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FINANCE & INVESTMENT | CAPITAL MARKETS | MERGERS & ACQUISITIONS |
FINANCIAL CONTRACTS | FINANCIAL TOOLS | COMPETITION |
INDUSTRIAL & INTELLECTUAL PROPERTY RIGHTS | SHIPPING |
TRANSPORTATION | PRIVATE INSURANCE | INSOLVENCY- BANKRUPTCY | TOURISM |
TECHNOLOGY - MEDIA - ELECTRONIC COMMUNICATIONS - INTERNET |
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2nd EDITION



NOMIKI BIBLIOTHIKI

RES PROJECTS TRANSFER, PRIVATE FINANCING AND SECURITIES

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Introduction

RES projects' transfer has been a highly contested subject both in market and in legal terms. The transfer may take place at any of the different stages of the licensing procedure or grid connection of the project as well as after the beginning of its implementation and/or operation. Various legal issues arise therefrom, which need careful examination and legal support, given that the transfer includes both the internal (business) agreement between the contracting parties and the external procedure in order to comply with all legal formalities before the authorities.

Usual distinction is made between asset deal (transfer of the RES installation and connected rights, licenses, contracts etc.) and share deal (transfer of the shares/parts of the project company). Furthermore, the law (mainly Law 3468/2006, Official Gazette A' 129/27.6.2006, as amended) provides for the transfer of the production license.

Legal due diligence of a RES project

The transfer of a RES project is made through a transfer agreement between the seller and the purchaser. Before the signing thereof, a thorough legal, financial, tax/accounting and technical due diligence should take place.

The legal due diligence (LDD) covers, first of all, the project itself, i.e. the examination of the project's licenses, if it is a project subject to license, the connection terms by HEDNO (DEDDIE) S.A. or IPTO (ADMIE) S.A., the environmental terms and other permits required by law, the existing agreements, namely the Grid Connection Agreement, the Power Purchase Agreement, already signed with HEDNO (DEDDIE) S.A. [former PPC (DEI)], for Non-Interconnected Islands, or HEMO (LAGIE) S.A. [former HTSO (DESMIE)], for Connected System, etc.

In addition, the site of installation of the power plant should also be investigated in order for the ownership and right to use of the land to be confirmed. Therefore, a land property's titles' review in the local Land Registry and/or the Cadaster should be conducted.

Legal due diligence of the project company

The legal due diligence of the project company is also strongly recommended. It shall include the lawful establishment, operation and representation of the company. It is of particular importance to clarify whether the owner company is already bound by contractual commitments, for example by an EPC contract, whether it owns other projects than the one to be transferred, etc. In cases of shares/parts transfer, the legal due diligence should, of course, be of greater depth and intense.

Protection during the due diligence

The legal, financial and technical due diligence period may last from some days to few months and create significant costs. Both parties should be therefore protected during it: the purchaser, primarily, with regard to the exclusivity of negotiations and the seller with regard to confidentiality issues.

In this respect, the signing of a preliminary agreement is recommended. Such agreement may range from a more loose commitment, such as a letter of intent, a non-disclosure agreement (NDA) or a memorandum of understanding to a more binding one, such as a share transfer pre-agreement. If possible, the terms of the final transfer agreement should be agreed between the parties already at this stage.

The RES production license

Some RES projects are subject to a production license, whereas others not, namely today: geothermal up to 0,5MW, biomass, biogas and biofuel up to 1MW, photovoltaic up to 1MW, cogeneration of power up to 1MW and wind farms up to 50kW, RES and cogeneration for research and education purpose up to 5MW, installed by KAPE, autonomous not connecting to the grid projects up to 5 MW and any RES up to 50 KW, not (collectively hereinafter referred to as "exempted projects").

For the second category, today no administrative act confirming the exemption is issued, as was the case based on the previous Law 3587/2007 (Official Gazette A' 152/10.7.2007); according to that law, the administrative act of the exemption was not transferrable at the time point before the beginning of operation of the project. Moreover, according to article 27A of the Law 3734/2009 (Official Gazette A' 8/28.1.2009), production licenses or exemption acts for Photovoltaic Plants could not be transferred before the beginning of their operation, unless the share capital of the company to which the transfer is made, was entirely (100%) owned by the transferring person.

Following the adoption of Law 3851/2010 (Official Gazette A' 85/4.6.2010), the transfer of RES production licenses to a, natural or legal, person, is allowed after an approval by the Greek Regulatory Authority for Energy (hereinafter referred to as "RAE"). In this respect, RAE should issue a decision according to article 3 par.6 of Law 3468/2006, as amended, and art.39-40 of the new Regulation on Electricity Production Licenses, Ministerial Decree F1/14810/4.10.2011 (Official Gazette B' 2372/25.10.2011).

