

Electricity Regulation

Contributing editor
John Dewar



2019

GETTING THE
DEAL THROUGH

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John Dewar

Milbank, Tweed, Hadley & McCloy LLP

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CONTENTS

Global overview	5	Japan	103
John Dewar Milbank, Tweed, Hadley & McCloy LLP		Nagahide Sato and Sadayuki Matsudaira Nishimura & Asahi	
Angola	9	Kenya	110
Ricardo Andrade Amaro and Pedro Capitão Barbosa Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, SP, RL		Karim Lalji and Edwin Baru Anjarwalla & Khanna	
Argentina	15	Korea	116
Hugo Martelli Martelli Abogados Rogelio Baratchart Tecnolatina SA		Joonki Yi and Chin Pyo Park Bae, Kim & Lee LLC	
Australia	21	Mexico	122
Andrew Monotti, Simon Cooke and William Osborn King & Wood Mallesons		Rogelio López-Velarde, Amanda Valdez and Daniela Monroy Dentons López Velarde, SC	
Belgium	29	Netherlands	130
Arnaud Coibion, Lothar Van Driessche, David Mailleux and Léonore De Mullewie Linklaters LLP		Sophie Dingenen and Sharon van de Kerkhof Bird & Bird LLP	
Brazil	36	Nigeria	137
Marcello Lobo, Flavia Piras Lodi and Pedro Ícaro Lopes Vargas Pinheiro Neto Advogados		Ike C Ibeku, Ifeyinwa Ufodu and Shammah Vidal Benchmac & Ince	
Costa Rica	44	Panama	145
Ruben Zamora-Castro Aguilar Castillo Love		Erika Villarreal Z, José A Brenes and Ixalondra Chee Chong Anzola Robles & Asociados	
Croatia	48	Poland	153
Ivana Manovelo and Miran Macesic Maccesic & Partners LLC		Piotr Ciołkowski, Agnieszka Skorupińska and Adam Kędziora CMS	
Ecuador	54	Portugal	159
Pedro J Freile and Roque Bernardo Bustamante Bustamante & Bustamante Law Firm		Ricardo Andrade Amaro, Joana Alves de Abreu and Pedro Capitão Barbosa Morais Leitão, Galvão Teles, Soares da Silva & Associados, Sociedade de Advogados, SP, RL	
Ghana	61	South Africa	166
Kimathi Kuenyehia, Sarpong Odame and Phoebe Arde-Acquah Kimathi & Partners, Corporate Attorneys		Jonathan Behr and Todani Sikhwari Werksmans Attorneys	
India	72	Spain	174
Neeraj Menon and Amit Maheshwari Trilegal		Gonzalo Olivera and Alberto Artés King & Wood Mallesons	
Indonesia	82	Turkey	180
Arfidea Dwi Saraswati, Tara Priscilla Ogilvie and Thalia Priscilla AKSET Law		Değer Boden Akalın, Şeyma Olğun and Aysegül Önel Boden Law	
Ireland	89	United Kingdom	190
Peter McLay, Eoin Cassidy and William Carmody Mason Hayes & Curran		John Dewar and Seyda Duman Milbank, Tweed, Hadley & McCloy LLP	
Italy	97	United States	196
Arturo Sferruzza and Ginevra Biadico Norton Rose Fulbright Studio Legale		Daniel Hagan, Jane Rueger and John Forbush White & Case LLP	

Preface

Electricity Regulation 2019

Seventeenth edition

Getting the Deal Through is delighted to publish the seventeenth edition of *Electricity Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Ecuador, Brazil, South Africa, Poland, Italy and the Netherlands.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editor, John Dewar of Milbank, Tweed, Hadley & McCloy LLP for his assistance with this volume. We also extend special thanks to Kirsti Massie of White & Case, who contributed the original format from which the current questionnaire has been derived, and who helped to shape the publication to date.

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DEAL THROUGH 

London
October 2018

Poland

Piotr Ciołkowski, Agnieszka Skorupińska and Adam Kędziora

CMS

1 Policy and law

What is the government policy and legislative framework for the electricity sector?

Government policy and its determinants

The main act indicating the government policy for the electricity sector is the Energy Policy 2030 adopted by the Council of Ministers in 2009. The Ministry of Energy is currently working on the new energy policy, covering the period until 2050, but it has not been adopted yet.

