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Legal Bulletin



Energy

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Amendments in the Field of Power Generated from Renewable Energy Sources

On 6 May 2015, the Chamber of Deputies adopted a law (in its capacity of decisional chamber of the Parliament) introducing several amendments to the principles governing the power generated from renewable energy sources (the “**New Law**”).

The changes laid down by the New Law impact various participants on the power market, such as the power suppliers and producers which are subject to the mandatory green certificates acquisition quota, but also the producers of power generated from renewable energy sources and, in particular, those operating plants with installed capacity exceeding 125 MW and those operating small plants (up to 3 MW). According to the legislation enactment procedure set out by the Romanian Constitution, the New Law will be submitted to the President for promulgation purposes and, immediately after, it will be published in the Official Gazette of Romania. The New Law will enter into force within 3 days from its publication.

The most important changes brought by the New Law are summarised herein below.

1. **New temporary accreditation for power plants exceeding 125 MW, after the expiry of the temporary accreditation**

The producers operating power plants exceeding 125 MW for which the European Commission (“**EC**”) does not issue the individual authorization decisions within the 24-month temporary accreditation period have the right to request the Romanian Energy Regulatory Authority (“**ANRE**”) a new temporary accreditation. The new accreditation will apply as of its issuance date until the date EC issues the individual authorisation decision.

The explanation for this change lies in the fact that, when the 24-month duration of the temporary accreditation was established (by Government Emergency Ordinance No. 88/2011 as subsequently amended by Law No. 134/2012), its purpose was not to impose a time limitation to the support scheme benefit in case of the concerned producers. The said period was selected as it was considered sufficient for the issuance of the EC decision, considering the average duration in which such decisions were issued by EC at that time.

However, through no fault of the concerned producers, the 24-month period was significantly exceeded by EC, *inter alia*, due to the successive legislative changes brought to the support scheme which caused EC to suspend the settlement of all individual notifications filed regarding Romanian renewable producers until all such legislative amendments are analysed by EC. As a result, the concerned producers no longer receive green certificates starting from the expiry date of the 24-month temporary accreditation period.

Therefore, the new legal provisions are meant to solve the serious problems caused to the concerned producers by the delays registered by EC in issuing the individual authorization decisions.

The New Law also provides that the green certificates representing negative differences between the green certificates received and those to which the relevant producers are entitled to according to the EC decision are issued within 24 months from the EC decision date, based on a settlement decision to be issued by ANRE. Before, the law addressed only the recovery by the State of the green certificates representing the positive difference between those issued and those to which the producers are entitled.

2. The individual authorisation decision from EC no longer required for power plants with installed capacity between 125 MW and 250 MW

In the summer of 2014, the EC adopted new *Guidelines on State aid for environmental protection and energy 2014-2020* according to which the installed capacity threshold (over which it is necessary to obtain an individual authorization decision from the European Commission) was increased from 125 MW to 250 MW. Thus, the New Law harmonizes the Romanian legislation with the new principles adopted at European level, no longer requiring the individual authorization decision for the accreditation of power plants with installed capacity not exceeding 250 MW.

3. Opening the support scheme to other EU member states on a reciprocity basis

Following a request received from EC, the New Law states that the Government will approve a mechanism for opening the green certificates support scheme to the power produced from renewable sources in a different EU member state. Nevertheless, such mechanism will become applicable only after the execution by Romania of bilateral agreements with the other EU members states and based on the terms thereof.

Following the implementation of such mechanism, the power generated from renewable energy sources in another EU member state which is imported in Romania will benefit from the green certificates support scheme as if produced in Romania. Similarly, renewable power producers will be

able to export to other EU member states the power generated in Romania, in which case they will no longer benefit from the Romanian green certificates support scheme, but from the support scheme applicable in the relevant member state.

Considering that the changes brought to the support scheme during the last two years triggered a significant excess of green certificates on the market and a corresponding decrease of the green certificates trading price to the floor price, it is unlikely that foreign power producers will be interested in selling the renewable power in Romania in order to benefit from the Romanian support scheme. However, from the perspective of exporting the renewable power generated in Romania in another EU member state, since Romania already exceeded its intermediary targets of power generated from renewable energy sources and is expected to exceed also the 2020 target (*i.e.* 24%), this may be a solution both for the renewable producers (considering the current and expected increased difficulties in capitalizing the green certificates), as well for decreasing the costs incurred by consumers with the support scheme. Nevertheless, we expect that opening the support schemes to be a lengthy process.

4. Exclusion from the support scheme of the renewable power sold at negative prices

The New Law provides that no green certificates are to be issued for the power generated from renewable sources if it is sold at negative prices. This principle was introduced also following the request of the EC.

5. Quarterly mandatory quota for green certificates acquisition

According to the New Law, the suppliers and producers subject to the mandatory quota for green certificates acquisition have the obligation to acquire a specific number of green certificates not only on an annual basis, but also on a quarterly basis. The quarterly green certificates number is calculated by multiplying (a) the annual mandatory quota with (b) the quantity of power supplied/consumed during the relevant trimester.

