**EFET**

**European Federation of Energy Traders**

Amstelveenseweg 998 / 1081 JS Amsterdam
Tel: +31 20 5207970 / Fax: +31 20 64 64 055

E-mail: secretariat@efet.org

Webpage: www.efet.org

**WAIVER: THE FOLLOWING GUIDANCE NOTES FOR THE POLISH MARKET WERE PREPARED BY EFET’S MEMBERS EXERCISING ALL REASONABLE CARE. HOWEVER, EFET, OR ITS AFFLIATED MEMBERS, REPRESENTATIVES AND COUNSEL INVOLVED IN ITS PREPARATION SHALL NOT BE LIABLE OR OTHERWISE RESPONSIBLE FOR THEIR USE AND ANY DAMAGES OR LOSSES RESULTING OUT OF ITS USE IN ANY INDIVIDUAL CASE AND IN WHATEVER JURISDICTION. IT IS THEREFORE THE RESPONSIBILITY OF EACH PARTY WISHING TO USE THE GUIDANCE NOTES TO ENSURE THAT CONTRACTUAL CONDITIONS OF THE PPA ARE LEGALLY BINDING, VALID AND ENFORCEABLE AND BEST SERVE TO PROTECT THE USER’S LEGAL INTEREST.**

**FOLOWING GUIDANCE NOTES ARE A WORKING DOCUMENT OF EFET. PARTIES USING THE GUIDANCE NOTES WHEN NEGOTIATING A POWER PURCHASE AGREEMENT AS ISSUED BY EFET. FOLLOWING GUIDANCE NOTES WILL BE CHANGED FROM TIME TO TIME IN VIEW OF CHANGING MARKET PRACTICE, OR CHANGE OF LAW, OR CHANGE OF APPLICABLE REGULATION.** **USERS OF THE GUIDANCE NOTES ARE URGED TO CONSULT THEIR OWN COUNSEL WHEN BRINGING CONTRCTUAL ARRANGEMENTS IN PLACE.**

**[WORKING DRAFT]**

STATUS: 04 February 2020

These Guidance Notes have been prepared in relation with the Individual Power Purchase Agreement for Corporates and Utilities (hereafter referred to as “CPPA”), issued by EFET on 26 June 2019. The Polish Guidance Notes are designed to inform users of the PPA about issues relating to:

1. CPPA is governed by Polish law; and/or
2. The Facility (electricity generation plant of the Seller) and/or the electricity consumption unit of the Buyer are located in Poland and connected to the Polish power system;
3. Specific Polish market practices reflecting the specifics of the use of CPPAs.

Comments are provided in the table below. They may be addressed in an *ad hoc* appendix or in the Election Sheet (in the Section specified as per the table). The notes do not address compliance with the Regulation (EU)
No. 1227/2011 (REMIT) or Directive 2014/65/EU (MIFID) as these matters are not Poland specific. Capitalised terms not defined herein have a meaning ascribed to them in the CPPA.

|  |  |
| --- | --- |
| **General remarks** |  |
| 1. **Required content of a power purchase agreement**
 | Art. 5.2. 1) of the Polish law of 25 April 1997 – the Energy law (the “**Polish Energy Law**”) prescribes the minimum content of an “energy sales agreement”.According to this provision, the energy sales agreement must contain at least the clauses specifying:1. place of delivery;
2. volume of energy to be delivered to the offtaker, broken down into contractual periods;
3. contractual capacity and the terms of its modification;
4. the price or the applicable tariff group (to which the offtaker belongs) and the terms of its modification;
5. the method of settlements;
6. discounts to be granted to the offtaker for failure to maintain the quality standards of serving the offtakers;
7. liability for breach of contract;
8. term of the contract and the terms for its termination;
9. notice on the consequences of selecting a reserve seller of energy.

