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ARBITRATING DISPUTES IN CONNECTION WITH RENEWABLE ENERGIES (WIND, SOLAR, WATER)

National Report of the Republic of Poland

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ARBITRATION IN DISPUTES IN CONNECTION WITH RENEWABLE ENERGY (WIND, SOLAR, WATER)

1 Legal Framework

1.1 What is the legal framework for renewable energies in your jurisdiction? Can investors take advantage of certain incentives such e.g. premium tariffs, very low taxes on power generators' revenues, subsidies for renewable energy producers etc.?

a. introduction

Since 2005 in Poland there has been a support system for renewable energy sources based on tradable renewable energy certificates. This system was previously regulated in the Energy Law Act (hereinafter the "Energy Law"), and currently it is regulated in the Act on Renewable Energy Sources (hereinafter the "Act on RES") and the Energy Law.

The Act on RES, with some exceptions, came into force on May 4, 2015. Chapter 4 of the Act, regulating the new support system for RES installations was supposed to come into force on January 1, 2016, however, on December 30, 2015 the President of Poland signed the Act of December 29, 2015 on changing the Act on Renewable Energy Sources and the Energy Law Act – (hereinafter the "Amending Act"). The Amending Act postponed the coming into force of Chapter 4 of the Act on RES concerning the new support system.

After the amendments, the new support system is to come into force on July 1, 2016.

b. definition of renewable energy sources

The provisions of the Polish law define **renewable energy sources** as renewable, non-fossil energy sources which include wind energy, sun radiation energy, aerothermal energy, geothermal energy, hydrothermal energy, hydropower, energy of waves, currents and sea tides, energy obtained from biomass, biogas, agricultural biogas and biofluids (Article 2 point 22) of the Act on RES).

c. present support scheme for renewable energy sources

Under the currently operating support system, namely **the system of tradable renewable energy certificates**, support for RES power plants is provided by certificates of origin, issued by the relevant public entity, i.e. **the President of the Energy Regulatory Office** (hereinafter the "**President of ERO**"). Such certificates are issued for the volume of MWh of electrical energy

produced by wind turbines in a given month. According to the new wording of the Act on RES, certificates will be issued for energy produced during the period of 15 years from the first day of production in a certain installation, however no longer than until December 31, 2035 (Article 44 item 5 of the Act on RES).

The support consists of two elements:

- certificates of origin which are subject to purchase/sale on the Polish Power Exchange (*Towarowa Gielda Energii - TGE S.A.*) – the law obliges a certain group of entities to purchase certificates of origin and to redeem them;
- obligation to purchase green energy by **an obliged seller** (an energy company indicated by the President of the Energy Regulatory Office) – the obliged seller is obliged to purchase the energy produced in the RES installation located in its area – the territory of Poland has been divided among five obliged sellers: Enea Operator Sp. z o. o., Tauron Dystrybucja S.A. Energa-Operator S.A., RWE Stoen Operator Sp. z o.o. and PGE Dystrybucja S.A.

Group of entities obliged to purchase certificates of origin and to redeem (cancel) them

According to Article 52 of the Act on RES, a power utility, a final consumer, an industrial consumer and a commodity brokerage house or a brokerage house are obligated:

- to acquire and present to the President of ERO for cancellation a certificate of origin issued for electricity produced in renewable energy source installations located in the area of the Republic of Poland or located within a special economic zone, or
- to pay a “substitution fee”.

This obligation should be performed by:

- an industrial consumer which in the calendar year preceding the year when the obligation is fulfilled consumed no less than 100 GWh of electricity and who filed a special declaration;
- a power utility conducting business activity in the scope of production of electricity or trade in electricity and sale of electricity to final consumers other than industrial consumers;
- a final consumer other than an industrial consumer which is a member of an exchange pursuant to the Commodities Exchange Act or a member of a market organised by a subject managing a regulated market in the area of the Republic of Poland, as regards transactions contracted on its own behalf on a commodity exchange or on a market organised by that subject;

- a final consumer, other than an industrial consumer, which is a member of an exchange clearing house pursuant to the Commodities Exchange Act as regards transactions contracted by the final consumer outside of the commodity exchange or the market, subject to settlements managed within the house by a company managing the exchange clearing house, the National Depository for Securities or by a company, to which the National Depository for Securities assigned the performance of actions within the scope of the tasks of the Financial Instruments Trading Act of July 29, 2005;
- a commodity brokerage house or a brokerage house pursuant to the Commodities Exchange Act as regards transactions contracted upon the request of final consumers other than industrial consumers on a commodity exchange or on a market organized by a subject managing a regulated market in the area of the Republic of Poland.

