application for CfD for 13 months. As this relates to the project itself, and as it endangers the economic viability of the project and thus also the possibility for a developer to sell it, the UK considers this bar to be a sufficient disincentives for applicants to submit applications for projects that cannot become operational in time.<sup>14</sup>

**Solution in case of insufficient bids:** Due to the limited budget, the UK government was not so worried about having insufficient bids, in which case the available budget would simply not be spent, but rather concerning the diversification of the bids. Therefore the distinction between established and less established technologies was introduced. Further, the possibility to reserve certain budgets for certain technologies, e.g. wave and tidal in the first allocation round, exists, or to introduce maxima for other technologies.<sup>15</sup>

## 2. Germany

The State aid character of the German support scheme for renewable electricity, i.e. Feed-in Tariffs under the German Renewable Energy Act, the “Erneuerbare-Energien-

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<sup>14</sup> See DECC, Non-Delivery Disincentive for Contracts for Difference Policy, Update 28 January 2015, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/398825/NDD\\_Policy\\_Update\\_DECC\\_Update.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/398825/NDD_Policy_Update_DECC_Update.pdf).

<sup>15</sup> Art. 11 Contracts for Difference (Allocation) Regulations 2014.



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Gesetz" (EEG), is still debated and the German government notified the latest reforms stating that they would not consider it to fall under the definition in Art. 107 TFEU. However, Germany nevertheless introduced a "pilot" tendering procedure, which until 2017 is supposed to run only for solar PV. In 2017, competitive bidding shall be introduced also for other technologies, where appropriate.<sup>16</sup>

The Freefield Solar PV pilot, according to the "PV-Freiflächenverordnung", foresees tendering as follows:

**Budget:** Germany does not fix a certain budget for the tenders, but the law foresees certain capacities to be tendered for in the different tendering rounds<sup>17</sup> The costs will – as the costs for the support of technologies not subject to the scheme – passed on to consumers through a surcharge on the electricity prices.

**Tendering rounds:** The law foresees overall 9 tendering rounds up to the end of 2017. Each round has already been allocated a certain amount of capacity, in order to give investors security on when tendering rounds of which size will be held and to allow them adapt their business and development plans.<sup>18</sup>

**Subject of the tender:** The tenders are for capacity.<sup>19</sup> There had been considerations to combine capacity with electricity production, but those have been dropped. Instead, Germany introduced a clause that only projects between 100 kW und 10 MW are eligible, which for Freefield Solar PV is rather a medium size.<sup>20</sup>

**Diversification of technologies:** So far, Germany has only introduced a competitive bidding procedure for Freefield Solar PV. The government is assessing whether and for which other technologies such procedures can be introduced. In particular, and recalling par. 125 of the Guidelines, which allows restrictions to certain technologies, a

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<sup>16</sup> See also Keep on Track! The Legal Helpdesk, Dynamic Development of Support Schemes – the impact of the State aid Guidelines, available at: <http://keepontrack.eu/contents/virtualhelpdeskdokuments/update-dynamic-development.pdf>.

<sup>17</sup> §3 PV-Freiflächenverordnung.

<sup>18</sup> §3 PV-Freiflächenverordnung.

<sup>19</sup> §3 PV-Freiflächenverordnung.

<sup>20</sup> §6(2) PV-Freiflächenverordnung.



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different regime e.g. for offshore wind has been discussed, in particular based on potential network constraints and grid stability reasons as well as system (integration) costs. However, the studies have not been completed yet, so one cannot make reliable statements in this regard.

**Prices:** For each tendering round, there will be a maximum price, which is oriented on the price large rooftop Solar PV would get under the “normal” EEG regime without tendering. Accordingly, all applicants are supposed to compete against each other on prices below that price.<sup>21</sup> Germany will test both a pay as bid mechanism, in which all bidders get the price they offered, as well as in later rounds of the tendering process, a uniform pricing mechanisms, in which all bidders only get the lowest price offered in all bids.

**Organization of the tenders:** The tenders will be organized by the Bundesnetzagentur (BNetzA), the respective regulator.<sup>22</sup> The bids have to be addressed to and will be assessed by the BNetzA.