It is generally accepted that the above stated terms, other than: (i) the type of commodity contracted, (ii) its volume and (iii) its price (or a method of establishing the price) are not *essentialia negotii* of the contract for sale of electricity, consequently, a failure to include such non-essential terms of a PPA would not result in invalidity or ineffectiveness of the contract.Nevertheless, in the event of a CPPA with physical delivery of electricity, since a Seller would be operating under a licence for power generation granted by the Polish energy regulator, President of the Energy Regulatory Authority (*Prezes Urzędu Regulacji Energetyki*), failure to include in the CPPA elements required by the Polish Energy Law should be also assessed from the point of view of a potential breach of an obligation by a licenced entity to conduct its operations in accordance with law.The CPPA does not include terms referred to in points **c, f and i** from the list above.In our view, the lack of inclusion of the terms referred to in points **c and f** is of no consequence as they would be of no relevance in a PPA entered into by a power generator and an end-user being a professional participant of the power market.We would however recommend to include in the CPPA a provision required under the point **i** from the list.“**Reserve Seller**” is defined in art. 3 point 29a of the Polish Energy Law, i.e. it is an entity holding a licence for trading in electricity, indicated by the end-user, providing to such an end-user “reserve sale” of electricity, i.e. sale of electricity in the event the original seller of electricity, with whom the end-user has a PPA, fails to perform sale of electricity under such a PPA. The “Reserve Seller” is indicated by the end-user in the distribution services agreement between the end-user and the distribution grid operator running the grid to which the end-user is connected.**We propose the following language to be included in Part I, Section C, as an additional provision**:„*In the event the Seller ceases to sell electricity to the Buyer, the sale of electricity to the Buyer will be performed by the Reserve Seller chosen by the Buyer*”. |
| 1. **Requirement for the Seller to possess a “distribution services agreement” with the operator of the grid to which the Buyer is connected**
 | The Seller, as a producer of electricity, will need to have a distribution services agreement with the operator of the grid to which the Facility is connected (such distribution services agreement sets out the terms relating to feeding into the system the power generated by the Facility).However, since the Seller will be selling electricity directly to an end-user (the Buyer), the Seller will need to be a party also to a seperate distribution services agreement with the operator of the grid within which the offtake point is located (i.e. of the grid, to which the electricity consumption facility of the Buyer is connected).Such distribution services agreement is called “general distribution agreement” (“*generalna umowa dystrybucyjna*”, acronym “*GUD*”). The GUD sets out the terms of the relationship between a seller of electricity and the relevant grid operator in relation to the sales of electricity by such a seller to end-users connected to the network of the relevant grid operator.Forms of the “general distribution agreements” are available from the grid operators and follow a template worked out several years ago between the relevant industry associations and the Polish energy market regulator. |
| 1. **End-user purchasing electricity from several sellers**
 | In the event the CPPA would not serve to satisfy all electricity needs of the Buyer, the Buyer would need to have additional PPAs for the remainder of the required power (with other power producers or with a utility).Currently, the grid codes of most of the major Polish distribution system operators (Polish name of such grid codes: “*instrukcja ruchu i eksploatacji sieci dystrybucyjnej*”, acronym: “*IRiESD*”)” stipulate that an end-user may have any number of power purchase contracts for a single “Power Offtake Point” (Polish: “*Punkt Poboru Energii*”, acronym: “*PPE*”), however, in such an event:1. only one of the sellers may notify the grid operator of the power purchase agreements to be performed (i.e. only one of the sellers may perform scheduling);
2. there may be only one so-called “entity responsible for commercial balancing” (Polish: “*Podmiot Odpowiedzialny za Bilansowanie Handlowe*”, acronym: “*POB*”) for such a PPE (power offtake point), i.e. there may be only one entity performing scheduling and making settlements for imbalances for such a PPE (power offtake point). Such single POB has to be indicated only in one “general distribution agreement” (GUD) entered into by the grid operator with only one of the several sellers delivering power to the same PPE.

