

Final draft amending the RES Act approved by the Polish government

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On 6 March 2018 the Polish government approved the final draft act amending the Renewable Energy Sources Act of 20 February 2015 (Journal of Laws of 2015, item 478, as amended; the **RES Act**), introducing a number of modifications to the auction mechanism (**Amendment Act**) and which contains a number of variations in comparison to the initial version of the amendment act announced on 28 June 2017. Now the government is expected to submit the Amendment Act to Sejm, the lower chamber of the Parliament within next weeks.

New auction baskets structure

The Amendment Act proposed a completely new structure of auction baskets referring to specific types of RES technologies listed in the regulation of the Minister of Energy on reference prices:

- **Auction basket (1):** RES installations using landfill gas, gas from sewage treatment plants, other types of biogas, dedicated biomass firing installations or hybrid systems, thermal waste treatment plants or dedicated multi-fuel firing installations;
- **Auction basket (2):** RES installations which use only hydro power, bioliquid fuels, geothermal energy or offshore wind farms;
- **Auction basket (3):** RES installations which use agricultural biogas for the generation of electricity,
- **Auction basket (4):** Onshore wind farms and PV plants,
- **Auction basket (5):** Hybrid installations.

Each of these baskets would be further sub-divided in the following sub-baskets for installations:

- a) operating before July 1 2016 (existing RES installations)
- b) operating after close of relevant auctions (new RES installations)

And within each of these sub-baskets there would be separate auctions for installations with total installed electrical capacity:

- a) not higher than 1 MW;
- b) higher than 1 MW.

Limited pre-qualification requirements for new installations

New RES installations would be admitted to auctions only if they undergo a pre-qualification procedure conducted by the President of the ERO and obtain a certificate (valid for 12 months). The Amendment Act proposed that eligibility criteria for new projects would be simplified in comparison to the present RES Act and limited to the following documents:



- a) grid connection conditions issued by, or a grid connection agreement executed with, the relevant grid operator;
- b) final and unappealable (*prawomocne*) building permit (*pozwolenie na budowę*) except for off shore wind farms;
- c) In case of off shore wind farms, the developers should submit (i) final and unappealable (*prawomocne*) permit to build and operate artificial islands, structures and devices in Polish maritime areas for projects located in the exclusive economic zone along with (ii) final and unappealable (*prawomocne*) environmental decision;
- d) timetable for implementing the project;
- e) a RES installation plan presenting projected location of generation units, grid connection points and metering system.

Reference prices

Under the Amendment Act, the Minister of Energy would be obliged to set a maximum bid price (called "reference price") which bidders cannot exceed when bidding at auction separately for 25 categories of RES (currently the RES Act identifies 21 such categories). The

Amendment Act sets out reference prices for all 25 categories of RES for the purposes of the auctions to be held in 2018.

Volume and value of electricity from RES that can be sold in auctions in 2018

The Amendment Act proposed the maximum volumes and values of electricity that can be sold in auctions in 2018. The highest allocation was proposed for new RES installations with an installed capacity higher than 1 MW in respect to: Auction basket no. (1) in relation to (57,699,309 MWh worth PLN 24,929,301,412) and Auction basket no. (4) (45,000,000 MWh worth PLN 15,750,000,000). On the other

hand, under the Amendment Act no auctions are planned in 2018 for existing wind farm projects or existing PV plants.

Obligation to sell electricity on a commodity exchange

A very important provision has been added to the Amendment Act (a new article 72a) under which:

- 1) RES installations which produce electricity until 31 December 2020 (except for biogas plants and hydro power plants smaller than 1 MW):
 - a) may sell such electricity provided that **entire electricity produced** by the RES installation is fed into the grid and sold on a commodity exchange or on a market organised by an entity managing so called regulated market in Poland (so again – selling entire electricity through TGE would qualify); and
 - b) RES installation operator is obliged to submit 14 days before the commencement of generating electricity a written representation to the energy regulator (the President of the ERO) that the electricity produced in the relevant RES installation will be fed into the grid and sold on a commodity exchange or on a market organised by an entity managing so called regulated market in Poland.
 - c) If the RES installation operator fails to submit the above representation or if the operator breaches the representation, the President of the ERO would issue a decision excluding the RES installation from the auction system.
- 2) With respect to new RES installations (that will start operating after the closing of the relevant auction) the 15-year support period would start on the date of the first sale of electricity produced in the given RES installation..

