

The amendment to the Polish act on renewable energy sources (RES)

On 29 June 2018 the amendment to the act on renewable energy sources and certain other laws was published in the Journal of Laws (the "Amendment"). It introduces a number of significant changes to the Act of 20 February 2015 on renewable energy sources (the "RES Act"), in the Act of 20 May 2016 on investments in wind power (the "Distance Act") and the Construction Law Act of 7 May July 1994 ("Construction Law"). The major part of the changes will come into force on 14 July 2018.

1. Summary

- (1) The Amendment introduces a number of significant changes in the auction support system for renewable energy sources ("**RES**"), primarily concerning the so-called Auction baskets, rules for admission of producers to auctions, and rules for the organization of auctions.
- (2) **New structure of auction baskets:** the creation of five separate baskets, based on the technology criterion for which separate auctions will be conducted. For example, installations using biogas (other than agricultural) will compete in the basket with thermal waste treatment installations ("**ITPO**") and dedicated multi-fuel combustion installations ("**DISW**"), while onshore wind farms will be in the basket with photovoltaic installations.
- (3) **The most important parameters of the auction system in 2018:** the parameters were set out directly in the Amendment; there will be no need for the Minister of Energy to issue regulations specifying the auction budgets and the reference prices for individual renewable energy technologies.
- (4) **Auction budget in 2018:** PLN 87.6 billion in total, earmarked for support for 84.8 TWh produced in subsequent years. Producers will compete for support in 15 auctions.
- (5) Approximately 81% of the funds under auctioning budgets will be allocated to the so-called **New Installations** (see below), for which a total of 8 auctions will be carried out in all five baskets. Almost 75% of the total amount of funds allocated under the auction system are to go to the so-called **Large Installations** (see below), for which 6 auctions will be organized.
- (6) **Most funds were allocated for:** (i) Large Installations being New installations in basket I (biogas, biomass, biogas, ITPO, DISW) (about PLN 24.929 billion); (ii) Large Installations being New Installations in basket IV (onshore wind farms and photovoltaic installations) (PLN 15.750 billion); and (iii) Large Installations being Existing Installations in basket I (biogas, biomass, bioliquids, ITPO, DISW) (PLN 14,203 billion).
- (7) **Significant changes to the Distance Act:** modifications to, e.g. the definition of a wind turbine installation will result in more favourable taxation with real estate tax. Other changes concern, among other things: extension of the validity period of wind farm permits issued before the entry into force of the Distance Act (from three years to five years) and the possibility of changing these permits without the need to meet the distance criterion.
- (8) **FIT and FIP for biogas and hydro:** a feed-in-tariff ("**FIT**") system has been introduced for installations with less than 500 kW and feed-in-premium ("**FIP**") for installations no larger than 1 MW as an alternative to participation in auctions. The new rules apply only to biogas installations and hydroelectric plants.
- (9) **Other changes concerning RES producers:** the most important changes concern the principles of state aid calculation, the minimum share of biomass of agricultural origin in the total weight share of biomass used in the installation and the so-called commodity exchange obligation.

2. Key changes in the auctions organization

- (10) Pursuant to the RES Act, RES installations may compete in auctions for 15-year support in the form of a revenue bonus (the "**Auction System**"). The Amendment introduces a number of significant changes concerning the functioning and organization of the Auction System.
- (11) This system is generally aimed at installations that will start production after the auction closes ("**New Installations**"). Installations launched before 1 July 2016 ("**Existing Installations**") continue to receive support in the form of renewable energy certificates ("**Green Certificates system**"), but they may participate in separate auctions dedicated to them. In case of winning, they pass from the Certificates System to the Auction System.
- (12) The Amendment also introduces an alternative model of support for biogas and hydroelectric installations – instead of the Auction System, installations with a capacity below 500 kW can choose between FIT and FIP systems, and installations with a capacity between 500 kW and 1 MW can use the FIP system. This system applies to both Existing and New Installations of that kind.

