

“OVER THE COUNTER” - TRANSACTIONS

Securing stable prices on long term - Perspectives from Germany and France

Paris | 19 June 2019
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General Framework

Over the Counter Power Purchase Agreements



Power Purchase Agreements (“PPAs”) not as such a new development



Corporates have at the same time increasing interest in procuring their energy from renewable energy facilities

- for reputational purposes
- improving the “green footprint” for energy-intensive companies
- as part of general sustainability strategies

Increasing interest in PPAs, given

- the expiry of subsidised tariffs by way of direct marketing and
- the lack of subsidies for e.g. new offshore wind farms due to 0€ bids in tenders



Different types of PPAs are currently being developed and established in various European jurisdictions



Types of PPAs

Physical PPAs

- “On-Site Direct PPAs” – Physical PPA without any use of utility grid, typically fall-back supply by utility required
- “Offsite Direct PPAs” – Physical PPA with all-inclusive services (balancing, marketing of green certificates etc.)
- “Sleeved PPAs” – Third party is used as service provider for all services exceeding the actual feed-in of energy



Synthetical PPAs

- Purely financial agreement, e.g. contract for difference
- PPA purchaser will be entitled to any excess market remuneration and compensate any shortfall market remuneration to PPA seller

PPA Price Regulation

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graph TD; A[Core Provisions of any PPA] --> B[Stable/constant price can in principle be agreed under German law]; A --> C[Price adjustments subject to two restrictive legal concepts: German Civil Code provisions on general terms and conditions and the German Price Clause Act];
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Core Provisions of any PPA

Stable/constant price can in principle be agreed under German law

Price adjustments subject to two restrictive legal concepts: German Civil Code provisions on general terms and conditions and the German Price Clause Act

PPA Price Regulation



Fixed price for entire term does not raise legal issues



However, „bet“ of the Parties implied by fixed price critical on long-term agreements



Consequence: Escalation clauses or price determination right for one party to the PPA (typically energy supplier) common

PPA Price Regulation



- Escalation clauses refer to objective external benchmark (e.g. index published by the Federal Statistical Office)
- Restricted by German Price Clause Act (*Preisklauselgesetz*)
- Primarily permitted, if (i) supplier is bound to the contract for at least 10 years, (ii) the price adjustment is only based on the change of cost of a party or (iii) if the clause leaves a „reasonable discretion“ (Billigkeitsgrundsatz)

However:

Violations of Price Clause Act does not immediately render the relevant clause unenforceable, but only after a final and finding judgement has been achieved

PPA Price Regulation



- General Terms and Conditions („**GTC**“) under German law subject to restrictions according to Sections 305 ff. of the German Civil Code
- GTC: all contractual provisions pre-formulated for a multitude of contracts and „imposed“ on the other party to the contracts, not only: contractual provisions „headed“ as GTC
- GTC unenforceable under German law in B2B agreements, if they disadvantage the non-user in violation of the principle of good faith

Important

GTC are always to be interpreted in the „least favourable“ manner for the non-user and in case one possible interpretation results in unenforceability the clause is unenforceable in total (no preservative interpretation, “*geltungserhaltende Reduktion*”)

PPA Price Regulation



Transparency

Any clause not linking a right to adjust the remuneration to transparent and objection criteria risks or leaving one party the right to increase its margin can be unenforceable



Fairness

If price increases can be included, clause should also oblige the supplier to reduce prices in case of lower costs



Termination rights

To reduce the risk for an unenforceability, termination clauses for the non-user in case of price increases to be considered, however, if determination of criteria impossible

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