
THE ENERGY REGULATION AND MARKETS REVIEW

FIFTH EDITION

EDITOR
DAVID L SCHWARTZ

LAW BUSINESS RESEARCH

THE ENERGY REGULATION AND MARKETS REVIEW

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For further information please email
nick.barette@lbresearch.com

THE ENERGY
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REVIEW

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Editor
DAVID L SCHWARTZ

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PUBLISHER
Gideon Robertson

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EDITOR'S PREFACE

Our fifth year of writing and publishing *The Energy Regulation and Markets Review* has been marked by significant efforts to reduce greenhouse gases (GHGs), important infrastructure development needs and continued low oil and gas prices. We have also seen divergent positions on existing and future nuclear power generation, and further liberalisation of the energy sector.

I CLIMATE CHANGE DEVELOPMENTS

With respect to climate change efforts, 177 countries signed the Paris Agreement and 17 countries have ratified the Paris Agreement, which will enter into force after at least 55 countries representing at least 55 per cent of the global greenhouse gas emissions ratify the Agreement. Even prior to the effectiveness of the Paris Agreement, we are seeing significant carbon reduction efforts, such as increased development of renewable resources, as well as energy efficiency and demand reduction measures.

In Europe, the European Union adopted 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy', and it is expected that there will be a large amount of European secondary legislation to increase the amount of renewable resources. The United Kingdom announced its energy goals, which includes increasing reliance on renewables and imposing strict 'carbon budget' requirements. France adopted new energy legislation that seeks reductions of fossil energy consumption by 30 per cent, reductions of GHGs by 40 per cent by 2030 (and by 75 per cent by 2050), reduction of energy consumption by 50 per cent by 2050, and increased reliance on renewables to eventually reach 40 per cent of electricity production. Denmark established a goal of having renewable energy meet all electricity demands by 2050. The Netherlands has made significant efforts to reduce GHGs, including the shutdown of some older coal-fired power plants. Italy enacted new legislation encouraging energy efficiency, biomass, biogas and bioliquids. Germany undertook significant steps to increase reliance on renewable energy resources.

In the United States, the Environmental Protection Agency's Clean Power Plan, which is currently stayed pending further judicial proceedings, would require 32 per cent

reductions in CO2 emissions from 2005 levels by 2030. Last year, China set out a goal to peak CO2 emissions by 2030 and to increase reliance on non-fossil fuels to 20 per cent by 2030. Japan, Korea, and Australia are working to improve energy efficiency and conservation and to increase reliance on renewable energy supply. The United Arab Emirates continues its efforts to reduce its carbon footprint, increase energy efficiency, reduce existing energy subsidies and to develop greater renewable energy infrastructure. Dubai has established a Dubai Green Fund to assist in the development of renewable energy and energy efficiency. South Africa is looking to procure significant new renewable resources. India has set a target of 175GW of renewable energy to be installed by 2022. India's Renewable Energy Certificate programme has largely failed because of non-enforcement of Renewable Purchase Obligation goals.

II INFRASTRUCTURE DEVELOPMENT

For many countries, reliable energy supply is the key concern, regardless of fuel source. Coal still plays a dominant role in meeting energy supply for Poland, India, Turkey and China. Indonesia's primary challenge remains to reach its goal of 90 per cent electrification by 2020. The primary concern for India's energy sector remains the challenge of providing reliable, uninterruptible electricity to its population and India has begun to employ a variety of creative measures (including a transitional state financing programme) to allow distribution companies to expend greater resources on investment in procurement and infrastructure over the next five years. To meet electrification needs in Central and West Africa, the Regional Initiative for Sustainable Energy identifies over 100 generation power sector projects in countries that are members of the West Africa Economic and Monetary Union that are targeted for development prior to 2030. Mozambique similarly continues to face significant infrastructure needs to meet electricity and natural gas demand. As a result of its civil war, Angola desperately needs to rebuild infrastructure (generation, transmission and distribution). Ukraine's main focus is building infrastructure and reducing gas dependence on Russia following Russia's annexation of Crimea.

III IMPACTS OF LOW OIL AND GAS PRICES

Low oil and gas prices continue to have adverse impacts for the United Arab Emirates, Mexico, Angola and Nigeria. Exploration and production activity has slowed in the United States because of current oil and gas prices, and low gas prices have led to increases in coal plant retirements. Since the relaxation of certain US and international sanctions against Iran, Iran is now looking to attract US\$200 billion in investment in its oil and gas industries over the next five years, which may be challenging with today's low oil and gas prices. China is also looking for assistance with shale exploration in the Sichuan Basin, with mixed levels of interest from potential investors. Mexico has also sought to eliminate some of its regulatory uncertainty as a way to attract new investors.

IV NUCLEAR POWER GENERATION

We have seen divergent positions with respect to nuclear power. Following the Fukushima disaster, Japan has shut down all 48 of its nuclear power stations pending new detailed safety reviews. Germany has targeted 2022 as the date for phasing out all nuclear generation.