2.1. New structure of auction baskets

- (13) Auctions are organized separately for installations qualified for various so-called auction baskets. In a given basket, installations compete for the same pool of funds. The Amendment introduces a new and more transparent basket structure, which is based solely on the technological criterion and is related to the division made for reference prices:

Basket	RES installations generate electricity using only:
Basket I	biogas other than agricultural, biomass, bioliquids (including so-called dedicated biomass combustion installations, hybrid systems and dedicated multi-fuel combustion installations)
Basket II	hydropower; bioliquids; geothermal energy; offshore wind energy
Basket III	agricultural biogas;
Basket IV	onshore wind energy solar radiation energy
Basket V	hybrid RES installations

2.2. Admission to participate in auctions

- (14) As before, auctions will be organized separately: **(i)** for RES installations with a capacity of not more than 1 MW ("**Small Installations**") and installations with a capacity of at least 1 MW ("**Large Installations**"); **(ii)** for Existing Installations and New Installations. The admission to participate in auctions will take place in separate modes for Existing Installations and New Installations.
- (15) Producers in Existing Installations who want to participate in auctions are required to submit to the President of the Energy Regulatory Office ("**ERO**") a declaration on joining the auction. The President of ERO will have 30 days to confirm receipt of the declaration. According to the Amendment, a copy of the installation scheme is attached to the declaration, but there is no obligation to provide other documents, which limits formalities in the qualification of Existing installations to the Auction System.

- (16) The prequalification procedure for auctions for producers in New Installations is more complicated. It is necessary to obtain a certificate of admission to the auction, which is issued by the President of ERO, provided that the RES installation has:
- (i) the connection conditions or the connection agreement for the electricity grid;
 - (ii) a final and un-appealable decision on environmental conditions ("**EIA Decision**");
 - (iii) an excerpt and an outline from the local zoning plan (if it has been prepared); or a final and un-appealable permit for the construction and use of artificial islands, structures and facilities in Polish maritime areas – the offshore location licence (in the case of offshore wind farms);
 - (iv) a valid construction permit – this condition does not apply to offshore wind farms.
- (17) **In relation to the state before the Amendment:** (i) the requirement to present the EIA Decision in each pre-qualification procedure was introduced; (ii) offshore wind farms may enter the auction without a building permit, and only on the basis of the EIA Decision and the offshore location licence. In addition, the Amendment does not provide for the obligation to submit local zoning conditions in pre-qualification proceedings – it seems that in the case of RES installations located on their basis, there will be no need to attach these decisions.
- (18) Due to changes introduced in the Auction System, after the effective date of the Amendment, **it will be necessary to obtain a new certificate of admission to the auctions**, also by those producers who currently already hold a valid certificate issued under the previous legal framework.

2.3. Increase of deposit amounts for New Installations.

- (19) Producers wishing to participate in an auction must submit a bank guarantee or make a deposit to the bank account indicated by the President of ERO. Pursuant to the Amendment, the value of such collateral should be:
- (i) **PLN 60,000** for each **1 MW** of installed capacity in the case of New Installations,
 - (ii) **PLN 30,000** for each **1 MW** of installed capacity in the case of existing Installations,
- (20) The deposit is refunded in the event of a loss in the RES auction or – in the case of winning the auction – after generating electricity in the RES installation, if such production occurred within the period prescribed by the RES Act.

2.4. Tightening regulations regarding the age of devices used in installations

- (21) The Amendment introduces stricter requirements regarding the age of devices included in renewable energy installations participating in the Auction System. The condition for taking advantage of support will now include the following time limits for production of equipment installed during the construction or modernization of the installation to immediately precede the day of generation of electricity for the first time in a given RES installation:
- (i) **18 months** for renewable energy installations using solar energy;
 - (ii) **24 months** for onshore wind farms;
 - (iii) **72 months** for offshore wind farms
 - (iv) **36 months** for other RES installations.

In addition, the equipment may not be depreciated earlier in the meaning of the accounting regulations by any entity. The condition does not apply only to hybrid systems, dedicated multi-fuel combustion installations and installations using only hydropower.

