

NEWSLETTER

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Important Upcoming Changes to the Korean Electricity Business Act regarding Solar Farm Developments

There have been recent amendments to the Electricity Business Act ('EB Act') (the main Act governing the granting of permits required to develop and operate renewable energy projects in Korea) that are likely to affect a large majority of potential investors in Korean solar farm projects. As is discussed below, the legislative amendments are due to take effect in October of this year and there is currently scope for interested parties to make submissions in respect to some of the more important potential exceptions to be enacted. There are a number of changes, however, the most significant change includes a prohibition on the sale or acquisition of a solar farm business prior to the relevant business reaching commercial operation. Although the changes were introduced in March 31, 2020 the relevant exceptions to the most important rule change have only recently been published for public comment. Given the importance and potential impact of the changes, Lee & Ko has prepared a brief summary of the anticipated changes and draft exceptions. Further, and for convenience, we have also included the relevant details on how to make submissions (below).

We note that all translations in this article are indicative and only the original Korean version of any legislation or texts should be relied upon.

I. Prohibition on Transfer or Acquisition of Solar Farm Business prior to Commercial Operation Date

Renewable energy projects in Korea are, to a large extent, approved under and governed by the EB Act. The EB Act has, since its enactment, included a requirement that (a) any person seeking to acquire, in whole or in part, an electric utility business, or (b) a controlling stake in a company which holds an electricity business license with an approved capacity of 20MW or over (each of which includes renewable energy generators), must first obtain the approval from the Minister of Trade, Industry, and Energy ('MOTIE'). MOTIE approval has been to now a largely standard and administrative process.

However, pursuant to amendments passed on March 31, 2020 to Article 10(2) of the EB Act due to come into force on October 1, 2020, MOTIE approval will be restricted prior to the relevant project achieving commercial operation ('COD Restriction'). A summary and translation of the relevant provisions are provided immediately below.

Electricity Business Act Amendment (2020. 3. 31.)

Article 10 (Acquisition of Business by Transfer and Division or Merger of Company)

- ① Persons falling under one of the following categories must obtain approval from the Minister of Trade, Industry and Energy:
 1. A person who seeks to fully or partially acquire an electric utility business.
 2. A person who seeks to divide or merge a corporation, which is an electric utility business entity.
 3. A person who seeks to acquire shares in an electric utility business entity with the intent to exercise actual control over the company (excluding electric utility business with power capacity of less than 20,000 kW), and falls under the standards as prescribed by the Presidential Decree.

- ② In granting the approval pursuant to Paragraph 1 above, the Minister of Trade, Industry, and Energy, must consider the following matters in accordance with the procedures under Article 7.
 1. Must be compliant with the approval requirements as prescribed in Article 7.
 2. Must not be likely to undermine public interests, by adversely affecting electricity supply, or quality thereof, as a result of the proposed acquisition, division, or merger.
 3. **Must have commenced operation of the electric utility business during the relevant preparation time pursuant to Article 9, Paragraph 1 (limited to solar farm generation projects, but not applicable to the extent there are justifiable circumstances that make such commencement of operation of the business difficult or other similar reasons to be prescribed by Presidential Decree).**

II. Exceptions Allowing Transfer and Acquisition of Solar Farm Business prior to the Commercial Operation Date

As is apparent from the above, the original amendment to the EB Act indicates that an exception to the COD Restriction would include circumstances making the operation of the business difficult (or other similar reasons as prescribed by Presidential Decree). However, the recently proposed amendment to the Presidential Decree of the EB Act, published on the MOTIE website homepage, proposes only to include the following exceptions to the COD Restriction.

Enforcement Decree of the Electricity Business Act (Proposed Amendment)

Article 5-2 (Exceptions for Transfer · Acquisition after the commencement of the project)

‘Causes defined under the Presidential Decree’ under Article 10, Paragraphs 2 and 3 refer to the following events.

1. In the event where due to death or other such similar serious personal reasons, a non-corporation electric utility business is not able to continue operating the relevant solar farm project.
2. In the event the electric utility business is no longer able to continue the business due to reasons such as bankruptcy, enforcement proceedings, or restructuring processes.
3. In the event the electric utility business is no longer able to continue operating the business due to reasons such as natural disaster, calamity, or fire.

In other words, under the proposed amendment, (i) when there is a death or other such serious personal issues that make operation of the electric utility business difficult; (ii) in the event of an insolvency event or restructuring process etc. in respect to the relevant electric utility business, or (iii) where continuation of the electric utility business by the relevant entity becomes impossible due to reasons such as a natural disaster, calamity, or fire, the solar farm business may be sold and purchased on an exceptional basis.

Currently the Korean solar farm development market includes a number of smaller local developers who, having progressed their projects to a certain stage of development, require larger developers to invest in order to take the projects to the next stage. More often than not, that investment will include the eventual acquisition of the project or the relevant project company. The above legislative changes and very limited exceptions to the COD Restriction will obviously have a large impact on those companies (both domestic and foreign) whose business model includes the purchase of an interest in an existing solar farm project.

However, the proposed amendments to the Presidential Decree which will codify the exceptions have not yet passed into law. The above proposal is in draft form and may be revised or changed according to public comments received by MOTIE. In this regard, for those persons interested in making a submission as to the content of the proposed exceptions, the relevant details are as set out below. Submissions are due by June 28, 2020.

This note is intended as a very brief review of one of a significant upcoming change to the EB Act relevant to renewable energy developers in order to alert readers to a potentially important change to their business and Korean development plans. To the extent any reader would like additional information in respect to the above (including a number of ancillary changes to the EB Act not within the scope of this article) we would encourage them to contact the authors.

III. Comment Process

Institutions, organizations, individuals who have opinions on this amendment should submit their comments online through People's Participation Registration Center (<http://opinion.lawmaking.go.kr>) by June 28, 2020, or submit their opinions to the Minister of Trade, Industry, and Energy (Addressed to: Director of the New and Renewable Energy Policy Division, Address: Ministry of Trade, Industry, and Energy at the Sejong Government Complex, 402 Hannuri Road, Sejong Special Administrative District) stating the following matters:

- A. Opinion supporting or opposing the Notice (state the reasons for objection)
- B. Name (if institution or entity, name of the director/president of such institution or entity), address, and phone number
- C. Other relevant notes, etc

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