

Legal Alert

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THE POLISH OFFSHORE WIND ACT

On 18 February 2021, the Act on the promotion of power generation in offshore wind farms, i.e. the Polish Offshore Wind Act ("OWA") will become effective. The OWA provides a comprehensive regulatory regime for the development and support of offshore wind farms ("OWFs") in the Polish exclusive economic zone in the Baltic Sea.

The key matters regulated in the OWA are: (i) a support scheme for offshore energy, (ii) a regulatory regime concerning the maximum price of power, (iii) a regulation concerning OWFs grid connections, (iv) a reset of existing seabed permit proceedings regarding OWFs projects, (v) the supply chain plan, and (vi) fast-track permitting procedures.

The large energy potential of the Baltic Sea, estimated at 80-90 GW (depending on the methodology used) makes it an area with the second-largest offshore wind potential in Europe after the North Sea. The OWA allows Poland to use this potential - Poland can become a leader in offshore wind development in the Baltic Sea, with its target installed capacity of 28 GW in 2050, providing one-third of the total capacity that could be built in the region. By creating a regulatory framework for the offshore wind sector, Poland will join the implementation of the European Green Deal, opening the possibilities for investors to obtain additional funding for energy transformation.

SUPPORT SCHEME

The OWA provides for a support scheme for OWF project owners (beneficiaries). The support is based on the contract of difference formula - this will create the right to settle the negative balance resulting from the difference between the average market price and the strike prices ("CfD"). In the case of a positive balance, the beneficiary will be obligated to pay back the surplus. The beneficiaries will be entitled to a CfD-based subsidy for 25 years (counting from the first power generation). The subsidy will be capped by multiplying 100,000 hours and the installed capacity of the OWF. The beneficiaries will be obliged to generate power and feed it into the grid within 7 years of the date the CfD was awarded.

The OWA defines two different schemes in which the CfD may be awarded, i.e.

Stage I (only for the most advanced projects) – support granted by means of an administrative decision issued by the President of the Energy Regulatory Office ("CfD Decision"), and subject to the individual notification of State aid to the European Commission,

Stage II – support granted within the auction-based incentive scheme.

STAGE I (CfD Decision)

The total maximum installed capacity of the OWFs: 5.9 GW

Final deadlines:

- to submit a complete application for the CfD Decision: **31 March 2021**
- for the President of ERO to issue the CfD Decision: **30 June 2021**

Attachments to the application include:

- the final seabed permit for an OWF
- the map proving that the given OWF is located within the areas specified in Annex 2 to the OWA
- initial grid connection conditions or the grid connection agreement
- the material and financial schedules
- the plan of the supply chain (plan for local devices and services to participate)
- securities (collaterals) – amounting to PLN 60 for each 1 kW of the OWF's installed capacity
- an environmental decision is NOT REQUIRED

STAGE II (auctions)

The first auction is in 2025 (2.5 GW), the second auction is in **2027 (2.5 GW)**, further auctions to take place in **2028** and subsequent years - subject to the decision of the Council of Ministers

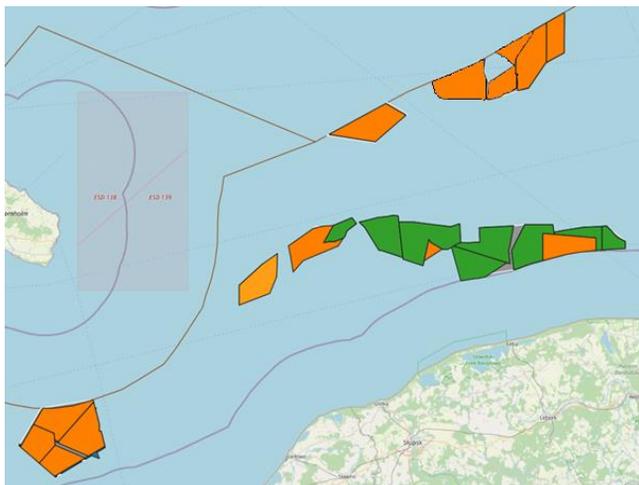
The bid price as the sole winning criterion in the auction.

Attachments to the application for admission to the auction include:

- the final seabed permit for an OWF
- the environmental decision
- initial grid connection conditions or the grid connection agreement
- the material and financial schedules
- the plan of the supply chain (plan for local devices and services to participate)
- securities collaterals – amounting to PLN 60 for each 1 kW of the OWF's installed capacity

THE RESET OF EXISTING SEABED PERMIT PROCEEDINGS – OPPORTUNITY FOR NEW INVESTORS

The OWA provides that **all seabed permit proceedings concerning OWFs – ongoing as of the date of the OWA's entry into force – will be discontinued** if the OWF's location does not correspond to the specific OWF locations set out in Annex 2 to the OWA, as specified on the map below.



Map – areas specified in Annex 2 to the OWA – orange; most advanced projects eligible for Stage I CfD support – green

In practical terms, almost all existing proceedings will be discontinued, and consequently, the areas marked in orange will be available for new competition.

This will create an opportunity for new investors to enter the Polish offshore market.