2.5. New dates for energy sales for the first time after the closing date of the auction

- (22) The Amendment also introduces new, **more restrictive deadlines for starting sales of energy generated in New Installations and modernized installations**. The deadlines, counted from the date of closing an auction session are as follows:
- (i) **72 months** for offshore wind farms;
 - (ii) **36 months** for other RES installations, with the following exceptions;
 - (iii) **30 months** for onshore wind farms;
 - (iv) **18 months** for photovoltaic installations

If the producer fails to energize the RES installation within this timeframe and start selling electricity (if applicable – after obtaining the concession), it loses the right to benefit from support in the Auction System and loses the deposit paid.

3. Auctions in 2018

- (23) The Amendment explicitly sets the budgets for the RES auction in 2018, which will enable the auction to be conducted without waiting for executive regulations of the Minister of Energy. In addition, the Amendment provides for a number of exceptions to the general rules for the organization of auctions in 2018.
- (24) Before the first auction in 2018, the President of ERO will have to adjust its Auction Regulations to changes resulting from the Amendment. In addition, the President of ERO must announce the RES auction 30 days in advance. Before the auction, it will also be necessary to pre-qualify the New Installations according to the amended requirements.

3.1. The method of conducting the auction

- (25) Auctions in 2018 will not be carried out using a dedicated internet platform, as has been the case until now. The producer will submit one offer in paper form or using the electronic platform of ePUAP public administration services. Bids placed in the auction bind the participants and cannot be modified or withdrawn. When submitting bids on paper, the date and time of submitting the offer will be recorded with accuracy to the nearest minute (this may be important in case of high competition in the auctions).

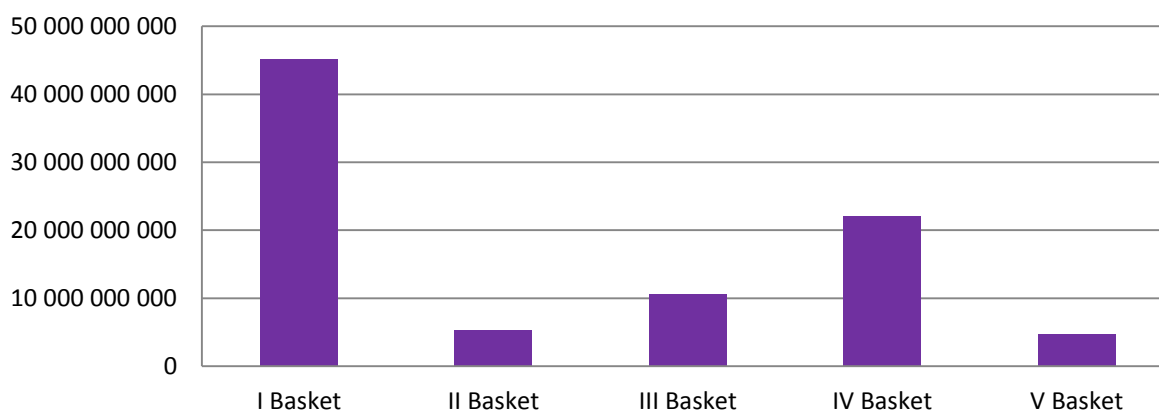
3.2. Budgets of auctions in 2018

- (26) In 2018, the auction budget is **PLN 87.6 billion** intended for auctions, in which **84.8 TWh** produced over the next years will be supported. Producers will compete for support in **15 auctions**.

Basket	Existing Installations		New Installations	
	Small Installations	Large Installations	Small Installations	Large Installations
I Basket	915 336 MWh 512 588 160 PLN	33 864 470 MWh 14 203 623 881 PLN	13 311 000 MWh 5 507 985 000 PLN	57 699 309 MWh 24 929 301 412 PLN
II Basket	1 475 211 MWh 767 716 880 PLN	0	3 750 000 MWh 1 895 250 000 PLN	5 400 000 MWh 2 592 000 000 PLN
III Basket	1 149 296 MWh 655 098 834 PLN	1 467 617 MWh 807 189 350 PLN	11 700 000 MWh 7 160 400 000 PLN	3 510 000 MWh 1 930 500 000 PLN
IV Basket	0	0	16 065 000 MWh 6 243 300 000 PLN	45 000 000 MWh 15 750 000 000 PLN
V Basket	0	0	1 140 000 MWh 473 100 000 PLN	10 260 000 MWh 4 206 600 000 PLN

