

Legal Alert

February 2020 r.

www.skslegal.pl

Proposed new offshore wind farm incentive scheme

On 15 January 2020 the Minister of the State Assets published the draft act on the promotion of the offshore wind electricity generation (the "Draft Offshore Act"). The Draft Offshore Act provides for the dedicated incentive scheme to support development of the offshore wind farms (the "OWF"), such incentive scheme to be granted in the form of the „Contract for Difference”, i.e. right to compensation of the difference between the market price of the electricity and the price of electricity from respective OWF agreed in the decision of the President ERO or the auction (CFD). According to the Draft Offshore Act, the support will be granted in one of the following two forms:

- (i) Stage I (most advanced projects) – within the administrative decision and the individual notification of an aid measure;
- (ii) Stage II – within the auction-based incentive scheme.

STAGE I

Basic assumptions:

- CFD granted by way of decision of the President of Energy Regulatory Office (the "**President of ERO**") issued upon the application of the OWF's operator;
- applications can be submitted no later than 30 August 2022; decision of the President of ERO shall be issued no later than 31 December 2022;
- total installed capacity of the OWFs granted CFD within Stage I cannot exceed 4600 MW;
- CFD will be granted based on the criterion of the time of submission of application and provided that the applicant establishes collateral (bank guarantee or security deposit) in the amount of PLN 60 per each kilowatt of the capacity of the OWF;
- CFD granted upon the decision of the President of ERO will be subject to individual notification to the European Commission and the disbursement of CFD will be available only after the EC's decision stating that the granted support does not infringe the EU regulations on state aid.

Main attachments to application:

- (i) grid connection agreement;
- (ii) final decision on environmental conditions;
- (iii) final permit to erect and operate artificial islands, structures and devices in the Polish maritime territory (the "**Seabed Permit**");
- (iv) schedule of works and expenditures along with plan of participation of materials and local services („local content“).

Incentive effect

Prior to submission of the application for CFD each operator must obtain the „incentive effect certificate“, i.e. certificate issued by the President of ERO confirming that given OWF would not be implemented unless the CFD was granted.

STAGE II

Basic assumptions:

- auctions announced, carried out and settled by the President of ERO within the dedicated technological basket covering only the OWF;
- each of auction participants to be submit only one offer, confidential for others;
- selection of offers within the auction to be based on the criterion of the lowest price provided that the winning offers do not exceed (i) 90% of the total volume of installed capacity covered by all the offers submitted within given auction; (ii) 100% of total volume of installed capacity specified in an announcement of the given auction;
- auctions are occurred in 2023, 2025, 2027 and – in case of unused limit of total installed capacity for the auction for 2027 – also in 2028; the Polish Council of Ministers may decide to conduct an additional auction;
- within the first auction envisaged for 2023, CFD might be allocated only in respect of the unused limit of the total installed capacity established for Stage I and provided that the minimum capacity would be at least 500 MW.

Pre-qualification to the auction

Participation in the auction is possible upon positive outcome of “prequalification procedure”. Under the prequalification procedure each operator should obtain the certificate from the President of ERO in order to be entitled to submit offer within the auction. An application for certificate should contain similar elements as the application submitted in the course of the Stage I, i.e. (i) grid connection conditions or grid connection agreement, (ii) final decision on environmental conditions, (iii) final Seabed Permit. The certificate is valid for 36 months. The application should be secured with bank guarantee or security deposit in the amount of PLN 60 per each kilowatt of the envisaged OWF's capacity.

SELECTED ELEMENTS COMMON TO STAGE I AND II

- 1) CFD would be limited to the maximum period of 25 years starting from the first day of generation of the electricity from a given OWF or its part on the basis of the concession for electricity generation.
- 2) CFD might be granted exclusively with respect to electricity generated in that part of the OWF which is not entitled to the remuneration for services similar to the capacity obligation.
- 3) The Draft Offshore Act provides that the operator of the OWF may be entitled to the CFD for the amount of electricity generated in this part of the OWF which has been completed and has been commissioned to use. It means that the operator may benefit from the CFD for individual parts of the OWF in stages.
- 4) The maximum volume of electricity which might be subject to the CFD is:

