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At the start of my career in the renewable energy industry, renewable energy generation was seen as an immature, fast-developing subsector that was seeking to get a foothold in, and be accepted within, the existing mature and stable electricity sector. Renewables focused on gaining political and social support for new or decentralised technologies that were often perceived as costly and unreliable. At that time, it was also primarily developed economies that were funding and supporting this nascent industry through feed-in tariffs or certificate schemes.

While renewable energy remains a subsector in transition, the conversation has moved on substantially. It is now largely focused on new jurisdictions, much larger projects and marginal efficiencies from technological gains. It is also about whether governments, through facilitative legal and regulatory regimes, are catalysing the development of a sufficiently long and sizeable pipeline of projects to feed the almost insatiable desire of banks, investors and developers to deploy capital and debt in the sector.

Five years on from the signing of the Paris Agreement, the world has witnessed the consequences of systemic threats on a global scale via the spread of the covid-19 pandemic. The message of the Paris Agreement was clear in that it is the shared responsibility of the global community to mitigate the impact of climate change, and those with the broadest shoulders should take the largest burden.

Despite the impact of the covid-19 pandemic, IRENA reported a record 260GW of renewable energy capacity added globally in 2020, beating previous records by almost 50 per cent. Looking ahead to COP26, which is scheduled to take place in Glasgow, United Kingdom later this year, we have seen renewed commitments and increasingly ambitious targets to deploy renewable energy from governments across the globe in the spirit of ‘green recovery’ in light of covid-19, as well as to respond to climate change threats. Securing the transition to a clean energy system has become less about actively facilitating or subsidising the sector and more about removing the legal, political and structural barriers to deployment.

The decarbonisation of energy systems remains fundamental in global efforts to keep the global temperature increase to below 2°C. Deployment of renewable energy across the globe will play an important role in the world’s clean energy transition. However, it is not the only driver for renewable energy deployment. Renewable power is also now, in many places, the cheapest form of new capacity to add to the electricity system. This means that it also has an important role in helping post-pandemic economic recovery. In addition, many people are anticipating a very significant increase in ‘clean power’ consumption driven by, among other things, the electrification of transport.

This guide has been produced to provide an overview of the legal framework and current status and challenges in structuring, financing and investing in renewable energy.
projects in the selected jurisdictions. Whether you are already active in the sector or simply interested in learning more about the legal framework and key developments underpinning the renewable energy industry, I hope that this guide will provide you with an insight into our exciting industry.

Munir Hassan
CMS
London
July 2021
Chapter 12

POLAND

Piotr Ciołkowski and Ada Szon

I INTRODUCTION

The development of renewable energy sources in Poland has become one of the most essential goals in the Polish energy sector. In light of European Union (EU) legislation, Poland has been obliged to achieve renewable energy targets. For 2020, the EU established for Poland a 15 per cent renewable energy share in final energy consumption (which, unfortunately, has not been achieved). For 2030, the EU established that the EU’s gross final consumption of energy should amount to at least 32 per cent. The Polish government decided in its integrated national energy and climate plan that it will commit itself to contribute to this target by achieving a 21–23 per cent share of renewable energy in the gross final consumption.

According to the information from the Polish regulator – the President of the Energy Regulatory Authority (President of the ERA) – in 2020, the majority of electricity generation was still based on conventional sources (hard coal and lignite). However, their share decreased from 75 per cent to 72 per cent. As regards the wind sources, in 2020 the share was at the level of 9 per cent and other renewable energy sources at 6 per cent.\(^1\)

To be able to achieve the aforementioned goals, the Polish government decided to provide stronger support for the renewable energy sector and, most notably, to strengthen support for offshore wind farms.

II THE YEAR IN REVIEW

In December 2020, the Sejm (lower chamber of the Polish parliament) adopted the Act on the Promotion of Generation of Electricity in Offshore Wind Farms, which entered into force at the beginning of 2021. The Act sets the framework for a dedicated subsidy scheme for offshore wind projects and addresses other relevant issues pertaining to the development and operation of offshore projects such as grid connection, investment process, local supply chain and the requirements applicable to the construction, operation and decommissioning of offshore wind farms.