- (27) This data show that in 2018 auctions will be aimed primarily at New Installations, for which over PLN 70.6 billion is to be allocated. From the perspective of the size of the installation, a significant part of the budget, of over PLN 64.4 billion, is intended for Large Installations.
- (28) The lion's share of the funds will be allocated to projects using non-agricultural biogas, dedicated biomass combustion installations, dedicated multi-fuel combustion installations, thermal waste treatment installations and hybrid systems (PLN 45.153 billion in four auctions). In the second place there are onshore wind farm and photovoltaic installation projects (PLN 21.993 billion in two auctions for New Installations).

Auctions budgets in 2018



- (29) For the first time, a significant amount was also earmarked for large wind farm projects (IV Basket for Large, New Installations – PLN 15.75 billion). Auctions in 2018 may be the last chance to get support for large onshore wind projects in a situation where many of these projects have connection agreements, in which the deadline for starting production expires on 4 May 2019. At the same time, in 2018, the so-called migration auctions for existing wind farms covered by the Green Certificates system were not foreseen.

3.3. Reference prices in auctions in 2018

- (30) The maximum price that an auction participant may offer at auction cannot exceed the reference price. Reference prices have been set at the same level for Existing and New Installations. The reference prices for the auction in 2018 were, just like the auction budgets, specified directly in the Amendment. For auctions in subsequent years, they will be specified in executive regulations. A list of reference prices for all installation categories is included in **Appendix No. 1**.

4. New support systems for installations with lower installed capacity

- (31) The Amendment introduces new support mechanisms for smaller RES installations using biogas (agricultural, obtained from landfills, sewage treatment plants and other types of biogas) or hydro-energy (installations of other technologies are not admitted to these systems).
- (32) The first mechanism is based on the so-called feed-in-tariff system ("**FIT**"). It is dedicated to Producers in:
- (i) small installations with a total capacity of more than 50 kW and less than 500 kW connected to a network with voltage of under 110 kV or with heat output above 150 kW and not more than 900 kW, in which the total installed electric capacity is greater than 50 kW and less than 500 kW; and
 - (ii) microinstallations with a total capacity of not more than 50 kW, connected to a network with voltage of under 110 kV or with heat output within the combination of not more than 150 kW, in which the total installed electric capacity is not more than 50 kW.
- (33) FIT entitles producers to sell unused electricity, if delivered to the grid, at a fixed purchase price of 90% of the reference price as of the day of submitting the declaration on joining the FIT less the value of investment aid received. The unused energy is sold to the so-called obligated seller at a fixed price (FIT). It may also be sold to another entity chosen by the producer – in this case the support takes the form of a *feed-in-premium* ("**FIP**").
- (34) FIP applies to eligible producers in installations with capacity below 500 kW, who have decided to sell energy to entities other than the obligated seller and to producers in RES installations with a total installed electric power of not less than 500 kW and not more than 1 MW. After submitting to the President of ERO the required declaration on accession to the indicated mechanism, the producer will be entitled to recover the negative balance by the operator of renewable energy settlements on the principles analogous to those in the Auction System.
- (35) Every year, the Council of Ministers will determine the maximum capacity of installations, which may join each of the above-mentioned systems in a given year. Both already completed installations and projects in their development phases will be able to join the system. In the latter case, accession will be contingent upon having connection or connection conditions as well as a building permit for the project, and starting energy production in the project within 36 months from joining the FIT or FIP system. The producer in the installation wishing to join the FIT or FIP system will pay a reservation fee of 30,000 for 1 MW, refunded after the start of production within the statutory period or if the application to join the system is rejected.

5. Changes regarding onshore wind farm projects

- (36) The Amendment does not eliminate the applicable distance criterion of wind farms from residential buildings, however, the changes introduced have some positive impact on the situation of existing farms and projects in the development phase.

