



## 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

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### *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,
  - biomass, and bioliquids
  - waste,
  - brown coal,
  - hard coal,
  - liquid fuels, and
  - gaseous fuels (except biogas and agricultural biogas).

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

- a) with the installed capacity no more than 1 MW for each unit and total installed capacity of the units they operate cannot exceed 3 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 (i) power purchase contracts<sup>1</sup>, (ii) within the framework of power sales in the balancing market and (iii) contracts related to the sale of electricity including, in particular, financial instruments or guarantees of origin. The contribution will be calculated based on three main components:

- the volume of electricity sold on a given day,
- the volume-weighted average market<sup>2</sup> 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.

<sup>1</sup> A power purchase contract, as defined under the amendment to the Act, is a sales contract with a guarantee of physical delivery including any additional monetary settlements related to the sale of this energy 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.

<sup>2</sup> The "market price" on the grounds of the amendment to the Act should be understood as the net electricity price established under: (i) a power purchase contract, or (ii) the electricity balancing market, or (iii) a contract related to the sale of electricity including, in particular, financial instruments or guarantees of origin, in which additional monetary settlements depend on the volume or value of energy sold.

### Price cap

The price cap to calculate the contribution to the Fund will be calculated in accordance with specified formulas set in a [Regulation of the Council of Ministers of 8 November 2022 on the method of calculating the price limit](#) ("Regulation").<sup>3</sup> 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 product of the volume-weighted average price of purchased electricity on a given day, and the commission (respectively: 1.01 and 1.015 for sales of energy for resale and 1.03 and 1.035 for sales 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,<sup>4</sup> by the 10th working 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.

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

<sup>4</sup> 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 Operator, 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 contributions to the Fund due for the month covered by the report,
- the sum of the matured contributions 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.
- data used to calculate the price limit in accordance with the provisions of the Regulation,
- statement of liability for making a false statement.

The obliged entity can adjust the contribution to the Fund by submitting a correction to the report. 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 can submit a correction to the report only until the date of receiving information about the President of Energy Regulatory Office (ERO) inspection, or no later than 31 March 2024.

Submitted reports are verified by the Settlement Operator. In the case of formal omissions, calculation errors, or reasonable doubts, the Settlement Operator 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 Operator will submit a request to the ERO to carry out an inspection.

If it is found during the inspection (or as a result of a correction) that the transferred contributions to the Fund have been:

- lowered - the obliged entity will transfer the missing amount of the contribution within 30 days (or 7 days respectively in case of correction); 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 (and, in case of correction, the obliged entity itself) 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 (or when the report correction was issued after the period of the contribution obligation), the ERO President will declare a refund of the excess amount from the Fund account to the obligated entity (or in the case of a correction - the obliged entity will apply to the Settlement Operator for a refund of the excess amount).

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 Operator, the obligated entity will be subject to a penalty of up to 50% of the due amount of the contribution to the Fund for the given settlement month.

### ***Amendment to the Act***

On 8 February 2023, the Parliament adopted [amendment to the act of special protection for certain gas fuel end-users in 2023 due to the gas market situation](#), which amends the current provisions of the Act ("**Amendment**"). President signed the Amendment on 13 February 2023.

Under the Amendment, **the definition of "market price" will be supplemented to include the net price of power settled under the financial instruments (virtual PPAs) and the net price for guarantees of origin**, as well as other monetary settlements depending on the volume or value of power sold.

**The new Article 22b of the Act restricts the existing exemption from the contribution obligation applicable to the small RES installations. Namely, if a generator is part of a corporate group, all generating units located in Poland, owned, held, operated or managed by such group entity, should be taken into account when determining the exemption for installations with an installed capacity of not more than 1 MW where the total installed capacity of such installations does not exceed 3 MW (now at the capital group level rather than at the level of a company).**

In addition, the Amendment provides that the **calculation of the volume-weighted average market price of electricity sold should include all additional monetary settlements of obligated entities, resulting from concluded contracts for the sale of electricity or other contracts** in which additional monetary settlements depend on the volume or value of electricity sold.

The above changes will affect the method of determining the amount of the contribution to the Fund, calculated as the difference between (i) the revenues received from the power purchase contract and guarantees of origin, as well as virtual PPAs and other monetary settlements under the power sales contract, if they depend on the volume / value of energy sold, and (ii) the price cap set under the Regulation.

**The effective date of the foregoing key changes is the first day of the month following the date of promulgation, i.e. on 1 March 2023.**

**Remaining changes are effective as of 15 February 2023 i.e. the day following the date of promulgation of the Amendment.**

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



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