- How to design wind energy valuably:
Citizen´s participation in Germany and France -
Conference of the German-French Office of Renewable Energies

Citizen owned wind farms and their legal forms in Germany:
Advantages and challenges of the different schemes

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1. **Historical development of citizen owned wind farms**

- The wind energy in Germany started with citizen owned wind farms
- The “cradle” of German citizen owned wind farms can be found in North Frisia (*Nordfriesland*)
- About 90 % of all wind farms in North Frisia are organized as citizen owned wind farms
- More than 20 years of experience in citizen owned wind farms
2. Criteria for choosing legal form of citizen owned wind farm companies (i. a.)

- **Limited liability;** therefore generally no private partnership („GbR“, comparable with French „S.C.“), general partnership („oHG“, comparable with French „S.N.C.“) and „pure“ limited partnership (Kommanditgesellschaft resp. „KG“, comparable with French „S.C.S.“)

- **Simple transfer of shares;** therefore generally no limited liability company („GmbH“, comparable with French „S.A.R.L.“) (notarization of the share transfer required)

- **Simple amendment of the articles of association/partnership;** therefore generally no GmbH or public limited company („Aktiengesellschaft“, „AG“, comparable with French „S.A.“) (notarization required)

- Usually, a citizen owned wind farm is structured in the legal forms

  **GmbH & Co. KG or cooperative**
3. Citizen owned wind farm in the legal form of GmbH & Co. KG

Basic principles of the GmbH & Co. KG

**General partner** in the legal form of GmbH; generally holds no shares in capital

**Limited partners**, liability limited to the respective limited partner’s capital contribution
3. Citizen owned wind farm in the legal form of GmbH & Co. KG

Typical legal set-up

- **Limited partners**: local residents, land owners, municipality, project developer, pot. external investors; issue of shares through circular process (every interested party can acquire a certain number of shares in every round to avoid a concentration of shares)

- **Management**: general partner GmbH; regularly no shareholding of the citizen herein, but either management by the initiator or „Einheits-KG“ (KG is the sole shareholder of the general partner GmbH)

- **Supervisory or advisory board**: Rules in articles of partnership concerning formation required, rights to reserve approval for extraordinary management measures, meetings as required, usually at least 2 to 4 times a year

- Registered office of the GmbH & Co. KG situated in the municipality of the wind farm
3. Citizen owned wind farm in the legal form of GmbH & Co. KG

Characteristics

- Special right of “partnerships with a large number of partners” (Publikumsgesellschaften)
  
  - Investor-friendly interpretation and content review of the articles of partnership
  
  - The usual contractual freedom to draw up the articles of partnership is significantly limited

- Legal obligation to draw up a prospectus; prospectus requires the approval of the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht resp. „BaFin“)

- Compliance with the specifications of the Capital Investment Code (Kapitalanlagegesetzbuch resp. „KAGB“), if applicable
4. Citizen owned wind farm in the legal form of a cooperative

General aspects

- Common legal form for the implementation of citizen owned renewable energy systems
  - At the end of 2013: nearly 900 energy cooperatives in Germany

- Cooperatives (eingetragene Genossenschaften resp. „eG“) are
  
  „companies with a non-closed number of members, whose purpose is to promote the members´ income or business or their social or cultural issues through joint business activities“ (§ 1 Cooperative Societies Act)

- Corporate bodies: executive board, supervisory board, general assembly
  - Principle of a self-managed company (executive and supervisory board has to consist of cooperative´s members)
4. Citizen owned wind farm in the legal form of a cooperative

Characteristics of the cooperative (1)

- „Member principle“
  - Each member has the right to one vote ("one man one vote")
    - The voting right of an investor does not correlate with the amount of his investment (unlike "central cooperatives" [Zentralgenossenschaften])
  - The share merely represents the amount of the capital contribution, but does not grant a participation in the assets / goodwill
    - Investors acquire a participation in the cooperative´s profit, not in the assets / goodwill
- Simple way of members´ joining and withdrawing from the cooperative
- Principle of statute stringency
4. Citizen owned wind farm in the legal form of a cooperative

Characteristics of the cooperative (2)

- Cooperative’s liability limited to its assets

- Normally exclusion of the obligation to make an additional contribution under the articles of association

- Purpose of the cooperative: promotion of the income or the economy of its members or their social or cultural interests through joint business operations

  - The mere indirect participation of the members in the cooperative’s success (through the payment of dividends) not sufficient

    - Therefore unlawful: the mere “dividends distributing cooperative” (Dividendengenossenschaft)
    - Non-material promotion of the members, however, sufficient

- Obligatory cooperative’s membership in an auditing association
4. Citizen owned wind farm in the legal form of a cooperative

