



Energy price caps and other emergency interventions in the electricity market in Poland in 2023

November 2022

As a sharp increase in energy prices has been observed in recent months, the Polish Parliament, following the Council of the European Union, introduced a new emergency intervention in the electricity market to protect end-users and businesses from potential harm due to the current unstable situation. Energy price caps for specific eligible off-takers, mechanisms for redistributing excess profits of energy producers and instruments promoting a reduction in electricity demand have been adopted. The new laws will have a profound impact on the electricity market in Poland and on all of its participants.

Council Regulation (EU) 2022/1854

On 6 October 2022 the Council of the European Union adopted Regulation 2022/1854 on an emergency intervention to address high energy prices (the Regulation). It sets out measures aimed at implementing an emergency intervention in European energy markets to provide a united and well-coordinated EU-wide response to deal with the increase of electricity prices and their impact on households and industry.

The Regulation generally has a direct effect although member states are allowed to introduce further national crisis measures which in all cases must be proportionate and non-discriminatory, not jeopardise investment signals, ensure that investments and operating costs are covered, not distort the functioning of electricity wholesale markets and be compatible with EU law.

The Regulation concentrates on three main instruments:

- the reduction of total gross electricity consumption and reduction of gross electricity consumption during peak hours;
- a cap on market revenues of electricity producers and distribution of surplus revenues and surplus congestion income revenues to final electricity customers; and
- measures to support final energy customers through a temporary solidarity contribution for entities with activities in the crude petroleum, natural gas, coal and refinery sectors.

Cap on market revenues

Market revenues of producers obtained from the generation of electricity are capped to a maximum of EUR 180 per MWh of electricity produced.

Market revenue means realised income a producer receives in exchange for the sale and delivery of electricity in the Union, regardless of the contractual form in which such exchange takes place, including power purchase agreements and other hedging operations against fluctuations in the wholesale electricity market and excluding any support granted by Member States.

Except for the above definition, the Regulation does not provide for any detailed manner of calculating market revenues and the application of the revenue cap.

Polish Emergency Intervention

Based on the Regulation, the Polish Parliament adopted the Act of 27 October 2022 on Emergency Measures Aimed at Limiting Electricity Prices and Supporting Certain Customers in 2023 (the Emergency Measures Act).

It followed and extended the protective measures adopted in the preceding Act of 7 October 2022 on special solutions to protect electricity consumers in 2023 in connection with the situation on the electricity market (Protection Act).

The Protection Act mainly refers to the final customers purchasing electricity for household consumption. It sets out the mechanisms aiming at freezing the energy prices of 2022 for 2023 but only up to the maximum electricity consumption threshold of 2 to 3 MWh. It also provides for compensation for energy producers who are obliged under the Protection Act to sell energy to end users at the frozen price.

The Emergency Measures Act introduces:

- maximum energy prices for specific eligible offtakers beyond and above the limits set out in the Protection Act;
- an additional discount for micro-, small and medium-sized enterprises (SMEs), for the reduction of their energy consumption in 2023;
- compensation to energy suppliers delivering energy to eligible offtakers at the maximum price; and
- obligatory contributions to the special state-owned fund, being the amount of money that an obliged producer of electricity (including renewable energy producers) has to pay due to its excess profits from electricity sales.

Energy price cap

Who?

The Emergency Measures Act sets maximum energy prices that may be charged in 2023 to households and other residential premises above the threshold set in the Protection Act (PLN 693/MWh) and to other eligible offtakers who were not covered by the price freeze under the Protection Act, including SMEs and selected public and social sector entities eg local governments, hospitals, or schools (PLN 785/MWh). The maximum prices does not include the VAT or excise taxes.

The criteria for qualification as an SME under the Emergency Measures Act are based on the Polish Act of the 6 March 2018 Entrepreneur law. Therefore, the ceilings of staff headcount and either the turnover or balance sheet total apply to the figures for individual firms only. This approach is different from the one adopted in the Regulation which refers to the European definition of SME. Under the European legislation, an SME that is part of a larger group may need to include the relevant headcount and financial data of that group too.

Additional discount for SMEs

Aimed at the reduction of electricity consumption, the Emergency Measures Act allows certain offtakers to benefit from an additional discount of energy price in 2023. The SMEs which reduce their energy consumption in the period between 1 January 2023 and 31 December 2023 to 90