5.1. Modified definition of a wind farm and the real estate tax

- (37) The Amendment modifies the definition of a wind turbine installation by indicating that only the construction part of a wind turbine installation is a structure within the meaning of the

Construction Law. The revised structure definition will cover only the construction parts of technical devices such as wind farms. This modification results in reversing taxation rules for wind farms with respect to the real estate tax to those effective before 1 January 2017. Changes leading to a reduction in property taxation should cover the period from 1 January 2018.

5.2. The validity of building permits and repermitting

- (38) Pursuant to the Amendment, building permits for wind farms issued prior to the entry into force of the Distance Act (i.e. 16 July 2016) and issued in the course of proceedings initiated and not completed before that date, remain in force, provided that within five years of the Distance Act coming into force (i.e. until 16 July 2021), the decision on the use (occupancy) permit will be issued (not the three years as was prior to the Amendment). This effectively extends the application of building permits for many wind projects on the market.
- (39) The Amendment introduces regulations regarding changes to building permits issued before July 16, 2016 or during proceedings initiated and not completed before that date. Proceedings concerning changes to this type of permits are carried out on the strength of provisions in force before the Distance Act took effect. In addition, if a change or the issuance of a new decision on environmental conditions is necessary for the procedure for changing a building permit, meeting the distance criterion will only be necessary if the installed capacity of the wind farm or its impact on the environment is increased.

5.3. Other changes related to wind farms

- (40) In the case of wind farms, which do not meet the distance criterion provided in the Distance Act, it will be acceptable to carry out renovations and other activities necessary for the proper use of the installation, excluding activities leading to increasing the installed capacity or increasing its impact on the environment.

5.4. Extending the connection deadline in case of winning the auction

- (41) The Amendment introduces the right of the winning RES auction bidder to demand from the operator of the power system to which the installation is connected an adjustment of the deadline for producing energy for the first time in this RES installation to correspond with the statutory deadlines (indicated in point (18) above).
- (42) The Amendment does not change the current rules regarding contracts for the connection of renewable energy installations to the power grid. This means that in the case of contracts concluded before the day of entry into force of the RES Act (4 May 2015), the date of delivery for the first time to the electricity network produced in this type of installation cannot be longer than 48 months counted from 4 May 2015. Failure to deliver electricity before this date is the basis for termination of the network connection agreement by the relevant operator. This means that after May 4, 2019, grid connection agreements on the basis of which no electricity was supplied to the system could be terminated.

6. Other changes provided for in the Amendment

- (43) The Amendment introduces a number of smaller changes affecting the activity of producers of electricity from RES. Below we present a few of the changes that may affect the situation of producers.

6.1. Change in the rules for calculating the amount of state aid

- (44) The Amendment introduces new simplified rules for calculating state aid received by the producer wishing to benefit from support under the auction system. The new mechanism for calculating the state aid due, is based on the so-called corrected price. It involves the reduction of the electricity price indicated by the producer in the successful auction offer by the value of

the investment aid received. The purpose of the modification is to adjust the rules provided for in the RES Act to the EU rules on granting state aid.

6.2. Obligation to sell electricity on the commodity exchange

- (45) The Amendment introduces a controversial obligation to sell all electricity generated in renewable energy installations on the commodity exchange or on the market organized by the market regulator in the Republic of Poland (in practice at TGE). This obligation is to be extended to producers who until 31 December 2020 produced electricity in an RES installation other than micro-installation or installation covered by the FIT or FIP system.
- (46) Pursuant to the Amendment, the producer is obliged to submit a written statement to the President of ERO, within 14 days before the date of producing electricity for the first time in the RES installation, that the electricity generated in this installation will be fully delivered to the grid and sold on the commodity exchange or on the regulated market. Not submitting a declaration or submitting it after the prescribed deadline results in a ban for the producer to access support schemes provided for in the RES Act.
- (47) The structure of this obligation raises a number of doubts. It is widely believed that the intention of the legislator was to extend its scope only to those producers who do not participate in the Green Certificates system and at the same time for various reasons are forced to start generating electricity before the expected closing date of the auction. In the absence of an appropriate exception, such producers would not be able to join the auction – the regulation should enable them to start production and simultaneously qualify for the Auction System.
- (48) However, its literal wording suggests that all generators who produced energy in RES installations before December 31, 2020 would be covered by it. This would mean introducing the exchange obligation for all producers in RES installations. We expect that the final scope of this obligation will be subject to a clarifying interpretation issued by the President of ERO or the Minister of Energy.