The Energy Policy 2030 focuses on the following six key objectives:

- improving energy efficiency;
- increasing security of fuel and energy supply;
- diversification of electricity generation through the introduction of nuclear energy;
- development of renewable energy sources (RES); and
- development of competitive energy and fuel markets; and
- reducing the energy sector's impact on the environment.

In line with EU regulations, Polish law provides for the obligation to limit pollutant emissions by energy generation facilities. With regard to large combustion plants, existing and planned facilities must meet stringent environmental standards set out in the best available techniques (BAT) conclusions. Poland is obliged to meet the EU requirements related to the reduction of greenhouse gases.

Legislative framework

The most important act concerning the electricity sector in Poland is the Energy Law, which implements EU energy regulations. The Energy Law sets out, among other things, the rules for supply (transmission, distribution and sales) of electricity and its generation, rules for operation of the energy installations, networks and equipment, the obligations and powers of the president of the Energy Regulatory Authority (ERA) as well as rules for licencing and for energy tariffs. There are also implementing regulations adopted under the Energy Law, which provide for, in particular, detailed rules for operation of the electricity system, as well as preparation and approval of the tariffs for electricity.

Other important acts for the electricity sector include the recently adopted Capacity Market Act, which is intended to address the generation adequacy concern and determines the rules for providing the service of availability to deliver capacity at times of system stress and rules for rewarding capacity market units (including generation, demand side response and storage units) for their availability.

2 Organisation of the market

What is the organisational structure for the generation, transmission, distribution and sale of power?

The electricity market in Poland is dominated by state-owned companies in each of the market sectors of generation, transmission, distribution and sale. The four main capital groups active in the sector of generation, distribution and supply of electricity include PGE, Tauron, Enea and Energa.

The structure and mechanisms related to the functioning of the market are very similar to those in most European countries.

Generation

PGE capital group maintained the largest market share in the electricity generation sector in 2017, which amounted to 43.5 per cent. On the other hand, Tauron was the leader on the final sales market with a 10.8 per cent share.

The three largest producers (grouped in capital groups: PGE, Tauron, Enea) had in total almost two thirds of the installed capacity and were responsible for almost 70 per cent of electricity production in the country.

Transmission and distribution

In Poland, in accordance with the Energy Law, the electricity transmission grid is owned and operated by one transmission system operator – Polskie Sieci Elektroenergetyczne SA (PSE), a company 100 per cent owned by the State Treasury.

The transmission system operator (TSO) and in specified situations the distribution system operators (DSOs) are subject to the unbundling requirement (separation of the transmission and distribution activity from other operations including electricity generation and trading), with some more stringent rules applicable in this respect to the TSO.

At the end of 2017, 183 DSOs in Poland, which have been appointed under the decisions of the president of the ERA, were involved in electricity distribution.

Sale

In Poland, the domestic electricity consumption amounted to 168,139GWh in 2017 (an increase of 2.13 per cent as compared to 2016). In the same period, the import of electric energy to Poland amounted to 8 per cent of the total delivery of electric energy to the electricity system with the export amounting to 6.6 per cent of the total off-take of electricity.

The largest share in the sale of electricity to the final customers belongs to incumbent suppliers that emerged after the unbundling of the main distribution operators and currently act as the ex officio (last resort) sellers for all household customers that have not decided to change their electricity supplier. In 2017 there were five such last resort suppliers, as well as over 119 alternative trading companies actively involved in the sale of electricity to end users, including sellers operating on the household market.

In Poland, market participants have access to various electricity sale and purchase options and to information regarding volumes and prices at which electricity is sold.

Apart from concluding bilateral contracts, trading in electric energy in Poland may be performed on the commodities exchange run by Towarowa Giełda Energii SA – the Polish Power Exchange. The total volume of transactions concluded in 2017 on the Polish Power Exchange amounted to 111.7TWh, which means an 11.8 per cent decrease in comparison to 2016, in which the total transaction volume amounted to 126.7TWh.

The balancing market on the other hand is a specific area of the energy market, where differences between the transactions made by market participants and the actual demand for electricity are balanced.

The rules for price setting on the balancing market are – in some aspects – regulated in the Transmission Network Code. According to this document, the prices offered on the balancing market shall not be

lower than 70 Polish zloty per MWh and shall not exceed 1500 Polish zloty per MWh.

