



Obligation for energy companies to “contribute to the Fund” to finance the “price freeze” for households, SMEs, and selected public-social sector end-users in 2023

Current status of legislative work

The [act on extraordinary measures to reduce electricity price levels and support certain end-users in 2023](#) (“Act”) was adopted by Parliament and has entered into force on 4 November 2022. The Act establishes rules to “contribute to the Fund” to finance the “price freeze” for households, SMEs, and selected public-social sector end-users in 2023. The Act aims to implement Article 6 of Council Regulation 2022/1854 concerning the mandatory cap on market revenues and the distribution of excess revenues to electricity end-users.

What issues does the Act address?

The Act introduced the maximal electricity prices of PLN 693/MWh for households and PLN 785/MWh for micro businesses, SMEs, and selected public-social sector end-users.

According to the Act, companies that are engaged in electricity generation or trading and are obliged to apply maximum prices will be entitled to compensation. To finance the compensation, **the Act imposes an obligation on energy companies engaged in electricity generation or trading to “contribute to the Price Difference Payment Fund” for the period from 1 December 2022 to 31 December 2023.**



Regardless of the above, the Act provides a solution that allows, in the event of shortages in the market of ammonia water necessary for the proper operation of equipment to reduce nitrogen oxide emissions into the air, the temporary admission to operation of generating units, with a capacity of 50 MW or more, fuelled by hard coal.

Who will be obligated “to contribute to the Fund”?

Under the Act’s current wording, the obligation to contribute to the Fund will apply to:

- a) energy companies engaged in power trading, and
- b) generators of power in plants using:
 - wind energy,
 - solar energy,
 - geothermal energy,
 - hydropower,
 - biogas, agricultural biogas, biomass, and bioliquids (except biomethane),
 - waste,
 - brown coal,
 - hard coal,
 - liquid fuels, and
 - gaseous fuels.

Generators are exempted from the obligation to contribute when generating electricity in a generating unit:

- a) with a capacity of not more than 1 MW,
- b) which is a demonstration project;
- c) which is a renewable energy source installation for which the generator benefits from the following support systems: (i) a feed-in tariff or feed-in premium, regulated under Articles 70a-70f of the Renewable Energy Sources Act, (ii) the auction system, or (iii) settlements carried out between the energy cooperative and the obligated seller under Article 38c(3) of the Renewable Energy Sources Act.

However, the exemption in such case is limited only to electricity sold under the terms of these support systems (the remaining electricity generated and sold is the basis for calculating the contributions).



How is the contribution to be carried out?

Calculation rules

The contribution to the Fund will be calculated for power purchase contracts¹ and within the framework of power sales in the balancing market. The contribution will be calculated based on three main components:

- the volume of electricity sold on a given day,
- the volume-weighted average market² price of electricity sold on that day, and
- the volume-weighted average cap price of electricity sold on that day.

The amount of the contributions to the Fund is calculated individually by the generator based on the formula:

$$OF_d = W_d * (\overline{X_{CRd}} - \overline{X_{CLd}})$$

where: OF_d denotes the contribution to the Fund, W_d denotes the volume of electricity sold on a given day, $\overline{X_{CRd}}$ denotes the volume-weighted average market price of electricity sold on a given day by the obligated entity, $\overline{X_{CLd}}$ denotes the volume-weighted average cap price of electricity sold on a given day by the obligated entity.

Price cap

The price cap to calculate the contribution to the Fund will be set (or calculated in accordance with specified formulas) in a separate regulation³. The regulation introduces a variation of the price cap depending on the technology of electricity generation (in these cases, depending on the type of generation technology, the price cap will be determined by: (i) the amount considering reference prices set for the purposes of the auction support scheme for renewable energy source installations, or (ii) specified components calculated based on a formula or by amount). In turn, the price cap for trading companies will be calculated as the product of the price of purchasing electricity from the generator or other trading companies and a coefficient set by the Council of Ministers (respectively, 1.01 and 1.015 for sales of energy for resale, and 1.03 and 1.035 for sales made to end-users).

Transfer rules

Entities will be required to transfer the sum of the contributions to the Fund, calculated for each day of a given month, by the 5th day of the following month while it is assumed that the payment will apply only to the amounts for which payment was made in the month for which settlement is made.

If a contribution to the Fund has not been settled in full on time, the missing amount is included in the sum of the contributions to the Fund for the next calendar month in which the settlement occurs.

¹ A power purchase contract, as defined under the Act, is only a sales contract with a guarantee of physical delivery concluded: (i) in the wholesale electricity market between a generator and a trading company, or (ii) between a trading company or a generator and an end-user.

² The "market price" on the grounds of the Act should be understood as the net electricity price established under: (i) a power purchase contract, or (ii) the electricity balancing market. Unlike under Council Regulation 2022/1854, the amount of the market price taken into account to settle the "contribution to the Fund" does not take into account settlements based on financial instruments (e.g. virtual cPPAs). However, the costs associated with the performance by some generators of contracts qualified as financial instruments that hedge the amount of generators' revenues and customers' costs (virtual cPPAs) are included in the calculation of the price cap and effectively reduce the "contribution to the Fund". Also, revenues from such contracts are not the basis for calculating the "contribution to the Fund".

