

# Legal Alert

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## Draft new regulations on maximum energy prices for SMEs and selected public-social sector customers

### I. Status of work

The Sejm has adopted the [Law on Emergency Measures to Reduce Electricity Prices and to Support Certain Consumers in 2023 \('Draft'\)](#). The Draft freezes electricity prices for selected consumers and introduces energy price discounts for micro, small, and medium-sized entrepreneurs (SMEs) and selected public-social sector consumers.

Below we present information on the planned solutions, based on the information available at the moment. The final solutions will result from the adopted legislation and may differ from the information below. The Senate is currently working on the bill.

### II. What will be the maximum prices and discounts on the price of energy?

The draft proposes to set the **maximum Energy prices**<sup>1</sup> at the level of

- PLN 693 /MWh - for eligible customers consuming energy in households,<sup>2</sup> and
- PLN 785 /MWh - for other eligible customers, including SMEs and selected public-social sector customers.<sup>3</sup>

<sup>1</sup> The prices indicated are exclusive of VAT and excise duty.

<sup>2</sup> i.e. for: households; domestic business premises in connection with the running of households, insofar as no economic activity is carried out therein; premises in the nature of collective housing, insofar as no economic activity is carried out therein; rotational housing, housing for staff of diplomatic missions and staff of foreign representations; holiday homes, camping homes and gazebos in allotment gardens where no commercial activity is exercised and, in cases of common metering, by the allotment administration; lighting in residential buildings; power supply for lifts in residential buildings; heat and hydroelectric power stations under the management of the residential housing administration; garages where no commercial activity is exercised. This report presents, in principle, the rules for customers other than those identified in this footnote.

<sup>3</sup> i.e. this group includes, inter alia, local government units or entities providing services to that unit (including a local government budgetary establishment, a local government budgetary unit and companies referred to in Article 9(1) and Article 14(1) of the Act of 20 December 1996. on municipal management) to the extent to which they consume electricity for the performance of commissioned tasks and own tasks, including services of general economic interest within the scope specified in the Project; entities providing healthcare services financed from public funds; within the scope of their social and welfare activities: night shelters, heating facilities, family and foster care support units, entities of the educational system and higher education and science, nurseries, children's clubs, churches and religious associations; trade unions, etc.

In addition, the Draft introduces additional **discount for SMEs that reduced power consumption in 2023**. The condition for granting the discount is the power consumption in 2023 at the level not exceeding 90% of the annual average volume consumed in 2018-2022, and the amount of the discount is 10% of the total price for electricity purchase payable for the period 1 January 2023 - 31 December 2023. Settlement of the discount is to take place in 2024.

### III. For what period will the maximum prices be applied

Electricity companies will apply **the maximum prices** in principle for the period **1 December 2022 - 31 December 2023**<sup>4</sup> and, if an energy sales contract/complex agreement was concluded after 23 February 2022, also in the period from the date of the agreement until 30 November 2022.

The settlement of **the discount** for the 10% reduction in power consumption by SMEs in 2023 is in turn scheduled for **2024**.

### IV. Who will be entitled to reduced energy prices?

Maximum prices will be available for:

- 1) final customers purchasing electricity for household consumption (to the extent they consume electricity above the maximum electricity consumption limits set out in the Act of 7 October 2022 on special solutions to protect electricity consumers in 2023 in connection with the situation on the electricity market);
- 2) SMEs, including agricultural producers who are natural persons, to the extent that they consume electricity for their primary activities;

<sup>4</sup> In the case of consumers consuming energy for residential purposes - in the period from the date of exceeding the electricity consumption limit referred to in Articles 3(1), 4(2), 5(1), and 6(1) of the Act of 7 October 2022 on special solutions for the protection of electricity consumers in 2023 in connection with the situation on the electricity market, until 31 December 2023.

- 1) local government units and entities providing services to these units (including local government budgetary establishments, local government budgetary units, and municipal companies), to the extent that they consume electricity to perform mandated tasks and their own tasks, including services of general economic interest;<sup>5</sup> and
- 2) the public utilities indicated in the project, which carry out, i.a. health, educational, cultural, and social activities, to the extent that they consume electricity to provide services/basic activities/non-business activities indicated in the project (depending on the entity).<sup>6</sup>

In turn, SMEs whose level of electricity consumption in the period 1 January 2023 - 31 December 2023 does not exceed 90% of the average annual power consumption in the period 1 January 2018 - 31 December 2022, will be eligible for the discount.<sup>7</sup>

### SMEs - analysis at company or group level?

With regard to qualification as an SME, the Draft provides for a reference to the definition of an SME contained in the act of 6 March 2018 – the Law of Entrepreneurs. According to this act, the status of the SME is determined based on financial and employment data within a single entity (e.g. a company).

