

LEGAL ALERT

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STATUTORY PRICE REGULATION AT THE POLISH ELECTRICITY MARKET

On 28 December 2018 Sejm (lower chamber of the Polish Parliament) adopted the Act amending the Act on the Excise Duty and selected other acts (“Act”), which aims at temporary stabilization of electricity costs being incurred by final customers, in particular by implementing the following instruments:

- imposing temporary restrictions on power supply companies as regards setting of electricity prices;
- temporary „freezing” of transmission and distribution tariffs applied by electricity grid operators;
- decrease in excise duty on electricity and in the rates of transitional fee incurred by final customers of electricity.

The Act entered into force with the effect from 1 January 2019 and it was subsequently amended by the act of 21 February 2019 (“First Amendment”), which entered into force on 6 March 2019 and the act of 13 June 2019 (“Second Amendment”), which entered into force on 29 June 2019.

First Amendment has introduced significant modifications consisting in (i) cancelling the obligation to temporary “freeze” the tariffs applied by the grid operators, (ii) amendment of the mechanism of calculating the electricity price applicable in 2019 and (iii) prolonging the deadline for signing amendments to the power supply contracts. Nevertheless, the Amendment maintained the obligation to apply the Maximum Price (as specified below) for the purpose of the settlements with respect to the period starting from 1 January 2019.

According to the Second Amendment, it is provided i.a. that: (a) the scope of entities entitled to benefit from the obligation to apply the Maximum Price would be limited as of 1 July 2019, (b) breach of the obligation to apply Maximum Price (as specified in Art. 5 Sec. 3 of the Act) would not be subject to administrative penalty and (b) certain types of end-users would be entitled to apply for grant due to electricity price increase with respect to the electricity purchased between 1 July and 31 December 2019, such grants to be given as the *de minimis* state aid.

INSTRUMENTS REDUCING COSTS OF OBTAINING ELECTRICITY

MECHANISM LOWERING THE PRICE OF ELECTRICITY / ELECTRICITY SUPPLY SERVICE	THE WAY OF THE MECHANISM'S OPERATION	METHOD OF COMPENSATION FOR LOST REVENUES OF ENERGY COMPANY																								
<p>DECREASE IN EXCISE DUTY</p>	<ul style="list-style-type: none"> Modified rate of excise duty on electricity from PLN 20 / MWh to PLN 5 / MWh starting from 1 January 2019. 	<p>NOT APPLICABLE</p>																								
<p>DECREASE IN TRANSITIONAL FEE RATES</p> <p>(i.e. the fee, which is aimed at covering the so-called stranded costs arising from the termination by PSE (TSO) of long-term contracts with power generators)</p>	<ul style="list-style-type: none"> Decrease in transitional fee rates by 95% from 1 January 2019 with respect to certain groups of final customers: <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: center;">Group of final customers:</th> <th style="text-align: center;">Previous rate:</th> <th style="text-align: center;">Rate after amendment:</th> </tr> </thead> <tbody> <tr> <td>Households < 500 kWh / year</td> <td style="text-align: center;">PLN 0.45 / month</td> <td style="text-align: center;">PLN 0.02 / month</td> </tr> <tr> <td>Households 500 – 1 200 kWh/year</td> <td style="text-align: center;">PLN 1.90 / month</td> <td style="text-align: center;">PLN 0.10 / month</td> </tr> <tr> <td>Households > 1 200 kWh / year</td> <td style="text-align: center;">PLN 6.00 / month</td> <td style="text-align: center;">PLN 0.33 / month</td> </tr> <tr> <td>Others connected to the low-voltage grid</td> <td style="text-align: center;">PLN 1.65 / kW of contractual capacity</td> <td style="text-align: center;">PLN 0.08 / kW of contractual capacity</td> </tr> <tr> <td>Others connected to the medium-voltage grid</td> <td style="text-align: center;">PLN 4.10 / kW of contractual capacity</td> <td style="text-align: center;">PLN 0.19 / kW of contractual capacity</td> </tr> <tr> <td>Others connected to the high-voltage grid and > 400 kV grid</td> <td style="text-align: center;">PLN 7.65 / kW of contractual capacity</td> <td style="text-align: center;">PLN 0.20 / kW of contractual capacity</td> </tr> <tr> <td>Energy-intensive companies</td> <td style="text-align: center;">PLN 2.10 / kW of contractual capacity</td> <td style="text-align: center;">PLN 0.06 / kW of contractual capacity</td> </tr> </tbody> </table> <ul style="list-style-type: none"> Obligation to take into account the decrease in the rates of the transitional fee in the tariffs specifying fees and rates for transmission and distribution services applicable in 2019. 	Group of final customers:	Previous rate:	Rate after amendment:	Households < 500 kWh / year	PLN 0.45 / month	PLN 0.02 / month	Households 500 – 1 200 kWh/year	PLN 1.90 / month	PLN 0.10 / month	Households > 1 200 kWh / year	PLN 6.00 / month	PLN 0.33 / month	Others connected to the low-voltage grid	PLN 1.65 / kW of contractual capacity	PLN 0.08 / kW of contractual capacity	Others connected to the medium-voltage grid	PLN 4.10 / kW of contractual capacity	PLN 0.19 / kW of contractual capacity	Others connected to the high-voltage grid and > 400 kV grid	PLN 7.65 / kW of contractual capacity	PLN 0.20 / kW of contractual capacity	Energy-intensive companies	PLN 2.10 / kW of contractual capacity	PLN 0.06 / kW of contractual capacity	<p>NOT APPLICABLE</p>
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<p>RESTRICTIONS CONCERNING SETTING OF ELECTRICITY PRICES</p>	<ul style="list-style-type: none"> Obligation to specify the fees and rates for the sale of electricity at the level not higher than those specified in the price list (such as the price lists resulting from the individual agreement) applicable to particular final customer as of 30 June 2018 ("Maximum Price"), it being specified that under the Second Amendment the obligation to specify the rates at the level not exceeding the Maximum Price is generally limited to the 1H2019 except for certain types of end-users (e.g. households interconnected to the grid at the power supply point not exceeding 1 kV, micro- and small entrepreneurs, units of the public finance sector, hospitals) who may benefit from the abovementioned obligation throughout the entire 2019 subject to submission of statement (the condition related to submission of statement does not apply to 	<p>Payment by the Settlement Operator (company called <i>Zarządca Rozliczeń S.A.</i>) - at the seller's request - the amount of the difference between the revenue from the sale of energy for the Maximum Price and the revenue from the sale of the same amount of energy at the price specified in the secondary legislation issued on the basis of Article 7 of the Act, calculated on the basis of the weighted average price of electricity</p>																								