$$WW = P [MWH] \times 100\,000 \text{ h}$$

WW- amount of support

P – installed capacity of OWF or its part specified in the concession

- 5) The Draft Offshore Act allows for calculation of the compensation on the basis of actual electricity sale price or the settlement price received from the balancing market – provided that the entire volume of electricity generated in the OWF in given month is sold on the commodity exchange (including the Market Coupling) or settled within the central trade balancing mechanism (if the condition is not met the compensation would be calculated based on the market value of electricity corresponding to the weighted average hourly spot prices from the day-ahead market).
- 6) The Draft Offshore Act excludes the possibility of obtaining the CFD in respect to electricity generated in those hours when the an average market price quoted on the day-ahead market is negative for at least 6 subsequent hours. On the other hand, the CFD is granted to electricity which has not been produced and fed into the grid due to TSO's operational orders.
- 7) An operator that has been entitled to CFD is obligated to generate electricity and fed it into grid within 7 years from:
 - (i) Stage I – the day on which the President ERO issued the decision on granting the right to compensation of negative balance;
 - (ii) Stage II – the day of the auction settlement.
- 8) An operator applying for CFD in both Stage I and Stage II is obligated to submit to the President of ERO the plan of participation of materials and local services. The plan should contain, among other things, information on what actions the operator intends to take in order to develop human resources and improve professional qualification needed for the construction and operation of the OWF and how many workplaces intends to create on the territory of Poland in connection with the OWF implementation. The operator should regularly report on the execution of the plan.
- 9) Regardless of the Stage, in the course of applying for the CFD the operator is obligated to establish contact with potential suppliers of materials and services used during the OWF development.

OTHER SIGNIFICANT REGULATIONS

Tax on the offshore wind farms

According to the Draft Offshore Act, the OWF will be subject to a new tax. The tax will be paid by the entity conducting business activity consisting in the generation of electricity in the OWF. The base of this tax is a product of the installed capacity of the OWF expressed in MW specified in the concession for generation of electricity and the amount of PLN 23 000, which is to be subject to yearly indexation. The OWF are exempt from the property tax.

Extension of validity of the Seabed Permits

The validity of Seabed Permits issued before the date of entry into force of the Draft Offshore Act is extended by 8 years.

Assignability of the CFD

The right to compensation of negative balance is a transferable right which might be transferred to the legal successors of the operator and is subject to foreclosure which would in practice simplify the establishment of security over the CFD.

Transfer of the right to compensation of negative balance

Prior to the conclusion of the agreement transferring the OWF ownership, the operator is obligated to obtain the consent of the President of ERO to transfer the CFD to a third party. The consent is issued in the form of an order.

Improvements of proceedings for the OWF development

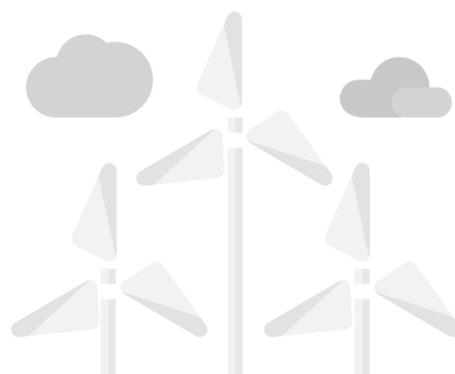
Deadlines have been shortened: decisions and permits issued in order to implement the OWF, i.e.: (i) decision on environmental conditions; (ii) water law permit; (iii) construction permit (iv) occupancy permit will be issued within 90 days from submission of request (for each day of delay the authority will pay a fine of PLN 1000). The Voivodship Administrative Court will hear the case within 30 days from receipt of the case files (currently from 6 months up to 12 months). The Supreme Administrative Court will hear the case no later than 2 months from the date of appeal (currently even up to 2 years).

Immediate enforceability clause for decisions and permits has been introduced: it means that an appeal will not stop the enforceability of the decision. It will be possible for the investor to progress with a project during appeal proceedings. No public authority will be entitled to stop enforcement of a decision or permit during an administrative proceedings.

The possibility of repealing decisions or permits is limited: if any of the abovementioned decisions or permits is only partially defective, such decision or permit cannot be repealed or annulled in its entirety.

Streamlining the procedures for the implementation of grid connection investments by PSE

Investments related to development of the transmission grid and the lines connecting the OWF with the transmission grid will be carried out by PSE on the basis of the so-called Transmission Special Act. It allows to improve and shorten the period of preparation and development of these investments by PSE. The Draft Offshore Act regulates the issue related to the acquisition by TSO of those parts of the OWF which link the offshore generation equipment with transmission grid.



General overview on the Draft Offshore Act:

- the Draft Offshore Act is currently at an early stage of legislative work;
- the main assumptions of the Draft Offshore Act might be changed;
- the Polish Government plans to adopt the Draft Offshore Act in the first quarter of 2020 due to deadlines for submitting applications for administrative decisions which might grant the CFD;
- Incentive for investors to build the OWF in the Baltic Sea is a key step for development of RES technologies in Poland and might contribute to meet the European Union requirements in respect to the share of electricity from RES sources in the total gross electricity consumption on a nationwide scale and might ensure Poland the energy security.

Contact us



Krzysztof Cichocki

Partner, attorney-at-law

☎ 22 608 70 51

✉ krzysztof.cichocki@skslegal.pl



Tomasz Młodawski

Senior Counsel, attorney-at-law

☎ 22 608 73 27

✉ tomasz.mlodawski@skslegal.pl



Łukasz Wyszomirski

Attorney-at-law

☎ 22 608 73 21

✉ lukasz.wyszomirski@skslegal.pl



Maciej Lewicki

Attorney-at-law

☎ 22 608 73 03

✉ maciej.lewicki@skslegal.pl