On the other hand, according to the explanatory memorandum to the Draft, the regulations introduced by the Draft are to be in line with Council Regulation 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices which refers to the EU definition of an SME. As a rule, in EU Law group data is taken into account and thus, also partner and linked enterprises. This definition is also used in state aid law.

This may cause doubts as to whether a particular entrepreneur is eligible for support. The issue is ambiguous, although arguments can be found to examine the status at the level of a single company. The issue will probably be clarified in the near future.

<sup>5</sup> From the scope of: roads, streets, bridges, squares, and organization of road traffic; water supply and water supply, sewerage, removal and treatment of municipal sewage, maintenance of cleanliness and order and sanitation, landfill and disposal of municipal waste, supply of electricity and heat and gas; public transport; health care; social welfare, including care centers and institutions; support for the family and the foster care system; housing; public education; culture, including libraries and other cultural institutions as well as protection and care of historical monuments; public order and safety of citizens as well as fire and flood protection, including equipment and maintenance of a flood prevention warehouse; maintenance of public facilities and equipment as well as administrative facilities; pro-family policy, including the provision of social; medical and legal care to pregnant women; cooperation and activities for non-governmental organizations and entities listed in Art. 3(3) of the Act of 24 April 2003 on public benefit activity and voluntary work; physical culture as defined in Article 2(2) of the Act of 25 June 2010 on sport.

### Principal activity of the entrepreneur

The draft does not define what the entrepreneur's primary activity is. This raises doubts as to:

- (a) the extent to which the energy the entrepreneur consumes is subject to the maximum price regulation,
- (b) the scope of information provided when applying for support, and
- (c) the necessary data to be completed.

However, in this context, it is worth noting that there might be doubts whether volumes of energy re-invoiced to third parties are used for the purpose of entrepreneur's primary activity.

## V. How to apply for assistance?

### How should the statement be made?

In order to benefit from maximum prices, an eligible customer should make a declaration to this effect to **the energy company** from which it receives energy.

### When should the statement be made?

The declaration must be made in writing in a paper or electronic form by **30 November 2022**. If the deadline is not met, the maximum price will be applied from the month following the month in which the declaration was made (no retroactive application of the maximum price will be possible).

### What should the statement be made?

The statement should include:

- 1) a declaration that the conditions to be qualified as the eligible customer are fulfilled;
- 2) data to determine the estimated proportion of electricity that:
  - will be used by entities / for purposes referred to in Part 4 of the alert;<sup>8</sup> and
  - other purposes (not subject to maximum price);
- 3) a specification of the estimated proportion of electricity to be used for the purposes referred to in point 2;
- 4) number of power supply point;
- 5) the date of the conclusion of the sales contract/complex agreement; and
- 6) a clause on the awareness of criminal liability for making a false declaration.

A template of a statement will be specified by the Minister of Climate and Environment by way of a regulation.

<sup>6</sup> See Article 2(2)(c) of the proposed law.

<sup>7</sup> If electricity is not purchased during the indicated period, the data constituting the basis for calculating the equivalent of the electricity consumption during that period is: (1) the amount consumed in the period from the date of commencing the electricity purchase to 31 December 2022, recalculated proportionally for the entire period if the eligible customer did not purchase electricity in the entire indicated period; or (2) the amount declared by the eligible customer in the contract referred to in Article 5(2)(1) and (3) of the Energy Law if the eligible customer commenced purchasing electricity after 31 December 2022.

### What should be included with the statement?

In an eligible customer's draft declaration, there is an option to indicate a list of attachments, i.e. documents to determine the estimated share of electricity covered by the maximum price. However, this field is currently not indicated as being mandatory to fill in.

### What data should be prepared

To prepare an SMEs to apply for support, we suggest that the following data be prepared in the first instance:

- 1) data concerning the date of concluded contracts for the supply of electricity (purchase contracts, comprehensive contracts);
- 2) numbers of the power supply points/electricity meters; and
- 3) financial statements and employment data for the last three financial years of the entrepreneur (and linked and partner entities).

The Draft also indicates that there is need to prepare data to determine the estimated proportion of electricity that will be consumed by the entities / for purposes referred to in Part 4 of the alert (subject to maximum price). The scope of this requirement for SMEs is currently unclear.

However, we must introduce the caveat that, until we know the final content of the legislation, more information may be required.

## VI. Compensation of energy suppliers

Energy entrepreneurs will be able to apply for compensation for maximum prices and discounts.

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