households).

Although the First Amendment repealed the statutory obligation of additional decrease of the Maximum Price by the amount resulting from the decrease in the rate of excise duty from PLN 20 / MWh to PLN 5 / MWh, such decrease may still arise from the individual arrangements specified in the agreement.

With respect to the situations where on 30 June 2018 the price was not determined in relation between the seller and given customer (e.g. if the customer or the seller started their operations after 30 June 2018, or the change of the energy supplier occurred) or if there are difficulties in determining the proper price (e.g. the change of the tariff group occurred or the price was based on benchmarks referring to the commodity exchange indices) the detailed method of calculating the Maximum Price will be specified in the secondary legislation to the Act.

The entrepreneur that obtained the concession for trading in electricity after 31 December 2018 and at the same time pursues the electricity distribution activities would be obliged to sell electricity to the end-users interconnected to the grid of such entrepreneur at the price applied by the last resort supplier as of 31 December 2018.

- **The sellers' obligation to apply the Maximum Price in the settlements with the final customers concerning the period starting from 1 January 2019** (breach of this obligation is not subject to financial penalty since 29 June 2019).
- **The sellers' obligation to amend the agreements to reflect the price not higher than the Maximum Price with the effect as from 1 January 2019** – effective within 30 days from the date of adopting of the regulation on the basis of the Article 7 of the Act (before the Amendment entered into force, the final date to comply with the obligation was 1 April 2019).
- Administrative fine for failure to comply with obligation to fix the rates at the level not higher than Maximum Price and/or obligation to amend the power supply agreement - in the amount of up to 5% of revenue from the licensed activity in the previous tax year - imposed by the President of the Energy Regulatory Office.

at the wholesale market and common costs related to end-customer supplies.*

An application for the payment of the difference should be submitted on 20 January 2020 at the latest, whereas the energy volume covered by the application for compensation may be based on a forecast or actual results of metering and billing devices.

By 30 September 2020, the applicant is obliged to submit an appropriate correction of the original application based on the data received from the DSO, under sanction of imposing an administrative fine.

The compensation for the difference* may also be applied for by the final customer purchasing the electricity at the commodity market.

