THE ENERGY REGULATION AND MARKETS REVIEW

TENTH EDITION

Editor
David L Schwartz

THE LAWREVIEWS

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David L Schwartz

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PREFACE

In our tenth year of writing and publishing *The Energy Regulation and Markets Review*, the most pressing global concerns have again revolved around the covid-19 pandemic, which has slowed infrastructure development globally. Accordingly, many of our contributing authors have emphasised concerns associated with the effects of the crisis on energy demand and consumption, and delays in the development of infrastructure. Beyond this crisis, we have seen many other significant geopolitical changes that have added uncertainties to global energy policies. For example, oil prices have hit record lows (hitting negative values in April of 2020), which has slowed exploration and production efforts, and has threatened economic stability for countries that depend upon oil revenues. The United Kingdom is transitioning out of the European Union (a process known as Brexit), creating uncertainties regarding the future of the UK's energy policies and its coordination and cooperation with the European Union, including with respect to commitments to reduce greenhouse gases (GHGs). Following the end of the Trump administration's 'America First' trade policies, the Biden administration is seeking to reassure US allies and historical trading partners and re-commit to the 2015 Paris Agreement. The 2011 Fukushima nuclear incident continues to affect energy policy in many countries. Finally, there are continued efforts to liberalise the energy sector globally.

I CLIMATE CHANGE DEVELOPMENTS

We continue to see significant carbon reduction efforts globally, including increased use of renewable resources, and measures to improve energy efficiency and reduce demand.

In the United States, contrasting with the Trump administration's support for fossil fuels, the Biden administration has committed to being a leader in the fight against climate change. While coal and other aged fossil fuel plants continue to retire at an unprecedented rate (due primarily to the economics of those facilities), the Texas winter storm in February 2021 raised some questions about whether renewable resources alone will be sufficient for long-term reliability. Many states have pushed for the procurement of thousands of megawatts of renewable resources, including from new offshore wind development projects on the east coast and, in May 2021, the US Bureau of Ocean Energy Management granted its first approval for the Vineyard Wind offshore project. The Federal Energy Regulatory Commission has continued to struggle with whether and how to impose regulatory restrictions on the ability of state-subsidised renewable energy projects to clear in the regional capacity markets through a minimum offer price rule to mitigate buyer market power.

Despite Brexit, the United Kingdom's renewable energy targets have already exceeded those of the European Union. France is seeking to double its wind and solar capacity and President Macron has announced a goal to close the remaining coal plants by 2022. Italy had

previously targeted a 28 per cent reliance on renewable energy by 2030 but is now working to reach the 32 per cent target adopted by the European Union. Belgium has continued its significant offshore wind procurement efforts, and is seeking to reduce subsidies in future procurements. While Germany has had difficulty meeting its previous emissions reductions goals, it has now set a target of 2038 for the phase-out of coal power plants, and remains focused on the continued development of renewable generation, energy efficiency and conservation, as well as energy storage technologies. In Portugal, carbon emissions dropped by 7 per cent, perhaps in part due to the covid-19 pandemic. Poland has been struggling to meet the European Union renewable energy targets but has plans to develop offshore wind generation.

Japan has continued its efforts to develop solar and wind resources, including opening new sea areas for offshore wind. But the shutdown of most of its nuclear generation has resulted in a significant reliance upon natural gas, including liquefied natural gas, and reductions in renewable energy prices have caused a slowdown in new solar and wind development. Japan has long utilised a feed-in tariff mechanism to encourage renewable development, and in 2022 will implement a feed-in premium to further encourage renewable investment. China continues to have ambitious renewable energy goals, aiming for an emissions peak by 2030, carbon neutrality by 2060 and a goal of 15 per cent of generation supplied by non-fossil fuel generation. Taiwan is seeking 20GW of solar PV installed capacity by 2025, and is looking to develop 5.5GW of offshore wind capacity.

There remains significant debate in Australia regarding the role of gas and coal in the energy landscape, which has led to a patchwork of national and state policies that points to continued uncertainty regarding Australia's commitment to carbon reduction. Malaysia continues its efforts to encourage greater entry into the renewable energy market and has approved 349 new renewable projects over the last decade.

The United Arab Emirates aims to reduce its carbon footprint by 70 per cent by relying on 50 per cent renewable energy by 2050, and Abu Dhabi is seeking to reduce electricity consumption by 22 per cent by 2030. In Brazil, hydroelectric resources constitute more than half of its installed generation capacity, and efforts continue to increase wind and solar generation as the cost of renewable generation has decreased.