³ Such a solution may raise significant constitutional concerns regarding parliamentary control over the imposition of taxes / public tributes or the introduction of expropriation instruments.

⁴ The Act stipulates that the negative difference between the market price and the price cap (loss) for a given day does not reduce the contributions for days in which the difference is positive (there is excess income as defined under Council Regulation 2022/1854).

Reporting obligation

Obligated entities must submit to the Settlement Administrator, by the 20th of each following month, a report on the fulfilment of the obligation to contribute to the Fund in a given month, prepared on an e-form.

The report is to include, i.a.:

- the total volume of electricity sold, to four decimal places,
- the sum of the Fund write-offs due for the month covered by the report,
- the sum of the matured write-offs to the Fund for which payment was made in the month covered by the report,
- data on power purchase contracts and in the sale of power in the balancing market, e.g.:
 - the volume of electricity sold,
 - the volume-weighted average market price of electricity sold,
 - the volume-weighted average price cap of the sold electricity price, and
 - the payment term.

Submitted reports are verified by the Settlement Administrator. In the case of formal omissions, calculation errors, or reasonable doubts, the Settlement Administrator may call on the obliged entity to remove the indicated irregularities.



What are the sanctions for breaching the obligation to contribute to the Fund?

If formal omissions, calculation errors, or reasonable doubts are not addressed, as well as in the case of negative verification, the Settlement Administrator will submit a request to the President of Energy Regulatory Office (ERO) to carry out an inspection.

If it is found during the inspection that the transferred contributions to the Fund have been:

- lowered - the obliged entity will transfer the missing amount of the contribution within 30 days (statutory interest for delay that is calculated from the date of receiving the decision of the President of ERO will be charged on the missing amount); or
- excessive - the ERO President will declare a reduction of the contribution to the Fund in the following month to the extent of the difference between the amount transferred and the amount of the contribution due, and if the excess relates to the last month under the obligation, the ERO President will declare a refund of the excess amount from the Fund account to the obliged entity.

Enforcement will be carried out based on the decision issued by the President of ERO in the above regard.

For breaching the obligation to contribute to the Fund, the obliged entity will be subject to a penalty of up to 15% of the income earned in the previous fiscal year.

For breaching the obligation to submit reports to the Settlement Administrator, the obliged entity will be subject to a penalty of up to 50% of the due amount of the write-down to the Fund for the given settlement month.

Draft amendment to the Act

On 22 November 2022, the Government submitted to Parliament [a bill on special protection for certain gas fuel end-users in 2023 due to the gas market situation](#) which includes proposals to amend the current provisions of the Act (“**Draft**”).

The Draft envisages a slight reduction in the scope of generators obliged to pay a contribution to the Fund who generate electricity using gaseous fuels (generators generating energy from gaseous fuels supplied outside the gas pipeline system will not be subject to the obligation but only generators using gaseous fuels that are supplied by gas grids or direct pipelines, or natural gas transported by a grid of upstream pipelines).

In addition, it is intended that the exemption from the obligation to make contributions to the Fund for generators producing electricity in a unit with an installed capacity of no more than 1 MW will apply only to those generators for which the total **installed capacity of the units they operate does not exceed 1 MW (in contrast to the current regulations, entities with several generating units of up to 1 MW, whose total installed capacity exceeds 1 MW, will be subject to the obligation).**

Obligated entities are additionally to provide in their reports on the fulfilment of the obligation to make contributions to the Fund the data used to calculate the price cap in accordance with the provisions of the [Regulation of the Council of Ministers dated 8 November 2022 on how to determine the price cap.](#)

The Draft provides the possibility of **adjusting the contribution to the Fund** by submitting a correction to the report mentioned above. The correction of the report is to be submitted together with the report for the month following the month in which the circumstances justifying the adjustment of the allowance to the Fund occurred.

The obliged entity will only be able to submit a correction to the report until the date of receiving information about the ERO inspection, but no later than 31 March 2024.

If the report is corrected and it is determined that the contribution to the Fund has been:

- lowered - the obliged entity will transfer the missing amount of the contribution within 7 days (statutory interest for delay from the date of the lapse of the above deadline will be charged on the missing amount); or
- excessive - the obligated entity will independently reduce the contribution to the Fund in the following month to the extent of the difference between the amount transferred and the amount of the contribution due, and if the excess relates to the last month under the obligation, or if the report correction was made after the period of the application of the deduction obligation, the obligated entity will apply to the Settlement Administrator for a refund of the excess amount.

Under the Draft, the definition of "market price" will be clarified and understood as the price of electricity established under: (i) the electricity sales contract, or (ii) the electricity balancing market.

Currently, the Draft envisages an effective date for the amendment of 1 January 2023.

The Infrastructure and Energy Department team of our law firm are happy to provide support in conducting the above processes.



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