Obligation to purchase green energy by obliged seller

Under the new regulation (Chapter 4 of the Act of RES), which will come into force on July 1, 2016, an obliged seller will be obliged to purchase energy from a producer only if that producer offers to the obliged seller the entire volume of energy produced in producer's RES installation for the period of minimum 90 subsequent days (Article 42 item 2 of the Act on RES). The purchase price should be calculated and announced by the President of ERO. Article 23 item 2 point 18a of the Energy Law defines the price as an "average price for electricity on the competitive market from the prior quarter". This information is available on the webpage of the Energy Regulatory Office.

At the moment, at least until June 30, 2016, all obliged sellers have to buy energy produced in RES installations in the volume offered by producers. This means that each producer may choose whether to sell energy on a market or to offer it to an obliged seller who should buy it for the average sale price of energy on the competitive market. This price should be calculated and published by the President of ERO.

d. new support system

The new support system comes into force on July 1, 2016 and it will obligatorily apply to all RES installations launched on July 1, 2016 and thereafter. The new system stipulated in the Act on RES is based on contracts of differences – it is the so-called auction model and it is a model well-known throughout Europe.

The main element of this support system consists in auctions announced and conducted by the President of ERO. Article 73 of the Act on RES states that auctions are to be held at least once a year, separately for installations with the total installed power of up to 1 MW and for those with power of over 1 MW. Separate auctions should also be held for installations launched before July 1, 2016 which choose to adopt the new system. It is important that at least 25% of the volume of

electricity covered with the auction system should be produced in “small installations” i.e. installations with the total installed power of up to 1 MW.

In practice, the new support system guarantees the full competitiveness of all technologies which will compete in one auction basket (only sources with the capacity of up to 1 MW and over 1 MW are separated). Auctions will be conducted in electronic form via an internet auction platform. The auction criterion will be the price for 1 MWh of electricity produced in 15 years. The winner is to be selected in a simple way: the lowest price offered wins.

The essence of the support resulting from the auction system is that the relevant obliged seller will buy the volume of energy which is the object of the auction from the winner for the price offered in the auction during the period of the subsequent 15 years (Article 92 of the Act on RES). All sale prices established in auctions are subject to annual adjustment by the inflation rate.

The obligation to produce electricity in the declared volume will be verified once every three years. The sanction for failure to fulfil this obligation will be a cash penalty.

Reference price

One of the main elements of an auction is the maximum price (the “reference price”) which may be offered by entities taking part in the auction. It should be underlined that there is no minimum price. Article 77 of the Act on RES states that the reference price is the maximum price of 1 MWh of energy sold in an auction, announced by the Minister relevant for matters of energy at least 60 days before a given auction.

Pre-qualification procedure

To participate in the upcoming auctions a producer has to meet the requirements indicated in the Act on RES. Participation in an auction will be possible for:

- installations which started energy production before July 1, 2016 and will voluntarily join the auction system;
- installations which will start electricity production in the new system (from July 1, 2016);
- new projects, which will have to go through the so-called “pre-qualification procedure”, i.e. projects which, although they have not been launched yet, are ready to produce electricity from the legal point of view.

The pre-qualification procedure will be conducted by the President of the Energy Regulatory Office who is authorised to issue certificates confirming qualification for an auction.