II INFRASTRUCTURE DEVELOPMENT

The covid-19 pandemic has slowed infrastructure development for many countries, particularly those in which a reliable energy supply remains the primary concern, regardless of fuel source. As less than half of Myanmar is connected to the grid, there are continued efforts to electrify remote parts of the country (55 per cent by 2021 and 100 per cent by 2030). Lebanon has been relying upon floating generation barges to increase electricity supply, but now faces the risk of having some of these barges leave Lebanese shores due to the government's failure to make payments to the barge owners.

III NUCLEAR POWER GENERATION

Nine years after the Fukushima disaster, Japan has stopped operations at all but seven of its 36 nuclear power stations, and 11 nuclear power stations are in the process of being reviewed for restart under Japan's stringent new safety standards. Germany continues efforts to phase out all nuclear generation by 2022, and Belgium's nuclear plants have often been offline

for maintenance for technical issues in the past few years. France had previously sought to eliminate nuclear generation by 2025 but has extended that date. South Korea has continued its efforts to phase out nuclear power (replacing nuclear plants with new renewable facilities over time). South Africa's nuclear ambitions appear to be on hold at least until 2030.

However, the phasing out of nuclear energy is not universal. The United Arab Emirates' new 5,600MW Barakh nuclear power station is almost complete and one of its units is already operational. When all units are online, Barakh will supply 25 per cent of the emirates' electrical needs. Poland still intends to explore the development of nuclear power in the future, with a target date for the first unit in 2033. In the United States, even though the early retirement of certain nuclear plants has been driven by cost and power market considerations (rather than safety concerns), some states have passed legislation to subsidise nuclear energy to allow owners to continue to operate through zero emissions credit programmes, including Illinois, New York, New Jersey and Ohio.

IV LIBERALISATION OF THE ENERGY SECTOR

We have seen significant energy sector regulatory reforms in many countries. The European Union has sought to continue efforts to centralise the regulation of the EU energy sector. France has taken significant steps towards further liberalisation of its energy sector. Japan has fully liberalised its electricity and gas sectors and is encouraging market entry. Australia has opened access to transmission through regulatory reforms to encourage entry into the generation market and is undertaking significant energy market reforms to send more accurate price signals to market participants. Brazil continues its efforts to implement net metering regulations. China has reduced subsidies for renewable energy, price transmission and distribution rates based upon a cost-plus regulatory methodology, and has implemented a market-priced mechanism for pricing coal-based generation. The United Kingdom has implemented a competitive tender process for the development of offshore transmission. In the United States, while states have continued to subsidise nuclear and renewable generation, the Federal Energy Regulatory Commission has permitted certain regional markets to implement minimum offer price rules to combat buyer-side mitigation in an effort to maintain competitive capacity markets.

I would like to thank all the authors for their thoughtful consideration of the myriad interesting, yet challenging, issues that they have identified in their chapters in this tenth edition of *The Energy Regulation and Markets Review*.

David L Schwartz
Latham & Watkins LLP
Washington, DC
May 2021

Chapter 14

POLAND

Piotr Ciołkowski and Ada Szon[1]

I OVERVIEW

The Polish energy mix is based mainly on hard coal and lignite, which cover approximately 75 per cent of the generation. Gas fuels, onshore wind farms, and photovoltaic, hydropower and biomass installations are used for the remainder of energy generation. There are no offshore wind farms and nuclear power units in Poland as yet, but there are plans to construct them. In the Energy Policy for Poland until 2040, it is highlighted that the energy mix should change in the coming years; in particular, the government assumes that, by 2030, hard coal and lignite should not exceed 56 per cent of energy generation. Indeed, in the past couple of years, the development of energy from renewable sources has been significant, particularly with respect to wind farms and photovoltaics. The renewable energy is supported through various subsidy schemes (i.e., auction systems, feed-in-tariffs and feed-in-premiums). The government has also decided to support the development of offshore wind projects and dedicated act has been adopted. The list of the projects under development grows longer each year. However, the most advanced projects are those developed by jointly PGE SA and Ørsted, jointly PKN Orlen SA and Northland Power, jointly by Equinor and Polenergia, as well as by EDPR and Innogy.

With respect to natural gas, domestic sources cover around 25 per cent of market demand and the majority of natural gas is imported. As of 2016, Poland no longer imports gas solely from Russia, as a new liquefied natural gas (LNG) terminal in Świnoujście covers a significant part of the gas demand. To diversify the sources of natural gas, two independent projects are currently being undertaken – an extension of the LNG terminal and a new gas connection with Norway (the Baltic Pipe).