**Conditions for application:** As mentioned already, the German tendering procedure is currently only being implemented for Freefield Solar PV plants, with a capacity between 100 kW and 10 MW. However, the law explicitly allows bidders to submit more than one bid in one tendering round. The bids need to state clearly the amount of capacity and the price offered, to be expressed in ct / kWh, as well as information about the location of the project. Further, bidders need to provide prove of a spatial planning decision allowing to build Freefield Solar PV plants in that location.<sup>23</sup> In addition, already at the time of the application, a guarantee payment of 4 EUR/kW becomes due (2 EUR/kW for certain projects which are supposed to have community support).<sup>24</sup>

**Specific rules for community projects:** With the introduction of tendering procedures for renewable electricity, the German government was concerned that community projects, i.e. projects wherein the local population were integrated and which had

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<sup>21</sup> § 8 PV-Freiflächenverordnung.

<sup>22</sup> Compare e.g. §5, §6, §9 PV-Freiflächenverordnung.

<sup>23</sup> Compare §6 PV-Freiflächenverordnung.

<sup>24</sup> §7 PV-Freiflächenverordnung



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driven the German “Energiewende” so far, would be left out. Therefore, the maximum limits for eligible projects and the reduced guarantee payments were introduced (the latter based on the assumption, that with community support, the necessary planning and construction approvals would be obtained more easily).

**Subject of the contracts:** In the German support scheme, producers of renewable electricity are not financially supported based on contracts, but there is a legal purchase obligation on the grid operators. For participants in the competitive bidding procedure this means that they will benefit only from this purchase obligation when their bid gets accepted by the BNetzA, without a contract as such being necessary.<sup>25</sup> The acceptance of the bid is personal to the bidder. Within 24 months after the acceptance of the bid, the bidder has to dedicate the acceptance to a realized project. They can however allocate the acceptance of the bid to a projected located elsewhere than originally planned, although then a fee of 0,3 ct / kW becomes. Further, the law expressly allows developers to transfer the project together with the acceptance.<sup>26</sup>

**Punishment in case of non-delivery:** In order to ensure that the bids are sufficiently serious and that the projects will actually be executed, Germany first introduced a bid bond, i.e. a guarantee payment. The payment is staggered, with a first guarantee payment of 4 EUR/kW coming due at the time of the application (2 EUR/kW for certain projects which are supposed to have community support)<sup>27</sup> and a second guarantee payment of 50 EUR/kW coming due at the time of acceptance of the bid (25 EUR/kW for certain projects which are supposed to have community support).<sup>28</sup> Those payments are considered a guarantee for the penalty payment of 50 EUR/kW due in case of non-delivery of the project (25 EUR/kW for certain projects which are supposed to have community support).<sup>29</sup> However, in case it becomes clear that the acceptance of a bid cannot be allocated to a project realized within 24 months, the bidder can return

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<sup>25</sup> Compare §28 PV-Freiflächenverordnung.

<sup>26</sup> § 17 PV-Freiflächenverordnung.

<sup>27</sup> § 7 PV-Freiflächenverordnung.

<sup>28</sup> § 15 PV-Freiflächenverordnung.

<sup>29</sup> §30 PV-Freiflächenverordnung.



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it, in which case the penalty payment is reduced by 50% if it is returned within the first nine months.<sup>30</sup>

**Solution in case of insufficient bids:** The German government was aware of the fact that the guarantee payments, in particular the second one at the time of the acceptance of the bid, might be an obstacle to having a sufficient number of projects to be realized. Accordingly, a succession procedure was introduced, which the BNetzA has to open in case bidders together representing more than 30 MW lost their rights due to non-payment of the second guarantee fee. In the succession procedure, the same rules for the selection of the bids are to be applied as in the first round.<sup>31</sup>

### 3. Poland

Poland so far had a bumpy road towards renewables over the years there were long periods of lack of legal and regulatory clarity. The former quota and certificate system led to a drastic downfall of investment security due to a drastic devaluation of the prices for the certificates caused by the surplus of certificates on the Polish market.<sup>32</sup> After this dramatic regulatory failure, the Polish renewable industry waited for years to get a new support mechanism, as Poland just now adopted a new Renewable Energy Sources Act in February 2015. Poland has not notified its support scheme so far, but has announced that it would conform to the General Block Exemption Regulation,<sup>33</sup> and thus would not need notification under the State aid rules. The GBER in the relevant provisions relating to operating aid for renewable electricity however foresees a very similar system to the Guidelines, though e.g. slightly other thresholds ap-

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<sup>30</sup> §29 PV-Freiflächenverordnung.

