

THE MINISTRY IS NOT DEAF TO CRITICISM

KEY ELEMENTS OF THE NEW DRAFT ACT ON RENEWABLE ENERGY SOURCES ANNOUNCED

During a press conference held on 29 May 2012 the Ministry of the Economy (the "**ME**") presented key elements of the new draft Act on Renewable Energy Sources (the "**New Draft**"). Although it will be necessary to wait until work on the New Draft is completed, the ME already now decided to calm the renewable energy sector, which was thrown into turmoil after the publication in December 2011 of the first draft Act on renewable energy sources ("**RES**"). The ME presented the most important provisions - from the sector's point of view - which are to be included in the New Draft.

The key elements of the New Draft which were presented, constitute the ME's response to the criticism of the first draft Act on RES, which envisaged the cancellation of the obligation to purchase electrical energy generated from RES at a regulated purchase price, a differentiation in levels of support for different forms of RES (through, among other things, the introduction of so-called 'corrective coefficients') and change in the way the substitute fee is calculated.

The new reforms presented by the ME, although still require further work, take into consideration most of the important criticism made with respect to the first draft Act on RES.

Key issues

- Reinstatement of the obligation to purchase energy generated from RES
- Priority for interconnection of RES to the grid
- The first values for the corrective coefficients are known
- "New old" substitute fee
- Modification to the share of electrical energy generated from RES

Reinstatement of the obligation to purchase energy generated from RES

The obligation on the part of suppliers of last resort (*sprzedawcy z urzędu*) with respect to RES installations connected to the distribution or transmission grid located where a given supplier of last resort operates – to purchase electrical energy and gaseous fuels generated from these RES installations, will be reinstated in the New Draft.

The price for electrical energy and gaseous fuel will be different in the case of micro-installations and certain small installations which will not be entitled to receive certificates of origin from the price for electrical energy and gaseous fuel for installations which receive certificates of origin. In the case of the latter (i.e. wind power plants with a total electrical energy capacity above 200 kW, photovoltaic power plants with a capacity above 100 kW, etc.) the obligatory purchase of energy will be made at the average selling price for electrical energy in the competitive market in 2011, which amounted to PLN 198.90/1 MWh, taking into account annual indexation by the consumer price index. This is a move away from the rule currently in effect which states that obligatory purchase shall be made at the average selling price for electrical energy in the competitive market in the preceding year, announced by the President of the Energy Regulatory Office.

The solutions presented by the ME also contain a provision in accordance with which the obligation to purchase electrical energy arises as of the date of the introduction of the electrical energy into the grid. On this basis it could be presumed that the ME has decided to extend the obligation to purchase energy to also encompass energy generated during the start-up trials of an energy source. However, this still remains contrary to another proposed provision that the purchase obligation should apply to energy offered by enterprises holding licences to generate energy (or entered in the register of small installations), what continue to be possible after the source has officially been put into operation (thus, as a rule, after a successful start-up period).

Priority for interconnection of RES to the grid

Although they are still far from ideal, the ME nevertheless presented new proposals which introduce preferential rules for interconnection of new RES installations to the grid, which were missing in the first draft Act on RES.

Pursuant to the proposals presented, the New Draft will introduce a priority rule for RES – as regards the conclusion of agreements on interconnection to the grid – over conventional sources. It is not clear, however, how this rule is to be enforced in practice, particularly in cases where the terms of interconnection have already been issued for a given conventional source of energy.

Doubts related to interconnection to the grid being conditional on the fulfilment of the technical and economic conditions for connection (which terms still remain undefined) have still not been alleviated.

From the proposals presented it may be concluded that the 'technical conditions of interconnection' should be understood as the readiness of the grid to accept new capacity within a time limit proposed by the entity applying to be interconnected (which is a totally new concept!). If within the proposed time limit, interconnection will not be possible, the operator will have to propose the nearest possible date for interconnection after the necessary expansion and modernisation of the grid is completed. The operator will also be able to, subject to the consent of the entity applying to be interconnected, issue conditions for interconnection for a lower capacity in relation to which the technical and economic conditions are fulfilled.

The ME also proposes to regulate in the Act the possibility of issuing interconnection conditions which envisage temporary limitations in the generation of energy when the grid is being overhauled or in a state of breakdown. The decision as to whether to interconnect sources to a grid with a risk of temporary shutdowns, or whether to pull out from the investment until the grid is in an appropriate operating condition belongs to investors, not operators.

In light of the proposals presented by the ME, it seems that when analysing an application for the issuance of interconnection conditions, an operator will have to take into account many more scenarios than is currently the case. However, taking into consideration that there still are no objective prerequisites for assessing whether the interconnection of a new source with a given capacity is possible, it is unlikely that the concepts set out in the New Draft will reduce the number of disputes regarding interconnection.

The direction of the changes proposed by the ME should be deemed as correct, as for the very first time the problems associated with applying for the interconnection of RES to the grid have been noticed by the legislator; however, the mechanisms themselves still need to be fine tuned in detail, since, for the time being, there are still more questions than answers.