What is the procedure for the transfer of the production license?

The holder of the production license files an application before RAE asking for the approval of the transfer along with a statement by the new owner for the acceptance of the transfer.

The application is accompanied by the data and information listed in Annex 5 of the above mentioned new Regulation on Electricity Production License: data of the license's holder, data of the license, data of the person to whom the license is to be transferred, business plan and overall business plan of the future license holder, proof of the financial ability of the future license holder, including equity and/or bank financing, granting, funding or other ways of financing.

RAE may also request the licensee and the future license holder to provide, within a specific time frame, additional information that it deems necessary. If the set deadline expires, RAE considers the application as incomplete and rejects the application.

If the file is found complete, RAE publishes a summary of the submitted application on its website (www.rae.gr). Parties with a legitimate interest may submit their justified objections, together with all documentation, within fifteen (15) days starting from the publication date. RAE notifies the present and the future license holder, who have the right to respond to these objections.

Following the expiration of the 15-days deadline, RAE proceeds to the examination of the transfer application.

What does RAE examine in order to allow the RES production license transfer?

RAE examines the application on the below criteria:

- National security [see criterion (a) set by article 3 par.1 of Law 3468/2006];
- Ability of the future owner or of the shareholders/partners thereof to implement the project [see criterion (g) set by article 3 par.1 of Law 3468/2006, as specified by criterion (f) of article 13 of the new Regulation on Electricity Production Licenses]. This is practically the most important criterion. It refers to the ability of the future owner or of the shareholders/partners thereof to implement the project. This ability is assessed on the basis of the financial, scientific and engineering capacity and the ability to ensure the required funding from personal capital and/or bank financing and/or capital from business participation, or a combination of the above, taking into account that participation of legal entities shall be governed by the rules of transparency;
- Safeguarding of the provision of public utility services and the protection of customers [see criterion (h) set by article 3 par.1 of Law 3468/2006];
- Compatibility with competition law [art.39 of the new Regulation on Electricity Production Licenses].

How the financial ability to implement the project is assessed?

The examination by RAE of the most significant criterion (g), regarding financial ability, means practically that the future owner must provide a detailed business plan for the project as well as specific documentation proving the financial ability to cover part or the entire project's budget through equity and/or bank financing, participation in the company capital or funding.

How long the procedure before RAE will be and what are the results of the transfer?

Legislation does not provide for a certain time frame within which RAE should issue its decision. In practice, an average procedure may last from 3 to 6 months, depending, however, on the specialties of each case.

With the transfer of the production license the new holder undertakes all rights and obligations arising therefrom.

What about the transfer of other licenses?

The exempted projects are not obliged to acquire neither an installation nor an operation license, according to article 8 par. 13 of Law 3468/2006. In the case of projects subject to license, the transfer of the respective license requires the submission of a petition to the

issuing authority, i.e. the General Secretary of the De-centralized Administration or the Ministry for Environment, and has as prerequisite the prior transfer of the production license.

As for the environmental permit, if required by the law, given that it follows the project itself and not to the owner, no specific transfer procedure seems to be provided for in the legislation.

What will apply for the electric power purchase agreement with the competent Operator?

According to article 8 par. 12 of Law 3468/2006, if a RES plant is transferred (asset deal), the new owner undertakes all rights and obligations against the respective Operator [HEDNO (DEDDIE) S.A./HEMO (LAGIE) S.A.].

In compliance with the said article, the model Power Purchase Agreements include relevant terms (article 18 par. 4). In case of an asset transfer, a new Agreement has to be signed between the three parties (old owner, new owner and Operator), which includes the assignment of rights and the undertaking of obligations. The specific procedure and documentation which should be submitted to this purpose are defined by instructions of each Operator.

Is there any difference according to the new RES supporting scheme of Law 4414/2016?

Law 4414/2016 (Official Gazette A' 149/9.8.2016) brought some radical changes in the RES support scheme in Greece, introducing the tendering procedure organized by RAE and a pilot one, only for PV projects, that already took place on December 2016. Moreover, according to this new Law, two types of contracts will be signed with the competent Operator in the place of the previous Power Purchase Agreement: a) Agreement of Functional Support by Differential Increment, and b) Agreement of Functional Support by Fixed Tariff. The terms of these model agreements have been defined quite recently (December 2016) by Ministerial Decisions. They also mention that, if the RES plant is transferred, the new owner undertakes all rights and obligations arising therefrom.