<sup>31</sup> §12(3) PV-Freiflächenverordnung.

<sup>32</sup> Compare: PIGEO's Detailed Position on Oversupply of Green Certificates, 2913, available at: [http://www.pigeo.org.pl/pliki/stanowiska\\_en/11/PIGEO%E2%80%99s%20Detailed%20Position%20of%20Oversupply%20of%20Green%20Certificates.pdf](http://www.pigeo.org.pl/pliki/stanowiska_en/11/PIGEO%E2%80%99s%20Detailed%20Position%20of%20Oversupply%20of%20Green%20Certificates.pdf).

<sup>33</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance, OJ L 187, 26.6.2014, p. 1–78.



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ply.<sup>34</sup> In any event, the new Policy Act now generally provides for market premiums, granted based on a tendering procedure.

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<sup>34</sup> Compare Art. 42 GBER: "1. *Operating aid for the promotion of electricity from renewable energy sources shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided that the conditions laid down in this Article and in Chapter I are fulfilled.* 2. *Aid shall be granted in a competitive bidding process on the basis of clear, transparent and non-discriminatory criteria which shall be open to all generators producing electricity from renewable energy sources on a non-discriminatory basis.* 3. *The bidding process can be limited to specific technologies where a process open to all generators would lead to a suboptimal result which cannot be addressed in the process design in view of in particular: (i) the longer-term potential of a given new and innovative technology; or (ii) the need to achieve diversification; or (iii) network constraints and grid stability; or (iv) system (integration) costs; or (v) the need to avoid distortions on the raw material markets from biomass support. Member States shall carry out a detailed assessment of the applicability of such conditions and report it to the Commission according to the modalities described in Article 11 (a).* 4. *Aid shall be granted to new and innovative renewable energy technologies in a competitive bidding process open to at least one such technology on the basis of clear, transparent and non-discriminatory criteria. Such aid shall not be granted for more than 5 % of the planned new electricity capacity from renewable energy sources per year in total.* 5. *Aid shall be granted as a premium in addition to the market price whereby the generators sell their electricity directly in the market.* 6. *Aid beneficiaries shall be subject to standard balancing responsibilities. Beneficiaries may outsource balancing responsibilities to other undertakings on their behalf, such as aggregators.* 7. *Aid shall not be granted when prices are negative.* 8. *Aid may be granted in the absence of a competitive bidding process as described in paragraph 2 to installations with an installed electricity capacity of less than 1 MW for the production of electricity from all renewable sources except for wind energy, where aid may be granted in the absence of a competitive bidding process as described in paragraph 2 to installations with an installed electricity capacity of less than 6 MW or to installations with less than 6 generation units. Without prejudice to paragraph 9, when aid is granted in the absence of a competitive bidding process, the conditions under paragraphs 5, 6 and 7 shall be respected. In addition, when aid is granted in the absence of a competitive bidding process, the conditions under Article 43 paragraphs 5, 6 and 7 shall be applicable.* 9. *The conditions under paragraphs 5, 6 and 7 shall not apply to operating aid granted to installations with an installed electricity capacity of less than 500 kW for the production of electricity from*



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**Budget:** The law does not clearly identify a budget for the support mechanism. Neither does it allocate certain amounts of electricity to be tendered for to a given year.

**Tendering rounds:** It has not yet been defined how many tendering rounds will be held and when, and the law only requires a minimum of one round per year.<sup>35</sup> It is expected that the regulator organizes the first round in April 2016. This means that there is only one year left for preparations, including tendering procedure and establishing of the auctioning platform, and taking into consideration existing administrative practice, so that it is expected that the first auction would not be organised until mid-2016 the earliest.