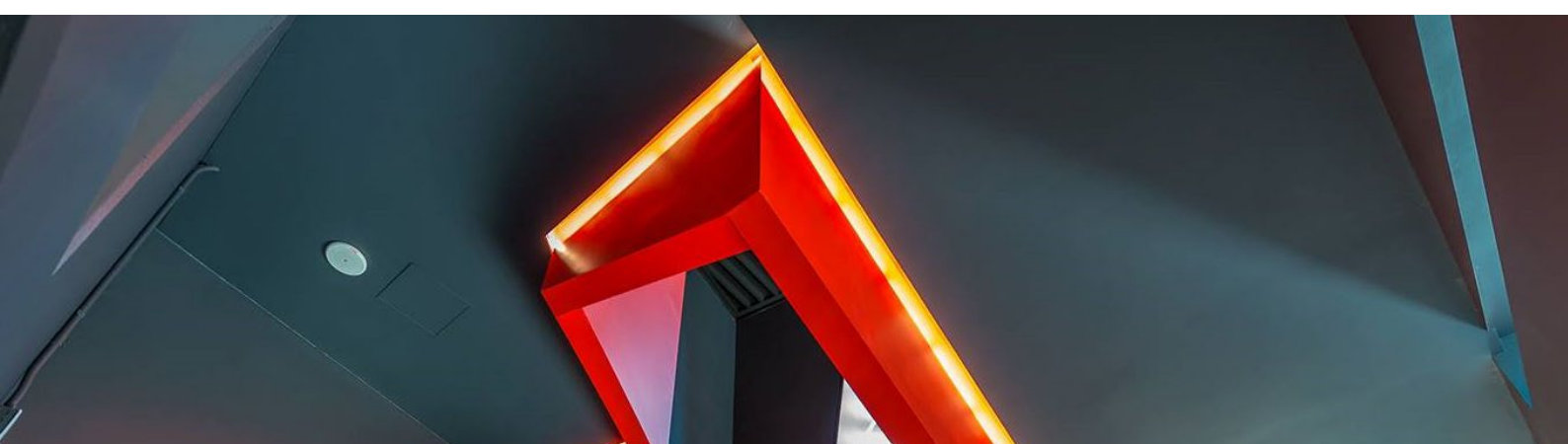
When?

The maximum energy prices should apply to the household offtakers from the day the thresholds set in the Protection Act are exceeded to and including 31 December 2023. In the case of other eligible offtakers the capped prices apply from and including 1 December 2022 to and including 31 December 2023, however, if they concluded a new energy supply agreement or amended the existing one with respect to the energy price after 23 February 2022, the price cap would also apply retroactively to energy deliveries made in the period between concluding or amending that agreement to and including 30 November 2022.

How?

If the eligible offtaker, other than household, wishes to benefit from the maximum energy price, it should file a declaration to its energy vendor on or before 30 November 2022. If a declaration is filed later, the maximum price will be applied from the month following the month in which the declaration was made. The declarations should be made on the official form.

percent of their average annual consumption in the period between 1 January 2018 and 31 December 2022 may receive a discount of 10% of the total billing amount of electricity sales incurred in 2023. A discount will be deducted from energy bills in 2024.



Compensation to energy suppliers

Energy suppliers are entitled to compensation for applying the maximum energy prices for the sale of energy to eligible offtakers. The value of compensation available for an energy supplier should be calculated as the product of the amount of electricity supplied in a given month and the difference between the applicable reference price and the maximum price for each power supply point. The Emergency Measures Act provides for different types of reference prices depending on the category of the eligible offtaker or the type of the sale agreement.

The compensations will be paid by the billing management company Zarządca Rozliczeń S.A. based on the application for compensation submitted by the energy supplier. The compensation can be granted for each month of a period when the maximum energy prices were applied for the eligible offtakers. Monthly advance payments are also possible.

Compensation qualifies as taxable income from the sale of electricity or services.

Contributions from energy producers and trading companies

General rules

Under the Emergency Measures Act the revenues generated by producers of energy and trading companies from sales of that electricity are subject to an additional contribution to the special state-owned fund (the Levy), which effectively sets a cap on revenue from sales of energy.

The Levy should be paid by entities producing electricity in generation units with an installed capacity exceeding 1 MW, using energy from

renewable sources (wind, solar, geothermal, hydropower, biomass and bioliquids), waste, lignite and hard coal, liquid fuels and gaseous fuels. The obligation to pay the Levy does not apply to energy producers using biogas and agricultural biogas, operating demonstration projects and some specific producers using renewable energy sources indicated in the Emergency Measures Act. The Levy is also payable by trading companies selling electricity on the wholesale and the retail market.

Calculation of the Levy

The Levy should be calculated based on the difference between the revenue from physical sales of electricity and the applicable price limit. Art. 23 of the Emergency Measures Act stipulates in more details that the Levy is calculated for each day by multiplying (i) the total volume of electricity sales on a given day by the producer; and (ii) the difference between (A) the volume-weighted average **market price** of sales of electricity of a given producer, and (B) the volume-weighted average **limit of the sales price** applicable to a producer on a given day.

The market price is defined as the price per MWh net of VAT that is established:

- under the electricity sales agreements – which are defined as any agreement the subject of which is the sale of electricity with a guarantee of physical delivery of electricity;

- on a balancing market, with respect to electricity sold through the balancing market.