II REGULATION

i The regulators

The regulatory authority

The administrative authorities that are responsible for determining regulatory policy are the Minister of Climate and the President of the Energy Regulatory Authority (ERA). The Ministry of Climate is currently in charge of energy and climate departments that were previously under control of the Ministry of Energy, which was liquidated at the end of 2019. The Minister of Climate is responsible for the legislative process (i.e., preparation of

1 Piotr Ciołkowski is a partner and Ada Szon is an associate at CMS Poland.

legislative acts that are later adopted by Parliament and signed by the President) and creating policy with respect to the energy market. The role of the President of the ERA is regulator of the activities of participants in the energy market.

The President of the ERA is appointed for five years by the Prime Minister in an open and competitive recruitment process. He or she may be reappointed only once. The regulator shall be impartial and independent of any public or private entities.

The scope of the powers and obligations of the President of the ERA is very broad. His or her general obligation is to monitor the functioning of the whole energy market, that is, all segments of the energy industry, including electricity and gas markets. He or she is entitled to grant licences to conduct business activity in Poland, and approve the tariffs for electricity, gas and heat. The President of the ERA is also responsible for managing auction systems (in the area of renewable energy, cogeneration and capacity mechanism), the purpose of which is to grant state aid for selected projects. Moreover, the President has the power to control the fulfilment of the obligations set forth in the relevant legislation and to impose financial penalties for any violations of those obligations.

Main sources of law

The main legislation setting forth the general framework for the energy sector in Poland is the Energy Law. This statute defines the basic terms regarding the energy sector and provides the rights and obligations of the main market participants, defines the powers and obligations of the administrative authorities (such as the President of the ERA), and sets forth the conditions for conducting business activities in the energy market in Poland.

However, there are many other laws regulating specific sub-sectors of the energy industry. With respect to electricity, the key legislative acts that promote clean energy in Poland are the Act on Renewable Energy Sources, the Act on the Promotion of Electricity from High-Efficiency Cogeneration, and the Act on Electromobility and Alternative Fuels, as well as the newly adopted Act on the Promotion of Generation of Electricity in Offshore Wind Farms. Also key is the Act on the Capacity Mechanism, which provides a support scheme for electricity generation. The framework for the gas industry is set out mainly in the Energy Law, but also in the Act on Mandatory Stocks of Crude Oil, Crude Oil Products and Natural Gas and on the Principles of Proceeding in Case of a Threat to National Fuel Security and Disruptions on the Crude Oil Market.

Acts of Parliament are not the only source of law regulating the energy market. When it comes to technical information or information pertaining to very specific issues, such as rules for the preparation of the tariffs for electricity, gas and heat, they are usually set out in secondary legislation. These are regulations issued by one of the government bodies; in this case, it is usually the Ministry of Climate (previously the Ministry of Energy).

Although not legally binding, one of the key pieces of legislation that presents Polish strategy with respect to the energy sector is the Energy Policy for Poland until 2040. The Energy Policy sets out the government's plans for the development of the energy market and the changes that will affect the industry.

As the energy market in Poland is regulated, one of the most important acts that create the legal basis for conducting business activities in the field are administrative decisions issued by the President of the ERA. The regulator is authorised to grant licences for energy companies that trade, inter alia, in electricity or natural gas, and to issue decisions through which he or she can impose financial penalties for violations of the Energy Law or other relevant acts.

ii Regulated activities

Conducting business activities in the energy market is subject to approval by the President of the ERA. Approval is given by means of an administrative decision – in most cases in the form of a licence for conducting the business activity (this obligation does not apply to micro and small installations as, for example, the latter need only to be entered into the dedicated register).

The list of activities that are subject to a licence is set forth in the Energy Law. The obligation to obtain a licence encompasses such activities as the generation of energy and fuels, storage of gaseous fuels, transmission and distribution of energy and fuels, and trading in energy and fuels. However, there are some exceptions; for instance, a licence is not required for trading in electricity on the Polish power exchange, which is run by Towarowa Giełda Energii SA (TGE SA).

If an energy company wishes to commence one of the above-mentioned activities, it has to apply to the President of the ERA for a licence. Unfortunately, in the past couple of years, the requirements set forth for these entities have been substantially expanded and obtaining a licence in Poland requires a lot more time and effort than in most other EU Member States.

iii Ownership and market access restrictions

There are not many restrictions imposed on energy companies willing to do business in the field of energy. However, as a licence is the key requirement for these activities, some specific limitations for licence holders and for entities applying for a licence should be mentioned.