The main purpose of this Act is to regulate a support system for the generation of electricity from offshore wind farms. The Act sets forth that the offshore projects will be entitled to contracts for difference (CfDs) – to settle the negative balance resulting from the difference between the fixed price and the average market price. The Act anticipates two

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1 Piotr Ciołkowski is a partner and Ada Szon is an associate at CMS Cameron McKenna Nabarro Olswang Poźniak i Bejm spk.
phases of support for electric energy generated in offshore wind farms. For the most advanced projects, the offshore wind investors may obtain the support in the form of an individual decision issued by the President of the ERA. The total installed capacity of offshore wind farms envisaged in the Act for this phase of projects that may receive support is set at 5.9GW. The deadlines for the applicants to submit the applications and for the President of the ERA to issue the decisions were set for 31 March 2021 and 30 June 2021, respectively. The maximum price was set in the regulation of the Minister of Climate at 319.6 zlotys/MWh. The President of ERA has already issued the first decisions granting the support for the offshore wind projects.

For the remaining projects, the right to settle the negative balance may be awarded through competitive auction held by the President of the ERA in the years 2025 (2.5GW) and 2027 (2.5GW) and, possibly, also in 2028 and beyond. The auctions are announced, organised and held by the President of ERA. In this case, the fixed price shall be specified in the auction bid.

The subsidy scheme is envisaged for 25 years from the first day the electricity from the offshore wind farm is generated. The beneficiaries shall 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 right to cover the negative balance applies to electricity in an amount not exceeding the product of 100,000 hours and the installed electrical capacity of an offshore wind farm or part thereof resulting from the licence for electricity generation.

The Act also regulates grid connection issues. Firstly, the Act specifies the requirements for applying for grid connection conditions and initial grid connection conditions (the choice of the method depends on whether the project will benefit from the subsidy scheme or not). The Act also sets forth that the project owner and the transmission system operator (in Poland there is one transmission system operator, which is a state-owned company Polskie Sieci Elektroenergetyczne SA) may conclude an agreement on the sale of the grid connection. However, the transmission system operator is under no obligation to enter into such an agreement.

Finally, the Act introduces amendments to the administrative proceedings. The Act introduces significant simplifications of the development process. For instance, it sets a strict timeline for issuing key decisions concerning the construction and maintenance of offshore wind farms and sets of power evacuation facilities (i.e., decisions on environmental conditions, water permits, building permits and use permits). The possibility of challenging those decisions has also been limited because the Act sets forth that neither the higher authority, nor the administrative court can reverse a decision in whole or declare it invalid where only a part of a decision concerning a part of the project is flawed. The aforementioned decisions as well as decisions approving geological work programmes or approving geological documentation are immediately enforceable by operation of the statutory law.

The offshore wind sector in Poland has brought the attention of many Polish and foreign investors. The most advanced projects are currently developed jointly by Equinor and Polenergia, PGE SA and Ørsted PKN Orlen SA and Northland Power as well as by EDPR and Innogy, respectively.

However, it should be underlined that the Polish government not only decided to support the offshore wind projects but also plans to enhance investments in onshore windfarms. In consequence, it decided to amend strict rules of the Act on the Investment in the Wind Turbines. According to the provisions of this Act, wind farms must comply with
a requirement pertaining to the minimum distance from residential buildings and nature protection areas which equals 10 times the height of the wind turbine with rotor blades (the ‘10H rule’). Establishing the minimum distance at such a level has prevented the investors from developing many new wind farms in the last few years. The first official proposal of the amendment to the Act was published in May 2021 and then public consultations were commenced. According to the proposal, each of the local governments may adopt a local zoning plan that will allow a wind turbine to be located at a closer distance than that resulting from the calculation of the 10H rule, but respecting the minimum distance indicated in the Act. The proposed minimum distance is planned to amount to 500 meters. The distance of the newly built wind farms determined in the local zoning plan is to be reviewed also by the Regional Director for Environmental Protection. It will be also necessary to conduct additional public consultations. The minister’s planned schedule envisages that the amendment to the Act should be submitted to the Sejm in the second or third quarter of 2021 and adopted by the end of 2021. The plan is that the new regulations would enter into force at the beginning of 2022.