France is seeking a reduction of nuclear power generation by 30 per cent by 2030. On the other hand, Turkey is continuing with development of a nuclear power plant (expected to be operational in 2023), and the United Arab Emirates is still proceeding with construction of the Barakah nuclear power plant, which is expected to be operational next year. The United Kingdom has stated that nuclear energy will remain an important part of the country's energy future. In the United States, the early retirement of certain nuclear plants has been driven by cost considerations, rather than safety concerns.

V LIBERALISATION OF THE ENERGY SECTOR

We have seen significant energy sector regulatory reforms in many countries. Italy has opened up distribution systems to retail competition and trading, and has seen the widespread introduction of smart meters. Portugal will complete its transition to competition in the energy markets by the end of 2017. South Africa is liberalising its generation sector through a massive procurement programme from independent power producers. Australia is in the midst of restructuring its electricity sector through retail competition. Japan is seeking full retail competition this year, as well as the unbundling of the transmission sector from the generation sector, and is seeking to achieve similar reforms (retail competition and unbundling) in the gas sector. Korea announced a new energy plan to deregulate energy markets and mitigate the monopoly power of the majority state-owned utility company by, among other things, encouraging customer-side generation projects. Brazil saw an increase in retail competition as a result of higher prices, which was an indirect result of the reduced availability of inexpensive hydroelectric power due to the drought from last year. Turkey is focused on privatising state-owned generation companies. There are proposals in Norway to separate transmission grid companies from supply.

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

David L Schwartz

Latham & Watkins LLP

Washington, DC

June 2015

Chapter 27

POLAND

Krzysztof Cichocki and Tomasz Młodawski¹

I OVERVIEW

Demand for primary energy sources in Poland is currently estimated at 100.2 million tonnes of oil equivalent (Mtoe) per annum. It is satisfied primarily by coal (36.9 per cent), oil (25.4 per cent), natural gas (14.1 per cent), lignite (14.3 per cent) and renewable energy sources (9.2 per cent). According to the information published by the Polish Main Statistical Office with respect to 2014, the renewable energy sources (RES) included in the Polish primary energy mix comprised solid biomass (76.62 per cent); biofuels (9.23 per cent); water (2.33 per cent); wind (8.18 per cent); biogas (2.57 per cent); photovoltaic (0.21 per cent); and smaller shares of other sources (municipal waste, geothermal and solar heat), with an increasing installed capacity of wind farms.

Local production satisfies the entire hard coal demand and approximately 28 per cent of natural gas demand in Poland. Oil demands are primarily met by import, with only 4 per cent of petroleum products coming from local crude oil production. On the other hand, lignite consumption is almost fully covered with local production, which stems from the fact that lignite is not customarily transported for great distances for economic reasons.

Final energy consumption in Poland is estimated at 67.2 Mtoe per annum and it is based on energy demand of: industry (27.4 per cent); transport (28.1 per cent); residential (31.8 per cent); services (12.8 per cent).

According to the government publication 'Energy Policy of Poland until 2030', the total consumption of primary energy in Poland should increase to 118.5 Mtoe per annum in 2030 and it should be satisfied by coal (31.0 per cent), oil (26.2 per cent), natural gas (14.5 per cent), lignite (8.2 per cent), renewable energy sources (12.4 per cent), and nuclear energy (6.3 per cent). At the same time, final energy consumption should increase to 84.4 Mtoe.

¹ Krzysztof Cichocki is a partner and Tomasz Młodawski is a senior associate at Sołtysiński Kawecki & Szlęzak, and both practise as legal counsels.

In line with EU policies for the reduction of greenhouse gas emissions, the Polish government continues policy aimed at achieving the envisaged 15 per cent share of RES in final energy consumption by 2020. In general, these actions are focused on the following basic aims: (1) to boost natural gas consumption by liberalising natural gas market, currently monopolised by only one single player – the Polish Oil and Gas Company (PGNiG) controlled by the State Treasury; (2) to intensify RES consumption, with special emphasis on stable electricity generation units based on biogas; and (3) to promote nuclear power generation – with the flagship project of the first nuclear power plant to be developed in Poland by PGE EJ1, a subsidiary of Polish Energy Group SA.

II REGULATION

i The regulators

The primary regulation of the Polish energy industry is set forth in the following main statutes adopted by the Polish parliament (i.e., the Sejm and the Senate) and thereafter approved by the President of the Republic of Poland:

- a* the 2011 Geological and Mining Law, which provides the general legal framework governing exploration for and exploitation of fossil fuels within Poland (including coal, lignite, hydrocarbons, uranium, etc.); and the use of underground reservoirs for storage of hydrocarbons, liquid fuels and the carbon dioxide processed in carbon capture and storage projects;
- b* the 2014 Act on Special Hydrocarbon Tax and the 2012 Act on Tax on Extraction of Certain Minerals, which provide for additional tax burdens imposed on entities involved in the production of hydrocarbons;
- c* the 1997 Energy Law, which provides for regulation of the entire electricity and district heating sectors and for the midstream and downstream oil and gas sectors, including production, transmission, storage and trading in liquid fuels;
- d* the 2015 Act on Renewable Energy Sources, which provides for special regulatory framework covering operation of and support for renewable energy sources;
- e* the 2007 Act on Reserves of Crude Oil, Petroleum Products, Natural Gas and on Procedures in Cases of Emergency in Security of Fuel Supply and Disturbance on the Oil Market (the Act on Reserves), which provides for certain obligations imposed on entrepreneurs involved in the natural gas and oil sectors, with these obligations being aimed at ensuring security of natural gas, oil and petroleum products supplies;
- f* the 2006 Act on the System of Monitoring and Control over the Quality of Fuels;
- g* the 2006 Act on Liquid Bio-components and Biofuels;
- h* the 2011 Act on Energy Efficiency;
- i* the 2000 Nuclear Law;
- j* the 2011 Act on Preparation and Implementation of Investments in Nuclear Power Facilities and Associated Investments;
- k* the 2009 Act on Investments with Respect to the Regasification Terminal in Świnoujście;
- l* the 2007 Act on Emergency Management; and
- m* the 2010 Act on special powers of the minister competent to the State Treasury affairs and their enforcement with respect to certain companies and capital groups conducting their businesses within the electricity, crude oil and natural gas sectors.

Under the statutes listed above, a number of governmental bodies, including the Council of Ministers, the Minister of Energy and the Minister of Environment, are authorised to lay down secondary legislation providing for more detailed regulations within the scope delegated to those bodies under the pertinent statute. Furthermore, the Council of Ministers is authorised under the 1997 Energy Law to adopt Poland's overall energy policy, setting general goals to be achieved by, *inter alia*, enforcement of existing statutes and adoption of new legislation.

The competence to enforce the above-mentioned legislation and policies, and to exercise supervisory and regulatory powers over energy market participants, is vested in the following bodies:

- a* the Minister of Environment, who is vested with power to grant authorisations for exploration and exploitation of fossil fuels within Poland and for the use of underground reservoirs for storage of hydrocarbons, liquid fuels and carbon dioxide;
- b* directors of mining offices, who are responsible for supervision of exploration and exploitation of fossil fuels and of the use of underground reservoirs for storage of hydrocarbons, liquid fuels and carbon dioxide;
- c* the President of the Energy Regulatory Office, who is vested with competence to, *inter alia*, (1) grant licences for production, storage, transmission, distribution, trading and supply of electricity, heat and fuels (including natural gas), and liquefaction and regasification of liquefied natural gas (LNG); (2) approve tariffs; (3) grant exemptions from tariff obligations; (4) approve grid codes; (5) certify operators of both gas and electricity transmission systems; (6) organise tenders for new electricity generation capacities; (7) organise tenders for energy efficiency projects eligible to benefit from the support scheme based on tradable 'white certificates'; (8) grant tradable 'green' and 'red' certificates to energy producers benefiting from the support schemes addressed to RES and combined heat and power plants; (9) organise 'auctions' selecting the RES installations eligible to benefit from the new support system in force as of 1 July 2016; and (10) control compliance with a number of obligations imposed on energy market participants (including those related to compulsory stocks of natural gas, coal and lignite, and to the public sale of electricity and gas) and to enforce financial penalties for non-fulfilment of these obligations;
- d* the Minister of Energy and the President of the Material Reserves Agency, who is responsible for enforcement of compulsory stocks of crude oil and liquid fuels;
- e* the President of the Office for Competition and Consumer Protection, who is responsible for enforcement of antitrust regulations (control of mergers and acquisitions, investigation and punishment for conclusion of anticompetitive agreements or abuses of dominant position, etc.); and
- f* courts considering appeals against the decisions issued by the above-mentioned authorities.

ii Regulated activities

The following types of activities performed within the territory of Poland require prior authorisation in the form of a licence:

- a* exploration for and exploitation of fossil fuels, including crude oil, natural gas, coal, lignite, uranium, etc.;
- b* development and exploitation of underground storage facilities;

- c* production of electricity except for generation performed in facilities with total installed capacity not exceeding 50MW, it being specified, however, that generation of electricity in RES installation with installed capacity exceeding 0.2 MW or combined heat and power (CHP) installation is always subject to a licence requirement;
- d* production of heat except for generation performed in facilities with total installed capacity not exceeding 5MW;
- e* production of liquid fuels;
- f* storage of gaseous fuels, liquefaction of natural gas and regasification of LNG, and storage of liquid fuels, except for local storage of liquid gas in installations with capacity below 1MJ/s or storage of liquid fuels in retail trading;
- g* transmission and distribution of fuels and energy (including electricity and heat), except for distribution of gaseous fuels in networks with capacity below 1MJ/s and distribution of heat where the total booked capacity does not exceed 5MW;
- h* trading in fuels or energy (including electricity and heat) except for: (1) trading in solid fuels, (2) trading in electricity provided that trading is performed in installations with capacity below 1kV owned by the customer, (3) trading in gaseous fuels provided that the annual turnover does not exceed €100,000, (4) trading in liquid gas provided that the annual turnover does not exceed €10,000, (5) trading in heat provided that the total ordered capacity does not exceed 5MW, (6) trading in gaseous fuels and electricity performed via the commodity exchange by certain qualified participants of exchange (including brokers, commodity exchange operators, clearing house or National Security Depository, etc.), and (7) trading in gaseous fuels and electricity performed by clearing house or National Security Depository in the course of fulfilment of their duties to settle over-the-counter (OTC) contracts; and
- i* transmission of carbon dioxide.

