

# Into the New Year with a new draft Act on RES

At the beginning of 2014, the Ministry of Economy (ME) published a new version of the draft Act on Renewable Energy Sources (RES). It contains a number of amendments to the November 2013 draft of the new law after a series of short, but very intensive, public consultations and inter-ministerial consultations.

The publishing by the ME during the Christmas and New Year break of new ideas regarding the direction of the changes in the RES support system in Poland is slowly becoming a tradition. Please recall that the ME published the first draft Act on RES on 22 December 2011, thus initiating a discussion lasting over two years on the direction of changes to the RES support system.

This time, a new version of the draft of the Act on RES, marked as version 4.1 of 31 December 2013 (the "**New Draft**"), appeared on the website of the Government Legislation Centre shortly after the beginning of the New Year. The ME announced that it had finished its work on the New Draft and that by doing so it had fulfilled its promise to have the new version of the draft ready by the end of 2013. The New Draft contains amendments that were introduced to the draft Act on RES published by the ME in November 2013 (the "**November Draft**") after a series of short, but very intensive, public and inter-ministerial consultations.

A reading of the New Draft reveals that some (but not all) of the most frequently repeated concerns on the November Draft made by the RES sector were taken into account by the ME. Also, the New Draft also contains several new

interesting proposals regarding the shape of the RES support system.

Above all the New Draft still provides for the objective of a departure from the system of subsidising of ongoing production of renewable energy based, among other things, on a system of certificates of origin (known as "green certificates") and a move to an auction system based on guaranteed tariffs granted to producers offering renewable energy at the lowest price. For existing installations however (those existing at the time the new regulations come into force), the New Draft provides that the system of funding based on green certificates will be kept in place. The Draft says that the new rules for the funding system will come into force later than envisaged in the November Draft, which will enable investors who are planning to put new capacities into operation in 2014 or even 2015 to sleep more easily. This is because, as defined in the New Draft, their installations will also be treated as "currently existing" sources provided that they are used to generate power prior to the day the new regulations come into force.

## Key issues

- The main elements of the support system for existing RES installations
- New support system for RES – power auctions
- Limitation on the accumulation of state aid
- When will the new rules for funding come into effect?

## The main elements of the support system for existing RES installations

### General comments

Under the New Draft the system of support for existing RES installations other than micro-installations (as well as – to a limited degree – installations which will be upgraded after the new regulations come into force) will continue to be based on two pillars:

- the obligation to purchase energy from such installations, imposed on the so-called "bound" sellers (*sprzedawca zobowiązany*) (i.e. sellers of electrical energy with the largest volume of sales of that energy to final off-takers, designated by the President of the Energy Regulatory Office ("ERO"), being the equivalent of the present "suppliers of last resort" (*sprzedawca z urzędu*)); and
- the system of certificates of origin (the so-called green certificates) issued for electrical energy generated from RES.

Exceptions are made, however, for hydroelectric power plants and some co-incineration plants, for which the support is to be limited significantly. In the case of hydroelectric power plants, support in the form of the obligation to purchase energy and certificates of origin will be available only to installations with a total installed electrical energy capacity of up to 1 MW. In turn, in the case of co-incineration plants, it is proposed to introduce limitations regarding the volume of energy for which certificates of origin will be issued, and introduction of corrective coefficients for certificates of origin issued for energy from RES generated in those installations, which is supposed to counteract (or at least limit the scale of) the excess supply of certificates of origin from co-incineration plants. Like previous versions, the New Draft specifies a group of so-called "dedicated multi-fuel firing installations" to which the restrictions described above do not apply. Dedicated installations for "normal" multi-fuel firing installations are intended to be different primarily due to the

fact that they are fitted with separate technological lines for preparation and transportation of biomass<sup>1</sup>.

### Obligation to purchase

Under the New Draft, the obligation to purchase energy from RES will cover not only power generated when using RES installations, but also cover energy produced during the technological start-up of that RES installation (for a period no longer than 90 days counted from the date on which the energy was introduced into the grid for the first time), which is a change in relation to the regulations currently in force<sup>2</sup>.

Another proposed change is the extension of the obligation to purchase energy to cover all of the electrical energy produced from RES, determined on the actual readings of the measuring and settlement equipment and not, as sellers of last resort think at the moment, only energy offered by producers and specified in periodic forecasts.

The purchase of energy covered by the purchase obligation will be made, like now, at the so-called "ERO price", i.e. the average selling price for electrical energy in the competitive market which is determined annually by the President of the ERO.

The obligation to purchase electrical energy from a particular source will apply for a maximum period of 15 years counted from the date on which electrical energy was produced from renewable energy sources for the first time, as confirmed by a certificate of origin. At the same time, the cut-off date for the obligation to purchase energy is intended to be 31 December 2035.