**Subject of the tender:** The Polish government decided to tender for electricity produced, not for capacity. The amount of electricity tendered for will for the first round be published by May 2015 (large-scale projects), respectively June 2015 (small-scale projects). Projects of all sizes and technologies can participate. For micro-installations up to 10 kW a separate system has been created: they will get fixed feed-in tariffs of 0,75 PLN/kWh (0,18 EUR/kWh) for installations up to 3 kW and 0,65 PLN/kWh (0,16 EUR/kWh) for installations up to 10 kW (biogas installation with tariffs ranging between 0,45 PLN/kWh and 0,70 PLN/kWh, thus between 0,11 EUR/MWh and 0,17 EUR/MWh, depending on the technology..<sup>36</sup>

**Diversification of technologies:** The Polish law first distinguishes between large-scale projects (> 500 kW) and small-scale projects (< 500 kW).<sup>37</sup> Large-scale projects compete against each other in a technology-neutral tender. However, for each technology

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*all renewable sources except for wind energy, where these conditions shall not apply to operating aid granted to installations with an installed electricity capacity of less than 3 MW or to installations with less than 3 generation units. 10. For the purpose of calculating the above maximum capacities referred to in paragraphs 8 and 9, installations with a common connection point to the electricity grid shall be considered as one installation. 11. Aid shall only be granted until the plant generating the electricity from renewable sources has been fully depreciated according to generally accepted accounting principles. Any investment aid previously received must be deducted from the operating aid."*

<sup>35</sup> Art. 73 Renewable Energy Sources Act.

<sup>36</sup> Art. 41 Renewable Energy Sources Act.

<sup>37</sup> Art. 73(4) Renewable Energy Sources Act.



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administrative reference prices will be set for the bidders to have an idea of the range they are expected to meet. While large-scale projects will have to sell on the market and will receive a premium paid on top of the market price up to the level of their bid (or in the event the market price should be higher than the fixed maximum amount will have to pay back), small-scale projects up to 500 kW will get the amount of their bid as a fixed feed-in tariff.<sup>38</sup>

**Prices:** While administrative reference prices will be set for all technologies of all sizes participating in the tendering procedures, the bidders will be paid based on their bids. The first administrative prices are supposed to be published by the end of 2015.

**Organization of the tenders:** For the time being, the tenders will be organized by the regulator. However, the contracts for paying the market premiums will be concluded with and the money paid by a specific state-owned company (Operator Rozliczeń Energii Odnawialnej S.A.).

**Conditions for application:** The Polish law requires bidders to submit already quite some documentation in the course of a pre-qualification procedure before they can participate in the tendering procedure. The pre-qualification phase –if successfully completed – will result in an allowance to participate in all auctions in the coming twelve months.<sup>39</sup> To qualify, projects – where the respective legislation requires them to – need to have a spatial planning permit, a grid conditions confirmation or connection agreement, a construction permit and an investment plan.<sup>40</sup> Offshore wind plants also need the environmental impact assessment. In addition, a guarantee of 30 PLN/MWh (7,3 EUR/MWh) needs to be placed. Those extensive requirements are intended to ensure that the projects are already in an advanced stage of development, and are a response to the fact that in the past for example there were issues with wind farms blocking grid capacity but not being developed. In that context, also the duration of connection agreement was now limited to 48 months (72 months for off-shore wind). As bidders need the connection agreement before they can participate in the tendering rounds, the condition that successful projects need to be operational within

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<sup>38</sup> Compare Art. 92 Renewable Energy Sources Act.

<sup>39</sup> Art. 76 Renewable Energy Sources Act.

<sup>40</sup> Art. 75(5), Art. 77 Renewable Energy Sources Act.



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48 months (72 months for off-shore wind) for them to get support,<sup>41</sup> may in practice be less relevant, since the connection agreement will normally provide for a shorter and more stringent time frame.

**Specific rules for community projects:** While the Polish government did introduce rules for micro-installations below 10 kW, all projects above will have to compete in the tendering procedures, although projects below 500 kW will not have to sell on the market. There are thus no specific facilitations for smaller or mid-size, often decentralized community projects foreseen.

**Subject of the contracts:** The tenders relate to the production of electricity, however, the contracts are specific to the project as it was specified in the documents submitted in the pre-qualification phase, so that a producer cannot “buy himself out” by delivering electricity bought from another project. It is possible though that the project is transferred to and exploited by another producer.

