

THE ENERGY
REGULATION
AND MARKETS
REVIEW

NINTH EDITION

Editor

David L Schwartz

THE LAWREVIEWS

THE ENERGY REGULATION AND MARKETS REVIEW

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PREFACE

In our ninth year of writing and publishing *The Energy Regulation and Markets Review*, the most pressing global concerns have revolved around the covid-19 pandemic. 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, which has slowed exploration and production efforts, and has threatened economic stability for countries that depend upon oil revenues. The United Kingdom is now within its 11-month transition period to exit from 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). The Trump administration's 'America First' trade policies have continued to alienate US allies and historical trading partners. Despite its withdrawal from the Paris Agreement and expressions of support from the Trump administration for the coal industry, the United States has continued its extensive investment in renewable generation resources. 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

Despite the US withdrawal from the Paris Agreement, 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, despite the Trump administration's support for the US coal industry, coal and other aged fossil fuel plants are retiring at an unprecedented rate. Additionally, 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. However, the US Bureau of Ocean Energy Management has delayed granting approvals for offshore wind projects, and the Federal Energy Regulatory Commission has imposed 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.

The European Union issued a revised Renewable Energy Directive, which will take effect in 2021, targeting 32 per cent renewable consumption by 2030. Despite continued efforts to follow through on Brexit, the United Kingdom's renewable energy targets already exceed 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. In Denmark, renewables already constitute 40 per cent of electricity consumption and the aim is to have all energy demand met by renewables by 2050. Germany will not meet its goal of reducing emissions by 40 per cent by 2020, or its goal to reduce energy consumption by 20 per cent as compared with 2008, but remains focused on the continued development of renewable generation, energy efficiency and conservation, as well as energy storage technologies. 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 has caused a slowdown in new solar and wind development. China continues to have ambitious renewable energy goals, capping energy from coal generation to an amount equivalent to 5 billion tonnes and aiming to have 15 per cent of generation supplied by non-fossil fuel generation. Korea aims to generate 20 per cent of its power needs from renewable energy and has committed to cut GHGs by 37 per cent by 2030.

This year, Australia has reached almost 20 per cent reliance on renewable energy resources, including significant amounts of energy storage capacity (battery and pumped water) and South Africa increased its renewable independent power procurement efforts, with a goal of producing 17,800MW of renewable energy by 2030.

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 already constitute more than 60 per cent of its installed generation capacity, and efforts continue to increase wind and solar generation as the cost of renewable generation has decreased. Colombia has significant renewable energy resources and recently completed its first auctions for renewable projects, with 1,398MW awarded and installed.

II INFRASTRUCTURE DEVELOPMENT

For many countries, a reliable energy supply remains the primary concern, regardless of fuel source. As only 35 per cent of Myanmar is connected to the grid, there are continued efforts to electrify remote parts of the country. Lebanon is hoping to solicit bids for the development of 890MW on floating barges to increase electricity supply. Panama and Colombia continue to seek foreign investment.

South Africa is utilising its Integrated Resource Planning process with a goal of doubling its generation and transmission capacity by 2030. Australia is developing the Snowy Hydro Project, which, at 2,000MW, will be one of the largest pumped hydroelectric storage projects in the world. Colombia is developing a large hydroelectric project that is expected to produce up to 17 per cent of the country's energy needs, but that effort is hindered by construction delays.

In its eighth licensing round for oil and gas exploration in the North Sea, Denmark received five new applications, but owing to political pressure relating to GHGs, Denmark has put this licensing round on hold indefinitely.

III NUCLEAR POWER GENERATION

Nine years after the Fukushima disaster, Japan has stopped operations at all but nine of its 48 nuclear power stations, and 11 nuclear power stations are in the process of being reviewed for restart under Japan's new stringent 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 was seeking to eliminate nuclear generation by 2025 but has extended that date to 2035. 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 on-line, Barakh will supply 25 per cent of the emirates' electrical needs. Poland still intends to explore the development of nuclear power in the future. 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, with similar legislation being considered in Pennsylvania.