### New old system of certificates of origin

The New Draft keeps in place the current obligation to redeem certificates on an annual basis (or to pay substitute fee), imposed on a group of entities trading in energy and the so-called "industrial off-takers". In the New Draft the ME

<sup>1</sup> Dedicated multi-fuel-firing combustion plants are defined in the New Draft as multi-fuel-firing combustion plants set up before 30 June 2014, equipped with separate technological lines for preparing and transporting biomass, bioliquid, biogas or agricultural biogas, the share of which, calculated according to the energy value in the total quantity of all of the fuels combusted and consumed in such plants, exceeds 20 %.

<sup>2</sup> At the moment the obligation to purchase power generated from RE applies solely to power generated using RES.

has proposed however a completely new, and, it could be said, revolutionary mechanism for setting the level of the obligation to redeem certificates of origin (or alternatively pay the substitute fee), fixing that obligation at a set level of 20%, with the option of decreasing it for each particular year in the form of a decree issued by the Minister for Economy.

At present the amount of the obligation is specified in the Ordinance of the Minister of Economy of 18 October 2012, which sets out the amount of the obligation for each year starting from 2012 to 2021, increasing on a linear basis the amount of the obligation from 10.4% in 2012 to 20% in 2021. The amount of the obligation is determined as the quantitative share of the sum of electrical energy resulting from certificates of origin (or the substitute fee paid) in the total annual quantity of electrical energy sold to final off-takers.

Under the new proposal, the maximum amount of the obligation to redeem certificates of origin (or to pay the substitute fee) will be deemed as fulfilled if, for a given year, the quantitative share of the sum of electrical energy produced in the RES installations resulting from certificates of origin (or the substitute fee paid), in the given year in the quantity of electrical energy sold to final off-takers amounts to 20%. The Minister of Economy will be able, until 31 October of each year, to reduce by way of an ordinance the amount of the obligation in the following calendar year, taking into consideration, among other things, the performance to date of the share of electrical energy and fuels obtained from RES used in the power sector and in the transport sector and the price of electrical energy on the competitive market.

The ME's assumption is that the new mechanism for determining the amount of the obligation is to enable the ME to react, in a particular year, to the current rate of increase of the capacity installed in RES and to adjust the level of the obligation accordingly in the following year (and through this demand for green certificates, and by the same token their market price). Due to the fact that the level of this requirement is determined according to demand for certificates of origin on the market and by the same token it affects the market price of certificates of origin, the changes the ME is proposing to the New Draft in this respect could have a major effect on the shape of the certificates of origin market in the future.

Except for the above discussed proposed changes, the system of certificates of origin presented in the New Draft is

similar to the proposals presented in the November Draft, and hence:

- certificates of origin are to be available for a maximum period of **15 consecutive years**, counted from the date of the production of renewable energy for the first time, confirmed by a certificate of origin, but for no later than until 31 December 2035;
- the proposals for introducing a **periodic limitation of the obligation to perform the obligation by paying the substitute fee** if the average weighted price of certificates of origin on the market is lower than 75% of the amount of the substitute fee have been repeated – this mechanism is to prevent a repeat of the situation which occurred at the beginning of 2013 when, despite a fall in the prices of certificates of origin, some of the obliged enterprises performed their RES obligation by paying the substitute fee, not by purchasing and redeeming certificates of origin;
- **the substitute fee is to amount to PLN 297.35 per MWh** (i.e. it is to correspond to the amount of the substitute fee in effect in 2013) – it is unclear whether or not during further work on the New Draft its authors will decide to change the amount of the substitute fee so that it corresponds to the indexed amount of the substitute fee for 2014, which (pursuant to the provisions of law currently in force) the President of the ERO is to determine by 31 March 2014;
- **the substitute fee will not be subject to indexation** – the lack of indexation of the substitute fee is a solution which was earlier widely criticised by RES producers and investors. Nevertheless, the ME seems to be unyielding in this respect.

The authors of the New Draft decided not to introduce the obligation to sell part of the certificates of origin through a commodity exchange, which was one of the most controversial proposals put forward in the Draft.

The New Draft also does not contain the widely criticised provision pursuant to which certificates of origin were not to be available for energy sold at a price higher than 105% of the so-called "ERO price" (i.e. the price at which energy from RES is purchased by "bound" sellers).<sup>3</sup>

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<sup>3</sup> This proposal appeared for the first time in the draft Act on RES from July 2012, and was subsequently repeated in the draft from November 2013.

## Possibility of choosing the auction system

Pursuant to the New Draft, the producers of electrical energy from RES (excluding certain multi-fuel firing-combustion plants and hydroelectric power plants above 1 MW) will be allowed to choose between maintaining the present rules of support based on certificates of origin (taking into account the changes discussed above) and participating in a new auction system dedicated to existing installations (whereby the support will be possible in total for up to 15 years).

Auctions for existing RES installations are to be conducted, as a rule, according to the same procedure as auctions for new RES installations, but existing installations will not be subject to the formal assessment procedure (see our comments below). Accession to an auction of an installation covered by the support system for existing installations (described above) will entail the loss of that support only if such installation wins an auction.