**Punishment in case of non-delivery:** The Polish law foresees – as a sanction – high penalties amounting to 50% of the price of not delivered energy volume below 85% of declared value, calculated in 3 years periods, and that a project which was not able to deliver on time will be barred for three years from participating in another auction. With that, the project will likely lose economic viability, i.e. an incentive to deliver is created. Further, a guarantee of 30 PLN/kWh (7,3 EUR/kWh) is required for being allowed to participate in the auctions. If the project does not deliver on time, then the guarantee is lost. In addition, at least for smaller projects (< 500 kW, who do not have to sell on the market) contractual penalties may well be foreseen, but there is no information yet on what those – likely not to be regulated - contracts will look like.

**Solution in case of insufficient bids:** The Polish law does not foresee a succession mechanism or the like. Rather, it appears, that budget allocated to one tendering round but ultimately not spent may be taken over to the next tendering round. As budget allocations are however “ad hoc” and as the law does not set any objectives qua renewable electricity production as a result of the tender, there seems to be no “reserve” for that.

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<sup>41</sup> Art. 74 Renewable Energy Sources Act





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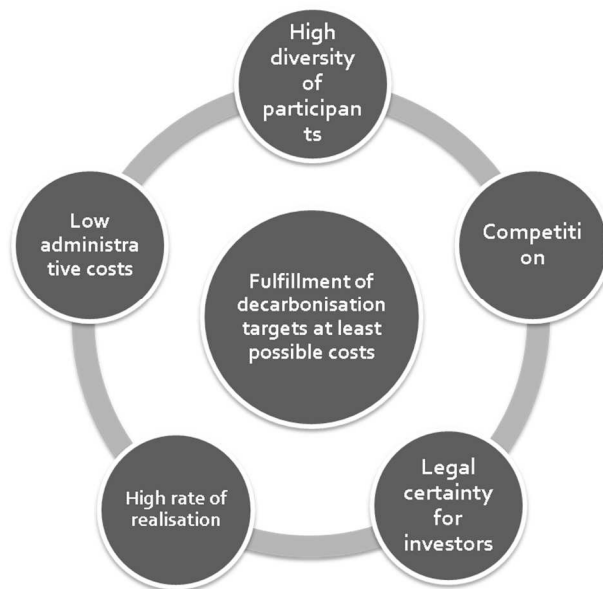
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#### IV. Critical issues when introducing competitive tendering

First of all, the design of a support scheme for renewable electricity including a competitive bidding process serves somehow conflicting objectives it seems. Those can be depicted as follows:



All tendering procedures should aim at fulfilment of the respective decarbonisation targets at least possible costs. The other objectives, high diversity of participants, competition, legal certainty for investors, high rate of realisation and low administrative costs can however conflict with each other and with the overall objective, as for example tough price competition may lead to low realisation rates.

Thus, depending on which objectives one is prioritising, the competitive bidding process may be designed very differently. The Member State's examples presented above indicate that even though the Guidelines are rather strict when it comes to prioritizing a competitive bidding procedure for operating aid to renewable energy, they do not fully harmonize the design of such procedures. As the examples presented above also suggest, in fact, such a full harmonization throughout Europe does not seem possible after all, considering the different conditions and in particular the different objectives and ambitions the Member States have.



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**The first reactions after the first bidding round in the UK:** The UK system seems to meet very well the objective of keeping costs low – there is a budget which cannot be exceeded and projects are incentivised to bid low. However the resulting risk is that only larger producers can participate or be successful. Further, as cost control is so important, the budget is fixed per allocation round, but this adds to uncertainty for investors and developers since the projects need to be developed largely in advance of the announcement of the budgets for the tendering rounds, therefore before there is any foresight of the likelihood of success in the auction. The same holds true for the conditions the projects need to meet – significant development capital must be spent before the tendering round is opened and it is even possible to bid for a contract.

The results of the first tendering round show that there was indeed competition around the available budget, and most of the projects were rather large scale, and/or by well-known energy companies. The total production capacity included in the tender process was 2 GW, distributed over the period from 2015 to 2019. Two offshore wind farms, for which strike prices of 119.89 and 114.39 £/MWh (162 to 155 EUR/MWh) were established, account for 1.16 GW of that total. Offshore wind was categorised as a “less established technology”, and therefore had less competition in the auction.

