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The Energy Efficiency Act (hereinafter referred to as “the EEA”, promulgated in The Official Gazette, No, 98 of 14 November 2008 and entered into force on 14 November 2008) regulates the pursuit of the government policy for enhanced energy efficiency in energy consumption and in the provision of energy services. Within the framework of the legal definition of the term “energy efficiency”, the objective of the law is to ensure a better balance between the energy input and the expected performance. There exist various measures to attain this objective, ranging from replacement of electrical appliances with similar devices of a higher energy class to streamlining of production processes, energy renovation of buildings and others.

The resources invested in these measures substantially exceed the value of monthly energy savings. In other words, the recoupment of the investment takes a long period of time of ten or more years. Therefore mechanisms have been put in place to have the measures financed by persons other than the owners of the buildings and industrial systems in which the measures are implemented. Guaranteed savings contracts feature prominently among the existing set of mechanisms.

These contracts (called also “ESCO contracts”) are concluded for the implementation of measures to enhance energy efficiency, whereby investments and the remuneration of the contractor are repaid on the basis of the energy savings performance. In accordance with the EEA, the objective of these measures is to ensure the statutory energy consumption class for the respective building (the wording of the law is inaccurate because the preceding provision of the EEA reads explicitly that an ESCO contract may be concluded also for an industrial system).

The customer under an ESCO contract may be an end consumer, whereas the contractor may be a trader within the meaning of the Commercial Code, or the legislation of a Member State of the European Union, or the legislation of another State Party to the Agreement on the European Economic Area, or the legislation of the Swiss Confederation. A further requirement to the contractor is to demonstrate that his objects of activity include the provision of services under a guaranteed savings contract.

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The contractor undertakes the obligation to perform measures and activities aimed at enhancement of the energy efficiency of the facilities of the contracting authority, financing them on his own account or procuring financial resources from a third party. The contract is for consideration, i.e. the contractor recovers the costs incurred from the difference between energy bills before and after the energy efficiency increase. This means that the only obligation that the customer has under the ESCO contract is to continue paying the energy bills in the same amounts.

The EEA stipulates that a condition precedent for the conclusion of the contract is to have the energy performance of the building or of the industrial system envisaged in the contract assessed and certified accordingly. It is only on the basis of this assessment that the possible energy savings can be identified and adequate measures can be selected for the attainment of these savings.

The energy consumption as of the date of the contract and the forecast energy savings are mandatory elements of the content of the ESCO contract in accordance with the EEA. Furthermore, the contract has to include two other sets of clauses: one concerning the sources of financing and the other concerning the payment of the remuneration due to the contractor. Remuneration payment clauses are of special importance given the complex mechanism applied to the calculation of its amount. Typically, such contracts envisage that the contractor will receive a monthly remuneration equal to the difference between the energy bills before and after the implementation of the ESCO contract. However, differences should be the outcome of enhanced energy efficiency rather than the result of the elimination or reduced use of electrical appliances in the household. Therefore methods should be agreed to how to report any increase or decrease of the energy consumption due to the introduction of new electrical appliances, the increase or decrease of the number of household members and other factors, which will guarantee a fair amount of the remuneration to the contractor. Besides, the contractor’s remuneration should be calculated in accordance with the saved kWh and the current energy prices should be applied to the savings on a monthly basis so that to ensure that none of the parties will be affected by price changes.

The mechanism introduced to pay for the energy efficiency measures and activities under the

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ESCO contract generates some issues related to the transfer of ownership of the facility under the contract. What will be the amount payable by the customer in case the customer does not use the property any longer and does not receive, for that matter, the energy bills for it? The alternative is to agree that the property owner, whoever this owner may be, is a party to the ESCO contract, i.e. to make contractual obligations transferrable with the transfer of ownership. In this case, the law-maker should envisage a statutory mechanism under the EEA to make sure that possible transferees are aware of the obligations of the property owner under the ESCO contract so that to know the obligations they take over and also to prevent any unjust enrichment of the owner as a result of possible property improvements in which the owner has taken no direct part.

ESCO contracts are closely linked to the other legal figures under the EEA as they may be concluded and implemented only after an energy performance assessment is made. Energy traders have the obligation to finance the attainment of higher energy efficiency either through cash contributions to the Energy Efficiency and Renewable Sources Fund or through the financing of renovation for energy efficiency enhancement under ESCO contracts. For this reason, ESCO contracts offer an opportunity for energy traders to achieve energy savings with less costs provided that the energy trader can prove the improved performance by means of the certificates laid down in the EEA.

The measures aimed at improving energy efficiency through ESCO contracts have a guaranteed market; pursuant to Art. 19(2) EEA all public service buildings with a total built-up area exceeding 250 sq m (250 sq m as from 9 June 2015) are subject to mandatory energy efficiency assessment, whereas paragraph 3 obligates the owners of these buildings to implement the measures prescribed in the assessment within three years. Furthermore, Art. 49(7) EEA envisages the obligation to allocate resources for payments to contractors under ESCO contracts from the budgets of municipalities or institutions for public service buildings they own or operate. Notwithstanding these statutory provisions, practices reveal failure of government institutions and municipalities to perform their obligations as contracting authorities under ESCO contracts and there is no enforcement mechanism which, in its turn, casts a shade of doubt on the applicability of ESCO contracts as a legal instrument for the improvement of energy efficiency in Bulgaria.

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