Regulation of electricity utilities – power generation

3 Authorisation to construct and operate generation facilities

What authorisations are required to construct and operate generation facilities?

The construction of generation facilities may require a number of administrative decisions related to the investment process, including a decision on environmental conditions, water permits and building permits. The planned investment must be compliant with the binding local zoning plan, and in the absence thereof, a zoning permit needs to be obtained. After completion of the construction and before the operation of the facility, an occupancy permit is required. In order to operate generation facilities, an integrated permit or sectoral permits (such as air emission permits and waste management permits) may be necessary. Special legal requirements concern the construction of a nuclear power plant.

For the purposes of connecting the generation facility to the transmission or distribution grid, a grid connection agreement has to be concluded with, as the case may be, the TSO or the DSO. The conclusion of such agreement is preceded by the issuance of the grid connection terms by the TSO or the DSO which typically refer to more technical conditions of connecting to the grid.

The operation of the generation facility requires obtaining a licence to generate electricity issued by the president of the ERA. Exceptions to the licence obligation cover generating electricity in conventional facilities with the total installed capacity not exceeding 50MW, in certain small RES installations and from agricultural biogas, exclusively from agricultural biogas in cogeneration and exclusively from bio liquids.

4 Grid connection policies

What are the policies with respect to connection of generation to the transmission grid?

The TSO is obliged to connect the customer to its grid, if such grid connection is technically feasible and economically viable and the customer complies with the terms and conditions for grid connection, which are determined by the TSO in accordance with the transmission network code. Connection to the transmission grid is performed on an equal treatment basis, however the RES installations benefit from the priority access to the grid.

5 Alternative energy sources

Does government policy or legislation encourage power generation based on alternative energy sources such as renewable energies or combined heat and power?

In Poland, renewable energy generation is financially supported through various support schemes, namely: tradable certificates of origin systems (which include the green certificates system and the agricultural biogas certificates system), auctions support system, as well as feed-in-tariff (FIT) and feed-in premium (FIP) systems.

The auctions system is based on a reference price that constitutes the maximum price for energy generated in specified RES installations that producers may obtain. In accordance with the auctions system, RES operators should submit offers to sell energy generated in RES installations at a price lower than the reference price (bids exceeding the reference price are rejected). In general, the support consists in the right to cover the negative balance resulting from comparing the price included in the offer and the price actually applied in the sale transactions in the given period.

The recent amendment to the Act on RES also introduced FIT and FIP systems (ie, financial support mechanisms for small-capacity hydro and biogas installations). Under the feed-in-tariff system, generators can sell electricity introduced into the power grid at a fixed purchase price. The feed-in-premium mechanism is based on the right to cover negative balance on the principles analogous to those in the auction system.

The current combined heat and power (CHP) technologies support system, based on tradable certificates of origin, expires at the end of 2018. The new support system for CHP installations – to be determined

in the prospective Act on promoting electricity from high-efficiency cogeneration – is in the public consultation phase. Most likely it will take the form of the auctions or premiums, depending on the type of the generating unit.

6 Climate change

What impact will government policy on climate change have on the types of resources that are used to meet electricity demand and on the cost and amount of power that is consumed?

Poland participates in the EU system of reducing greenhouse gas emissions. The EU has set goals to reduce carbon dioxide by 20 per cent by 2020 and 40 per cent by 2030 (compared to 1990 levels). Poland is obliged to follow those goals. Owing to the fact that Polish power plants use mostly coal and lignite, and the share of other types of resources is small, the objectives of reducing emissions have an impact on the energy market. In the coming years, a growing number of generation facilities will have to purchase carbon dioxide emission allowances. An increase in the share of renewable energy sources in the energy mix and the modernisation of existing generation facilities to reduce emissions may be expected to deal with the increasing climate change costs.

7 Storage

Does the regulatory framework support electricity storage including research and development of storage solutions?

Storage installation operators may participate in the capacity market in accordance with the Capacity Market Act. As a result of offering readiness to deliver specified capacity or volume of electric energy to the electricity grid and actually delivering specified volume of electric energy to the grid, such operator will be entitled to remuneration. Detailed rules of determining the remuneration have been set forth in the Capacity Market Act and the secondary legislation to it.