The first values for the corrective coefficients are known

Not surprisingly for anyone, the ME has maintained the rule introduced in the first draft of the Act on RES on diversification of the level of support for individual renewable energy generation technologies. The diversification of support will continue to be based on the mechanism of corrective coefficients (on which the value of a certificate of origin for the given generation technology will depend).

However, the New Draft will set out more precisely the rules with respect to applying corrective coefficients to a given installation in consecutive years of its operation; these rules have been the cause of most of the controversy. The corrective coefficients will continue to be subject to verification (they will be determined by the Minister of the Economy every three years for a period of five consecutive years¹); however, one constant corrective coefficient will apply to a given installation. The solutions presented by the ME assume that a given RES installation will receive a certificate of origin together with a corrective coefficient determined at a constant level for a period of 15 consecutive years, running from the date on which the installation is delivered for use².

In other words, one corrective coefficient (as in effect on the date of delivery of the installation for use) will apply to a given installation throughout the whole 15-year period.

According to the first draft Act on RES, corrective coefficients will be determined for the following categories of RES installations:

- agricultural biogas with a total installed electrical energy capacity above 500 kW to 1 MW;
- agricultural biogas with a total installed electrical energy capacity above 1 MW;
- biogas obtained from resources originating in sewage treatment plants and landfills with a total installed electrical energy capacity above 200 kW;
- biomass with a total installed electrical energy capacity below 10 MW;
- biomass with a total installed electrical energy capacity above 10 MW;
- biomass for multi-fuel firing;
- bioliquids;
- solar energy with a total installed electrical energy capacity above 100 kW;
- wind energy based on land with a total installed electrical energy capacity above 500 kW;
- off-shore wind energy;
- hydro energy with a total installed electrical energy capacity above 75 kW to 1 MW;
- hydro energy with a total installed electrical energy capacity above 1 MW to 5 MW;
- hydro energy with a total installed electrical energy capacity above 5 MW to 20 MW; and

¹ The doubts associated with the overlapping of the consecutive 5-year periods for which the Minister of the Economy will determine the corrective coefficients, will be eliminated in the New Draft: the corrective coefficients in effect in the first two years of a given 5-year period will be determined at the same level as the corrective coefficients in effect in the last two years referred to in the ordinance, applicable to the immediately preceding period.

² An exception from this rule will be support for multi-fuel firing installations, which will be entitled to certificates of origin, together with a corrective coefficient determined at a fixed level, for a period of 5 consecutive years, however, not longer than until 31 December 2020.

- hydro energy with a total installed electrical energy capacity above 20 MW.

At the same time, the ME presented a proposal of the first corrective coefficients for consecutive years starting from 2013 to 2017, for the individual categories of RES. From the proposals presented it follows that there is a tendency to decrease support for most RES installations over subsequent years, but in theory at least there are no obstacles to the corrective coefficients for a consecutive 5-year period being determined for the given support technology at a higher level than in the preceding period.

For example, in the case of wind farms the following corrective coefficients have been proposed:

RES Category	Value for the corrective coefficients in a given year				
	2013	2014	2015	2016	2017
Using wind energy (land based) > 200–500 kW	1,20	1,20	1,175	1,15	1,125
Using wind energy (land based) > 500 kW	0,90	0,90	0,875	0,85	0,825
Using wind energy (off shore)	1,80	1,80	1,80	1,80	1,80

(For the proposed corrective coefficients for other categories of renewable technologies – see the table on page 6)

It should be noted that according to the materials presented by the ME, the RES installations which were delivered for use prior to the coming into force of the Act on RES will be entitled to a corrective coefficient equal to "1" (i.e. it will not change with respect to the regulations functioning at the moment), and a certificate of origin with such a corrective coefficient will apply for a period of 15 consecutive years (running from the date on which the given installation is delivered for use).³

The ME's new proposal is a response to charges that the earlier proposed changes to the support scheme with respect to operating RES installations violate the acquired rights of investors, which in Poland are under constitutional protection. At the same time the ME decided not to grant any further concessions to the operators of already existing installations and has maintained the limitation regarding support for existing sources to a period of 15 years during the public consultations on the first draft of the Act on RES, numerous motions were submitted to extend the period of support for existing RES to at least 20 years).

"New old" substitute fee

Pursuant to the key elements of the New Draft, the ME returned to the current method of calculating the substitute fee to be paid by an entity obliged to submit certificates of origin for redemption, if it fails to obtain and redeem an appropriate number of certificates. In practice, the amount of the unit substitute fee is often used as a reference point for determining the selling price of property rights under the certificates of origin in Certificate Purchase Agreements.

³ In the case of multi-fuel firing installations which were delivered for use prior to the date of the coming into force of the Act on RES, certificates of origin with a determined corrective coefficient equal to one are due for a period of a consecutive 5 years, running from the date on which the installation is delivered for use.