According to Article 75 of the Act on RES, to pass the above-mentioned procedure, a producer has to provide the relevant documentation proving that the investment is consistent with the local zoning plan. At the same time, the producer has to hold all final administrative decisions (promise of license, building permit, environmental permit) as well as a contract for connection to the power grid, financial proof and capability proof that the investor is able to implement the project and a schedule of the project. Each of the above-mentioned administrative decisions shall be valid at least 6 months.

1.2 Has such legal framework been amended recently? If so, has it been ameliorated for investors or deteriorated?

Yes, after four years of legislative works and several published drafts, on May 4, 2015 the Act on Renewable Energy Sources (Act on RES) came into force. It was a significant change mainly because this act was a totally new, separate regulation concerning this important branch of the energy sector.

This act (currently in force) includes two separate support schemes for RES: first – the system of tradable renewable energy certificates, described herewith above, and the up-coming one – the auction system.

The establishment of a new, separate act, dedicated to renewable energy sources undoubtedly has been a favorable change for investors. Before, the legal regulation had not been as clear as it is now. The essence of the support under the Energy Law (the previously binding regulation applicable to RES) and Act on RES has not changed as such; the key transformation of the support scheme is yet to come into force on July 1, 2016.

The new system stipulated in Chapter 4 of the Act on RES is an auction model described herewith above. It is worth mentioning that the auction system was a “model support system” propagated by the European Commission until 2014.

At the beginning, investors were prejudiced against this new model. However, after becoming familiar with the newly published law, deep researches and thorough calculations, the majority of investors decided to follow their plans.

It is extremely difficult to clearly decide whether the auction system will be an amelioration or a deterioration for investors. There are two different opinions:

- The certificate system brings more benefits to investors because of the double support (energy purchase obligation + tradable certificates of origin),
- auction system is more stable than the certificate system – the winner of an auction will be supported for the period of 15 following years while the oversupply of certificates of origin every year is more notable.

The final evaluation of both support systems will only be possible after the entry into force of the auction system and after first auctions are executed.

1.3 May different legal frameworks applicable to renewable energy facilities coexist within your jurisdiction? What is the criterion to benefit from one or other?

Poland currently is on a transitional period from one support system to another, both regulated in the Act on RES. In the light of current regulations there is one criterion used in order to determine a legal framework applicable to RES installations – the date of commencement of energy production:

- for installations launched before July 1, 2016 the present support system (certificates of origin) will be applicable (this support scheme lasts only 15 subsequent years, however no longer than until December 31, 2035);
- for installations launched on July 1, 2016 and thereafter the auction system will be obligatorily applied.

It is worth underlining that a transition from one support system to the other is possible, however only in one direction, namely **from the system of certificates to the auction system**. According to Article 71 item 1 of the Act on RES, producers of energy in RES installations launched before July 1, 2016 **may voluntarily join the auction system**. Still, if they do not win an auction they will not be able to return to the old support system.

Nevertheless, a producer who wants to join the auction system voluntarily should calculate and monitor its state aid intensity.

Under Article 39 of the Act on RES the maximum state aid intensity may not exceed the difference between:

- the reference price for electrical energy (for each technology) upon filing of the bid by the producer multiplied by the volume of electrical energy generated in 15 years, and

- the revenue from the sale of this electrical energy pursuant to an average purchase price of electrical energy on the competitive market on the day of filing of the bid.

If the state aid granted to the producer exceeds the above, then this producer may not enter an auction.

1.4 If your jurisdiction grants an incentive scheme for renewable energies: Has your country notified it to the European Commission under Article 108(3) TFEU so that it can be assessed under the State aid legislation?

On June 11, 2014 the Ministry of Economy which at that time was responsible for adopting the new law (the Act on RES), decided that the draft of the Act on RES should not be notified to the European Commission. In the opinion of the previous government, the support scheme for renewable energy sources proposed by the Ministry of Economy in the Act on RES constituted state aid, however it did not require a notification to the European Commission. The reason for that was that the Ministry considered that the Commission Regulation (EU) No. 651/2014 of June 17, 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (General Block Exemption Regulation (GBER)) applied to that support system.

In accordance with Article 107 Item 1 of the Treaty on the functioning of the European Union (Treaty), any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market.