First, a licence shall not be granted to an entity that does not have its registered office in the European Union, Swiss Confederation, a European Free Trade Association Member State or Turkey. Likewise, the President of the ERA will not grant a licence if:

a an energy company:
- is declared bankrupt;
- has been convicted of any offence or tax offence relating to the economic activity conducted by the company;
- is not registered for paying value added tax; or

b an entity that has significant influence or has control or joint control over the applicant within the meaning of the relevant provisions of the Polish Act on Accounting was convicted in the past three years of any offence or tax offence relating to economic activity under the Energy Law.

Moreover, the President will only issue a licence to an applicant that has the financial resources and technical capacity to guarantee proper performance of the licensed activity and ensures the employment of individuals with appropriate professional competence.

Second, if an entity is granted a licence, it must observe the rules set therein and the statutory obligations provided mainly in the Energy Law. If an energy company violates any of these provisions, the President of the ERA will revoke the licence.

Energy companies may face further specific limitations, which vary according to the types of activities they are performing. For instance, electricity traders willing to become members of the Power Exchange must follow its internal regulations.

iv Transfers of control and assignments

Mergers or acquisitions in Poland are subject to notification to the President of the Office of Competition and Consumer Protection, which is the administrative authority responsible for supervising competition on the Polish market and assessing the concentrations.

The relevant entity is obliged to submit a complete merger notification and pay the relevant fee. The President of the Office of Competition and Consumer Protection shall issue a decision within one month of the start of the merger control proceedings. However, if the President raises any competition concerns or requires a market inquiry, the deadline can be extended by an additional four months.

The European Commission may also review mergers and acquisitions. This is the case when the merger or acquisition has a community aspect (for instance, a significant presence in the European Union).

With regard to assignments, the Renewable Energy Sources Act, in particular, provides for the possibility to transfer the right to the granted subsidy in the event of the sale of a renewable energy installation. However, the transfer will require approval from the President of the ERA. Irrespective of the foregoing, any division or merger of an entity holding a licence is subject to prior notification to the President of the ERA.

III TRANSMISSION/TRANSPORTATION AND DISTRIBUTION SERVICES

i Vertical integration and unbundling

As required by both EU and Polish regulations, the operation of the national transmission grids for electricity and natural gas is carried out in accordance with the unbundling rules. In both the electricity and gas sectors, the transmission system operators are state-owned companies: Polskie Sieci Energetyczne SA is responsible for the electricity grid and OGP GAZ-System SA is responsible for the natural gas grid.

The provisions on unbundling in Poland comply with the rules set forth by the European Union in the Third Energy Package. Grid activities (transmission and distribution) are separated from activities in the area of production and trade in gaseous fuels and electricity.

There are some exceptions, however. According to the Energy Law, provisions regarding legal and organisational separation do not apply to (1) a vertically integrated company with fewer than 100,000 customers connected to its distribution system or (2) a gas system if the sale of gaseous fuels during the year does not exceed 150 million cubic metres.

ii Transmission/transportation and distribution access

The transmission system operator is required to give equal treatment in its delivery of transmission services to all final customers and electricity traders or generators. The same applies to distribution system operators. To obtain these services, the applying party must enter into a transmission or distribution service agreement. By law, they must provide access to third parties on the objective and competitive rules. The obligation concerning third-party access results from the Third Energy Package that was implemented by the Polish legislator. Polish regulations are compliant in this respect with EU rules.

iii Rates

Operators prepare the tariffs for gaseous fuels and energy in accordance with the rules set forth by the Energy Law and the relevant secondary legislation, and present them to the President of the ERA for approval. These provisions set the legal limits within which the President of the ERA may approve or reject the tariffs. Tariffs should in particular ensure the legitimate business operation costs of the operator are covered, with a reasonable return on capital and the protection of customers against unjustified rates.

iv Security and technology restrictions

The Polish regulations regarding critical infrastructure meet the requirements of Directive 2008/114/EC.[2] Critical infrastructure is defined as systems and their functionally related objects, including construction objects, devices, installations, services that are key to the security of the state and its citizens, and to ensure the efficient functioning of public administration bodies, and of institutions and entrepreneurs. Certainly, critical infrastructure covers the energy and fuel systems. The designation of a given facility, device or installation as critical infrastructure imposes several obligations on its operators. These include preparation and implementation, in accordance with anticipated threats, of plans for critical infrastructure protection and maintenance of their own reserve systems to ensure security and maintenance of the functioning of the infrastructure until it is fully restored.