Discontinuation will be carried out by way of the Minister of Infrastructure's decision: it is expected that over 100 decisions will be issued with respect to particular applications.

One may not rule out that some applicants will try to question such decisions by submitting appeals. Consequently, opening particular areas from Annex 2 to the OWA for new competition may be slightly delayed due to those appeal proceedings.

Therefore, the time when particular areas from Annex 2 to the OWA will be free and available for new competition will be different – the process of freeing the areas may take several weeks.

NEW CRITERIA FOR ASSESSING SEABED PERMIT APPLICATIONS TO BE ADOPTED

The OWA sets out that **the detailed criteria for evaluating applications are to be specified in secondary legislation, i.e. the regulation to be issued by the Ministry of Infrastructure**. It is expected that several investors (including Polish State-owned companies and key international players) will compete for the areas specified in Annex 2 to the OWA. As a result, this regulation will be of key importance for selecting the best application by the Minister of Infrastructure (the seabed permit-issuing authority) and for the investors to prepare their applications.

Currently, the Minister of Infrastructure released the draft regulation for public consultations, and the interested parties submitted their comments. A second, revised draft is expected to be released for further consultations soon.

The first draft raised several serious questions. A number of issues need clarification, e.g. the total number of points available for a given criteria, the lack of a precise definition of key terms (such as a "partner of investor"), missing provisions concerning capital groups (whether the resources of a parent company may be deemed to be an applicant's own resources if an applicant is an SPV), etc. To meet the principles of non-discrimination and equal treatment of all entities that submitted complete applications, and to finally enable the proper use of the exclusive economic zone, the final content of the regulation should be refined in the coming weeks.

NEW SECONDARY LEGISLATION TO BE ADOPTED

To complete the regulatory framework for OWFs, the respective ministers need to issue relevant secondary legislation (regulations), including, in particular, regulations specifying the technical requirements for offshore installations, a detailed scope of analyses, and plans to meet marine safety requirements, etc.

This also includes the regulation on the maximum price for electricity generated in offshore wind farms which shall take into account costs during the whole investments procedure (preparation, construction, and liquidation), and the cost incurred in the period of offshore wind farm operation as well as the justified return on the capital involved.

On 16 February 2021 the Minister of Climate released the draft regulation on the maximum price for electricity generated in offshore wind farms for the public consultation and determined the maximum price in the amount of 301,5 PLN (70 Euro) per 1MWh. The consultation process is ongoing.

REGULATION REGARDING GRID CONNECTIONS

Initial grid connection conditions are the obligatory attachments to the application for both (Stage I and II) support schemes. The initial grid connections are issued by a transmission system operator (TSO) and are valid for 2 years after their delivery. **They are automatically transformed to (final) grid connection conditions after obtaining CfD support** - also with a 2-year validity period. Investors are obliged to cover the costs of building the grid connection between the OWF and the Polish grid (connection infrastructure). There is a specific regulation regarding the purchase of this connection infrastructure by the TSO. Before concluding the transmission services agreement, the TSO has the right to purchase the connection infrastructure. Additionally, the TSO has a pre-emption right with respect to the connection infrastructure sold by the investor, who, in such case, is obliged to inform the TSO of its intention to sell and the terms of the sale of this infrastructure. The OWA establishes the rules to determine the price for the infrastructure to be sold in this regime.

THE SUPPLY CHAIN PLAN

The obligation to submit a **supply chain plan** will help to mitigate the negative consequences of Poland's "green" transition for the Polish economy. Investors are obliged to submit a plan for local devices and services to participate - from the construction phase to initial power generation. The supply chain includes the results of initial talks with the authorities and operators. In the operation phase, investors are obliged to present, on a regular basis, a report to the President of the Energy Regulatory Office regarding the plan's implementation. The OWA does not indicate the minimum of the local content ratio to be included in the plan; further, there are no specific consequences for not complying with the plan.

FAST-TRACK PERMITTING

To speed up the permitting process, and eventually, start the OWFs' commercial operation, the OWA is introducing the fast-track permitting procedures, i.e.:

- strict, 90-day deadlines for issuing, i.a. the environmental decision, water permits, and building permits, and a 30-day deadline for the use permit. Currently, issuing similar permits for less complicated onshore projects may take substantially longer, in practical terms, even approx. 6-8 months. If the authority fails to issue a decision within the statutory deadline, the authority will be punished with a fine. Securing the environmental decision is particularly important to meet the deadline for the first 2025 auction (only entities that have an environmental decision will be allowed to participate),
- the key project permits referred to above are immediately enforceable by operation of law. This means that even if appeals are submitted against a particular permit, the investor may continue project development (the appeal will not suspend the given non-final permit),
- if complaints to administrative courts are lodged against the project permits, the courts will need to consider the cases within shorter, statutory 30-day deadlines (first instance) and two months (second instance – the court of last resort), and
- specific rules are provided to build grid connection infrastructure – a special law reserved, so far, for particular strategic TSO investments will apply, facilitating the permitting process for both the offshore and onshore parts of the connection infrastructure.

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