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PROPOSED CHANGES TO THE REGULATION OF THE RENEWABLE ENERGY SECTOR

On 22 December 2011 the Ministry of the Economy (the "ME") published a long-awaited set of regulations regarding the energy sector, i.e. the draft new energy law, gas law and the Act on Renewable Energy Sources (the "Draft Act on RES"). The new laws are intended to create a cohesive legal framework for the Polish energy industry.

In the opinion of the ME, the Draft Act on RES should also improve the effectiveness of the existing support scheme for energy from renewable sources. Moreover, the Draft Act on RES implements some of the regulations of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, so as to ensure that Polish law is consistent with EU law.[1]

Key issues

- No obligation to purchase electrical energy generated from renewable energy sources
- Modification of the certificates-of-origin mechanism – corrective coefficients
- Other modifications to the support scheme for renewable energy sources – change of the catalogue of entities
- Modification of calculation of the substitute fee
- Carrying on business as a generator of electrical energy from renewable energy sources
- Obligation to develop a National Action Plan
- Other regulations
- Legislative path

[1] Please note that the final wording of the Act on RES adopted by parliament may significantly differ from the Draft Act presented by the ME.

No obligation to purchase electrical energy generated from renewable energy sources

In a surprising development, the Draft Act on RES does not contain any general obligation to purchase electrical energy generated from renewable sources. At the moment, this obligation is imposed on suppliers of last resort (sprzedawca z urzędu), who have to buy such "green" energy at the average selling price for electrical energy in the competitive market in the preceding year. The price is announced on a yearly basis by the President of the Energy Regulatory Authority (**"ERA"**). In practice this change may limit the level of income of renewable producers, who will now need to search for offtakers in the market and will have no minimum price guaranteed.

The Draft Act on RES only retains this obligation for micro-installations which are, among other things, installations with an installed electric power capacity of up to 40 kW.

Modification of the certificates of origin mechanism – corrective coefficients

One of the major changes is a modification to the certificates-of-origin mechanism by way of the introduction of 'corrective coefficients', which are determined separately for individual renewable energy technologies. Pursuant to the Draft Act on RES, a certificate of origin will specify the amount of energy resulting from the product of the electric energy generated and the corrective coefficient determined for the given technology (in other words the corrective coefficient will specify the value of each certificate).

According to the ME, the reason for this is to improve the existing support scheme for renewable energy by giving different levels of financial assistance to each type of renewable energy technology.

In the ME's opinion, this is intended to ensure a more balanced development of energy sources based on all renewable energy technologies, and to facilitate direct support for those technologies which need it most. The ME cites analyses that the costs of generating electric energy using co-generation technology, from wind farms and old, depreciated hydropower plants is significantly lower than the support currently being received. Thus, the ME has assumed that less support will be envisaged for these sources, while greater support should be provided for more expensive technologies which, in the ME's opinion, require more support.

Currently, the exact proposals with respect to individual coefficients for the different renewable energy technologies are not known. They are to be determined by the ME in further legislation. What is clear from the Draft Act on RES is that separate corrective coefficients will need to be determined for the wind power sector as follows:

(i) wind energy sources based on land with an installed capacity of up to 200 kW,
(ii) wind energy sources based on land with an installed capacity above 200 kW and
(iii) off-shore wind energy sources.

Under the Draft Act on RES the corrective coefficients will be determined every three years for a period of five years for the different types and installed capacities of renewable energy sources. This provision has aroused controversy as it seems difficult to understand how the coefficients can be determined for five years but at the same time be changed every three years. Recently, a representative of the ME explained that the idea behind the determination of new coefficients every three years for subsequent five year periods is to increase the predictability of the system. For this reason in the two-year period between the time of determination (which is to take place every three years) and the term the corrective coefficients are in effect (every five years) the 'old' values (determined earlier) are to remain in force.

Pursuant to the Draft Act on RES, a certificate of origin together with the corrective coefficient will apply to a new renewable energy installation for a period of 15 years, running from the date on which the installation is delivered for use. The Draft Act on RES does not clearly provide whether the corrective coefficients are to be determined once for an installation for a 15-year period or are to change in accordance with further legislation. The latter option has been widely criticised by the wind power sector, as coefficients that change frequently do not allow to the level of profitability of an investment to be properly assessed and may, in fact, hinder of the possibility of obtaining financing for investment. However, a representative of the ME recently explained that the amount of the coefficient for a given facility is to be determined once for the entire period of support, i.e. 15 years.

Furthermore, representatives of the wind power sector claim that the 15-year period of guaranteed support for renewable energy sources is too short and should be extended to 20 years.

In the case of installations delivered for use prior to the Act on RES coming into force (which is currently predicted to take place in 2013), certificates of origin together with the corrective coefficient will apply for a period of 15 years from the date on which electric energy, to which the certificate of origin relates, was generated for the first time.

In the case of installations delivered for use after 1997 which have been modernised prior to the Act on RES coming into force, certificates of origin together with the corrective coefficient determined for that installation will apply a period of 15 consecutive years running from the date of delivery for use of the modernised installation.