The exploration for and exploitation of fossil fuels is possible upon obtaining both an agreement setting up the mining usufruct rights within the areas specified therein, and the related licence granted by the Minister of Environment. In each case, the licences are limited to specific areas covered by the relevant mining usufruct agreement. Hydrocarbon exploration and production licences might be granted exclusively to the entrepreneurs that obtained positive opinions within the 'qualification procedure', which is aimed at preselection of entities that do not pose a threat to national security and – in the case of entrepreneurs intending to hold the status of licensed operator – ensuring the proper level of experience. Licences are granted upon completion of the tender procedure, which is intended to give priority to the most experienced and financially stable entrepreneurs, and prioritise the best method for the prospection or exploration and production of hydrocarbons, which means that each bid must be evaluated on the basis of the following criteria:

- a* the experience of the bidder in the prospecting or exploration and production of hydrocarbons;
- b* the technical and financial capacity of the bidder;
- c* the proposed technology to be utilised in the licensed operations;
- d* the scope and time frame of the proposed geological works and sampling; and
- e* the best remuneration for the mining usufruct right offered by the bidder within the tender process.

Entrepreneurs holding hydrocarbon exploration and production licences are also obliged to establish the security instrument assuring future performance of the obligations and duties related to the licensed activity.

The remaining energy licences for operation of installations and provision of services (i.e., other than for exploration and exploitation of fossil fuels) are granted by the President of the Energy Regulatory Office at the request of the interested party provided that they prove their compliance with statutory conditions, including: (1) having a registered seat within any country belonging to the European Economic Area or the Swiss Confederation (subject to certain exemptions), (2) having the technical and financial capacity to conduct licensed activities, and (3) provided that the granting of a licence to a given entrepreneur does not pose a threat to defence or security of the Republic of Poland. In addition, the licence for international trade in liquid fuels requires prior establishment of the security instrument, assuring the future performance of public duties (including taxes) related to the licensed activity.

Regulatory consent of the President of the Energy Regulatory Office is also required for development of direct lines, including those connecting electricity or natural gas production installations with end-customers who are not interconnected to the transmission or distribution grid or network.

iii Ownership and market access restrictions

In general, Polish law does not impose restrictions on ownership of existing and new energy assets and these may be owned by any natural or legal person, either seated in Poland or abroad. However, as an exception to the foregoing general principle, any new elements of the electricity and gas transmission networks used for the provision of transmission services may be owned exclusively by joint-stock companies incorporated in Poland and wholly-owned by the Polish State Treasury. The foregoing restriction arises from the fact that Polish law provides for the ownership unbundling of gas and electricity transmission system operators and it further provides that gas and electricity transmission system operators should be joint-stock companies wholly-owned by the State Treasury.

The licensed activities and services listed in Section II.ii, *supra*, may be generally conducted by any entrepreneur seated within any country belonging to the European Economic Area or the Swiss Confederation. However, as an exception to the foregoing general principle, gas and electricity transmission networks may be operated (and thus the related transmission services provided) exclusively by joint-stock companies incorporated in Poland and wholly-owned by the Polish State Treasury. Besides, in specific circumstances there might also arise certain restrictions on foreign control over licence holders, which stem either from the qualification procedure applicable to hydrocarbon licences (see Section II.ii, *supra*) or the fact that the authority may refuse to grant a specific energy licence or may withdraw a previously granted licence if it is justified by a need related to defence or the security of the Republic of Poland.

iv Transfers of control and assignments

Transfer of title to energy assets

Transactions concerning transfer of title to regulated energy assets are generally exempted from administrative approvals, except for common antimonopoly clearance. However, owners and operators of energy assets (1) used for generation and transmission of electricity, and for production, refinement, processing, storage, transmission or transshipment of natural

gas, LNG, crude oil or petroleum products; and (2) qualified as critical infrastructure under the 2007 Act on Emergency Management are subject to certain security obligations set forth in the 2007 Act on Emergency Management and the 2010 Act on Special Powers of the Minister Competent to the State Treasury affairs and their enforcement with respect to certain companies and capital groups conducting their businesses within the electricity, crude oil and natural gas sectors. In particular, owners and operators of the above-mentioned critical infrastructure are obliged to, *inter alia*, develop and enforce security and emergency plans for their assets and to provide the Minister of the State Treasury with all the legal acts performed and resolutions adopted in the course of exercising their powers as owners or operators of critical infrastructure, including: disposal, alienation, decommissioning, lease or establishment of encumbrances over critical infrastructure, and adoption of investment, financial or strategic plans, or dissolution of the company. The Minister of the State Treasury has power to raise objections to, and hence invalidate, any legal acts or resolutions if performance or enforcement of the act or resolution would pose an actual threat to the functioning, continuity of operation or integrity of critical infrastructure.