Additionally, as a part of the implementation of the NIS Directive,[3] the Act on the National Cybersecurity System was adopted in 2018. One of the strategic sectors covered by this Act is the energy sector. The energy companies affected by the obligations arising from the Act had to obtain a decision regarding their classification as an operator of key services by November 2018. If a company has been classified as an operator of key services, it is obliged to fulfil the statutory requirements pertaining to cybersecurity.

IV ENERGY MARKETS

i Development of energy markets

Electrical energy

With respect to the wholesale power market, participants have broad access to various forms of electricity sales and to information on volumes and prices at which electricity is contracted.

There is an obligation to sell 100 per cent of the generated electric energy on the commodities exchange but there are many exceptions to this rule. For instance, it does not apply to renewable energy sources or energy generated in cogeneration plants.

Various types of companies become participants on TGE SA – electricity producers, traders and large final customers. They can act independently after joining TGE SA as a member or through brokerage houses. At the end of 2018, 77 companies had the status of a member of the power exchange, of which 42 actively participated in trading on electricity markets operated by TGE SA.

2 Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection.

3 Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union.

Market participants may also conclude bilateral agreements, creating an over-the-counter (OTC) market. The prices and conditions of these contracts are known solely to the parties to the agreement.

The two sides of the retail market comprise (1) the final customers – both households and enterprises – purchasing the energy for their own use and (2) are suppliers, usually electricity traders or distribution system operators responsible for physical transportation of the electrical energy.

There is also a balancing market in Poland. This is a technical market that is essential for the functioning of the whole energy market.

Gaseous fuels

The sale of gaseous fuels on the Polish wholesale market takes place primarily on TGE SA. Similarly to electrical energy, there is a power exchange obligation. According to the Energy Law, any company trading in gaseous fuels is obliged to sell on the power exchange not less than 55 per cent of high-methane natural gas introduced into the transmission network in a given year. OTC, retail and balancing markets exist similarly to the energy markets. Owing to the mandatory stocks regime, the majority of the market is dominated by Polskie Górnictwo Naftowe i Gazownictwo SA and its capital group.

ii Energy market rules and regulation

The process of liberalisation of the energy market, set forth in the first, second and third EU energy packages, has been gradually implemented in Poland. On a power market, traders have been gradually exempted from the obligation to submit their tariffs to the President of the ERA for approval. Currently, the tariff obligation is not applicable to electrical energy traders and, hence, they are allowed freely to determine the price at which they sell energy to their customers. However, there is an exception to this rule. The President of the ERA still requires the companies that hold the status of *ex officio* (last resort) suppliers to submit their tariffs for approval with regard to electricity delivered to households.

As regards wholesale trading in electrical energy, as indicated above, traders are exempted from tariff obligations. Prices are established according to the market. However, when trading on organised markets such as the balancing market or TGE SA, there might be some regulations limiting this rule.

On the gas market, the approval of tariffs for sales of gas to any entities other than households was abandoned with effect from 1 October 2017. The obligation to apply to the President of the ERA for approval of the tariff for households will remain in force until 2023, after which (from 1 January 2024) the gas tariffs will be entirely eliminated.

iii Contracts for sale of energy

Apart from trading on an organised market such as that run by TGE SA, market participants are allowed to enter into bilateral contracts that create an OTC market. The price and other contractual terms of these bilateral contracts are the result of negotiations between the parties based on the freedom of contract rule.

The tariff obligation is still in force in certain circumstances, which affects the concluded contracts. As mentioned above, in respect of the power market, the *ex officio* suppliers who deliver electricity to households are subject to tariff obligation. In respect of the gas market, tariffs for households remain in force until the end of 2023.

iv Market developments

Corporate power purchase agreements are a new form of regulation of the sale of electrical energy in Poland. There are no legal provisions specifically regulating this issue apart from the general rules concerning the agreement on the sale of energy in the Energy Law. However, in the past few years, there has been a growing interest in direct purchase of renewable energy from generators. This trend will become increasingly popular as it is seen as a way to ensure the stability of energy prices, among other things.

V RENEWABLE ENERGY AND CONSERVATION

i Development of renewable energy

In order to achieve the renewable energy targets set by the European Union (previously for 2020 and now for 2030) the government has provided strong support for renewable energy projects in the past couple of years and has strengthened support for offshore wind farms.