In addition, energy demand management installations, which include energy storage installations, are excluded from the obligation to pay the connection fee typically paid to the TSO or the DSO for connection of the installation to the electricity transmission or distribution system, provided that such energy demand management installations fulfil specific technical requirements determined by the TSO and the DSO in the relevant grid code.

8 Government policy

Does government policy encourage or discourage development of new nuclear power plants? How?

Inter-ministerial discussions on nuclear power are currently underway in Poland. The Energy Policy 2030 envisages the construction of the first nuclear power plant and it also provides for the creation of favourable conditions for the development of the nuclear power sector. However, the Polish government is currently working on the Energy Policy 2050 which is supposed to replace the existing one and constitute a long-term plan for the development of the energy sector. The details of the Energy Policy 2050, including possible support schemes for nuclear power plants, have not yet been revealed.

Regulation of electricity utilities – transmission

9 Authorisations to construct and operate transmission networks

What authorisations are required to construct and operate transmission networks?

The construction of strategic transmission networks is subject to special rules. The procedure requires, among others, the obtaining of a decision on environmental conditions, a water permit (if required) and a decision on the localisation of the strategic transmission network. The localisation decision replaces the necessity to divide plots of land and expropriate property. Before commencing construction works, it is necessary to obtain a building permit. After completion of the construction and before the operation of the facility, an occupancy permit is required. With respect to transmission networks that do not have the status of strategic networks, general requirements related to the investment process apply. That includes the need to ensure that the

investment complies with the zoning plan. If the given area does not have such a plan, it is required to obtain a decision on the localisation of a public purpose investment. It may also be required to obtain a decision regarding the division of properties as well as a decision regarding property expropriation. If no complete expropriation occurs, a decision to limit the use of the property shall be issued. In general terms, it may be required to obtain a decision on environmental conditions, building permit and occupancy permit.

To be able to operate a transmission network, a transmission licence has to be issued by the president of the ERA. Also, the president of the ERA has to appoint the relevant entity as the TSO (this step is in addition preceded by the issuance of an independence certificate confirming the fulfilment of the unbundling requirements by the prospective TSO). In accordance with the Energy Law, one transmission system operator (a joint-stock company – spółka akcyjna – 100 per cent owned by the State Treasury) shall operate the electricity transmission grid.

10 Eligibility to obtain transmission services

Who is eligible to obtain transmission services and what requirements must be met to obtain access?

Under the Third Party Access (TPA) rule, the TSO is obliged to provide transmission services for all final customers and electricity traders or generators on an equal treatment basis. In order to obtain transmission services, the applicant must be connected to the grid and enter into a transmission services agreement.

A transmission services agreement is concluded upon a customer's application. If the customer is under an obligation to hold a licence for a given activity (trading in, or generating electricity), the TSO will require such customer to submit a valid licence before execution of the transmission services agreement. Under certain conditions, the TSO may also require financial collateral from the customer.

11 Government transmission policy

Are there any government measures to encourage or otherwise require the expansion of the transmission grid?

The TSO is required to draft a development plan for a period of 10 years, proposing how to cover existing and future demand for energy. Such plan must be submitted, negotiated with and approved by the president of the ERO and must be updated at least once every three years. The financing of the prospective investments included in the above development plan is mainly ensured in the tariffs for the transmission services, which are also approved by the president of the ERA. The TSO needs to consider the EU-wide development plans adopted by the European Network of Transmission System Operators for Electricity.

According to the Act on Preparation and Implementation of Strategic Investments in Transmission Networks, investments in transmission networks may be funded not only by the investors themselves, but also by the state and the EU. The above Act also sets forth the rules for simplifying the development of the transmission system.

12 Rates and terms for transmission services

Who determines the rates and terms for the provision of transmission services and what legal standard does that entity apply?

The general rules and standards regarding the rates and terms for the provision of transmission services are set out in the Energy Law and implementing regulations. Those general rules are meant to ensure equal treatment of all system users and safety of both the grid and the system.

Specific rates for the provision of transmission services are determined in the tariff, which is prepared by the TSO on a cost-plus-margin basis and approved by the president of the ERA. Detailed terms for the provision of transmission services are set out in the transmission network code, which is prepared by the TSO and approved by the president of the ERA, as well as in transmission services agreements.