Furthermore, under the 2015 Act on Control of Certain Investments, any direct or indirect acquisition of shares in 'protected entities' (entities engaged in, *inter alia*, the energy sector to be listed in a separate regulation of the Council of Ministers) shall be subject to prior notification to the Minister of Energy, who may raise objections to such transactions in certain circumstances, and in particular when it is justified on the grounds of public policy or public security. Under the aforementioned Act, both direct and indirect acquisition of shares resulting in achieving domination or a 'significant participation' in the protected entity is null and void if performed without the required notification, or despite the objection of the Minister of Energy. In such cases, the shareholder shall also be deprived of its voting rights. Finally, achieving domination or gaining a significant participation without prior notification is subject to a fine of 100 million zloty or six months to five years' imprisonment.

Transfer of licences

As regards transfer of administrative authorisations to conduct regulated energy businesses, it is generally not possible under Polish law to transfer an energy licence to a third party, except in certain situations, indicated below. Therefore, if any entrepreneur would like to acquire the energy assets within the asset deal and ultimately continue business based on those assets and previously conducted by the vendor, it is generally required to purchase the regulated assets and apply to the corresponding authority for a new licence.

Nevertheless, it is possible to transfer energy licences in the course of a merger of companies effected under the 2000 Code of Commercial Companies, provided that the pertinent energy licence held by the merged company was issued after 1 January 2001. Such transfers are effected by operation of law.

Besides this, the 2011 Geological and Mining Law provides for the limited possibility of assignment of the licence covering prospecting, exploration or production of fossil fuels; such an assignment is subject to the prior consent of the Minister of the Environment and is granted in the form of an administrative decision.

Change of control

Change of control over companies holding energy licences is not generally subject to regulatory approval of the licensing authority. However, a change of control may in specific circumstances result in withdrawal (and effectively loss) of the licence if the licensing

authority determines that regulated activity conducted by the licence holder controlled by a new shareholder poses a threat to defence or security of the Republic of Poland. Change of control may also be subject to antimonopoly clearance by the President of the Office for the Competition and Consumers Protection.

III TRANSMISSION/TRANSPORTATION AND DISTRIBUTION SERVICES

i Vertical integration and unbundling

Subject to certain *de minimis* exceptions applicable to the electricity and gas distribution systems operators, Polish law provides for the unbundling of electricity and natural gas transmission and distribution systems operators, and of operators of gas storage facilities (transmission, distribution and gas storage facilities operators). In particular, Polish legislation sets forth detailed regulations implementing the European accounting, management and legal unbundling rules as laid down for transmission, distribution and gas storage facilities operators in the 2009/72 Directive and 2009/73 Directive and it further provides for ownership unbundling rules applicable to electricity and natural gas transmission system operators (except for services provided with gas transmission network existing and owned by the vertically integrated companies as of 3 September 2009 where appointment of an independent system operator is available). It is also provided that the gas and electricity transmission system operators should be joint-stock companies wholly-owned by the State Treasury, which results in there being only one electricity and one gas transmission system operator appointed in Poland.

In practice, over the past 10 years the State Treasury separated the existing transmission assets previously owned by vertically integrated undertakings (this separation being effected in the course of either transfer of assets or division of companies controlled by the State Treasury) and established two sole-shareholder companies controlled by the State Treasury: PSE SA, which is appointed as a transmission system operator for electricity; and OGP Gaz-System SA, which is appointed as transmission system operator for natural gas. OGP Gaz-System SA is also appointed as an independent transmission system operator with respect to the Polish section of the Jamal pipeline owned by the vertically integrated company EuRoPol GAZ SA – a joint venture between Polish company PGNiG and Russian company GAZPROM. The foregoing transmission system operators are responsible for development of their respective transmission networks within the territory of Poland, and for expansion of transborder interconnectors. OGP Gaz-System also established its wholly-owned subsidiary Polskie LNG sp. z o.o., responsible for development of the LNG regasification facility in Świnoujście.