Moreover, the PV sector is the most dynamic and fast-growing sector in the renewables sector in general. According to the information provided by the Institute for Renewable Energy, which based its assessment on the data from Polskie Sieci Elektroenergetyczne (the Polish transmission system operator), the installed power in PV at the end of 2020 was 3,935.74MW. The Institute concludes that the increase in the installed power in PV amounted to 200 per cent during the year. Also, according to this analysis and forecasts by the Institute, in 2021 the interest in PV development will grow, which may even result in 6GW of operating PV installations at the end of 2021.3

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, in particular the renewable energy investors. Firstly, in the case of producers whose offers had already won the auctions and in consequence were granted the right to benefit from this subsidy scheme, the Anti-Crisis Shield granted the possibility of applying to the President of the ERA to extend the deadline to commence the sale of electric energy within the auction system by a maximum of 12 months. Likewise, a similar regulation was introduced for changes to small and micro installations.

III THE POLICY AND REGULATORY FRAMEWORK

i The policy background

The policy regarding renewable energy has been a key element of the most essential strategic documents in Poland. One of them, the Energy Policy for Poland until 2040, stipulates the government’s plans for the development of the energy market. With respect to renewable energy in 2030, the share of renewables in the final gross energy consumption shall be at least 23 per cent and not less than 32 per cent in the power sector (mainly wind and photovoltaic (PV)), 28 per cent in heat and 14 per cent in transport (with a large contribution of electromobility). In another important policy, the National Energy and Climate Plan for the
years 2021–2030, the government has also declared that Poland will achieve a 21–23 per cent share of renewables in the final gross energy consumption. In order to achieve these goals, subsidy schemes have been introduced for the renewable investors.

Throughout the years, Poland has been supporting renewable energy sources through a system of tradeable certificates of origin, the ‘green certificates’. Green certificates are transferable property rights that may be received by a producer of electricity from a renewable energy source in which the energy was generated for the first time before 1 July 2016. The support may be granted for the maximum period of 15 years; however, no longer than until 31 December 2035.

The green certificates system is being slowly replaced by the new support scheme in the form of auctions. The winners of the auctions obtain the right to settle the negative balance between the respective auction price and the power exchange price (average market price). The negative or positive balance is settled on a monthly basis upon an application submitted by a renewable energy source (RES) producer to the Settlement Operator (Zarządca Rozliczeń). Auctions for renewable energy are carried out separately within five technology baskets, separately for installations with an installed capacity of up to 1MW and above 1MW, and separately for electricity generated in:

- renewable energy source installations commissioned before 1 July 2016;
- modernised RES installations; and
- new RES installations (i.e., planned RES installations, which will generate electricity for the first time after the closing of the auction session).

In the auctions held to date, the majority of support was granted to onshore wind farm projects generating more than 1MW and photovoltaic projects generating up to 1MW.

According to the information from the President of ERA, because of the auctions held in 2020, over 1.56GW of PV installations, nearly 0.93GW of new wind farms and over 4MW of new capacity in other renewable energy technologies may be developed. In 2020, nearly 75.3TWh of electricity from renewable energy sources has been allocated for sale, with a total value of over 27.4 billion zlotys. However, only four out of eight auctions were resolved (the remaining four were not resolved because a sufficient number of bids was not submitted). In consequence, 54.5TWh of electricity was sold, with a total value of nearly 12.9 billion zlotys.

An alternative to the auction system has been envisaged for small capacity installations that may be supported by two other schemes, namely feed-in tariff (FiT) and feed-in premium (FiP) systems. FiPs and FiTs are dedicated for installations using only the following sources for electricity generation:

- agricultural biogas;
- biogas obtained from landfills;
- biogas obtained from a sewage treatment plant;
- another biogas than specified above;
- hydropower; or
- biomass.