The main form of support for these projects is state aid (approved by the European Commission). Poland has been supporting renewable energy sources through a system of tradeable certificates of origin. However, it was decided to introduce a new support scheme in the form of auctions. The winners of the auctions obtain the right to cover the negative balance between the respective auction price and the power exchange price. In the auctions held to date, the majority of the support was granted to onshore wind farm projects generating more than 1MW and photovoltaic projects generating up to 1MW.

Small capacity hydro and biogas installations are supported by two other schemes, namely feed-in tariff and feed-in premium systems.

The government has been putting an increasing emphasis on supporting offshore wind farm projects. The Act on the Promotion of Generation of Electricity in Offshore Wind Farms entered into force at the beginning of 2020 and sets the framework for a dedicated subsidy scheme for offshore wind projects as well as addressing other relevant issues pertaining to the development and operation of offshore projects.

Currently, in accordance with the WTG Investment Act, wind farms must comply, in particular, with requirements concerning the minimum distance from residential buildings and nature protection areas. The minimum distance is equal to 10 times the height of the wind turbine with rotor blades (i.e., in practice in most cases with currently applied technology this is approximately 1.5–2km (the '10H rule')) and it prevents development of many new wind farms. The Polish government, however, commenced the works towards the amendment of the minimum distance requirement under the WTG Investment Act. No official proposal of the amendment to the WTG Investment Act was published or adopted in 2020.

ii Energy efficiency and conservation

The Council of Ministers adopted the National Energy Efficiency Action Plan for Poland on 23 January 2018. This document includes a summary of the measures intended to contribute to the overall energy efficiency target of 20 per cent primary energy consumption savings in the European Union by 2020. The plan provides a description of measures to improve energy efficiency by end-use sectors. These measures include a white certificates system, a national advisory support system and information campaigns.

In the area of energy efficiency, there are also programmes prepared by the National Fund for Environmental Protection and Water Management or within the Operational Programme on Infrastructure and the Environment 2014–2020. The aim is to enhance energy efficiency in buildings, in the industry and in transport.

The regulations concerning energy efficiency are to be strengthened.

iii Technological developments

The government has been working on the framework regulation for energy storage for several years. At the end of 2020, the draft amendment to the Energy Law was in the works and, among other things, concerned the definition of energy storage, the connection between the storage and the grid, as well as the obligations of the storage system operators.

Not only does the government undertake legislative actions, it also supports technological developments financially. In 2018, some energy companies received financial grants from the Operational Programme on Infrastructure and the Environment 2014–2020. One of the supported companies received a subsidy for a demonstration project of a stationary energy storage system as a smart grid element.

Projects developing smart cities are also being supported. New funds for investments are provided, for instance, to adapt the electricity distribution network in the municipalities to the requirements of the smart grid.

At the end of 2019, Polskie Sieci Elektroenergetyczne SA (Poland's transmission system operator (TSO), implemented a system for a smart grid project (Special Protection Scheme). The aim of the project is to eliminate grid overload. The TSO is carrying out tests on the system during 2020. There are also companies looking into the possibility of using energy storage on a larger scale.

VI THE YEAR IN REVIEW

i The Energy Policy for Poland until 2040

In 2018, the Minister of Energy published a draft of the Energy Policy for Poland until 2040. This document, which was highly anticipated by market participants, presents the long-term strategy in the Polish energy sector. The strategy takes into account the present situation in the energy market, and the current trends and goals that the government is aiming to achieve in the next few decades. The Energy Policy has been designed to mirror the EU strategy presented in the Clean Energy for All Europeans legislative package, known as the Winter Package. The final Energy Policy was adopted in March 2021.

One of the key elements of the Energy Policy is a plan to construct a nuclear power plant. Although it will be quite some time yet before this comes to fruition, the government's representatives seem determined to develop this project to gradually replace coal-fired plants. According to the Energy Policy, the first nuclear unit with a capacity of approximately 1–1.6GW will be commissioned in 2033. The entire nuclear programme envisages that six units will be constructed in total.

The Energy Policy also strengthens the renewable target so that it will amount to 23 per cent in the final gross consumption of energy.

ii Capacity mechanism

One of the milestones in the Polish energy sector in 2018 was the decision issued by the European Commission on 7 February 2018 (State Aid No. SA.46100 (2017/N) – Poland – Planned Polish capacity mechanism) in which the Polish electricity capacity market was approved. In its decision, the Commission has found the Polish capacity mechanism to be compatible with the internal market in accordance with Article 107(3)(c) of the Treaty on the Functioning of the European Union.