13 Entities responsible for grid reliability

Which entities are responsible for the reliability of the transmission grid and what are their powers and responsibilities?

The TSO, acting under the supervision of the president of the ERA, is responsible for the reliability of the transmission grid and system. The TSO is obliged to ensure the proper functioning of the grid and its maintenance, as well as required grid development. The TSO is also responsible for, among other things, procurement of ancillary services, (re)dispatching of centrally dispatched generation units and operation of the balancing market.

If the security of electricity supply is threatened, the TSO, in cooperation with system users, will undertake all possible actions using available means to remove this threat and prevent its negative effects. Those actions may include issuing orders to system users. The TSO may also impose limitations in the supply and off-take of electricity for a period not longer than 72 hours.

Regulation of electricity utilities – distribution

14 Authorisation to construct and operate distribution networks

What authorisations are required to construct and operate distribution networks?

Depending on the voltage of given distribution networks, a decision on environmental conditions may be required. The construction of distribution networks is considered a public purpose investment, which means that obtaining a decision on the localisation of such an investment takes place in a simplified procedure. This type of decision is obtained in cases when the zoning plan does not provide for the construction of a distribution network. In many cases a decision is issued to expropriate the property for the construction of a distribution network. A decision regarding the division of the properties may also be required. If no complete expropriation occurs, a decision to limit the use of the property shall be issued. Before commencing construction works, it is necessary to obtain a building permit. After completion of the construction and before the operation of the facility an occupancy permit is required.

To be able to operate the distribution network, a distribution licence has to be issued by the president of the ERA.

15 Access to the distribution grid

Who is eligible to obtain access to the distribution network and what requirements must be met to obtain access?

Under the TPA rule, DSOs are obliged to provide distribution services for all final customers and electricity traders or generators on an equal treatment basis. In order to obtain distribution services, the applicant must be connected to the distribution grid and enter into a distribution services agreement.

The DSO is obliged to connect the customer to its grid, if such grid connection is technically feasible and economically viable and the customer complies with the terms and conditions for grid connection, which are determined by the DSO in accordance with the distribution network code.

A distribution services agreement is concluded upon a customer's application. If the customer is under an obligation to hold a licence for a given activity (trading in, or generating electricity), the DSO will require such customer to submit a valid licence before execution of the distribution services agreement.

16 Government distribution network policy

Are there any governmental measures to encourage or otherwise require the expansion of the distribution network?

Distribution system operators are required to draft a development plan for a period of at least five years, proposing how to cover existing and future demand for energy. Such plan must be submitted, negotiated with and approved by the President of the ERA and must be updated at least once every three years. The financing of the prospective investments included in the above development plan is mainly ensured in the tariffs for the distribution services which are also approved by the president of the ERA.

17 Rates and terms for distribution services

Who determines the rates or terms for the provision of distribution services and what legal standard does that entity apply?

The general rules and standards regarding the rates and terms for the provision of distribution services are set out in the Energy Law and implementing regulations. Those general rules are meant to ensure equal treatment of all system users and safety of both the grid and the system.

Specific rates for the provisions of distribution services are determined in the tariff, which is prepared by the DSO on a cost-plus-margin basis and approved by the president of the ERA. Detailed terms for the provision of distribution services are set out in the distribution network code, which is prepared by the DSO and approved by the president of the ERA, as well as in distribution services agreements.

Regulation of electricity utilities – sales of power

18 Approval to sell power

What authorisations are required for the sale of power to customers and which authorities grant such approvals?

In general, the sale of electricity to customers (both household and commercial) requires an energy trading licence, or with regard to generators selling electricity produced in their own units – electricity generation licence. The energy licences are granted by the president of the ERA, upon verifying that the applicant meets the requirements set out in the Energy Law (ie, has its seat in the EU, Switzerland, a European Free Trade Association (EFTA) member country, or Turkey, and has technical and financial capacity to ensure proper performance of a given energy activity).

There are some exceptions from the obligation to hold an energy licence. An electricity trading licence is not required for trading in electricity through a less than 1kV installation owned by the energy customer, or trading on the Polish Power Exchange (PPE). However, if the entity intends to trade in electricity on the PPE on its own (ie, not through a broker), it is obliged to become a member of the PPE.