"FREEZING" OF TRANSMISSION AND DISTRIBUTION TARRIFS

- Obligation to maintain in the tariff applicable in 2019 the prices and rates of fees for transmission and distribution services at the level not higher than the prices and rates which were specified in the company's tariff / price list applicable on 31 December 2018 (maximum price).
- **The obligation to freeze the transmission and distribution tariffs has been repealed by the Amendment.**
- Administrative fine for non-compliance with the abovementioned obligation in the amount of up to 5% of revenues from the licensed activity in the previous tax year - imposed by the President of the Energy Regulatory Office.

The Act provides for the option for the DSO to submit to the Settlement Operator an application for compensation of the difference in the price of electricity, however the amount of compensation, which can be paid in favor of the DSO is not clear.*

Indirectly also:

Enabling the DSOs to make extended use of funds from the National Green Investment Scheme with respect to grid investments and energy storage (see

* The detailed manner of calculating the compensation for the difference will be specified in the regulation of the Council of the Ministers.

OFFICIAL STATEMENTS OF THE INITIATORS OF THE ACT

- (a) **„The result of the proposed amendment shall be the reduction of the bills received by the individual users, entrepreneurs and self-government units by over PLN 3,5 bln, as well as maintaining the energy prices at the level from the first half of 2018.”¹**
- (b) **„In addition, we would like to state very clearly that for the self-government units, for the firms, where private firms or private distribution firms have already worked out certain new contracts or agreed new contracts with the self-government units, we are preparing the mechanism of return to the prices which were applicable before 1 July 2018.”²**
- (c) **„Thanks to this mechanism, where presenting the bill for the electricity to the customers, we will actually maintain the prices specified in the bills for the electricity at the level as of 2018 without the detriment to the energy companies – both the companies influenced by the State, as well as the private companies active in the electricity trading. In the proposed draft, the reference date, when the electricity prices for the customers have not been on the growth path yet, is 30 June 2018. Therefore, the draft act proposes the mechanism of modification of the currently concluded agreements, in order to ensure that the customers of electricity, who have concluded unfavourable contracts in the second half of 2018, are not adversely affected. The foregoing pertains also to the self – government units, who were first to indicate the loss and problems which affected them in connection with this aspect.”³**
- (d) **Moreover, the substantiation (explanatory memorandum) of the Act directly indicates that the Act addresses the problem of price increase observed „in tender procedures”, and that „implementation of the mechanisms included in the draft act will mitigate those negative effects for the final customers of electricity”.**

MAIN FEATURES OF THE INSTRUMENTS IMPLEMENTED BY THE ACT

- **temporary** (apart from the mechanism of decrease in the rates of excise duty and transitional fee, the instruments specified in the Act refer only to electricity prices in 2019, and thus they encourage to implement other long-term measures of energy cost optimization);
- **introduced to lower the costs of obtaining the electricity in 2019 or 1H2019 only** (the Act maintains the level of electricity prices as of 30 June 2018, taking into account the decrease in the excise duty);
- **automatically applicable as regards the decrease in the transitional fee;**
- **requiring additional actions of the final customers in order to ensure the “stabilization” (decrease) of the electricity purchase price** (submission of statements, conclusion of respective agreements with the seller,

¹ Official position published at the website of the Chancellery of the Prime Minister of Poland, available at:

<https://www.premier.gov.pl/wydarzenia/aktualnosci/premier-mateusz-morawiecki-wprowadzamy-rozwiazania-ktore-zapobiegaja.html>.

² Speech of Mr Mateusz Morawiecki, the Prime Minister of Poland, at the 75-th Sejm plenary meeting – Stenographic report from the 75-th meeting of the Sejm of the Republic of Poland – page 5.

³ Speech of Mr Krzysztof Tchórzewski, the Minister of the Energy, at the 75-th Sejm plenary meeting – Stenographic report from the 75-th meeting of the Sejm of the Republic of Poland – page 5.

taking legal actions in order to enforce application of the Maximum Price in the settlements concerning the period starting from 1 January 2019).

LEGAL ACTIONS AIMING AT APPLICATION OF MAXIMUM PRICE

In order to enforce application of the Maximum Price, one should consider the following actions:

- review of the power purchase agreements in order to determine actual Maximum Price, which should be applied in 2019;
- provide the seller with the request for the immediate conclusion of the amendment to the power purchase agreement; and if there is no reaction of the seller
- appropriate legal steps to accelerate fulfilment of the obligation to settle at the Maximum Price in accordance with the Act, i.e. for the periods from 1 January 2019 onwards - in cases where the Maximum Price can be defined (payments for the electricity together with respective refund statements (Pol. *zastrzeżenie zwrotu*) as regards the amount which exceeds the price which would be due if the Maximum Price was applied and then request for return of the overpayment.