6.3. Obligation to demonstrate the minimum share of biomass of agricultural origin

- (49) The Amendment removes the existing obligation to demonstrate the minimum share of the so-called local biomass in the total weight share of biomass incinerated in a given installation. However, this obligation has been replaced by the obligation to demonstrate the minimum share of biomass of agricultural origin.
- (50) Agricultural biomass is understood as biomass from energy crops, as well as waste or residues from agricultural production or from the industry processing agricultural products. According to the Amendment, the minimum weight share of biomass of agricultural origin in the total biomass weight is:
 - (i) 85% for multi-fuel combustion installations and dedicated multi-fuel combustion plants with an installed electric capacity of more than 5 MW; and
 - (ii) 10% for dedicated biomass combustion installations and hybrid systems with installed electric capacity higher than 20 MW.
- (51) The transitional provisions contained in the Amendment, however, indicate that in the case of multi-fuel combustion installations and dedicated multi-fuel combustion installations, in respect of which the works¹ will start before 1 January 2019, the requirement to demonstrate the minimum share of biomass of agricultural origin does not apply. In turn, in the case of multi-fuel combustion installations and dedicated multi-fuel combustion plants with a capacity of more

¹ Start of works means either the start of construction works on the investment or the first firm commitment to order equipment or other commitment that makes the investment irreversible, whichever is the first in time. Buying land and preparatory work such as obtaining permits and producing preliminary feasibility studies are not considered as start of works. For take-overs, 'start of works' means the moment of acquiring the assets directly linked to the acquired establishment.

than 5 MW, for which the works start on or after 1 January 2019, the minimum weight share of biomass of agricultural origin in the total biomass weight is 10%.

Appendix no. 1

Reference prices applying in 2018 (PLN per MWh)

No.	Type of RES installation	Reference price for RES installation
1.	Installations with a capacity of less than 500 kW using only agricultural biogas	630
2.	Installations with a capacity of less than 500 kW using only biogas obtained from landfills	560
3.	Installations with a capacity of less than 500 kW using only biogas obtained from sewage treatment plants	420
4.	Installations with a capacity of less than 500 kW using only biogas other than obtained from landfills or sewage treatment plants	420
5.	Installations with a capacity of less than 500 kW using only hydropower	550
6.	Installations with a capacity of not less than 500 kW and not more than 1 MW using only agricultural biogas	570
7.	Large Installations using only agricultural biogas	550
8.	Installations with a capacity of not less than 500 kW using only biogas obtained from landfills	500
9.	Installations with a capacity of not less than 500 kW, using only biogas obtained from wastewater treatment plants	385
10.	Installations with a capacity of not less than 500 kW using only biogas other than that obtained from landfills or sewage treatment plants	385
11.	Dedicated biomass combustion installations or hybrid systems	415
12.	Thermal waste treatment installations or dedicated multi-fuel combustion installations	325
13.	Installations with a capacity of not more than 50 MW, in a dedicated biomass combustion installation or hybrid systems, in high-efficiency cogeneration	450
14.	Installations with a capacity of more than 50 MW, in a dedicated biomass combustion installation or hybrid systems, in high-efficiency cogeneration	435
15.	Installations using only bioliquids	475
16.	Small Installations using only onshore wind energy	320
17.	Large Installations using only onshore wind energy	350
18.	Installations with a capacity of not less than 500 kW and not more than 1 MW using only hydropower	500

No.	Type of RES installation	Reference price for RES installation
19.	Large Installations using only hydropower	480
20.	Installations using only geothermal energy	455
21.	Small Installations using only solar energy	420
22.	Large Installations using only solar energy	400
23.	Installations using only offshore wind energy	450
24.	Small hybrid installations	415
25.	Large hybrid installations	410