

Warsaw, 18 July 2017

PWEA Position Paper on the parliamentary draft amendment to the RES Act Sejm paper 1733

The draft Act amending the Renewable Energy Sources Act (Sejm paper 1733) has been submitted to the Sejm on 12 July 2017

The purpose of the proposed amendment, as specified by MPs in the statement of reasons, is to bind the unit substitution fee referred to in Article 56 of the RES Act to the market price of proprietary interest stemming from certificates of origin. The payment of the substitution fee is an alternative to the fulfilment of the obligation to cancel certificates of origin of electricity, the so-called green and blue certificates, through the purchase and cancellation thereof. Currently, the unit substitution fee amounts to 300.03 PLN/MWh and, as stressed by MPs, substantially differs from the price of, for example, the so-called green certificates, for their yearly weighted average 2016 price was 73.67 PLN/MWh.

MPs propose the unit substitution fee, calculated separately for the so-called green and blue certificates, to amount in a given year to 125 percent of the yearly weighted average price of the proprietary interest stemming from the certificates of origin, published in accordance with Article 47 of the RES Act, but no more than 300.03 PLN per 1 MWh. In the statement of reasons the MPs stress that due to the regulation forbidding to pay the substitution fee when any of the weighted average prices of proprietary interest stemming from certificates of origin – monthly or yearly – is lower than the substitution fee, a change setting the substitution fee at arm's length will be of no practical consequence in an environment with low proprietary interest prices.

The MPs stress that when the market value of certificates increases, the “arm's length” unit substitution fee “will perform its function as a certain maximum price that may be achieved by producers of electricity from RES in exchange for proprietary interest and will decrease support for such producers, thus decreasing the burden for final consumers due to the increase in energy prices.”

Polish Wind Energy Association (“PWEA”) stresses that in conjunction with the pending works on the governmental draft Act amending the Renewable Energy Sources Act of 20 February 2015 and certain other acts, published on 28 June 2017, the key issue for the industry, i.e. **the value of the substitution fee, subject to the draft submitted by the Proposer MPs, may be regulated within the above-mentioned amendment procedure.**

In PWEA opinion the draft amendment to the RES Act (Sejm paper 1733) submitted by Proposer MPs is disadvantageous for the RES industry, for – contrary to the statements contained in the statement of reasons thereto – by no means it contributes to solving the market oversupply of certificates of origin; to the contrary, it will quickly and adversely affect the economic situation of many RES investors.

In PWEA opinion the procedure for the procedure for calculating the substitution fee assumed in the draft will result in the establishment thereof at the level of 125% of the yearly weighted average



price of proprietary interest stemming from certificates of origin, what is clearly disadvantageous for the industry, for it limits the potential increase in prices of the instrument. Therefore, the growth rate of green certificate prices will be limited by the substitution fee, which pursuant to the proposed draft will be limited from 300.03 PLN/MWh to an estimated level of approximately 56 PLN/MWh in 2018. Binding the unit substitution fee with market prices of certificates will result in the establishment of a lower price threshold for the instruments, what may contribute to the decrease in the prices thereof. Available models forecasting the development of market prices of green certificates demonstrate that the achievement of green certificate prices expected by investors in terms of investment profitability and debt repayment capacity is possible only in the very distant future, making it irrelevant for investors, who by then will incur losses substantial enough to have bankruptcy declared for a majority of them.

PWEA signalled that there exist many long-term certificate purchase agreements concluded between RES investors and obligated vendors, i.e. the largest trading companies. In the agreements the green certificate prices have been specified with reference to the unit substitution fee. If the regulation binding the unit substitution fee with green certificate prices becomes effective, the long-term agreements will require adjustment to the new legal environment, inevitably leading to the necessity to re-negotiate them.

This would directly and quickly adversely affect the economic situation of many RES investors. Furthermore, it could result in an amendment to the wording of the agreements or attempts to terminate them by energy vendors due to changes in legal environment.

In PWEA opinion the economic issues faced by RES investors as a result of the decrease of revenues of yet another group thereof may constitute a serious problem for the banks crediting the RES sector. Binding the unit substitution fee with green certificate prices in the current environment would constitute yet another negative signal both for the RES market and the banks. **For both groups this would constitute yet another proof how unstable the regulations concerning RES are, how unpredictable state actions are and how risky investing in renewable energy sources is Poland is.** The severity of regulatory risk in the RES sector has already been discovered by at least part of investors from other RES industries that won the RES auctions announced by Ministry of Energy, but are facing problems with acquiring bank financing for the investments. Therefore, yet another adverse regulatory change will result in the incapacity to finance any RES investment in Poland in the predictable future, irrespectively of technology or organisational formula thereof.