The EU's general rule is that a Member State has an obligation to notify any planned state aid unless it meets the criteria set out in the General Block Exemption Regulation (GBER).

The support system should meet several criteria so that it can be recognized under the Community law as a permitted state aid, i.e. an aid which does not require notification. Among such criteria is that the support scheme should be consistent with the guidelines on state aid for environment protection and energy for 2014-2020 and the GBER.

The society of RES specialists highlighted several times the need of notification of the Act on RES. However, having examined the EU regulation, the Ministry of Economy decided that the

Act on RES did not require a notification as the new rules of support for renewable energy do not constitute unlawful state aid.

Nonetheless, one month before the previous date when the new support system was supposed to come into force the Ministry of Economy had decided to submit the Act on RES to the Polish Office of Competition and Consumer Protection with a request to notify it to the European Commission. As a result of the above, on November 25, 2015 the Polish Office of Competition and Consumer Protection notified the Commission on the Act on RES. The notification concerned all provisions relating to the principles of support for producers of “green energy” which are included in Chapter 4 of the Act on RES and which were supposed to come into force on January 1, 2016.

The possible lack of acceptance of the new support system by the European Commission will result in an obligation to refund illegally obtained aid, but such situation is highly unlikely.

1.5 If the answer is in the positive: Has the European Commission issued any decision on your current or former national incentive scheme? On what grounds was its ruling based?

The European Commission has not issued any decision yet.

2 LAW-MAKING PROCESS

2.1 By what means may the renewable sector exert influence on the law-making process in your country? Does the renewable sector hold a fluent relation with the national energy authorities of your country? What about foreign investors?

There is no a specific model of collaboration between representatives of the renewable energy sector and the national energy authorities.

The Ministry of Economy, previously responsible for the energy sector in Poland, had organized several seminars and breakout sessions dedicated to RES and formerly planned changes. Apart from the Ministry’ representatives there were also specialists from RES organizations invited as speakers. This sort of events were a great opportunity for each group (politicians responsible for creation of the new law, specialists, investors) to discuss the planned changes and their consequences.

However, the biggest influence on the law-making process in the area sector of the renewables has always been exerted by the lobbying activities of different associations gathering RES

specialists and investors. Such associations are very active in Poland, therefore many foreign investors become their members and act through them.

2.2 Has any renewable subsector recently or in the past reached any sort of agreement(s) with your State on a particular issue concerning the applicable legal framework?

No agreements concerning the applicable legal framework have been signed between the representatives of renewable subsectors and the State.

2.3 If the answer is affirmative: What are the agreed-upon terms of such agreement(s)? How is/are that/those agreement(s) regarded from a legal perspective (an administrative act, a bilateral contract, etc.)?

Not applicable.

3 DEVELOPMENT OBJECTIVES

3.1 What policy instruments has your country implemented to meet the EU's binding 2020 renewable energy targets in the last few years (renewable action plans, incentive programs to increase installed capacity, etc.)? Will your country presumably comply with these objectives going forward?

In 2010 Poland had presented the European Commission with the National Renewable Energy Action Plan, prepared on the basis of the Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009. The National Renewable Energy Action Plan assumes 15% renewable energy share in the final gross energy volume in 2020.

Looking at the results of last few years the given 15%-objective seems to be within reach. Moreover, some calculations show that it may amount up to 19%. The percentage of RES energy share in the Polish energy mix in the last 4 years was approximately:

- 2012 – 11 %
- 2013 – 11.4 %
- 2014 – 12.2 %
- 2015 – 13 %

Poland has implemented several programs to stimulate the development of RES market over the last few years. The primary sources of aid have been the funds obtained from the European Union budget, as well as the state resources.

Except for the EU funds there are programs based on the state resources which come from environmental fees. Contests in this area are organized in particular by the National Fund for Environmental Protection and Water Management (*Narodowy Fundusz Ochrony Środowiska i Gospodarki Wodnej*) as well as by the Voivodship Funds for Environmental Protection and Water Management (*Wojewódzkie Fundusze Ochrony Środowiska i Gospodarki Wodnej*).