On the other hand, onshore wind and solar parks were categorised as “established technologies”. In the case of onshore wind farms, the strike prices ranged from 82.5 to 79.23 £/MWh (111 to 107 EUR/MWh), and the onshore wind capacity in the first round resulted to almost 479 MW. For solar power, the strike prices ranged between 79.23 to 50.00 £/MWh (107 to 68 EUR/MWh) and only 71.6 MW capacity were successful, out of which only two of the five projects will be implemented in 2015/2016. These projects show a problem with the auction system, as £50/MWh is not a commercially viable price in the UK- indeed these contracts were not actually signed in the end. The developers were clearly desperate to secure some support and bid at a very low level, in the hope that they would have the price increased by the “clearing price” for that year, which was not the case. The remaining three will be built in the following financial year 2016/2017..<sup>42</sup>

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<sup>42</sup> Compare: Contracts for Difference (CFD) Allocation Round One Outcome available at: <https://www.gov.uk/government/statistics/contracts-for-difference-cfd-allocation-round-one-outcome>.



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The renewable industry criticised the relatively small CfD budget. In the first round, the British government allocated £50 million per year to the “established technologies”. By contrast, funding via Renewable Obligation Certificates (ROCs), which will still to be open for applications for all technologies except large scale solar PV until spring 2017, has a sum of £3.1 billion (EUR 4,3) at its disposal for the year 2014/2015 – more than fifty times as much. Funding via ROCs is open to all technologies, with the exception of large solar park projects. Large scale solar projects therefore rely on funding solely through the CfD mechanism, which explains the unfeasible £50/MWh bids. It may even be the case that only a very few such projects actually bid, due to the high risks and administrative costs in preparing the bids. The solar industry sees a need for action because of a perception that solar energy is currently in danger of falling through the gaps in a policy framework that favours large players and large wind projects.<sup>43</sup>

Indeed, with large scale generation seeming to have been “the winner” of the tendering process, in terms of holistic system change considerations could become problematic, as it could create supplementary system costs in view of integration of renewable electricity, and it certainly goes against the objective of a diversification of participants. Still, almost surprisingly as there are no some smaller community projects were in fact successful, despite the fact that there are no specific rules making it easier for such projects to participate.<sup>44</sup> Now it remains to be seen whether the contracts will be actually signed and performed on, thus whether the UK with this strongly cost-control-focussed scheme is in fact meeting the objective of meeting its renewable electricity deployment objectives. Considering the tough price competition may detriment realisation rates, this will be interesting to follow.

**Reflection on the German system:** The German system works without a budget, but the focus is on getting a capacity of 400 MW Freefield Solar PV annually developed

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<sup>43</sup> CFD tenders in UK: Wind energy prevails over photovoltaics; in: Sun, Wind & Energy, 03.03.2015; <http://www.sunwindenergy.com/photovoltaics-wind-energy-press-releases/cfd-tenders-uk-wind-energy-prevails-over-photovoltaics>

<sup>44</sup> Compare: Contracts for Difference (CFD) Allocation Round One Outcome available at: <https://www.gov.uk/government/statistics/contracts-for-difference-cfd-allocation-round-one-outcome>.



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until 2017. The tendering rounds and capacities to be tendered for are fixed in the law to provide more investment security. As the German government – not the least to meet its own ambitious renewable energy targets – wants to see the actual realization of the projects, i.e. is keen on a high realization rate, the guarantee or penalty payments in case of non-realization were introduced. Those however could at the same time detriment competition and diversity of participants, as it may be difficult in particular for smaller project developers to come up with those amounts of money. To meet the complaints by the industry – and in particular those smaller project developers - that the administrative burden in a tendering process would be high and that generally such processes tend to favour only bigger projects, not only the restriction in size but also the lower guarantee payments for certain projects which are supposed to have community support (this being measured by the type of spatial planning proof they can already present, as it is presumed that community supported projects will get those proofs easier and faster) were introduced: Those measures are supposed to safeguard that community projects, which had been a driver of the German “Energiewende” (“energy system change”), can still compete and ultimately succeed in the tendering procedure. However, whether this approach succeeds in practice and leads to the high realization rates envisioned still needs to be seen when the first tendering rounds are actually held.