In turn, electricity and gas distribution systems are generally operated by separate companies belonging to vertically integrated undertakings, the most significant of them being local incumbents (ENEA in northwest Poland, ENERGA in northern Poland, TAURON in southern Poland, PGE in central and eastern Poland). Depending on the specific situation, distribution system operators (DSOs) are appointed with respect to either certain geographic areas (especially operators belonging to incumbent vertically integrated undertakings) or specific installations (e.g., operators of local distribution grid developed within industrial zones, office complexes, etc.). Nevertheless, Polish law does not provide for exclusive rights of DSOs to provide distribution services in a particular geographic area; the rights to provide distribution services are limited to installations operated by given DSOs.

ii Transmission/transportation and distribution access

In general, Polish law implements the third-party access principle within the electricity and natural gas transmission and distribution sectors. According to the foregoing principle, the transmission and distribution system operators are required, subject to certain exemptions, to render services to all market participants on an equal, transparent and non-discriminatory basis. The foregoing principle is envisaged to foster competition in wholesale and retail electricity and natural gas market within the single European zone.

iii Rates

Except for transborder transmission services provided based on prices set within the capacity allocation auctions, the remuneration for access to the transmission and distribution system is generally calculated based on rates set forth in regulated tariffs, which are developed by a given system operator and subject to review and approval by the President of the Energy Regulatory Office. According to Polish law, the rates set forth in tariffs should reflect actual ('justified') costs incurred by service providers in the course of the provision of their respective services, as well as reasonable returns. Except for the minimum rate of return for storage of natural gas, which is set in the 1997 Energy Law at 6 per cent, the rates of return are not provided in legal acts. The rates of return are established by the President of the Energy Regulatory Office in accordance with its own current regulatory policy adopted with respect to a given type of business or sector. The algorithms used for calculation of the tariff also include certain factors envisaged to encourage efficiency and cost reductions, which are often established by the President of the Energy Regulatory Office in accordance with its own current regulatory policy to restrain increase in prices. The foregoing regulatory power vested in the regulator results in much uncertainty as to what rates are acceptable to the authority in a given year.

iv Security and technology restrictions

The energy interests and security of Poland are protected by number of instruments spread across several acts, including: (1) the power of a regulator to refuse or withdraw energy licences if it is justified by needs related to defence or security of the Republic of Poland; (2) the power of the Minister of the State Treasury to prevent or invalidate legal acts or resolutions resulting in actual threats to the functioning, continuity of operation or integrity of critical infrastructure; and (3) numerous obligations imposed on market participants, *inter alia*, the obligation to diversify natural gas supplies, maintain compulsory stocks of crude oil, petroleum products, natural gas and coal or lignite used for generation of electricity, and to develop security and emergency plans for critical infrastructure.

IV ENERGY MARKETS

i Development of energy markets

The organised trade in electricity was originally established in Poland by Towarowa Giełda Energii SA (TGE). At present, TGE is controlled by Giełda Papierów Wartościowych w Warszawie SA (the Warsaw Stock Exchange) and it operates the Polish Power Exchange commodity exchange, allowing for (1) trading in electricity within the Polish national electricity system, and in transborder exchanges with the neighbouring EU electricity systems (market coupling) carried out in accordance with Commission Regulation (EU)

2015/1222 establishing a guideline on capacity allocation and congestion management; (2) trading in emission allowances, certificates issued under the incentive schemes addressed to RES and CHP installations, and energy-efficiency investments; (3) trading in natural gas; and – from 2015 onwards – (4) entering into derivatives contracts based on commodities traded at Polish Power Exchange. TGE also renders a system designed for public auctions of power. Transactions executed at the Polish Power Exchange are cleared and settled by Izba Rozliczeniowa Giełd Towarowych SA (the Warsaw Commodity Clearing House). The order of priority of the physical performance via the transmission system of transactions concluded within the Polish Power Exchange depends upon their respective grid codes.

ii Energy market rules and regulation

Trading in electricity and natural gas at the Polish Power Exchange is regulated by the 2000 Act on Commodity Exchange and by internal by-laws developed by the operator of the commodity exchange and subject to the prior approval of the Polish Financial Supervisory Commission. The remaining OTC electricity and gas sale agreements are regulated by the 1997 Energy Law and secondary legislation issued thereupon and by the grid codes that are binding on market participants upon their approval by the President of the Energy Regulatory Office.

All transactions covering wholesale energy products (made either on organised markets or on an OTC basis) are subject to the transparency rules set forth in Regulation (EU) No. 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency (REMIT) and secondary legislation issued thereupon, which (1) prohibit market manipulation and insider trading; and (2) oblige market participants to disclose inside information and report to the EU Agency for the Cooperation of Energy Regulators on fundamental data and all transactions in wholesale energy products, including orders to trade.

iii Contracts for sale of energy

In principle, electricity and natural gas may be traded either via commodity exchange or in OTC contracts. However, recent amendments to the 1997 Energy Law provide that:

- a* every electricity producer is obliged to sell at least 15 per cent of its annual production via the commodity exchange or other organised trading platforms operated by the company operating the regulated stock exchange;
- b* furthermore, the electricity producers entitled to compensation for the stranded costs are obliged to sell their outstanding production (i.e., not subject to the above-mentioned 15 per cent commodity exchange obligation) via the commodity exchange or other organised trading platforms operated by the company operating the regulated stock exchange or in public auction;
- c* the above-mentioned obligations related to public sale of electricity do not apply to certain types of electricity (*inter alia*, electricity delivered via direct lines, electricity generated in installations with total installed capacity not exceeding 50MW or renewable energy sources or certain CHP installations, and electricity used for the producer's own purposes or for statutory tasks allocated to system operators); and
- d* the entrepreneur trading in natural gas is obliged to sell via the commodity exchange or other organised trading platforms operated by the company operating the regulated stock exchange at least 55 per cent of natural gas introduced into Polish gas transmission system, it being specified that the foregoing obligation does not apply to

certain quantities of natural gas (*inter alia*, compulsory stocks, natural gas exported from Poland or used for own purposes of the gas trader or used for statutory tasks allocated to system operators).

iv Market developments

At present, the main goals of the Polish legislature and regulators include (1) restructuring and strengthening the coal mining industry; (2) securing long-term profitability of large conventional system power plants by, *inter alia*, organisation of the power supply capacity market; and (3) supporting the most efficient CHP and RES generation, while at the same time limiting the budget allocated for incentive schemes.

V RENEWABLE ENERGY AND CONSERVATION

i Development of renewable energy

RES operators currently benefit from a number of incentives, including (1) an incentive scheme based on an obligation imposed on certain market participants (mainly electricity suppliers and major end users) to acquire and redeem green certificates corresponding to a pre-defined percentage of electricity sold to end customers or pay a substituting fee (the fee working in practice as maximum level of support available to beneficiaries); (2) exemption from excise tax; (3) reduction of interconnection fees payable by certain RES energy producers; and (4) preferential financing, etc. In general, the current incentive system does not differentiate in the level of support depending on the RES technology applied (biomass, wind, photovoltaic, etc.) or generation capacity of a given RES installation. It does not provide RES operators with stable support as the level of support depends on the global amount of RES energy supplied to the market in a given period (thus if the overall production of RES energy is higher than the general aim set forth in the law, the level of support is lower).

The foregoing drawbacks of the current system resulted in the adoption of the new 2015 RES Act, which should significantly change the RES support system as of 1 July 2016. The 2015 RES Act should introduce the new auction-based support system under which auctions shall be carried out at least once a year to select the most competitive RES operators authorised to benefit from support in the form of either:

- a* a 15-year long-term power purchase agreement concluded with the obliged purchaser and providing for sale of electricity for the price agreed within the auction – in the case of RES installations below 0.5MW; or
- b* the right to compensation of the difference between (1) the envisaged revenues from the sale of actually generated electricity for the price agreed within the auction and (2) the market value of the same electricity calculated based on average daily prices of electricity quoted at the commodity exchange – in the case of RES installations with installed capacity of 0.5MW or higher.

The above is valid provided that the period of support in any form must end no later than 31 December 2035, save for offshore wind installations where the expiration date may be extended to 31 December 2040.

Financial resources available to RES producers under the new auction system will be collected from the final energy consumers by DSO and TSO (RES Payers) and then

transferred through the state-controlled company Renewable Energy Settlement Operator SA to the RES operators selected within the auction either directly or – in the case of RES installations below 0.5MW – through obliged purchasers.

The operators of RES installations commissioned before 1 July 2016 will be authorised to choose whether to benefit from the current support scheme based on the tradable certificates of origin (acquired rights) or the new auction system, but in any case the total period of support available to the existing RES cannot exceed 15 years from the first generation confirmed by green certificate. Besides this, the current support scheme based on tradable green certificates will be adjusted to:

- a* limit the total period of support to 15 years from commissioning of given installation; and
- b* limit the amount of support addressed to multi-fuel power plants using biomass and hydro-power installations.

According to the press releases, the 2015 RES Act is envisaged to be further amended in mid-2016 to increase the support addressed to stable RES power generation units, including biomass and biogas-fired power plants.

At the same time, a draft bill on investments in wind power plants has been submitted to the Sejm, which – once adopted – is likely to introduce regulations negatively affecting onshore wind-farm businesses in Poland, including:

- a* setting of a minimum distance between wind turbines and buildings, which may negatively affect viability of projects including wind farms under construction and modernisation of existing wind farms;
- b* changes to the rating of wind turbines for the purposes of property tax, which – if adopted – may result in a significant increase in property tax paid on wind turbines;
- c* a requirement for an additional approval to be obtained every two years for the operation of wind turbines, and upon each repair of wind turbines, with the approvals subject to the positive completion of compulsory technical inspections of the wind turbines; each such inspection would be subject to a fee not exceeding 1 per cent of the value of the wind turbine.

ii Energy efficiency and conservation

The main incentive scheme relating to energy efficiency and conservation is based on tradable white certificates, which are granted to investors that undertake to make investments related to energy efficiency; these investments are selected within tenders organised by the President of the Energy Regulatory Office. According to the 2011 Act on Energy Efficiency, certain market participants (including electricity suppliers and major end-users) are obliged to acquire and redeem white certificates corresponding to a certain percentage of electricity sold to end-users or pay a substituting fee (the fee working in practice as the maximum level of support available to beneficiaries). The foregoing scheme is effectively designed for the period 2012–2016 (while some of obligations should be performed by 31 March 2017). Apart from the foregoing incentive scheme, there are preferential financing schemes offered by governmental funds and banks (e.g., the National Fund for Environmental Protection and Water Management) addressed to energy-efficiency investments.

