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Green Certificates Not For Everyone - Surprises in the New Draft Act on RES

Those who thought that the corridors of the Ministry of the Economy were empty during the summer holidays might have been surprised at the announcement made at Friday's press conference – namely that the Ministry has finished its work on the new version of the draft Act on Renewable Energy Sources (further referred to as the "**Act on RES**"). After the May conference, organised to lift the mood of investors, at which the Ministry withdrew most of the criticised solutions contained in the first draft of the act (announced in December 2011), only the biggest optimists expected a new, complete draft before the end of the holidays. Yet, since Friday (27 July 2012) we have had a new draft Act on RES, which, according to Deputy Minister Mieczysław Kasprzak, awaits only a second round of inter-ministry consultations and final amendment by the Ministry of the Economy.

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Generally, the new draft upholds and supplements the new regulations proposed during the May conference. In particular, the new draft repeats the solutions that are to be the foundation of the system supporting RES in Poland, which were favourably received by energy sector representatives Therefore, we have preferential rules for the interconnection of RES plants to the grid, we have the upheld (reinstated after the first draft act) obligation that a supplier of last resort buy energy, we have certificates of origin, a 15-year support system, and a substitute fee calculated according to the old rules (but now without annual indexation). The upper limit of the energy price at which a supplier of last resort is obliged to buy energy from RES is a new feature of Art. 38 of the new draft – the rule is that the energy price determined on the basis of the statutory rate of PLN 198.90 per MWh with consideration for annual indexation may not, however, be higher than the so-called "**ERO price**", i.e. the average electrical energy selling price on a competitive market, announced by the President of the Energy Regulatory Office.

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It would seem that apart from this new element of the new draft there are no other surprises. However, a certain idea, not presented earlier, has been surreptitiously added to the draft, which could entirely upset the financial models of more than one RES project planned or already delivered for operation.

The controversial provision is in Art. 41 sec. 3 of the new draft Act on RES. Under that provision, "if the sale of electrical energy or gas fuel produced from renewable energy sources in a renewable energy source plant interconnected to a distribution or transmission grid or network located in an area where that supplier of last resort operates and offered by an energy enterprise is made at a price higher than the purchase price referred to in Art. 38 [of the draft Act], there is no right to receive confirmation of the production of that electrical energy in the form of a certificate or origin or a certificate of origin of biogas."

That provision is not entirely clear, but the main idea of its authors seems apparent - producers of energy from RES will not receive certificates of origin for energy sold at a price higher than the regulated price determined for purchase by suppliers of last resort. If, therefore, a producer earned even one zloty more on the sale of energy than if it had sold the energy at the statutory price or at the ERO price (depending on which of them was lower and in force in the given year for suppliers of last resort), it would lose the opportunity to earn additional income from the sale of so-called green certificates.

The addition of this provision to the proposed Act on RES could prove tragic in its consequences for all those who, when selling energy on the basis of bilateral agreements (so-called power purchase agreements - PPAs) or on the commodities exchange or other trading platform, receive a price higher than the price of the mandatory purchase by suppliers of last resort, because in such a case they will be penalised by losing the right to receive certificates of origin and, consequently they will lose the most important source of revenue from the project.

Because of the lack of particular interim or harmonizing provisions, it should be assumed that the new rule – if it is upheld – will apply both to transactions entered into on the basis of PPAs concluded under the old (i.e. current) regulations and those entered into on the basis of newly concluded agreements and transactions on the commodities exchange.

The unclear provisions of Art. 41 sec. 3 of the new draft give the impression that originally the authors of the draft wanted to go even further and award certificates of origin only for energy that is sold to the supplier of last resort appropriate for the given area at the regulated price determined pursuant to Art. 38 of the draft Act. That intention is expressed outright in the justification to the draft Act of RES. The authors of the new draft must obviously have changed their minds at the last minute, because a provision in that form was not included in the draft. However, if it had been, it would have meant in fact the creation of local monopolies of suppliers of last resort for the purchase of energy from RES plants interconnected to the grid in the area where those sellers operate (because sales to any other entities

would have automatically entailed loss of support in the form of a certificate of origin). At the same time suppliers of last resort would have been guaranteed the maximum price level for the purchase of energy from RES. Detailed analysis is unnecessary to see that such a restriction would clash with the rules of the free market for energy in force in the member states of the EU. The consequences of the provision that ultimately found its way to the new draft act, although at first glance not far-reaching, could still materially impair the freedom of producers in the conclusion of agreements for the sale of energy from RES and the role that suppliers of last resort will play on the energy trading market.

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At this point, it is also worth pointing out one other amendment in the new draft Act on RES, i.e. the change to the definition of "supplier of last resort" and to the rules on which such sellers are appointed. As a reminder: currently, according to the definition set out in Art. 3 point 29 of the Energy Law, an "supplier of last resort" means a seller responsible for selling energy to those recipients who do not enjoy the right to choose a seller. Suppliers of last resort are appointed by the President of the ERO by means of a tender.

Under the new draft Act on RES, a supplier of last resort will be a seller supplying energy to the greatest number of household recipients of that energy when set against the number of recipients interconnected to the distribution network, in the area where that seller operates, in the preceding year, and designated in a decision of the President of the ERO on the application of the grid operator (Art. 40 in conjunction with Art. 2 point 31 of the new draft Act on RES).

The imprecise and incomplete regulation set out in Art. 41 sec. 3 of the draft Act on RES is the source of a number of queries and doubts as to how the proposed restriction is to function in practice. Would there be no right to certificates of origin only for that part of the energy sold at a higher price or for all the energy to which a given sale transaction relates? On what basis would the President of the ERO, who is responsible for issuing certificates of origin, be supposed to determine at what price a given portion of energy was sold? How would the energy price be calculated in the case of related transactions? There are no ready answers to these questions in the new draft Act on RES. For the time being, it is not known whether the presence of Art. 41 sec. 3 in the new draft Act on RES is a thought-out decision of the Ministry or whether it is an unfortunate inclusion that the Ministry of the Economy will change at the first possible opportunity. However, it should be expected that during further work on the draft, Art. 41 sec. 3 will be the provision that evokes the strongest emotions.

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Contacts

Agnieszka Janicka
Partner

T: +48 22 627 11 77
E: agnieszka.janicka@cliffordchance.com

Tomasz Janas
Counsel

T: +48 22 627 11 77
E: tomasz.janas@cliffordchance.com

Paweł Puacz
Senior Associate

T: +48 22 627 11 77
E: pawel.puacz@cliffordchance.com

Norway House, ul. Lwowska 19, 00-660 Warsaw, Poland

Clifford Chance, Janicka, Krużewski, Namiotkiewicz i wspólnicy spółka komandytowa

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