What will be interesting to follow as well, is whether and if so how Germany will introduce tendering also for other technologies. As briefly mentioned above, there have been voices saying that for example for offshore wind projects this would not make sense due to grid extension and stability considerations, so that the exemption possibilities of the Guidelines should be invoked. Others argue that the tendering procedures introduced for Freefield Solar PV will show that such procedures generally do not work and kill small, decentralized electricity generation, so that one should not introduce them for other technologies at all and should abolish them for Freefield Solar PV right after 2017 and there seem to be different ideas on how to defend this under the Guidelines. However, it seems rather likely is that Germany will try to develop a rather complex system, with different procedures for different technologies, making use of the respective exemption clauses of the Guidelines. The studies on how those systems could look like are running and first results may hopefully be expected by the end of 2015, also to provide more investment security on the future design of the German support scheme.



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**Reflection on the Polish system:** The Polish system seems to focus also very much on controlling the budget. It even does not allocate a long term budget, but decisions can be taken rather ad hoc and for each tendering round. While for the government, this may be very convenient as it allows flexibility, for investors, this is problematic as it provides little stability. What is more, the pre-qualification requirements are rather demanding, so that projects need to be already at quite advanced development stages. Certainly, for the government this brings more security that the projects will actually be delivered. Moreover the procedures are very complicated and long lasting, and there are already interpretation discussions and calls for amendment of the law not only from the industry but also from the regulator (as the procedures are not clearly defined in the law and the criteria even for the regulator unclear) and the Ministry of Economy (in particular regarding feed-in tariffs, with which the Ministry disagrees, arguing they are too expensive, and intends to change already before 2016). The penalty payments and the fact that projects will be barred for some time, in case they do not deliver, add to that, but again make it harder to develop projects. In particular for smaller decentralized community projects, there are no specific facilitations foreseen, which is why it appears likely that their development will not be supported by the system. A high diversity of participants appears not to have been foreseen. Also, it is expected that with the technology-neutrality of the scheme, only biomass, as the cheapest technology but treated like all others and competing in the same category, is going to win the tendering rounds. As the Polish government seems to intend notification to the European Commission only after implementation of the Act, there is some insecurity also on when the system will eventually become operational. In case the Commission would not agree on the issue of the compatibility with the GBER, and thus find that the system would have had to be notified under the Guidelines, this is likely to cause delays, as for non-approved State aid, under Art. 108(3) TFEU, an execution prohibition exists until the day approval is achieved. Thus whether investors will find that there is sufficient certainty that they will be able to benefit from the support.

## V. Overview table

As presented above, based on the examples from the UK, Germany and France, there are different concepts on how to implement a tendering procedure for renewable electricity. The differences are mainly due to the different priorities set by the respec-



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tive Member States. However, despite the differences, all implementation efforts need to address certain core issues in the design of the system. In the following table, a list of those crucial questions will therefore be presented, noting that certainly, an answer given to one question may have consequences as regards other design features.

Question	Why?	Example?
What is the budget for the tender: is it fixed or not, and if so for how long?	<p>Fixed budget = more control on spending – but the shorter the periods for which it is fixed, the less investment security</p> <p>“Open budget” for fixed deployment/production = more investment security, more control on deployment/production (as budget cannot be “insufficient”)</p>	<p>Fixed budget = UK</p> <p>Open budget = Poland</p> <p>“Open budget” for fixed deployment/production = Germany</p>
How many tendering rounds will there be and at what time?	<p>Fixed in advance = more investment security</p> <p>“Open” = more flexibility (e.g. to set/change budgets)</p>	<p>Fixed in advance = Germany</p> <p>“Open” = UK, Poland</p>
What is the subject-matter of the tender: electricity production or capacity or a combination of both?	<p>Only electricity production (kWh/MWh) = no security on capacity, but security on reaching renewable energy target (short-term)</p> <p>Only capacity (kW/MW) = no security on electricity</p>	<p>Capacity = UK, Germany</p> <p>Electricity = Poland</p>