The wording of article 72a is very poorly ambiguous and gives rise to several serious doubts. It may seem that the intended aim was to impose the obligation to sell electricity on a power exchange as a prerequisite for the eligibility to participate in auctions and in the guaranteed price scheme. However, the proposed language may be interpreted in a way that it applies to any electricity produced by any RES installation before the end of 2020, even if such an installation does participate in the auction system. Consequently, the following critical issues would arise if the wording of the proposed article 72a is not corrected during legislative works in the Parliament:

- 1) Would any electricity produced by a RES installation (except for biogas plants and hydro power plants smaller than 1 MW) before 31 December 2020 be barred from being sold outside of an energy exchange, in particular under direct PPAs with energy trading companies or electricity producers?
- 2) If yes, would it make not only impossible to enter into new PPAs but also would it render already existing PPAs illegal as far as they concern electricity produced before the end of 2020?
- 3) Would it be necessary to sell at the power exchange all electricity produced also after 31 December 2020 in order to be eligible to participate in and be supported from the auction system?

The proposed article 72a is currently an object of a heated debate and at the time of writing it is difficult to predict whether, and if yes – in what wording it would become binding legislation. It has been pointed out that an obligation to sell 100% of electricity production at a power exchange is both economically unjustified and impractical, since such a rule would ignore several complications caused, such as difficulty to manage electricity imbalances and unnecessary administrative burden for RES projects to arrange sales through a power exchange which under Polish regulations would require using licences brokers as intermediaries...

Other amendments proposed:

- a) In contrast to the current RES Act, under the Amendment Act, when calculating the total value of public aid awarded to the given RES installation, the value of green certificates, cogeneration certificates and energy efficiency certificates, CO2 emission allowances would no longer need to be included.
- b) Currently, when calculating the bid price generator should take into account state aid awarded to the given RES installation and reduce the price (i.e. deduct the value of state aid). In consequence, generators operating RES installations awarded with state aid might submit lower bids than those who operate RES installations without any state funding. Under the Amendment Act, the RES operators would offer prices without taking into account the value of other public aid awarded to the given RES installation. Only once an auction is completed, the winner would be required to recalculate its winning price and reduce it by the amount of public aid already awarded to the given RES installation (if such public aid was actually awarded). This change should result in equal treatment of all RES operators during auctions regardless of whether they obtained any public aid or not.
- c) Under the Amendment Act regardless of the initially planned volume of the given auction, the winners should represent no more than 80% of the total volume of electricity covered by the bids.
- d) The Amendment Act proposed reduced terms of constructing and launching winning RES installations, i.e.: 36 months save for PV plants (18 months), onshore wind farms (24 months) and offshore wind farms (72 months).

Changes to the Act on investments in wind power plants

The Amendment Act proposes certain changes to the Act on investments in wind power plants which introduced rules for locating and constructing wind farms (and established minimum distance requirement) in particular:

- 1) The Amendment Act basically retracts changes to the definition of a wind power plant aimed introduced by the Act on investments in wind power plants and which brought serious implications for the calculation of the real property tax payable on the real property where a wind turbine is located. Under the Amendment Act a wind power plant consists of two parts: building section (*część budowlana*) and technical equipment (*urządzenia techniczne*) which generates electricity. As a result the taxable base for calculating real property tax would be once again limited to the value of foundations and tower (just like it was before the Act on investments in wind power plants came into force). The above changes are to be binding retroactively – i.e. as from 1 January 2018.
- 2) Currently, building permits issued before the effective date of the Act on investments in wind power plants (16 July 2016) or as a result of administrative proceedings initiated the effective date of the Act on investments remain valid as long as the wind power plants are constructed and the permit for use (*pozwolenie na użytkowanie*) is issued not later than 3 years from the Act's effective date. The final version of the Amendment Act extends the above time limit to 5 years. In consequence, investors would be entitled continue the construction works and obtain permit for use on the even if the installation does not comply with the minimum distance rule provided that the permit for use is obtained no later than 16 July 2021.