In the financial framework for 2014-2020, the European Union is to continue the policy of backing investments aimed at building new resources which produce electrical and thermal energy obtained from renewable sources including their connection to the grid. The majority of the funds will be granted within:

- Operational Programme Infrastructure and Environmental for 2014-2020 (hereinafter “**OPIE**”) - (*Program Operacyjny Infrastruktura i Środowisko*),
- 16 Regional Operational Programmes (hereinafter “**ROP**”),
- Operational Programme Intelligent Development (hereinafter “**POIR**”) (*Program Operacyjny Inteligentny Rozwój*).

It will be also possible to apply for funds available directly from Horizon 2020 – a research and innovation program, granted through contests for low-emission energy.

However, the most important one is OPIE, which determines the national objectives in the area of sustainable development while maintaining consistency and balance between the investment activities concerning the necessary infrastructure and the support addressed to the selected sectors of economy. Support in the form of subsidies is planned to address investment projects aimed at producing energy from renewable energy sources together with their connection to the grid. These subsidies will concern the construction of projects with higher capacity for producing electrical energy using the wind energy, as well as biomass and biogas. Those investments should significantly help to fulfill the obligations resulting from the energy and climate package. OPIE has been approved by the European Commission on December 16, 2014.

3.2 What kind of initiatives have been taken by your national energy authorities in order to foster the proliferation of renewable energy within your country? In contrast, what kind of restrictions have been put in place to restrict the installed capacity within your country's borders?

a. initiatives stimulating the development of RES

In the latest publication of the United Nation Conference on Trade and Development, World Investment Report 2015, Poland has been classified among 20 main recipients of foreign direct investments in the world, with the amount of USD 13.8 billion in 2014. The investing attractiveness of Poland was confirmed in the survey carried out by the Polish-German Chamber of Commerce. Third time in a row Poland ranked first in central and eastern Europe.

Poland has implemented several programs to stimulate the development of RES market, as it has been already indicated and described herewith above, in point 3.1.

The renewable energy market is a relatively new market, however it is becoming more and more important every year. The new government, elected at the end of October 2015, seems to be RES-optimistic and from the very beginning it has been underlining the importance of the energy sector in Poland. As a result of this position, the new government created a new ministry i.e. the Ministry of Energy, separate from the Ministry of Economy.

Since 2014 Poland and Polish economy have been focused on the RES market because of both:

- several legal changes in the Energy Law and the establishment of the Act on RES,
- new funds and possibilities for RES installations.

The Polish Government is using various incentives to attract businesses in the country to invest in renewable energy sources. Poland is obliged by a EU directive to reach its target, therefore this is the best moment to invest in the renewable energy sector in Poland, taking advantage of both EU funding and Polish national and regional incentives.

b. restrictions of the installed capacity

Poland does not put any specific limitations in order to restrict the installed capacity. Energy production is a “regulated activity”, therefore in order to conduct such activity an investor first has to obtain a licence. The public entity responsible for issuing licences is the President of Energy Regulatory Office. The President of ERO verifies several documents first e.g. environmental conditions and the local zoning plan. He may refuse to issue a promise of licence / licence. By this procedure he may restrict the installed capacity.

However, there are some difficulties which are slowing down the development of the RES sector down. The most significant restricting factor in this regard is the issue of connection to the grid. Energy companies refuse to connect RES installations to their grid because of the lack of

technical conditions or technical and economic conditions. They justify their decision mainly by failure to meet the qualitative requirements for energy, short-circuit risks to the grids, failure to maintain the local character of the source or grid overload.

The regulation concerning the obligation to conclude a grid connection contract does not specify the criteria controlling such connections. Sometimes this results in that the operators (energy companies) issuing the conditions of such connections, reserve the right not to guarantee to accept power from the power plant until the producer makes an appropriate infrastructure investment e.g. replaces the cables with diameters atypical for the particular voltage. In the end, some of such cases are subject to the decision of the Energy Regulatory Office.