The role of a POB for a given PPE may be performed by the Buyer itself or by a third party service provider - an entity holding a licence for trading in electricity or a licence for production of electricity. An entity wishing to perform the role of a POB must have a relevant agreement with the Polish transmission system operator (PSE S.A.). In practice, for most of Polish end-users the role of a POB is performed by third party providers. Please also refer to point 4 below for further explanation regarding “commercial balancing”.Consequently, in the event there are to be several power purchase contracts with several sellers for the same PPE, all prospective sellers and the end-user have to come to an agreement on the use of balancing services of one POB. |
| 1. **Balancing**
 | In the Polish system, the participation in the balancing mechanism takes place primarily through the so-called “Commercial Balancing” (Polish: “*bilansowanie handlowe*”).“**Commercial Balancing**” is defined in article 3 point 40 of the Polish Energy Law as “notifying the transmission system operator of electricity sale agreements to be performed, where such notifications are made by an entity responsible for commercial balancing, and making settlements by the entity responsible for commercial balancing with system users for the differences between electricity actually delivered or offtaken and volumes of electricity specified in the electricity sales agreements”.“Notifying the transmission system operator of electricity sale agreements to be performed” means delivering schedules to the TSO ahead of the time of actual delivery/offtake.“Differences between electricity actually delivered or offtaken and volumes of electricity specified in the electricity sales agreements” means differences of volumes actually delivered/offtaken and volumes specified in the schedules submitted to the TSO (i.e. the imbalances).“**Entity responsible for commercial balancing**” is defined in article 3 point 42 of the Polish Energy law as “a physical or legal person, participating in the central balancing mechanism on the basis of an agreement with the transmission system operator, who deals with commercial balancing of system users”. The acronym often used to denote an entity responsible for commercial balancing is “**POB**”.Commercial balancing may be performed by a system user (electricity generator or electricity end-user) itself, in which case such a system user must have a relevant agreement with the TSO, or it may be outsourced to a third party provider.Importantly, both a power producer (the Seller) and the end-user (the Buyer) must have an entity responsible for commercial balancing appointed for each of them. Both may have the same POB, but they can also have different POBs.Consequently, the following configurations may take place:1. the Seller is a POB (it has a relevant agreement with the TSO) and performs commercial balancing just for itself or for itself and for the Buyer (as a service to the Buyer, for which the Seller should be remunerated);
2. the Buyer is a POB (it has a relevant agreement with the TSO) and performs commercial balancing just for itself or for itself and for the Seller (as a service to the Seller, for which the Buyer should be remunerated);
3. the Seller, the Buyer or both appoint a third party service provider as a POB for each of them; they may appoint separate POBs for each of them or they may appoint the same entity as a POB for both of them.
 |
| 1. **Statutory obligations associated with selling electricity directly to an end-user.**
 | Entities selling electricity to end-users are obliged to satisfy certain obligations related to the promotion of renewable energy sources and increasing energy efficiency. An electricity generator, if it sells electricity directly to an end-user, is also under such obligations.1. An entity selling electricity to end-users is obliged to cover a specified portion of the electricity sold to end-users with certificates of origin from renewable energy sources (so called “green certificates” and “blue certificates” – please see below for explanation). Such certificates are distinct from “guarantees of origin”. Certificates of origin are issued to renewable energy sources which started producing electricity before 1 July 2016, i.e. before the entry into force of a new, auction based, scheme of supporting renewables.