In terms of the price limit, the Emergency Measures Act only states that it shall be indicated as an amount per MWh net of VAT but leaves it up to the Council of Ministers to establish in secondary legislation, the manner of calculating the limit, separately for each technology to which the revenue cap applies, taking into account the necessity to balance the interests of electricity market participants. The Council of Ministers adopted such secondary legislation as the Ordinance of 8 November 2022 on the Method of Calculating the Price Limit (the Ordinance)

Power purchase agreements

According to paragraph (30) of the Regulation's preamble, "to the extent that existing or future contractual obligations, such as renewable power purchase agreements and other types of power purchase agreements or forward hedges, lead to market revenues from the production of electricity up to the level of the cap on market revenues, such revenues should remain unaffected by this Regulation". To comply with the Regulation, the mechanism of calculating the Levy should therefore take into account the financial hedging arrangements, the economic result of which is the reduction of market revenues below the price limit.

The Emergency Measures Act does not take the revenues generated or losses incurred by a producer of electricity under any financially settled power purchase agreement (ie the agreements that

refer to volume of electricity generated but do not require the physical delivery of electricity) into account when calculating the market price. Instead, the Ordinance increased the price limit applicable to a given producer by the average amount of a claim due from that producer to an offtaker under an electricity sales contract concluded between the producer and the offtaker, where such contract includes a financial instrument within the meaning of Art. 2.1 of the Act of 29 July 2005 on Trading in Financial Instruments (the TiFI Act)

The Emergency Measures Act and the Ordinance relating to the calculation of the price limit and the Levy seem not to properly reflect the principles set out in the Regulation and, if interpreted literally, may result in the Levy amount being higher than that which would have been payable had the Polish legislation in question reflected said principles.

Price limit for renewable energy producers

According to the Ordinance, the price limit for producers of renewable electricity from sources other than biomass and hydropower depends on whether or not their installations benefit from the support under the auction scheme in accordance with the Act of 20 February 2015 on Renewable Energy Sources (the RES Act).

If an installation benefits from that support, then the price limit is equal to the strike price indicated in the offer under which the producer is entitled to receive support under the auction scheme, as indexed by the CPI. If the installation does not benefit from that support, then the price limit is equal to the reference price as defined in the RES Act, ie the maximum price that can be offered in a given period of time for a given technology in an auction under the RES Act.

Under the Emergency Measures Act the electricity sold under the auction scheme (ie the volume of electricity notified to the settlement body as electricity in relation to which relevant CfD payments are calculated) is excluded from the obligation to calculate and pay the Levy. Therefore, the price limit should only apply to the volumes generated by a given installation

and not notified by the producer to the settlement body as electricity in relation to which the CfD payment is calculated.

The Ordinance stipulates further that, with respect to a volume of electricity covered by an electricity sales contract that includes financial instruments within the meaning of Art. 2.1 of the TiFI Act, to secure the revenues of an electricity producer and the costs of purchasing the electricity of a recipient, within the meaning of Art. 3 point 13 of the Act of 10 April 1997 – the Energy Law, against fluctuations in electricity prices on the wholesale electricity market concluded between the producer and the offtaker, the price limit will be additionally increased by "the average amount of the claim due to that offtaker under that electricity sales contract".

The manner in which the Ordinance is drafted suggests that only payments due under agreements between a given producer and an offtaker are taken into account when calculating the price limit. The terminology used by the Ordinance may cause further doubts as to which agreements should be taken into account when calculating the price limit, eg any purely financial hedging agreements.

Price limit for other obliged energy producers and traders

Price limits applicable to producers from other sources, which are subject to the Emergency Act, are calculated according to the formulas provided in the Ordinance. Those formulas are based on the cost of fuel and emission allowances, where applicable to a given installation, and the margin of 3% of a spot market price of electricity on the Polish Power exchange (80% based on the TGEBase index and 20% based on the TGE Peak index). Additionally, the limit is increased by PLN 50 per 1MW to cover a producer's fixed and investment costs.

Hydropower generation is subject to a price limit of 40% of the reference price, ie the maximum price that can be offered in a given period of time for hydropower in an auction under the RES Act.

Trading companies are subject to a price limit:

- (a) regarding sales on the wholesale market (ie not to final customers), calculated by multiplying the volume-weighted average cost of purchasing the electricity and a margin of:
 - 1.015 for electricity sold on the power exchange;
 - 1.01 for other electricity; and
- (b) regarding the sale to final customers calculated by multiplying the volume-weighted average cost of purchasing the electricity and a margin of:
 - 1.035 for electricity sold on the power exchange;
 - 1.03 for other electricity,

in each case increased by the unit rate of redeeming the certificates of origin, which a given producer must redeem in connection with the sales of electricity to final customers.

Payments and reporting

The producers of energy and trading companies are obliged to pay the Levy on a monthly basis on or before the fifth day following the end of the month for which the Levy is calculated. Moreover, detailed reports confirming the amounts of the due Levy must be prepared and submitted to the billing management company Zarządca Rozliczeń S.A. on or before the 20th day of the following month.

The reports are subject to verification by the billing management company as to the correctness and completeness of the data provided and the calculations made. In the event of negative results of such verification, the president of the Energy Regulatory Office may conduct a formal audit procedure with regard to Levy calculations and payments.



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