19 Power sales tariffs

Is there any tariff or other regulation regarding power sales?

Licensed entities are obliged to apply tariffs approved by the president of the ERA, unless specifically exempted under the Energy Law or through an individual decision of the president of the ERA. However, under statements issued by the president of the ERA in 2001, 2007 and 2008, the obligation to submit tariffs for approval of the president of the ERA, generally does not apply to entities holding a licence for trading in electric energy. In accordance with those statements, the obligation to apply tariffs approved by the president of the ERA pertains only to the supply of electricity to household customers by entities that have the status of ex officio (last resort) suppliers. In light of the above, companies that do not hold the status of ex officio suppliers and do not deliver electricity to household customers, are not obliged to apply tariffs approved by the president of the ERA, and thus are free to determine the price at which they sell electricity to customers.

20 Rates for wholesale of power

Who determines the rates for sales of wholesale power and what standard does that entity apply?

Wholesale trading in electricity has been exempted from the obligation to submit tariffs for approval of the president of the ERA. As regards wholesale trading on organised markets (eg, balancing market and PPE), the prices are determined on a market basis, but may be subject to some limitations in accordance with internal regulations. In particular, the rules for price setting on the balancing market are – in some aspects – regulated in the transmission network code.

21 Public service obligations

To what extent are electricity utilities that sell power subject to public service obligations?

The ex officio (last resort) sellers are obliged to render the universal service (which covers sale of electric energy and its delivery with the use of transmission or distribution services) on the equal treatment basis to all household customers that do not choose another supplier and are connected to the grid where the relevant electricity utility has been appointed the ex officio supplier. The last resort suppliers are appointed by the president of the ERA in a tender or appointed ex officio in the case of an unsuccessful tender.

In addition, electricity generators (with certain exceptions) are obliged to sell no less than 30 per cent of electricity generated through the PPE. Recently, plans to increase the above obligation to 100 per cent of generated electricity have been announced by the Minister of Energy.

Regulatory authorities

22 Policy setting

Which authorities determine regulatory policy with respect to the electricity sector?

In Poland, the Minister of Energy and the president of the ERA are main authorities determining the regulatory policy and performing supervision with respect to the electricity sector, with the Council of Ministers responsible for adopting the energy policy for the state.

The Minister of Energy initiates the legislative process with respect to most of the acts pertaining to the energy sector and is responsible for adopting various legislative acts which constitute secondary legislation to the Energy Law and some other Acts. The Minister of Energy also actively participates in creation of the energy policy on the Polish and the European level.

The president of the ERA regulates the activity of the energy companies aiming at balancing the interests of the energy enterprises and the fuel and energy customers. The president of the ERA monitors entities active on the electricity market with the aim of verifying whether the relevant obligations resulting from the Polish and European Union law, as well as administrative decisions are fulfilled.

In addition, the Minister of Environment participates in preparing and developing climate policy or setting environmental standards that the energy companies have to obey.

23 Scope of authority

What is the scope of each regulator's authority?

The scope of rights and obligations of the president of the ERA are set forth mainly in the Energy Law. This authority is responsible, inter alia, for granting and withdrawing licences and monitoring the functioning of the electricity market. The president of the ERA approves and controls the application of tariffs, controls the fulfilment of obligations to sell electricity through the power exchange and is allowed to impose financial penalties.

For responsibilities of the Minister of Energy, refer to question 22.

24 Establishment of regulators

How is each regulator established and to what extent is it considered to be independent of the regulated business and of governmental officials?

The Chairman of the Council of Ministers appoints the president of the ERA for a period of five years from not more than three candidates selected through an open and competitive recruitment. The relevant person can be re-appointed to this position only once.

The Energy Law guarantees the independence of the president of the ERA and ensures that it exercises its powers impartially and transparently. When carrying out the regulatory tasks it is legally distinct and functionally independent from any other public or private entity.

The Minister of Energy is a governmental authority. The relevant person holding the position of the Minister of Energy is nominated as part of the process of establishing the Polish government (Council of Ministers).

25 Challenge and appeal of decisions

To what extent can decisions of the regulator be challenged or appealed, and to whom? What are the grounds and procedures for appeal?