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 this year. China has reduced subsidies for renewable energy, prices 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 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 ninth edition of *The Energy Regulation and Markets Review*.

David L Schwartz

Latham & Watkins LLP

Washington, DC

May 2020

POLAND

Piotr Ciolkowski and Ada Szon¹

I OVERVIEW

The Polish energy mix is based mainly on hard coal and lignite, which cover more than 80 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, published by the government, 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 60 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 regulation is being prepared. The list of the projects under development grows longer each year. However, the most advanced projects are those developed by PGE SA (the largest energy group in Poland) and PKN Orlen SA (the leading Polish oil company), jointly by Equinor and Polenergia (a private Polish company), 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 Ciolkowski is a partner and Ada Szon is a lawyer at CMS.

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. 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. A draft of 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; and
- 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) 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.

Poland has committed to changing electricity price limits on the balancing market within the wholesale electricity market. From 1 January 2019, these price limits must conform with the Commission Regulation (EU) 2015/1022 of 24 July 2015, Decision No. 5/2017 of 14 November 2017 by the European Union Agency for the Cooperation of Energy Regulators and Commission Regulation (EU) 2017/2195.

V RENEWABLE ENERGY AND CONSERVATION

i Development of renewable energy

The government's goal is to achieve the renewable energy target for 2020 set by the European Union at the level of 15 per cent in its gross final consumption of energy. To be able to reach this level, the government has provided strong support for renewable energy projects in 2018 and 2019.

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 1 MW.

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. During 2019, the government was working on legislation setting forth the state aid rules for these installations, and other issues such as investment process aspects, tax issues and local content.

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.

iii Technological developments

In 2018, the Minister of Energy published a draft amendment to the Energy Law pertaining to the development of energy storage and smart metering. The draft amendment was still being worked on during 2019 and, therefore, the final form and rules on storage activities are yet to be determined.

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.

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 the coal-fired plants.

The government is still working on the Energy Policy and no final paper has been published yet. However, it is expected that the final decisions on the text will be made this year and that the official document will be published in 2020.

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). Previously, the same company challenged the British capacity market and the CJEU upheld the company's complaint.

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.

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, the government published a draft Act on the Promotion of Generation of Electricity in Offshore Wind Farms. 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 draft 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 a individual decision of the President of the ERA, in which case the fixed price will be set either in a regulation of the minister (specifically for the most advanced offshore projects) or through competitive auction in which the fixed price will be indicated in the auction bid. The subsidy will be paid out for 25 years from the first electricity being generated.

The draft 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 draft 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.

v 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.

vi Act on Energy Prices

The Act on Energy Prices was adopted on 28 December 2018. The aim of the Act was to prevent the increase in electricity prices that was expected in 2019 following rising prices of emissions allowances and coal. Its purpose in particular was to freeze electricity prices by setting price caps based on 2018 levels and to decrease the excise tax. Specific compensations for price increases are planned for 2020.

VII CONCLUSIONS AND OUTLOOK

During 2019, the Polish government continued its work to balance the need for energy security and the need to prevent climate change, to incentivise new investments and to support existing projects, in particular based on coal. One of the major issues was an attempt to fulfil the obligations imposed by the European Union regarding climate change, particularly the target of a 15 per cent share of renewables in gross final consumption of energy in 2020. To achieve this goal, the Renewable Energy Sources Act was amended, the auctions for onshore wind farms and photovoltaics were held and appeared to be a big success. Moreover, the government decided to support new types of installations (namely, offshore wind farms), which shall 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 most probably continue to promote renewable energy during 2020. In particular, next renewable energy auctions shall be organised. It is expected that photovoltaic projects above 1MW will be as successful as onshore wind farms in these auctions. Further, the government shall finalise its work on the act pertaining to offshore wind farm projects.

Finally, 2020 shall also be the year in which final decisions are made regarding nuclear energy in Poland, and for key decisions on how the energy mix should look by 2030.

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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.

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Ada Szon is a lawyer in the energy and projects practice 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.

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