**Advantages** of the citizen owned energy cooperative:
- Simple way of joining the cooperative, already with low financial contribution of each individual member
- Limitation on liability to the cooperative’s assets
- Democratic decision-making process
- No obligation to draw up a prospectus, **but**: liability for the prospectus under civil law, privileged by *KAGB*

**Disadvantages** of the citizen owned energy cooperative:
- Due to the fact, that the members do not have a stake in the assets, its suitability as investment vehicle is limited
- Due to the fact that the egalitarian principles are mandatory legal provisions, the balance of interests will be difficult in case of different capital contributions
- It is hardly possible for municipal companies (for example a municipal utility company) to invest in cooperatives → reason: obligation (pursuant German municipal codes [*Gemeindeordnungen]*) to ensure an adequate influence of the municipality within the cooperative
## 5. Comparison GmbH & Co. KG – Cooperative

<table>
<thead>
<tr>
<th></th>
<th>GmbH &amp; Co. KG</th>
<th>Cooperative</th>
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<tbody>
<tr>
<td><strong>Closed structure</strong></td>
<td>joining the KG only possible until closure; withdrawal only with the shareholders´ approval, if minimum term is not yet expired → personal and financial stability</td>
<td><strong>Open structure</strong>: joining and withdrawal the cooperative generally at any time → „structural equity weakness“</td>
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<tr>
<td>Typically <strong>higher</strong> contributions</td>
<td></td>
<td>Typically <strong>reduced</strong> contributions</td>
</tr>
<tr>
<td><strong>Voting rights</strong></td>
<td>shall correspond with the amount of investment, special rights for individual shareholders may be agreed</td>
<td>Mandatory basic democratic principles, normally overbalance of individual members not permitted</td>
</tr>
<tr>
<td>Obligation to draw up a prospectus, prospectus liability</td>
<td></td>
<td>No (formal) obligation to draw up a prospectus, prospectus liability, privileged by <strong>KAGB</strong></td>
</tr>
<tr>
<td>Participation in profits and assets</td>
<td></td>
<td>No participation in assets</td>
</tr>
<tr>
<td>Wide contractual freedom, minor administrative effort</td>
<td></td>
<td>Limited contractual freedom, higher formation expenses and administrative effort</td>
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6. Effects of the KAGB on the citizen participation

- Transpose of the AIFM-Directive into national law: **KAGB** of 22 July 2013

- Commercially operating companies outside the financial sector are not covered by the term “investment fund” (§ 1 para. 1 sentence 1 KAGB)

  - Citizen owned windfarm companies are „commercially operating companies“, if these companies **themselves** operate the wind turbines within the framework of normal ongoing business operations

  - This also applies, if the citizen owned windfarm companies use external suppliers for the operational work, as long as the business decisions remain with the company itself

- Advance inquiry with BaFin is strongly recommended due to remaining doubts / definition difficulties
6. Effects of the KAGB on the citizen participation

- If KAGB is applicable: significant restrictions and obligations

  - **Investment assets ≤ 100 millions € i. a.**
    - mandatory registration with BaFin
    - only the following legal forms are permitted: GmbH, AG and GmbH & Co. KG
    - risk diversification: at least three "material assets", unless the investors’ minimum contribution amounts to 20,000 €
    - limitation of debt leverage up to 60 %
    - independent depositary: monitoring of fixed assets

  - **Investment assets > 100 millions € i. a. (in addition)**
    - authorization from BaFin
    - the following legal forms are mandatory: Investment-KG and -AG
    - two professional qualified managing directors required

- **Privilege of cooperatives**, inter alia, if the investment assets are ≤ 100 million €: i. a. (simplified) registration with BaFin, no obligation to invest in at least three material assets, no limitation of the debt leverage up to 60 %
7. Legislative proposal

- Since 1 January 2012: special provision in § 121 para. 1a of the Hessian municipal code (Hessische Gemeindeordnung)
  - Municipal activities in the field of producing renewable energy only permitted if private third parties participate; citizen’s participation shall be provided

- Currently planned: „Citizens‘ participation act“ (Bürgerbeteiligungsgesetz) in Mecklenburg-Western Pomerania:
  - Obligation to offer shares in new wind turbines project to local residents and municipality
  - Legislative process shall start in summer 2014

- Draft of the amendment of the Regional Spatial Development Program Western Pomerania (Regionales Raumentwicklungsprogramm Vorpommern)
  - Within the 26 new „suitable areas“ (Eignungsgebiete) at least 20 % of the shares in operating companies must be offered firstly to the residents within a radius of 4,5 km, then to all residents of the area and to the municipality (so-called „local model“ [Einheimischen-Modell])
  - Validity in dispute
Thank you for your attention!

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