4 Grandfathering policy

4.1 Is there any grandfathering regulation or clause included in your jurisdiction's legal framework for renewable energies that prevents existing investors from any retroactive changes in the regulatory paradigm in the future?

Yes, a grandfathering clause constitutes an integral part of the Polish legal system. It is regulated in two legal acts:

- Article 2 of the Constitution of the Republic of Poland - the principal legal act of Poland,
- Article 3 of the Polish Civil Code.

Article 2 of the Constitution of the Republic of Poland

The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.

The grandfathering regulation has not been regulated *expressis verbis* in the Constitution but it follows from the above article and it is a deep-rooted legal rule.

This clause is also regulated under the Polish Civil Code:

Article 3 of the Polish Civil Code

The statute shall not have retroactive effect unless it results from its wording or purpose.

Neither the Energy Law Act, nor the Act on RES includes retroactive effect. Therefore the grandfathering clause is applicable to all acquired rights, including those acquired by the investors from the RES sector.

4.2 If a regulation or clause of this sort exists: How does national case law construe it? Is it applicable to every regulatory aspect or exclusively to particular ones?

The grandfathering regulation in the Polish case law, examples:

a. Article 2 of the Constitution of the Republic of Poland

- The ban on retroactivity of law is one of the most important elements of the democratic state based on the rule of law, as expressed in Article 2 of the Constitution. The principle of non-retroactivity, although not directly expressed in the Constitution, is a fundamental principle of the legal order in Poland based on the assumption that "every provision shall govern the future, not the past". (**Supreme Administrative Court in Warsaw of July 17, 2007; case number OSK 1194-1106 / Constitutional Tribunal judgement of August 22, 1990; case number K 7/90**).

b. Article 3 of the Polish Civil Code

- The exceptions established in Article 3 of the Polish Civil Code, that might justify derogation from the principle rule of non-retroactivity, shall always result from the wording of the law or its purpose. Any application of retroactive law cannot be derived from the interpretation, it must be clearly indicated in the law itself. (**Supreme Court judgment of November 17, 2011; case number IV CSK 70/2011**).
- Legal certainty and stability are the basis of the acquired rights rule. However, the application of this rule shall depend on the need to adapt certain legal solutions to the changing social and economic relations. This shall be acknowledged in particular when changes in the existing legislation aim for solutions more relevant than the existing. (**Constitutional Tribunal judgment of January 29, 1992; case number K 15/91**).
- The derogation from the principle of *lex retro non agit* must be based on a clear wording of the law, not its purpose. (**Supreme Court judgment of January 26, 2006; case number II CK 374/2005**).

All the thesis presented herewith above are of a general nature, therefore they may be applied to each legal situation, including RES investors.

4.3 Has your country ever undergone a profound change in the legal framework for renewable energies, recently or in the past?

Since 2005 in Poland there has been a support system for renewable energy sources based on tradable renewable energy certificates. In May 2015 Poland established a new legal Act – Act on RES with a new support system (the auction system) which has not come into force yet.

A detailed description of both support systems has been presented herewith above in the point 1.1 – 1.3.

4.4 If the answer is positive: What were the alleged reasons by the national authorities leading to those changes? Were acquired rights respected by the new regulatory legislation? What kind of transitional rules were enacted?

The reason for establishment of the Act on RES and the planned changes in the support system for the renewable energy is the intention to fulfill the EU regulations concerning the state aid and 2020 renewable energy target for Poland.

The Act on RES clearly regulates the situation of the investors who have acquired the right to operate in the system of green certificates, and those who will start production after Chapter 4 of the Act of RES has entered into force .

A detailed description of the transitional rules has been presented herewith above, in point 1.3.

5 Dispute resolution

5.1 Are there any pending claims before either the state courts or arbitral tribunals for changes in the legal framework regarding investor incentives in the renewable energy sector?

There are no pending claims regarding investor incentives in the renewable energy sector.

5.2 Are there any final decisions of your state courts approving/disapproving of changes in the legal framework regarding investor incentives in the renewable energy sector?

There are no final decisions concerning changes in the legal framework regarding investor incentives in the renewable energy sector.