Failure to acquire 90% of the quarterly quota leads to fines equal to (a) the maximum green certificates trading price multiplied by (b) the difference between 90% of the quarterly quota and the number of acquired green certificates.

Considering the ongoing procedure for exempting the energy-intensive consumers from the payment of the green certificates price for a percentage of the consumed power, the New Law exempts from the quarterly acquisition obligation those suppliers which sell power to consumers which applied for such exemption, until the date the exemption applications will have been settled, but no later than the end of the year 2015.

The quarterly mandatory quota is meant to increase the liquidity of the green certificates market and, thus, to ensure a protection to the producers considering that, under the existing annual mandatory quota, the transactions are not performed evenly throughout the year, but mostly at the end of the period for which the annual mandatory quota must be fulfilled.

6. Green certificates price invoiced to consumers

According to the New Law, the green certificates are no longer invoiced to the consumers at the price for which they were acquired, but (a) at the average weighted price of the centralised market transactions concluded in the month preceding the invoice issuance month or (b) at the last available average monthly weighted price.

7. Fines up to 5% of the turnover for breaching reporting obligations to ANRE

The New Law increases the fines applicable to the suppliers/producers subject to the mandatory acquisition quota, in case of failing to fulfil the reporting obligations to ANRE. Thus, in case of two breaches in the same calendar year, the relevant suppliers/producers are subject to fines up to 5% of their turnover.

8. Directly negotiated power purchase agreements available for small renewable power producers

The New Law provides a new derogation from the Power and Gas Law No. 123/2012 as regards the restriction to trade power only on OPCOM markets. Thus, renewable power producers operating power plants with installed capacity (a) between 1 MW to 3 MW per producer and (b) between 2 MW to 3 MW per producer in case of high efficiency cogeneration based on biomass, which benefit from the support scheme and qualify as small and medium sized enterprises under the law, may conclude power sale-purchase agreements through direct negotiations.

Just as a reminder, the renewable power producers operating power plants with installed capacity (a) not exceeding 1 MW per producer and (b) not exceeding 2 MW per producer in case of high efficiency cogeneration based on biomass were already granted in 2014 (through Law No. 23/2014) the right to conclude through direct negotiations agreements for selling both power and green certificates, but only with suppliers selling power to end consumers.

New Regulation on the Functioning of the Green Certificates Market

ANRE Order No. 60/2015 approving the *Regulation for the organization and functioning of the green certificates market* was published in the Official Gazette of Romania, Part I, No. 287 of 28 April 2015 (the “New Regulation”) and repealed ANRE Order no. 57/2013 approving the former regulation on the same subject-matter. The New Regulation entered into force on its publication date.

In a nutshell, the New Regulation aligns the structure of the green certificates with the changes brought last year by *Law No. 23/2014 on the approval of Government Emergency Ordinance no. 57/2013 amending and supplementing Law no. 220/2008 establishing the support scheme for the generation of power from renewable energy sources* (“Law No. 23/2014”) whereby small renewable

power producers may conclude sale-purchase agreements of green certificates by means of direct negotiations, with the suppliers of the final consumers.

The most important changes of the New Regulation are summarised herein below.

1. Establishment of a centralized market for bilateral agreements executed by direct negotiations

The New Regulation establishes the centralized market for bilateral agreements executed by direct negotiations, as a new component of the centralized market for bilateral agreements.

As mentioned above, the purpose of this provision is to implement in the secondary legislation the principle set out by Law No. 23/2014 according to which the renewable power producers operating power plants with installed capacity (a) not exceeding 1 MW per producer and (b) not exceeding 2 MW per producer in case of high efficiency cogeneration based on biomass are entitled to conclude through direct negotiations agreements for selling green certificates, but only with suppliers selling power to end consumers.

It is worth noting that, within 3 business days from the execution of such agreements, the sellers must submit the copies thereof to the operator of the green certificates market (*i.e.* OPCOM).

2. New case of suspension of a participant from the green certificates market

The New Regulation sets out an additional case when OPCOM may suspend the participation from the green certificates market, namely in case of expiry of the preliminary/temporary/final accreditation decision. The suspension shall apply 60 calendar days from the said expiry.

However, it is unclear how such producers may capitalize the green certificates not sold up to the suspension date, considering that the green certificates excess on the market may cause the producers difficulties in finding rapidly a buyer.

3. Reporting obligations to OPCOM for agreements executed before 1 July 2013

The sellers having concluded bilateral sale-purchase agreements of green certificates before the entering into force of Government Emergency Ordinance No. 57/2013 (*i.e.* before 1 July 2013) and which are still ongoing have the obligation to submit to OPCOM:

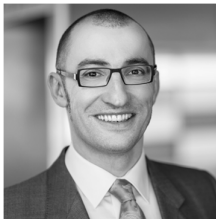
- A copy of those agreements, within 3 business days as of entry into force of the New Regulation (*i.e.* by 5 May 2015); and
- Information regarding the transactions performed based on such agreements (number of sold green certificates, numerical codes thereof and selling price), including confirmations on the extinction of the payment obligations corresponding to the sold green certificates, within 5 days from each payment collection.

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