In order to meet the quota, an entity selling electricity directly to an end-user needs to redeem the appropriate number of certificates of origin (by submitting them to the President of the Energy Regulatory Authority, *Prezes Urzędu Regulacji Energetyki*) or to pay so-called substitution fee. The entities selling electricity to end-users may source the green certificates by purchasing them – either at the Polish Power Exchange (TGE) or OTC (through bilateral contracts). There are two renewable energy quotas: 1. for so-called “green certificates” (for electricity generated in renewable sources other than electricity for which “blue certificates” are issued); and2. for so-called “blue certificates” (for electricity from biogas generated after June 2016). Both quotas are in principle set in the primary legislation (the Renewable Energy Act, Polish: ustawa z dnia 20 lutego 2015 r. o odnawialnych źródłach energii[[1]](#footnote-1)) at 19.35% for “green certificates” and 0.65% for “blue certificates”, of the volume of the electricity sold to end-users. However, the minister of energy is authorised to set the quotas at different levels in secondary legislation. The levels set for 2019 were 18.50% in relation to “green certificates” and 0.50% in relation to “blue certificates” and for 2020 they are at 19.50% and 0.50% respectively.The quotas are lower for certain end-users defined as “industrial end users” (Polish: “*odbiorcy przemysłowi*”) depending on their so-called “coefficient of intensity of electricity consumption” (Polish: “*współczynnik intensywności zużycia energii elektrycznej*”).Moreover, “industrial end-users” with annual electricity consumption of at least 100 GWh perform themselves the obligation to meet the quotas in relation to their own electricity consumption. Consequently, if a power producer enters into a PPA with such an end-user, the power producer will not be required to meet the quotas in relation to the electricity sold to such an end-user.**We recommend that, in Part 1 (Individual Terms) Section C 3, three alternative Buyer’s representations are added to the Additional Representations and Warranties of the Buyer:**“The Buyer represents that it is not an industrial end-user (*odbiorca przemysłowy*) as defined in article 52.6 of the Polish law dated 20 February 2015 on the renewable energy sources (*ustawa z dnia 20 lutego 2015 r. o odnawialnych źródłach energii)* and does not submit to the President of the Energy Regulatory Authority (*Prezes Urzędu Regulacji Energetyki*) the representation referred to in article 52.3 of the Polish law dated 20 February 2015 on the renewable energy sources”; **OR ALTERNATIVELY** “The Buyer represents that it is an industrial end-user (*odbiorca przemysłowy*) as defined in article 52.6 of the Polish law dated 20 February 2015 on the renewable energy sources (*ustawa z dnia 20 lutego 2015 r. o odnawialnych źródłach energii)* and submits to the President of the Energy Regulatory Authority (*Prezes Urzędu Regulacji Energetyki*) the representation referred to in article 52.1 of the Polish law dated 20 February 2015 on the renewable energy sources, however its electricity consumption in the calendar year preceding the Signing Date was less than 100 GWh”; **OR ALTERNATIVELY**“The Buyer represents that it is an industrial end-user (*odbiorca przemysłowy*) as defined in article 52.6 of the Polish law dated 20 February 2015 on the renewable energy sources, submits to the President of the Energy Regulatory Authority (*Prezes Urzędu Regulacji Energetyki*) the representation referred to in article 52.1 of the Polish law dated 20 February 2015 on the renewable energy sources and its electricity consumption in the calendar year preceding the Signing Date was at least 100 GWh”.**We also recommend to add in Part 1 (Individual Terms) Section C 3, an additional undertaking of the Buyer:**“If any time after the Signing Date the Buyer submits to the President of the Energy Regulatory Authority (*Prezes Urzędu Regulacji Energetyki*) the representation referred to in article 52.3 of the Polish law dated 20 February 2015 on the renewable energy sources *(ustawa z dnia 20 lutego 2015 r. o odnawialnych źródłach energii)*, the Buyer shall promptly, but in no event not later than within 5 Business Days, notify the Seller of such a circumstance. If the Buyer, in the year when the Buyer submits the representation referred to in article 52.3 of the Polish law dated 20 February 2015 on the renewable energy sources, consumes at least 100 GWh of electricity, the Buyer shall also notify the Seller thereof not later than within 5 Business Days from the end of such a year.”1. A similar obligation relates to energy efficiency certificates (“white certificates”) . Pursuant to article 10.1 of the law dated 20 May 2015 on energy efficiency, an energy trading company, as well as a power producer, selling electricity to end-users, have to meet a quota of white certificates. The quota is 1.5% of electricity sold to end-users, expressed in tons of oil equivalent (toe).