However, in 2019, Tempus Energy appealed against this decision to the Court of Justice of the European Union (CJEU) (the case has not been settled yet). Previously, the same company challenged the British capacity market and the CJEU upheld the company's complaint.

The subsidy scheme may be awarded through the auction system. The first auctions (for the 2021–2023 delivery period) were conducted in the fourth quarter of 2018. At the end of 2020, auctions were organised for the 2025 delivery period. PSE, which organises the auctions, stated that 55 offers won the auction (meaning that 55 installations were granted the right to benefit from the support system).

iii Renewable energy

To strengthen the auction system and make it more efficient and investment-friendly, important amendments to the Renewable Energy Sources Act were introduced in 2019, among others:

a an extension of the deadline for selling the electricity generated by a renewable energy source installation for the first time within the auction system;

b removal of the requirement to submit an environmental decision and excerpts from local zoning plan during the pre-qualification procedure; and

c an extension of the end date of the auction support scheme – from 31 December 2035 to 30 June 2039.

Following the covid-19 pandemic, the Polish government implemented a package of laws called the Anti-Crisis Shield, which aimed to minimise the negative effects of the pandemic on Polish companies. It also introduced some changes for renewables. First, in the case of producers whose offers had already won the auctions (meaning that they were granted the right to benefit from the support system), the new regulations grant the possibility of applying to the President of the ERA to extend the deadline to commence the sale of the electric energy within the auction system. The President of the ERA issues a decision on an extension of the deadline for the first sale of electric energy within the auction support system. The extension may be granted for an additional period indicated in the producer's application, but no longer than 12 months from the original day for fulfilment of the obligation. The President of the ERA may extend the deadline only once.

Likewise, a similar regulation was introduced for changes to small and micro-installations.

The Anti-Crisis Shield also envisaged some changes to the rules for auctions in 2020, which took place in the fourth quarter of 2020.

iv Promotion of offshore wind farm projects

As offshore wind farm projects have been attracting more attention from market participants, including major strategic international investors, in 2020 the government was working on the Act on the Promotion of Generation of Electricity in Offshore Wind Farms which was

finally adopted by the Sejm (lower house of parliament) in December 2020 and entered into force in February 2021. The main aim of this Act is to set the rules for a subsidy scheme to support the generation of electricity from offshore wind farms. According to the Act, offshore wind farms will be entitled to obtain the right to settle the negative balance resulting from the difference between a fixed price and the average market price (quasi CfD). The right to settle the negative balance may be awarded by way of an individual decision of the President of the ERA – specifically for the most advanced offshore projects. A regulation of the Minister of Climate set the maximum price for these at 319.6PLN/MWh. According to the final version of the Act, the total installed capacity of offshore wind farms that may receive support under this decision was set at 5.9GW. The deadlines for the applications and the President of the ERA's decisions were set for 31 March 2021 and 30 June 2021 respectively.

Secondly, the right to settle the negative balance may be awarded through competitive auction in which the fixed price will be indicated in the auction bid. The auctions will be held in 2025 (2.5GW), 2027 (2.5GW), 2028 and subsequent years (if the Council of Ministers decides so).

The subsidy will be paid out for 25 years from the first electricity generated. The beneficiaries of the support scheme are obliged to generate electricity (after obtaining a generation licence) and feed it into the grid for the first time within seven years of the date of the individual decision or closure of the auction, respectively.

The Act also regulates other important issues for offshore projects. First, when applying for support, a project needs to submit a plan regarding the involvement of local equipment, devices and services (i.e. a local content plan). With respect to grid connection, the Act stipulates that the project owner and the TSO may conclude an agreement on the sale of the grid connection; however, the TSO would be under no obligation to enter into such an agreement. The Act also specifies the requirements for applying for grid connection conditions. Finally, the Act introduces amendments to the administrative proceedings, for instance, the key permits such as the environmental decision (which is the key permit setting forth the environmental conditions for the specific project), as well as the building, use and water permits, will be immediately enforceable.

v Energy efficiency

During the summer of 2020, the Minister of Climate published a draft amendment to the Energy Efficiency Act. The aim of this amendment was to improve the regulations concerning energy efficiency in light of the efficiency target of 2030. The draft assumed savings of no less than 5.58 million tonnes of oil equivalent over 10 years.

According to the amendment, a central register of final energy savings is to be established that will be kept by the Institute of Environmental Protection – National Research Institute. Furthermore, the provisions on concluding agreements on the improvement of energy efficiency in the public sector have been strengthened.