PWEA stresses that the changes proposed in the draft pertain to a substantial element of the support scheme for producers of electricity from RES, i.e. the certificates of origin scheme. In the decision dated 2 August 2016, SA.37345 (2015/NN) the Commission deemed the scheme compliant with the internal market pursuant to Article 107(3)(c) of the TFEU **and stressed that any changes concerning this aid require notification to the European Commission.**

Therefore, the adoption and implementation of the changes proposed in the draft without prior notification may result in the obligation to return the received aid, together with interest, as illegitimate public aid. Similarly, as in the case of France, substantial penalties may be imposed on Poland for the period from the implementation of the change until notification thereof by the Commission (if it would be notified by the Commission, which is doubtful).



In PWEA opinion the likely obligation to return public aid granted in an illegitimate way resulting from the amendment proposed by Proposer MPs will cause the entities obliged to make such returns to pursue relevant claims against the State Treasury. Such claims will also arise in State Treasury companies; where the management boards thereof fail to pursue such claims, pursuant to statutory regulations they will be liable for acting to the detriment of the company and subject to certain legal consequences.

Furthermore, in PWEA opinion, the introduction of the amendment in question constitutes yet another regulation substantially deteriorating the business environment for foreign RES investors, which is likely to become the basis for their claims against the State Treasury related to compensation of damages or lost profits based on provisions of agreements on the mutual promotion and protection of investments as well as the Energy Charter Treaty. The draft violates the commitments to protect foreign investments and the ban on discriminatory violation of the other party's investors' rights as well as the obligation to ensure stable, fair, advantageous and transparent conditions for investors laid down in such documents.

In conjunction with the above, PWEA stressed the need to take effective action on the certificates of origin market aimed at restoring the balance on the market, not at further deterioration of the situation of RES investors, what will happen when the proposals of the Proposers laid down in Sejm paper 1733 are accepted. In PWEA opinion the solutions proposed by PWEA do not require substantial amendments to the Act or approval thereof by the European Commission.

PWEA thinks that currently it is difficult to predict how substantial the decrease in the GC quota obligation may be assumed by the minister for the subsequent years; however, market-available forecasts for the certificates of origin market clearly demonstrate that the oversupply thereof will increase, and the price will decrease further. Therefore, PWEA called for maintaining the statutory cancellation obligation level for the year 2018, followed by the introduction of the so-called rolling obligation to cancel certificates of origin at the level of 17.4%, 18.4%, 19.35% in subsequent years (2019-2021).

Furthermore, PWEA also proposed to bind the specification of the obligation to cancel green certificates with the publication of information concerning the maximum volume and value of electricity from renewable energy sources that may be sold by way of auctions in three subsequent calendar years. The information will also refer to the volume and value of electricity from RES that may be sold by way of transitory auctions, what directly translates into certificates of origin oversupply forecasts. Furthermore, the dates of publication of the said information have to be synchronised with the date of publication of the regulation amending the quota obligation.

PWEA stressed that the decrease of the oversupply as a result of implementation of the rolling scheme proposed by PWEA will have no noticeable impact on energy prices for final consumers (an increase in the average certificate of origin price to the level of 200 PLN/MWh would result in the increase of electricity bills for an average household in the order of 3 PLN/month). Furthermore, it shall be noted that notwithstanding a substantial decrease in certificate of origin prices after 2011 coupled with a simultaneous decrease in wholesale electricity prices, the price of electricity for final consumers is maintained at the same level or even slightly rising when compared to 2011. Hence, electricity prices cannot be directly related to the price of certificates of origin. Proposals of relevant



statutory provisions have been provided to Minister for Energy on 14 July together with remarks to the draft Act amending the Renewable Energy Sources Act and certain other acts.

The first reading of the parliamentary draft Act amending the Renewable Energy Sources Act (Sejm paper 1733) was held on 18 July. Currently, in conjunction with the Order no. 7 of the Speaker of the Sejm dated 14 July 2017 on ensuring law and order within the premises and in the buildings managed by the Chancellery of the Sejm, it will be impossible for the public to participate in the works on the draft. **In the procedure for the processing of the Act adopted by the Sejm there is currently no possibility for the public to submit any remarks to the draft, which practically precludes the opportunity to discuss its effects and take into account the opinion of representatives of the RES industry, whom the draft directly and acutely affects.**