Decisions of the president of the ERA may be appealed against to the District Court in Warsaw - the Court for Competition and Consumer Protection. In general, if the president of the ERA failed to apply the relevant legal provisions properly and this resulted in the improper determination of rights and obligations of the entity or their improper application in the particular case, the relevant decision of the president of the ERA can be appealed against.

Acquisition and merger control – competition

26 Responsible bodies

Which bodies have the authority to approve or block mergers or other changes in control over businesses in the sector or acquisition of utility assets?

Under Polish law, the relevant authority for the assessment of concentrations is the president of the Office of Competition and Consumer Protection (OCCP).

A concentration (ie, merger, acquisition of control, acquisition of assets or creation of a joint business entity) is subject to notification to the president of the OCCP, if the combined group turnover of the undertakings concerned in the year preceding the transaction exceeded €1 billion worldwide or €50 million in Poland. The obligation does not apply to insignificant concentrations, that is, concentrations where the turnover of the target or of any of the undertakings concerned (in case of merger or creation of a joint business entity) has not exceeded €10 million in Poland in either of the two years preceding the transaction. There are also certain case-specific exemptions from the obligation to notify.

If a concentration has a 'community dimension' (owing to very high turnovers or a significant overlapping presence in the European Union), it will normally be subject to review by the European Commission rather than by the president of the OCCP (or any other national merger control authorities in other member states).

27 Review of transfers of control

What criteria and procedures apply with respect to the review of mergers, acquisitions and other transfers of control? How long does it typically take to obtain a decision approving or blocking the transaction?

In general, the president of the OCCP has one month to finish merger control proceedings and issue a decision (Phase I proceedings). However, in cases that are particularly complicated, the president may raise competition concerns, or require a market inquiry, in which case the deadline is extended by an additional four months to a total of five months (Phase II proceedings). The above-mentioned time limits start only after the complete merger notification is filed and the filing fee is paid.

The 'stop-the-clock rule' applies to both phases, meaning that the deadline is extended by the time taken by the applicants to provide the President of the OCCP with additional requested documents or information. According to the most recent (1H2018) data, the actual average time for issuing a decision in simple (Phase I) cases has been indeed one month. In complex (Phase II) matters the actual time for issuing a decision varies greatly from case to case, but on average it has been over eight months.

If no decision is issued by the statutory deadlines, the president of the OCCP is deemed to have cleared the concentration (although this has never happened in practice).

The president of the OCCP has the power to block a concentration if it is bound to significantly lessen competition on the relevant market, in particular by creating or strengthening a dominant position (which under Polish law is presumed at the level of 40 per cent market share). A concentration that raises competition concerns may still be cleared if it boosts economic or technical development, or has positive effects on the national economy. The president of the OCCP may also issue a conditional decision, if the competition concerns may be

Update and trends

Recent adoption of the Capacity Market Act and the capacity market implementation, amendment to the Act on RES (which in particular introduced FIT and FIP support systems) plans to extend the support system for CHP installations after 2018, as well as plans to increase the obligation to sell 100 per cent of generated electricity on the commodities exchange remain hot topics in the electricity sector in Poland.

addressed by certain structural or (in exceptional cases) behavioural conditions.

The European Commission has its own set of merger control procedures for reviewing concentrations that have a 'community dimension'.

28 Prevention and prosecution of anticompetitive practices

Which authorities have the power to prevent or prosecute anticompetitive or manipulative practices in the electricity sector?

The president of the OCCP has the general authority to investigate and prosecute anticompetitive practices that have or may have an effect on the Polish market. Certain powers relating to the development of competition in the energy market are also vested in the president of the ERA. If the anticompetitive practice may affect trade between member states, it can also be investigated and prosecuted by the European Commission.

Refer to questions 34 and 35 for further information on manipulative practices.

29 Determination of anticompetitive conduct

What substantive standards are applied to determine whether conduct is anti-competitive or manipulative?

There are no sector-specific criteria for the energy sector under Polish or EU competition rules and therefore the general provisions apply.

Under both the national and the EU rules, the prohibited anticompetitive conduct includes: entering into anticompetitive agreements (ie, agreements between undertakings), the aim or effect of which is preventing, restricting or distorting competition; and any conduct that amounts to an abuse of a dominant position on the relevant market (which under Polish law is presumed at the level of 40 per cent market share).