We will be happy to support you with implementation of the abovementioned actions.

BUDGET AND FINANCING OF THE COMPENSATION MECHANISM

[Fund for the Payment of Price Differences] The estimated cost of the mechanism compensating the differences in the price of electricity in 2019 amounts to ca. PLN 9-13 billion (depending on the institution making the estimation; whereas the final cost may be even higher). The payments of the compensations (differences) will be made from the newly created special public fund called the Fund for Payment of Price Differences, whose authorising officer (Pol. *dysponent*) will be the Minister of the Energy, whereas the manager responsible for making payments – the company called Zarządca Rozliczeń S.A. (Settlement Operator).

The Fund will be financed, in particular, from the resources obtained in result of completing auction of unused greenhouse gas emission allowances, which were allocated to the power generation plants. If the abovementioned funds prove insufficient, the Act provides for the possibility to use the funds collected at the account of the transitional fee and the renewable energy sources fee.

[The National Green Investment Scheme] According to the Act, the National Green Investment Scheme will be credited with additional PLN 1 billion from the resources obtained as a result of the auction of unused greenhouse gas emission allowances allocated to the power generation plants. These funds will be granted, in particular, to the investments carried out by the DSO, as well as other investments concerning renewable energy sources or high-efficiency cogeneration units, investments related to the adjustment of power generation plants to the BAT requirements and investments in energy storage.

SECOND AMENDMENT

The Second Amendment results in the following:

- (a) **[limited scope of entities entitled to benefit from the obligation to apply the Maximum Prices]** As of 1 July 2019 onwards, only the limited scope of entities would be allowed to benefit from the obligation to apply the Maximum Price (e.g. households interconnected to the grid at the power supply point not exceeding 1 kV, micro- and small entrepreneurs, units of the public finance sector, hospitals), while the other entities (including entrepreneurs not qualified as micro- and/or small entrepreneurs, foundations, associations etc.) would be deprived of the right to purchase electricity at the price not higher than the Maximum Price;
- (b) **[obligation to submit statement allowing to benefit from the Maximum Price]** End-users intending to benefit from settlements at the Maximum Price after 30 June 2019 would be obliged to submit the

statement on their status as beneficiaries – the said obligation would not apply exclusively to those end-users that purchase electricity for the purpose related to households;

- (c) [**de minimis State aid for entrepreneurs other micro and small entrepreneurs**] Entrepreneurs not qualified as micro- and/or small entrepreneurs would be entitled to apply for grant due to electricity price increase with respect to the electricity purchased between 1 July and 31 December 2019, such grants to be given as the *de minimis* state aid (maximum amount capped at EUR 200k gross within 3 years; applicable regulations provide for exclusions from the right to obtain the *de minimis* state aid, including fisheries, basic agriculture products etc.);
- (d) [**obligation to reissue invoice**] For the purpose of the amendments to the power supply agreements as discussed above, the entrepreneur that was selling electricity to given end-user as of 30 June 2018 would be „re-issue” the invoice within 7 days from receipt of the application for re-issuance of such invoice (most probably it refers to the copy of the invoice);
- (e) [**no sanction for breach of obligation to apply Maximum Prices**] The proposed bill of amendments assumes that breach of Art. 5 Sec. 3 of the Act (i.e. breach of the obligation to apply the Maximum Prices) would not be subject to any administrative sanction (sanction would apply in case of breach of obligation to set the price for 2019 at the level not higher than the Maximum Price or to amend the power supply agreement in order to reflect such price; however failure to apply such prices would not be subject to sanction);
- (f) [**right to individual settlement of compensation for application of Maximum Price**] The proposed bill of amendments assumes that the power suppliers would be entitled to apply for individual assessment of compensation for application of Maximum Price (in the scope of some additional unit costs related to sale of electricity) based on individual situation of given power supplier – the analysis and approval of costs would be allocated to the President of the Energy Regulatory Office.

According to Art. 6 of the Second Amendment, the Minister of Energy is obliged to issue the Regulation indicated in Art. 7.2 of the Act by 20 July 2019 which means – in case the said regulation is timely issued – that the deadline for conclusion of the contracts amending the power supply agreements (reduction of the electricity price for the period between 1 January 2019 and, respectively, 30 June or 31 December 2019) should lapse as of 19 August 2019.



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