The draft amendment has not yet been adopted.

vi High-efficiency cogeneration

On 15 April 2019, the European Commission approved the support scheme regulated in the Act on the Promotion of Electricity from High-Efficiency Cogeneration. The Act sets forth the rules for providing support for electrical energy generated in high-efficiency cogeneration in cogeneration units. These new support measures replaced the old support mechanism in the form of tradeable certificates of origin.

This Act provides four support measures in the form of:

a auctions conducted by the President of the ERA;

b guaranteed premiums in an amount set by the Minister of Energy;

c individual guaranteed premiums as individually set in a decision issued by the President of the ERA; and

d a selection system – in the form of individual cogeneration premiums – for units that win the selection process conducted by the President of the ERA.

Each of the aforementioned support measures is designed for different types of cogeneration units (new, existing, modernised, materially modernised). Before obtaining support, all cogeneration units must obtain a decision from the President of the ERA allowing the unit to participate in the relevant support scheme.

The first auctions for cogeneration were conducted in the fourth quarter of 2019, and subsequently in the fourth quarter of 2020.

VII CONCLUSIONS AND OUTLOOK

During 2020, the Polish government continued to balance the need for energy security and the need to prevent climate change by supporting existing projects, in particular based on coal, and incentivising new investments particularly in the renewables sector. One of the major developments was to the framework regulation for offshore wind farms. The government decided to support new types of installations, which will significantly increase the share of green energy in the energy mix in the coming years. The construction of a nuclear power plant is still being considered as an option for shifting the energy mix from coal-fired power plants.

In light of the EU obligations, the government will continue to promote renewable energy during 2021. In particular, the government plans to soften the 10H rule. According to information given to the press, the Minister's planned schedule envisages that the amendment to the WTG Investment Act will be submitted to the Sejm in the second quarter of 2021 and adopted by the end of 2021. The plan is for the new regulations to enter into force at the beginning of 2022.

Appendix 1

ABOUT THE AUTHORS

PIOTR CIOŁKOWSKI

CMS Cameron McKenna Nabarro Olswang Pośniak i Bejm spk.

Piotr Ciołkowski, attorney-at-law, is a partner in the energy and projects department at CMS Poland. He manages the regulatory team that operates within the department.

He specialises in advising on regulatory issues in the energy sector. He advised Polish electricity generators on a comprehensive analysis of the most important documents, known as the Winter Package, from the perspective of the electricity sector and prepared comments, recommendations and amendment proposals supporting the Polish electric power industry's interest in the process of negotiating the package with the European Union bodies. He represents Polish and foreign companies that operate in the sector on matters relating to commencing and pursuing activities on the Polish market. His experience includes legal advice in connection with obtaining licences and tariffs, and on how to structure activities. In particular, he has been involved in unbundling processes, the creation of trade models and legislative work.

Piotr also advises on commodities trading and negotiates sales and services contracts. He has led numerous M&A transactions and investment projects, in particular in the renewables sector, involving offshore and onshore wind farms, and photovoltaics. Piotr's experience includes representing clients in administrative proceedings and in litigation, particularly with the President of the Energy Regulatory Office.

ADA SZON

CMS Cameron McKenna Nabarro Olswang Pośniak i Bejm spk.

Ada Szon is an associate in the energy and projects department at CMS Poland.

Ada specialises in advising entities in the energy sector on broadly understood regulatory issues. She advises companies on issues relating to licensing and business tariffs, and on commencing activities on the Polish market. Ada has experience in working for clients from different sectors, from oil and gas to electrical energy, and on topics ranging from investment process to state aid rules. She advised Polish power generators with regard to the European Commission's 'Clean Energy for All Europeans' legislative package. Currently, she mainly focuses on supporting companies in the offshore and onshore wind farm sectors with respect to the implementation and development of their projects in Poland.

She also supports companies in the energy sector during proceedings between them and the President of the Energy Regulatory Authority, in administrative proceedings and in proceedings before the common courts.

Ada also has experience in environmental law, primarily in issues relating to industrial emissions, carbon trading, waste management, and water and sewage management. She took part in due diligence processes concerning, among others, networks of waste treatment plants.

Ada is a PhD candidate at the Institute of Law Studies of the Polish Academy of Sciences.

CMS Cameron McKenna Nabarro Olswang Pośniak i Bejm spk.
Warsaw Financial Centre
ul. Emilii Plater 53
00-113 Warsaw
Poland
Tel: +48 22 520 5555
Fax: +48 22 520 5556
piotr.ciolkowski@cms-cmno.com
ada.szon@cms-cmno.com

www.cms.law

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