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5 ibid.
Producers of agricultural biogas may also benefit from the support system in the form of certificates of agricultural biogas origin confirming its production and introduction to the gas distribution grid. The certificate is granted by the President of ERA. The certificate is granted for 15 years, counting from the date of first production of agricultural biogas or electricity from agricultural biogas; however, no longer than until 31 December 2035.

ii  The regulatory and consenting framework

The key acts regulating the specific areas in Poland are statutes, which are the acts adopted by the parliament (i.e., Sejm and Senate – lower and higher chamber of parliament, respectively) and signed by the President. With respect to the energy sector in Poland, the general rules are provided in the Energy Law. The Energy Law sets forth rights and obligations of the market participants as well as the powers and obligations of the administrative authorities (such as the President of the ERA). Most importantly, the Energy Law stipulates the rules of conducting business activities in the energy market in Poland, by regulating the terms of grid connection to the transmission and distribution grid as well as by regulating the requirements regarding obtaining the energy licences necessary to conduct the business activity, for instance in electricity generation.

In the case of the renewable energy sector, the key statute regulating the rights and the obligations of the renewable energy investors is the Act on Renewable Energy Sources, which describes previously mentioned subsidy schemes (green certificates, auction system, feed-in tariff and feed-in premium systems). Another important act for the renewable energy sector is the newly adopted Act on the Promotion of Generation of Electricity in Offshore Wind Farms, which sets the framework regulations for the offshore wind farms.

Acts of Parliament are not the only source of law regulating the energy market in Poland. The technical information is usually regulated in the secondary legislation such as the regulations. The latter are issued by the government bodies; in the case of renewable energy, it is usually the Ministry of Climate.

The energy market in Poland is a regulated one. Although the President of ERA as a Polish regulator does not have a competence to issue binding acts on a national level such as statutes or regulations, it shapes the framework of the business activities in the energy market by, among others, issuing the administrative decisions for the specific market participants. In these decisions, the President of ERA is entitled, among others, to impose financial penalties for violation of the provisions of energy-related acts and most importantly, to grant licences for energy companies – in the case of renewable energy sources, licences for the generation of electric energy from the renewable energy installation, which are issued at the end of the development process for the renewable projects (this obligation does not apply to micro and small installations).

When developing a renewable energy project, but before obtaining the generation licence from the President of ERA, the investor shall also obtain many permits that are needed for construction and operation of such a project. Polish law requires holding several permits, where the most important decisions are the following:

a  local zoning plan or zoning permit – these documents constitute a legal basis for location of renewable projects; as regards the local zoning plan, the municipality council adopts it as a resolution which covers a group of plots not necessarily owned by the same landowner and that are not issued for the benefit of one party, whereas the zoning
permits are issued by the respective authority to the particular addressee; in practice, when there is no local zoning plan, the investors must obtain zoning permits to be able to continue the development of the project;

b) decision on environmental conditions – the decision determining the environmental conditions for a renewable energy project and approving its environmental impact assessment; it needs to be obtained prior to the zoning permit (if in the specific case it is needed as pointed out above) and construction permit;

c) construction permit – a decision allowing to construction works to start (although in some cases, solely a notification on construction works is sufficient); and

d) use permit – a decision allowing for the using and operating of a renewable energy project (although, in some cases, solely a notification on construction works’ end is sufficient).

Obtaining the environmental decision is one of the critical stages in the permitting process of the renewable energy projects. The environmental decision is issued by the head of the municipality, or mayor or president of the city in which the project will be implemented. The procedure for issuing the environmental decision is initiated at the request of the party who plans to implement the project (i.e., the investor). At the very beginning of the proceedings, the respective authority examines the application for issuing the environmental decision in order assess to which category the project should be qualified (i.e., with obligatory environmental impact assessment (EIA) or facultative EIA). Under Polish law, there are two groups of projects for which an environmental decision needs to be obtained:

a) projects that can always significantly affect the environment (for which it is obligatory to perform an EIA prior to issuing the environmental decision); and

b) projects that may potentially affect the environment (for which an EIA is not obligatory but may be required by the authority that is responsible for issuing the environmental decision).

IV RENEWABLE ENERGY PROJECT DEVELOPMENT

i) Project finance transaction structures

One of the interesting features of renewable project financing in Poland is that the structure of the financing must be in line with the support scheme currently existing under Polish law. The finance documentation should properly address the mechanism of the settlement with the settlement manager (which is Zarządca Rozliczeń SA) owned by the Polish state. The financing is provided to the special purpose vehicle (SPV) that owns assets of a project and the relevant permits and is controlled by the investor (sponsor) of the given project.