Certain agreements that are prima facie anticompetitive, may be – in certain situations – exempt from the prohibition. Conduct of a dominant entity that is prima facie abusive, will not be considered as anticompetitive if it is objectively justified.

Under EU Regulation on Wholesale Energy Market Integrity and Transparency (REMIT), manipulation in general means entering into any transaction or issuing any order to trade in wholesale energy products which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of wholesale energy products (which in certain situations may also include energy products sold to final customers).

30 Preclusion and remedy of anticompetitive practices

What authority does the regulator (or regulators) have to preclude or remedy anti-competitive or manipulative practices?

If a business entity, even unintentionally, infringes competition law by entering into anticompetitive agreements or by abusing dominant position, the president of the OCCP has the power to: issue a decision ordering the business entity to cease or modify its conduct, as well as imposing structural or behavioural remedies proportionate to the anticompetitive behaviour; impose on the business entity a fine of up to 10 per cent of its annual turnover; and impose on each individual in a managerial function who intentionally, through his or her actions or omissions, allowed the execution of the anticompetitive agreement (but not the abuse of the dominant position) a fine of up to 2 million Polish zloty (approximately €470,000).

Agreements or other legal actions that are anticompetitive or abusive are null and void by law. There may also be other negative consequences of infringing competition law, in particular private

enforcement (ie, civil law claims of third parties that incurred a loss owing to the infringement).

The European Commission has its own set of powers with regard to anti-competitive practices that may affect trade between member states.

Refer to questions 34 and 35 for further information on manipulative practices.

International

31 Acquisitions by foreign companies

Are there any special requirements or limitations on acquisitions of interests in the electricity sector by foreign companies?

Polish law places several restrictions relating to the ownership structure of energy companies. The Act on Control of Certain Investments enables the Minister of Energy to prohibit the acquisition of shares in an energy company if the transaction is deemed contrary to the interests of national security, human rights or environmental protection. Furthermore, the Act on Special Rights of the Minister of Energy includes provisions granting the minister similar powers, when the transaction is found to threaten the critical infrastructure. Also, the Act on Rules of Management of National Assets prohibits the government from selling state-owned shares in several companies listed in the act, including major energy companies.

32 Authorisation to construct and operate interconnectors

What authorisations are required to construct and operate interconnectors?

Apart from general rules related to the construction of transmission network and described in question 9 above, it needs to be considered that the interconnectors combine two different national territories and thus a procedure related to the transboundary environmental impact may be required. Under this procedure, consultations are planned between the countries and local communities concerned.

Also, conclusion of the interoperating agreement with the neighbouring TSO will be necessary, to determine the principles of the prospective interconnector management.

33 Interconnector access and cross-border electricity supply

What rules apply to access to interconnectors and to cross-border electricity supply, especially interconnection issues?

Apart from the general rules related to electricity trading resulting mainly from the Energy Law and the secondary legislation to it, some specific provisions regarding cross-border supply have been set forth in the Transmission Grid Code (this includes specific settlements for the transmission services with the use of the interconnector). The TSO is obliged to ensure non-discriminatory access to interconnectors in accordance with the EU legislation and the TPA rule.

Transactions between affiliates

34 Restrictions

What restrictions exist on transactions between electricity utilities and their affiliates?

In view of REMIT, Polish legal regulations on commodities exchange and on financial instruments, as well as in view of internal regulations of PPE, market manipulation – which in particular may cover transactions between electricity utilities and their affiliates – is prohibited.

In addition, energy utilities and their affiliates should refrain from any transactions that could result in the breach of the unbundling rules (separation of, eg, transmission or distribution activity from other types of activity on the energy market, such as trading).

35 Enforcement and sanctions

Who enforces the restrictions on utilities dealing with affiliates and what are the sanctions for non-compliance?

The president of the ERA is entitled to perform an inspection to establish whether a breach of the obligations determined for energy market participants in REMIT (this includes market manipulation restrictions) has occurred. Also, the Polish Financial Supervision Committee has similar authority with regard to transactions occurring on the commodities exchange (PPE).

Failure to observe market manipulation restrictions is subject to criminal prosecution and may result in a fine, limitation of liberty, or imprisonment. In addition, failure to observe the unbundling rules may result in financial penalty imposed by the President of the ERA in the amount up to 15 per cent of the revenue made under the relevant licence in the previous fiscal year.

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