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Any installations which were delivered for use prior to 1997 will not be entitled to receive certificates of origin unless such installations are modernised after the Act on RES comes into force in accordance with the terms and conditions specified in the Draft Act on RES. In such cases certificates of origin will apply to the energy generated from such modernised installations for 15 years commencing on the date of delivery for use of the modernised installation.

Other modifications to the support scheme for renewable energy sources – change of the catalogue of entities

The Draft Act on RES expands the categories of entities which are obliged to obtain certificates of origin for electrical energy generated from renewable energy sources.

End users who in the preceding year consumed 400 GWh or more of electrical energy and for whom the costs of electrical energy constitute not less than 15% of their costs of production, in relation to transactions not concluded on the commodity exchange or on a regulated market operated by an entity operating a regulated market in the Republic of Poland, have been added to the existing catalogue of entities. In this way, in the ME's opinion, so-called energy-intensive end users will receive preference by having the possibility to satisfy the obligation to participate in 'green' energy, which will make it possible for them to deduct excise duty. This is because electrical energy generated by renewable energy sources is exempt from such duty.

Modification to way in which substitute fee is calculated

The Draft Act on RES proposes a modification to the previous manner of calculating the substitute fee (an entity is obliged to pay a substitute fee if it fails to purchase a required number of green certificates). It is assumed that the substitute fee will decrease in the event of an increase of energy prices on the market.

Pursuant to the Draft Act on RES, the substitute fee is to be calculated by deducting the average selling price of electrical energy, announced by the President of the ERA, from the unit substitute fee, amounting to PLN 470. The unit substitute fee is adjusted annually by the Polish inflation index.

According to the ME, this modification will not have any immediate effect, but it will prevent an uncontrolled increase of the substitute fee in the case of a sudden increase of energy prices.

Carrying on business as a generator of electrical energy from renewable energy sources

The Draft Act on RES sets out in detail the conditions and rules for carrying on business as a generator of electrical energy from renewable energy sources. As a rule, in order to conduct such activity, it will be necessary, as is currently the case, to obtain a licence.

The Draft Act on RES exempts, however, the following activities from the obligation to obtain a licence:

- production of agricultural biogas and electricity generated from agricultural biogas. However, according to the Draft Act on RES this remains a regulated activity and will have to be entered in the register of undertakings engaged in producing agricultural biogas or generating electric energy from agricultural biogas maintained by the President of the Agricultural Market Agency); and

- generation of electricity in micro-installations and energy converted into equivalent amounts of electric energy generated in micro-installations. However, this activity will have to be entered in the register of producers of electricity in micro-installations maintained by the President of the ERA.

The generation of electricity in micro-installations, for own use (i.e. not for resale) or the sale of electricity generated in a micro-installation, in an amount not exceeding 30% of the electric energy generated in a micro-installation in a given year will not need to be recorded in the register of undertakings generating electricity in micro-installations.

Obligation to develop a National Action Plan

In accordance with the Draft Act on RES, the Minister of the Economy will be obliged to develop a draft National Action Plan setting out, among other things, national goals for the share of energy and fuels generated from renewable energy sources used in the power and transport sectors. The National Action Plan is to be adopted by the Council of Ministers and subsequently must then be submitted to the European Commission. Moreover, the Minister of the Economy has a duty to monitor the achievement of the national goals and to prepare and submit every two years a report on this to the Council of Ministers. The report, once approved by the Council of Ministers, is then to be presented by the Minister of the Economy to the European Commission by the 31st December of the relevant year.

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Other regulations

The Draft Act on RES includes a number of regulations concerning micro-installations – that is, renewable sources of energy with an installed electrical energy capacity of up to 40 kW or with an installed heat or cooling energy capacity of up to 70 kW, or used to produce agricultural biogas, or generate electric energy from agricultural biogas, with an installed capacity not exceeding 100 kW, or with an installed heat or cooling energy capacity not exceeding 130 kW. These regulations provide, among other things, for the following: (i) that micro-installations no longer require a licence to generate electricity; (ii) the obligation to purchase electricity generated in a micro-installation by enterprises conducting activity in the field of the generation of electricity or trading in electricity and selling it to end users; and (iii) the possibility of obtaining certificates of origin for electricity generated in a micro-installation.

An obvious weakness of the current Draft Act on RES is that it does not regulate the issue of interconnection of renewable sources of energy to the power grid. In this respect, the Draft Act on RES makes reference to the draft of a new Energy Law, which does not envisage any preferential treatment for renewable sources of energy. Therefore, unless this issue is addressed in subsequent drafts, it would seem that investors will continue to face considerable problems with interconnection of renewable sources of energy to the grid.

Legislative path

At the moment the Draft Act on RES represents the ME's first proposal for amendments to existing legislation. This proposal has been subject to extensive criticism by the wind power sector during the public consultation period (completed at the beginning of February 2012). The next step is that the ME will consider comments received, and then adopt a subsequent version of the Draft Act on RES, which will be presented for debate by the Council of Ministers. Once approved by the government it will then be submitted to the Sejm where it may be subject to further amendments. Therefore, it will be sometime before any changes to the current law come into effect. Pursuant to the Draft Act on RES – it should come into force in July 2012. However, 2013 seems to be a more realistic deadline.

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