The financing of renewable energy projects is usually provided under the standard documentation as used for the other kind of financing (i.e., the facility agreement, usually based on the Loan Market Association standard, the security documents and, if applicable, the intercreditor agreement). Direct agreements are more typical and specific documents for the financing of renewable energy projects are required in relation to the key project documents (e.g., engineering, procurement and construction contract (EPC Contract), O&M contract, power purchase agreements (PPA) and turbine supply agreements (TSA)). The tenor of the financing varies depending on the project but it is usually around 15 years. The standard structure of the security interests envisages:

a) registered and financial pledges over shares in SPV;
registered pledge over all assets and rights of SPV;
registered and financial pledges over rights to bank accounts of SPV;
security assignment of SPV’s rights under the project documents;
submission to enforcement of SPV and other security providers;
subordination agreement with assignment of rights under shareholder loans and, depending on the project; and
cost overrun guarantee or support agreement provided by a sponsor.

Many financial institutions and private funds are currently interested in providing the financing of renewable energy projects in Poland; in particular, Polish and foreign commercial banks, development banks as well as investment funds. In the larger projects (i.e. with a capacity higher than approximately 50–60MW), the financing is very often provided by a partnership of the financial institutions.

The growth in popularity of the renewable energy sources in Poland encourages financing entities to invest in such projects. According to the report prepared by Institute WiseEuropa, a dominant role in financing low-carbon technologies was played by the capital from the private sector, primarily commercial banks, which was responsible for approximately 83 per cent of funds allocated to these investments. The remaining 17 per cent of funds came from public funding sources: mainly European funds and debt instruments.

The WiseEuropa report also states that with respect to wind farm projects, private energy companies were responsible for over 90 per cent of all investments in wind energy during 2013–2019 but also over 90 per cent of them were financed from commercial banks and equity. As regards PV, initially development of PV projects depended on public investments (local governments) and EU funds; however, after 2017, private entities (prosumers) and commercial banks became more visible.

ii Power purchase

With respect to the sale of power, the most popular model is sale of power based on PPAs or Route to Market agreements with a utility or a private trading company. However, new models are becoming more popular in Poland, in particular corporate power purchase agreements (cPPAs), whether virtual or physical, and the energy as a service (EaaS) model (which is described below).

There are two main categories of cPPAs that are considered on the Polish market. The first one is the physical cPPA in which the electricity producer sells power to the corporate buyer for a specified term and the electricity is physically transmitted from the producer to the corporate buyer. The power producer is paid directly for the electricity by the corporate buyer.

The other model is the virtual (or synthetic) cPPA. In this case, the cPPA is a financial instrument rather than a contract for the sale of electricity because there is no physical delivery of power. Generally, the power producer delivers the electricity to the grid and sells it on the wholesale market whereas the corporate buyer purchases the electricity on its own, usually from an electricity trader. The parties of the cPPA settle the agreed volume of power produced in the renewable energy installation through a financial contract for difference. The

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7 id., pp. 4 and 28.
8 id., p.4.
virtual cPPA sets the fixed price and the market reference price. Depending on which price is higher, either the corporate buyer or the producer pays the other the difference. Such a model provides financial security and stability for both parties.

When calculating the price in the cPPAs (or any other PPA with the end user), the supplier should take into consideration the statutory obligations. The seller of electricity is obliged to cover a specified portion of the power sold to end users (such as a corporate buyer) with certificates of origin from renewable energy sources, as well as energy efficiency certificates. The quotas that must be met are stipulated in the Act on Renewable Energy Sources. However, the minister responsible for the climate may change them in the dedicated regulation until 31 August of the specific year.

cPPAs are still considered a new structure for renewable developers in Poland. However, several cPPAs have already been concluded in the past few years. According to the public information, cPPAs in the renewable market have been concluded between such companies as GIG and Signify; Acciona and Brembo; and Danone and GIG. The most common tenor of the cPPAs has been established for 10 years.

As regards the wholesale power market, the market participants such as electricity producers or large final customers act on the Polish Power Exchange (i.e., TGE SA, which is the licensed commodity exchange that exists in Poland operating on, among others, the electricity, property rights and CO2 emission allowances markets).

The market participants may join TGE SA as members or through brokerage houses. In 2020, there were 79 members of TGE SA.