May the exempted projects be transferred?

In cases of exempted projects no production license is issued by RAE.

Law 3468/2006, as amended by Law 3851/2010 (Official Gazette A' 85/4.6.2010), provides that exempted projects cannot be transferred before the beginning of their operation; nevertheless, the transfer is allowed if the share capital of the company (not a natural person) to which the transfer is made, is entirely (100%) owned by the transferring person.

In case of a shares/parts transfer deal of the project company, obviously the project company itself remains identical, i.e. same legal entity, with the same tax identification number and no change in the company name occurs. Therefore, the above provision regarding transfer before operation, should not apply. It is, however, noted that the competent Operators in cases of personal companies have raised objections regarding the possibility to amend the connection terms, the Grid Connection Agreement and the Power Purchase Agreement, with respect to the Producer's name, tax registration number etc.

After the beginning of operation, of course, the transfer is not prevented but has to observe all formalities defined by the Operator for the transfer of the existing agreement.

What formalities should be kept before RAE in case the shares/parts of the project company are transferred?

In order to transfer a RES project subject to production license, it is also possible to opt for the transfer of the project company's parts or shares, complying with the applicable provisions of corporate law.

According to article 18 of the new Regulation on Electricity Production Licenses, the production license should be amended, if the individuals or legal entities declared therein as the ones securing the funding for the implementation of the project change. An amendment is also necessary if the participation in the capital of the licensee changes, but only if the individuals or legal entities changed are the ones specified in the production license, as the ones securing the financing of the project.

What is the procedure for the amendment of the production license in case of shares/parts transfer?

An application should be submitted to RAE explaining the details of the requested change together with all necessary documentation. The amendment procedure is pretty much the same with the transfer procedure, as in brief described above; and criterion (g), set by article 3 par.1 of Law 3468/2006 as specified by criterion (f) of article 13 of the new Regulation on Electricity Production Licenses, as in brief described above, will be examined.

The licensee, however, before the transfer of the shares/parts, may preliminarily notify RAE of this intention and request RAE's pre-approval, which is not published. The application for the amendment should be submitted without delay after the approval.

Is the amendment of the production license necessary in every case of transfer of the shares/parts of the project company?

If the share capital of the company is modified only up to 20% and only once or if there is a change of name or corporate form, the amendment of the production license is not necessary. Instead, the Secretariat of RAE following a relevant application, along with supporting documentation, issues a simple certificate.

The same certificate is sufficient in cases when the share capital of the project company changes, even in total (100%), but the natural or legal persons participating in the share capital are different from those ensuring the financing of the project that remains invariable.

Private financing and securities. Can the RES producer assign the claims arising from the power purchase contract to a third financing party as a security?

The model Power Purchase Agreement, signed between the respective Operator [HEDNO (DEDDIE) S.A./HEMO (LAGIE) S.A.] and the RES producer, stipulates, in article 18, that any assignment and transfer of rights, in whole or in part, by the producer to a third party, shall be permitted only with the previous written consent of the Operator and the relevant notification to the Ministry of Environment, Energy and Climate Change and RAE. If no such permission is given, the Agreement may be unilaterally terminated by the Operator. Such cases have not been met in practice.

The new Agreements of Functional Support based on the Law 4414/2016 and its ministerial decisions, also treat and provide for this issue in the same way.

Can the RES producer assign the claims arising from the power purchase contract to a bank as a security?

Exceptionally, according to the said article 18 of the model Power Purchase Agreement, the assignment to a bank institution does not require the permission of the respective Operator. Specifically, the assignment and transfer of the financial claims to a) one or more Greek or European first-class banks and to one or more leasing companies, which will fund the construction and operation of the plant, and/or b) any affiliate company having as purpose the construction and/or the operation of the plant.

If this is the case, a notification regarding such assignment and transfer has to be made to the respective Operator, to the Authority issuing the installation license and to RAE.

The new Agreements of Functional Support based on the Law 4414/2016 and its ministerial decisions include also similar provisions about the issue.

What other securities may be offered in the context of private financing?

Third financing parties may agree with the RES producer to participate in the share capital of the company or to set up a pledge on the project company's shares.

A mortgage or a prenotation of mortgage on the land property where the project is or will be installed is also a potential security. Moreover, a quasi-lien on the power plant itself or on the bank account of the producer, at which the consideration of the power is paid, is also possible.

Finally, it is important to obtain personal guarantees from the partners of the project company.

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