In the first draft Act on RES published in December 2011, the substitute fee was to be calculated on the basis of the difference between the unit substitute fee (which initially was to amount to PLN 470 and was to be subject to annual adjustment) and the average selling price of electrical energy, announced by the President of the Energy Regulatory Office.

In the New Draft the unit substitute fee will be determined at a fixed level of PLN 286.74⁴ per 1 MWh, and the amount of the substitute fee will be determined as the product of: (i) the unit substitute fee and (ii) the difference between the quantity of electrical energy (expressed in MWh) resulting from the obligation to obtain certificates of origin and to present them for redemption and the quantity of electrical energy (expressed in MWh) resulting from the certificates of origin which a given entity presented for redemption in a given year.

The materials presented by the ME contain no information as to the annual indexation of the unit substitute fee. It is not known whether this should be interpreted as a conscious determination of the amount of the unit fee at a fixed level, or simply whether the provisions concerning the indexation in the ME's opinion did not constitute a "key element" of the New Draft and were therefore not included in the ME's publication, but will be included in the text of the New Draft itself.

Modification to the share of electrical energy generated from RES

A new concept proposed by the ME envisages the possibility of the Minister of the Economy increasing the required participation of electrical energy generated from RES by way of an ordinance, in order to guarantee an appropriate price for property rights under certificates of origin sold on the regulated market.

Such a possibility has been anticipated if the average prices of property rights under the certificates of origin sold on the commodity exchange or other regulated market are lower than 75% of the amount of the substitute fee for a period of at least two consecutive calendar quarters

In such case, the Minister of the Economy, in order to guarantee that the price of property rights remains above 75% of the amount of the substitute fee, will increase the required participation of electrical energy generated from RES in the following calendar year.

This regulation, which is decidedly beneficial for entities selling green certificates on the commodity exchange, may however give rise to controversy from the point of view of entities obliged to achieve the required participation of energy from RES and to redeem a specified number of certificates of origin each year.

Summary

The key elements of the New Draft presented by the ME seem to take into consideration most of the material comments submitted by the representatives of the renewable energy sector during public consultation on the first draft Act on RES. The reinstatement of the obligation on suppliers of last resort to purchase energy generated from RES at regulated price, as well as the maintenance of the support scheme at the existing level for installations existing upon the coming into force of the new regulations (i.e. the corrective coefficient at the level of "1") will undoubtedly gladden producers and investors who are at the final stage of implementing new RES installations (at least those for whom the 15-year period of support is sufficient in terms of a return on the costs of the investment). At the same time, the stabilising of the support scheme for new installations based on stiffening the value of the corrective coefficient applicable to a given installation will make it possible to reasonably plan investments in new sources.

⁴ i.e. the amount of the adjusted (indexed) substitute fee in 2012, according to a statement published on 8 February 2012 by the President of the Energy Regulatory Office.

The presentation by the ME of the key elements of the New Draft, which has to a great extent taken into account the market's expectations, should be positively received by the renewable energy sector, which seems to have been holding its breath since December 2001 when the ME published the first draft Act on RES.

Unfortunately, it can already be seen how much work has to be put in to make the provisions of the new Act on RES take on the shape of precise and clear legal norms. Many of the proposals presented by the ME must be made more precise or require modifications: inconsistencies in the regulations need to be eliminated and gaps in the law, which in some instances are glaringly obvious (such as, for example, in the provisions regulating the interconnection of new sources to the grid) must be eliminated. Taking into consideration the tremendous amount of work still facing the authors of the draft, the planned date for the coming into force of the new regulations – 1 January 2013, seems to be very ambitious.

However, irrespective of the imperfections of the text of the publication, the main message conveyed by the ME seems to be very clear – the renewable energy sector in Poland can continue to count on solid support!

RES Category	Value for the corrective coefficients in a given year				
	2013	2014	2015	2016	2017
Agricultural biogas > 200–500 kW	1,50	1,50	1,475	1,45	1,425
Agricultural biogas > 500 kW–1 MW	1,45	1,45	1,425	1,40	1,375
Agricultural biogas > 1 MW	1,40	1,40	1,375	1,35	1,325
Biogas originating from raw materials derived from wastewater treatment plants and landfills > 200 kW	0,75	0,75	0,725	0,70	0,675
Biomass < 10 MW	1,70	1,70	1,65	1,625	1,60
Biomass > 10 MW	1,15	1,15	1,125	1,10	1,075
Biomass for multi-fuel firing	0,30	0,30	0,25	0,20	0,15
Bioliquids	1,15	1,15	1,125	1,10	1,075
Solar energy > 100 kW	2,85	2,85	2,70	2,55	2,40
Hydro energy > 75 kW–1 MW	1,60	1,60	1,575	1,55	1,525
Hydro energy >1–5 MW	1,70	1,70	1,675	1,65	1,625
Hydro energy > 5–20 MW	2,00	2,00	1,975	1,95	1,925
Hydro energy > 20 MW	2,30	2,30	2,25	2,20	2,15

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