iii Technological developments

The Polish government supports the development of RES and CHP generation and investments aimed at energy efficiency, with such investments currently benefiting from, *inter alia*, (1) incentive schemes based on tradable certificates; (2) tax exemptions; (3) reduction of interconnection fees; (4) preferential financing; (5) exemption of ‘prosumers’ from licensing obligations; and (6) support for investments in smart grid and smart metering, etc. Besides this, under the new 2015 RES Act the RES operator will be able to benefit from the new auction system from 1 July 2016 (see Section V.i, *supra*), while RES prosumers will be able to benefit from the feed-in tariff, which will allow for the automatic sale of electricity generated in micro-installations at a price equal to 100 per cent of the electricity market price.

VI THE YEAR IN REVIEW

Polish energy policy is subject to significant changes arising from a need to adopt regulations that would, in particular, strengthen the coal-mining sector, support stable (including coal, lignite, gas and biogas-fired) power generation units, impose increased administrative and tax burdens on onshore wind-farm developers and operators, develop application of smart-grid technology and increase the overall reliability of the distribution grid, as well as ensuring proper levels of security within the Polish energy market, including state instruments to block potential hostile takeovers of energy companies currently controlled by the Polish state. Major developments in the Polish energy market in this year include:

- a* the entry into force of the new RES Act adopted by the Polish parliament on 20 February 2015, which restrains the costs of the RES support system and guarantees stable revenues from RES generation (see Section V.i, *supra*);
- b* legislative work on amendments to the 2015 RES Act and on a draft bill on investments in wind power plants, which is likely to affect negatively wind-farm businesses in Poland (see Section V.i, *supra*);
- c* implementation of the ‘quality regulation’ providing for a potential decrease of tariff revenues as a penalty for the incumbent distribution system operator not meeting the ambitious reliability targets established by the President of the Energy Regulatory Office in respect of power distribution services; and
- d* the entry into force of the Act of 24 July 2015 on Control of Certain Investments, which vests in the Minister of Energy powers of control over energy company takeovers (see Section II.iv, *supra*).

VII CONCLUSIONS AND OUTLOOK

The Polish energy market is still under reconstruction stemming from the implementation of European energy and climate change policies, technological revolution, and a need to foster market competition and replace worn energy assets developed more than 40 years ago. On the other hand, the government is aware of the costs related to reconstruction and it would like to prepare balanced reforms that will not become excessive burdens for the Polish industry and customers. In practice, the delayed reforms and uncertainty with respect to future regulation restrained investments in energy projects (especially development of RES installation and conventional power generation), which may have a negative impact on the future energy security, especially for generation capacities after 2016 when a number of old

and worn power plants will be decommissioned. Therefore, the Polish government currently seems to be determined to complete regulatory reforms to ensure the progress of energy investments and avoid disturbances in the energy market.

Appendix 1

ABOUT THE AUTHORS

KRZYSZTOF CICHOCKI

Soltysiński Kawecki & Szlęzak

Krzysztof Cichocki specialises in significant energy, natural resources, infrastructural and industrial projects. He also represents energy-sector companies before courts in regulatory and access-right matters. Recently he has been advising clients on regulatory and contract matters in respect of licensed hydrocarbon activities in Poland (shale gas). He has been with SK&S since 1998 and became a partner at the firm in 2009. He is a graduate of the Adam Mickiewicz University in Poznań, where he obtained his Master of Laws degree in 1997. In the years 1997–1998 he completed postgraduate studies at the Asser Institute in The Hague and at the Central European University, where he obtained his Master of Laws (LLM) degree in international business law, accredited by the University of the State of New York. He practises as a legal counsel. He is fluent in English.

TOMASZ MŁODAWSKI

Soltysiński Kawecki & Szlęzak

Tomasz Młodawski joined SK&S as an associate in 2006. Tomasz specialises in energy law with special emphasis on law in relation to electricity, the oil and gas sectors, and heating infrastructure. He has advised in several energy projects and assisted energy enterprises in regulatory and court proceedings, including those relating to compensation for stranded costs and incentive schemes addressed to CHP and LNG terminal projects. He has also supported clients in negotiations regarding EPC contracts for generation units. He is fluent in English. He received his master's degree in law from the University of Warsaw in 2007 and practises as a legal counsel.

SOŁTYSIŃSKI KAWECKI & SZŁĘZAK

ul. Jasna 26

00-054 Warsaw

Poland

Tel: +48 22 608 7000

Fax: +48 22 608 7070

krzysztof.cichocki@skslegal.pl

tomasz.mlodawski@skslegal.pl

www.skslegal.pl