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	production, but long-term system transformation	
Will there be restrictions on project size (min./max.)?	Restrictions may result in better chances e.g. for smaller decentralized projects	100 kW to 10 MW restriction for Freefield Solar PV = Germany  No restriction = UK, Poland
Will and if so how there be safeguards for diversification of technologies?	Different technologies are at different stages of development = different "costs"  Technology-neutral tenders may thus benefit only advanced, already competitive technologies (e.g. onshore wind)	In line with the Guidelines (allowing diversification exceptions), different "pots" for established and less established technologies = UK
How will the prices be determined? Will bidders all get the same price, or the prices they bid on?	Pay as bid (sealed bids, each bidder getting the price they bid for) = based on the proposal of the bidder, less risk for the bidder  Uniform Prices (e.g. all bidders get the lowest price placed) = "cheaper" as only lowest price paid, more risk for the bidder  Administrative prices (no price competition) = bidder to decide whether	Pay as bid combined with administrative maximum prices = UK, first tendering rounds in Germany, Poland  Uniform prices combined with administrative maximum prices = Germany (later rounds)



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	<p>they can make the price, but risk of over-payment and no insurance for "least cost"</p> <p>Combinations (e.g. "descending clock", i.e. setting a high starting price, against which all bidders bid and where bids exceed the budget/capacity/volume, then successive decreases, until bids match budget/capacity/volume) = setting administrative starting or maximum prices increase budget control and give investors more guidance as to their bids</p>	
<p>Who will organize the tenders?</p>	<p>Regulators? State-owned companies? Private companies? Other? Existing or new entities?</p>	<p>Regulator = Germany, Poland</p> <p>New state-owned company = UK</p>
<p>What will the conditions for participation in the tenders be? What "proof" will be required?</p>	<p>Spatial planning permit? Connection agreement?</p> <p>Studies? = the more requirements, the more difficult for project developers; BUT: the more "developed" the project, the more guarantee that the</p>	<p>Spatial planning and construction = UK</p> <p>Spatial planning = Germany</p> <p>Spatial planning, grid connection, construction permit = Poland</p>



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	project will be realized	
Will there be specific rules for e.g. community projects, so as to encourage decentralized generation?	Specific rules = could help overcome potential advantage of large centralized bidders	Specific rules (lower guarantee, restriction in size of projects) = Germany  No specific rules = UK, Poland
What will the acceptance of bids result in: acceptance personal to the bidder or relating to the project?	Acceptance personal = uncertainty on which project will be build, possibly less certainty that the project will be build	Acceptance personal (with restrictions, fee if other project than originally in bid) = Germany  Acceptance to the project = UK (background: in case of non-realization of the project, project cannot be bid for for 13 months; becomes economically non-viable), Poland (same rationale as UK, with three years bar to bid)
Which safeguards to implement as guarantee for non-delivery?	Bid bonds = additional burden for project developers  Exclusion of the project for some time = without being able to bid for support, project may become non-viable  No safeguards = risk of non-realization	Bid bonds = Germany  Exclusion of the project = UK, Poland



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<p>What in case of insufficient bids/realizable projects?</p>	<p>Succession procedures = make sure that (at least when there are more bids than originally accepted) budget/capacity/volume reached</p> <p>Taking budget over to next term = possibility that budget/capacity/volume eventually not reached</p>	<p>Succession procedures = Germany</p> <p>Taking budget over = UK</p>
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This list can certainly be extended and there are a lot more additional features a support scheme for renewable electricity could include, depending on the policy priorities a Member State is pursuing.

In addition, and as mentioned with the example of Germany, for some Member States it may turn out that exempting certain technologies from the obligation to tender entirely would make more sense, also relying on the possibility in par. 125 of the Guidelines. It may even be the case, that Member States face market conditions which turn out not to allow for tendering procedures at all, as only one or a very limited number of projects or sites could be eligible, a competitive bidding process would lead to higher support levels (for example to avoid strategic bidding) or a competitive bidding process would result in low project realisation rates (avoid underbidding), thus cases in which the Guidelines allow not to introducing such procedures.

However, to make some conclusion, it seems that in the process of the implementation of tendering procedures for renewable electricity, Member States can in fact learn from each other, although, due to their different conditions and priorities, the outcomes may well be rather different.



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