**The fact that under the CPPA the Seller sells to the Buyer electricity generated by a renewable energy source does not exempt the Seller from the obligations described above.** |
| **Comments in relation to specific provisions of the CPPA** |  |
| **3 Conditions Precedent** | If the CPPA is to be governed by Polish law, we recommend to add a new point clause §3.54 with the following language:“§3.54. The Parties acknowledge that some of the Seller Conditions and some of the Buyer Conditions entirely or partly depend on the will of, respectively, the Seller or the Buyer and do not constitute conditions precedent within the meaning of Art. 89 of the Civil Code, therefore only provisions of the Agreement apply to Seller Conditions and the Buyer Conditions.” |
| **18.4 Automatic Termination** | Please refer to the Legal Opinion on the EFET General Agreement Concerning Delivery and Acceptance of Electricity. This opinion can be procured via secretariat@efet.org. |
| **18.5 (b) Winding-up / Insolvency / Attachment** | Please refer to the Legal Opinion on the EFET General Agreement Concerning Delivery and Acceptance of Electricity. This opinion can be procured via secretariat@efet.org. |
| **21.4 Intentional Default, Fraud and Fundamental Rights** | Under Polish law liability may not be limited or excluded only in relation to intentional default. Consequently, if the CPPA is governed by Polish law, Clause 21.4 may be modified by removing letters (b) and (c).  |
| **22.4 Default Interest** | Under Polish Civil Code (article 481 §21) the interest for late payment may not be higher than double the statutory rate (which is set in accordance with article 481 §2 of the Civil Code). |
| **30.4 Additional Representations and Warranties of the Buyer** | Please refer to point 5 of the general remarks. |
| **31.1(c) Other** | If the CPPA is to be governed by Polish law, we recommend the following language:“This Agreement shall be construed and governed by the law of the Republic of Poland, excluding any application of United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980.” |
| **31.2(c) Other** | If the CPPA is to be governed by Polish law, we recommend the following language:“[ ] CourtsAny disputes arising under, out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be submitted to the exclusive jurisdiction of the common courts of the Republic of Poland; or[ ] ArbitrationAny disputes arising under, out of or in connection with this Agreement shall be referred to and finally resolved by arbitration under the Rules of the Court of Arbitration at Konfederacja Lewiatan in Warsaw, Poland, ousting the jurisdiction of ordinary courts, by three (3) arbitrators appointed in accordance with such Rules. The arbitration shall be conducted in [*specify location*] \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and [*specify language*] \_\_\_\_\_\_\_\_\_.” |
| **32.1 Recording Telephone Conversations** | Please refer to the Legal Opinion on the EFET General Agreement Concerning Delivery and Acceptance of Electricity. This opinion can be procured via secretariat@efet.org.  |
| **32.3 Amendments** | If the CPPA is to be governed by Polish law, we recommend the following language: “Except as otherwise expressly provided herein to the contrary, any amendments or additions to this Agreement shall be made only in writing signed by both Parties. For the avoidance of doubt, the Parties exclude the applicability of article 682 of the law dated 23 April 1964 – the Civil Code.”Under article 682 of the Polish Civil Code, if a business entity receives an offer to conclude a contract from a person with whom it maintains permanent business relations, failure to respond promptly to the offer is considered deemed acceptance of the offer. |
| **Definition of Commissioning** | In accordance with the long established interpretation of law by the President of the Energy Regulatory Authority (*Prezes Urzędu Regulacji Energetyki)* sales of electricity by a power producer may start only after such a producer has obtained a licence for the production of electricity. Such a licences is granted by the regulator only once the construction of the power production facility is fully completed from the point of view of construction regulations.Consequently, we recommend that in relation to a Facility which is located in Poland the following changes to the definition of “Commissioning” are made:1. The denomination of point (d) is corrected to point (c);
2. a new point (d) is added, reading as follows:

“(d) the Seller has obtained from the President of the Energy Regulatory Authority (*Prezes Urzędu Regulacji Energetyki)* Competent Authority in relation to the Facility an enforceable licence to produce electricity”. Before a power generation licence is obtained, any electricity produced by the power plant and fed into the grid is remunerated from the balancing market mechanism. If the CPPA is to be governed by Polish law, we recommend the following language: “Except as otherwise expressly provided herein to the contrary, any amendments or additions to this Agreement shall be made only in writing signed by both Parties. For the avoidance of doubt, the Parties exclude the applicability of article 682 of the law dated 23 April 1964 – the Civil Code”.Under article 682 of the Polish Civil Code, if a business entity receives an offer to conclude a contract from a person with whom it maintains permanent business relations, failure to respond promptly to the offer is considered deemed acceptance of the offer. |
| **Definition of Metering Entity** | In Poland meters are installed and owned by the Network Operator (they constitute part of the network). |

|  |  |
| --- | --- |
|  |  |

Status: 04 February 2020

Contact: secretariat@efet.org

1. <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20150000478> [↑](#footnote-ref-1)