In 2021, TGE SA and the Polish Wind Energy Association concluded a cooperation agreement to support trading in electricity generated in renewable energy sources. The purpose of this agreement is to develop services supporting the renewable energy sector, but most importantly to create exchange instruments to support the development of the cPPA market.9

iii Non-project finance development

Renewable energy projects have also been developed using non-project finance structures. In practice, such structures include mostly private equity models.

V DISTRIBUTED AND RESIDENTIAL RENEWABLE ENERGY

An on-site power purchase model has become more popular in recent years in Poland. However, not all structures that are used by the investors in Europe are also used in Poland. The structure that is used in Poland is a model of energy as a service that is common for smaller projects.

In such a case, the renewable energy installation developer owns the installation but leases it to the corporate buyer against the payment of the rent. The lease rent may be related to the volume of generated power but may also be agreed as a fixed yearly or monthly price. The owner of the installation sometimes also provides maintenance services (such as repairs) to the corporate buyer. Installations are usually designed to achieve 100 per cent self-consumption. However, if there is an excess of electricity that has not been consumed

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9 Information available at shorturl.at/ciuK0 (last accessed 8 June 2021).
locally, it may be introduced to the electricity grid and then sold on the wholesale market. Because there is no sale of electricity, the energy as a service should not be subject to energy regulatory obligations and requirements.

VI RENEWABLE ENERGY SUPPLY CHAINS

The Act on Renewable Energy Sources provides requirements for the renewable energy source generation devices. The devices installed in the photovoltaic power plants are to be manufactured not earlier than 24 months before the first electricity generation in that power plant; in onshore wind power plants, not earlier than 33 months; in offshore wind power plants, not earlier than 72 months; and for other devices, not earlier than 42 months.

Development of offshore wind farms provides new opportunities for local companies. The Act on the Promotion of Generation of Electricity in Offshore Wind Farms provides that, when applying for a subsidy for the offshore wind farm project, the project owner must submit a supply chain plan. The supply chain plan shall describe the investor’s plan of participation for local devices and services. The supply chain plan is supposed to include, among others:

1. the results of initial discussions with the representatives of the sea ports and terminal operators in Poland;
2. an indication of activities that are planned for the purpose of human resources development in the area of offshore wind expertise; and
3. a description and estimated number of jobs that the producer and suppliers of materials or services used in connection with the construction or operation of the offshore wind farm intend to create on the territory of Poland in connection with the construction or operation of the offshore wind farm.

The supply chain plan must be updated 18 months after submitting it. The Act also provides that the investor shall prepare the documentation showing the status of the implementation of the supply chain plan as well as submitting reports to the President of ERA on the implementation of the plan and potential derogations from it.

VII OTHER KEY CONSIDERATIONS

Although the renewable market in Poland is becoming more popular for investors, it is still growing and drawing on the experience of other countries.

Some of the aspects of the activities in electricity generation are still not regulated in detail. This pertains to repowering or decommissioning of the renewable installations. There are of course general rules in this respect. For instance, the licences for the generation of power issued by the President of ERA usually contain provisions according to which after ending the licensed activity, the producer is obliged to eliminate the effects of its activity, in particular in the field of land reclamation, restoration of the relief to its proper condition, and disposal of hazardous waste.

As regard the M&A landscape, in practice, most investors have been interested in investing in the projects that have already secured the right to settle the negative balance through the auction system for renewables. However, lately more and more companies have decided to develop projects that are not fully permitted and that have not obtained support yet.
VIII CONCLUSIONS AND OUTLOOK

The development of the renewable energy sector is one of the most crucial goals of the Polish government in the upcoming years. The share of renewable energy will be growing in the Polish energy mix, and it appears that the Polish government is putting great effort into fulfilling Polish obligations under the EU’s legislation.

The following years will be dominated by investments in offshore wind projects thanks to the newly adopted Act on the Promotion of Generation of Electricity in Offshore Wind Farms, which provides a long-awaited dedicated support scheme for offshore wind farms. However, because of ongoing auctions as well as the liberalisation of the 10H rule, which prevented the development of many wind farm investments, Polish as well as foreign investors will also develop onshore wind and PV projects.
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