## New support system for RES – power auctions

New RES installations will be able to take advantage of the new support system based on the auction system based, in turn, on the guaranteed tariffs mechanism. The basic elements of this system presented in the New Draft correspond, as a rule, to proposals already made in the November Draft. In the New Draft meanwhile the ME made certain changes to the auction system which should be seen as beneficial to investors.

Auctions are to be announced and conducted at least once a year by the President of the ERO. The subject of the auction is to be the purchase of a specified maximum quantity of electrical energy from RES. The auction is to be won by those participants who offered the lowest purchase price for electrical energy from RES – until the quantity and value of electrical energy from RES specified in the auction announcement is exhausted.

Producers of electrical energy from RES who intend to take part in an auction are to be subject to a formal assessment procedure, the purpose of which is to evaluate how prepared the producer is to produce energy from a given RES. Apart from presenting documents confirming the admissibility of the location of the related installation on

land covered by the planned investment, an interconnection agreement or building permit, investors wishing to participate in an auction will have to submit to the President of the ERO a deposit or establish a bank or insurance guarantee amounting to PLN 30 per kW of the planned total installed electrical capacity of the installation being designed.

The price per MWh of energy offered in an auction may not be higher than the reference price determined each time by the Minister of Economy before the first auction in a given auction year is conducted.

New installations taking part in an auction will have to commence producing energy within:

- 24 months of the auction closing date – in the case of solar power plants;
- 72 months of the auction closing date – in the case of offshore wind power plants; and
- 48 months of the auction closing date – in the case of all other RES installations.

A "bound" buyer will be obliged to purchase energy from those producers who won the auction only in the quantity specified by the given producer in the offer it submitted.<sup>4</sup>

The obligation to purchase the energy covered by the winning bid arises as of the first day of the introduction of that electrical energy to the distribution or transmission grid and lasts for 15 years from the date of production of electrical energy for the first time, but not beyond 31 December 2035, (and in the case of offshore wind farms – until no later than 31 December 2040). This period is counted from the date of sale of electrical energy for the first time after the auction closing date.

The energy covered by an auction will be sold for the fixed price determined in the auction; the New Draft envisages that the prices stated in the offers submitted by auction participants who win the auction **will be indexed annually** based on the average consumer goods and services price index. This meets the concerns of investors who were critical of the freezing of the price at a fixed level, as was proposed in the earlier versions of the draft Act on RES.

<sup>4</sup> A "bound" seller is to have the right to cover a negative balance, calculated on the basis of the difference between the value of the sale of electrical energy from renewable energy sources and the value of the purchase of this electrical energy, resulting from the performance of the obligation.

## Limitation on the accumulation of state aid

The November Draft envisaged an absolute prohibition on receiving aid for RES installations stipulated in the RES Act with other forms of state aid. This was commonly criticised by investors, which resulted in it being replaced by a new, less restrictive prohibition.

Under the New Draft, the total aggregate state aid and de minimis aid provided to any RES installation (including that received under the new RES law), irrespective of the form and source thereof, may not exceed the difference between the value of the electrical energy produced in a given RES installation, determined on the basis of the reference price appropriate for the given technology determined for the needs of an energy auction, and the value of the equivalent quantity of electrical energy determined on the basis of the ERO price (i.e. the average price on the competitive market in a given year announced by the President of ERO). If the aggregate value of the state aid granted exceeds this difference, the aid granted to the producer for this installation will be reduced to an amount that prevents it from being exceeded.

## When will the new rules for funding come into effect?

Investors developing RES projects at the moment which are at an advanced stage of development will be pleased to have an extension of the interim period for the implementation of the new rules regulating the RES support system as proposed in the New Draft. Pursuant to the last provision of the New Draft, the regulations implementing the new rules governing the RES support system (contained mainly in chapter 4 of the New Draft) will come

into force on the first day of the month following the lapse of 12 months from the date the European Commission issues a positive opinion on the compliance of the state aid envisaged in the New Draft with the common market.

Assuming that the proposed date of entry into force of the regulations described above will not be brought forward during the further stage of work on the New Draft, the new rules for the support system for RES will probably come into force no earlier than at the end of 2015. This means that RES installations which are delivered for use and start producing energy in 2014 or even in 2015 will still be able to take advantage of a tried and tested certificates of origin system incorporating the implemented modifications will not have to change to the auction system.

The ME's completion of its work on the New Draft marks the end of over two years of work to develop new ideas for solutions for the renewable energy sector in Poland. It is good news that, after much waiting and numerous breaks and changes in policy a final version has been drawn up (at least in the opinion of the ME). Also, credit is due to the authors of the New Draft for the fact that subsequent versions of the draft of the act, although not entirely devoid of defects and loopholes, have become more and more thorough each time. In particular changes proposed in the New Draft, in relation to past versions of the draft RES Act, should be seen as a step in the right direction.

Unfortunately it seems there is still quite a long way to go before the new rules come into force for funding renewable energy. Judging by the volume and range of comments made by other government departments regarding the draft act, there is still no consensus within the government as to what form the new renewable energy funding system should eventually take. It cannot be ruled out, therefore, either that major changes will still be made to the draft when it goes before parliament.

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