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# THE ENERGY REGULATION AND MARKETS REVIEW

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FOURTH EDITION

EDITOR  
DAVID L SCHWARTZ

LAW BUSINESS RESEARCH

# THE ENERGY REGULATION AND MARKETS REVIEW

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THE ENERGY  
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REVIEW

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# EDITOR'S PREFACE

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Our fourth year of writing and publishing *The Energy Regulation and Markets Review* has been marked by significant infrastructure development needs, low oil and gas prices, financial and economic sustainability measures, and carbon reduction programmes.

As many of the world's economies have begun to regain their financial footing following the global economic crisis, we are seeing a strong focus on infrastructure development. India is heavily engaged in providing economic incentives for the development of generation, transmission and distribution facilities, and many countries have acknowledged significant generation development needs to meet growing demand, including in Central Africa, Egypt, Uzbekistan, Indonesia and Malaysia. In the wake of Russia's annexation of Crimea, Ukraine is seeking IMF financing assistance to invest in power sector infrastructure, and New Zealand is looking to build large transmission projects.

We have also seen continued efforts to promote sustainability and development of green energy resources. Denmark has created a climate council and new regulatory requirements to encourage development of green energy and to promote conservation. France has adopted an aggressive new energy efficiency and conservation law that includes a new 'carbon' tax. The United States Environmental Protection Agency has proposed a Clean Power Plan to limit CO<sub>2</sub> emissions from existing generation facilities by 30 per cent by 2030. At the same time, however, a federal court of appeals in the United States has determined that the Federal Energy Regulatory Commission (FERC) had no authority to treat demand responsiveness (a form of conservation) with the same economic value as generation. Korea has been exploring eco-friendly sources of energy independence, and Brazil has encouraged renewable energy development to make up for reduced hydropower in recent years. Even China appears to be working to develop clean, safe and sustainable energy that reduces reliance on coal generation.

Oil and gas prices remain low, which appears to have allowed largely energy-dependent countries (such as Japan) to secure longer-term oil purchases, but appears to have had negative impacts on countries that largely rely upon oil export revenues, such

as Russia, Angola and Iraq. Efforts to reduce reliance on nuclear generation continue to create demand for other energy sources in Germany, Japan and France.

We have seen significant energy sector regulatory reforms in many countries. In Spain and Portugal, there have been efforts to reduce the tariff deficit and promote financial and economic sustainability. Poland has worked to reform its regulatory system to encourage competition and development, while, at the same time, protecting state-owned companies from hostile takeovers. Romania has sought to encourage competition and reduce political interference with the regulatory process. The United States has continued to struggle with how to allocate transmission costs fairly and efficiently under FERC's Order 1000.

Certain countries have continued their efforts to privatise state-owned companies. Turkey has engaged in an effort to privatise its generation facilities. Cyprus is continuing its efforts to privatise its state-owned utility company. India is privatising its coal mines, and Mexico is encouraging private oil companies to bid for exploration and production rights.

On the nuclear energy front, Turkey has moved forward in its efforts to develop its first nuclear generation facility. At the same time, Japan and Korea have sought to reduce their reliance on nuclear energy, and Germany has continued on its path to shut down all nuclear facilities, all in the wake of the 2011 events at the Fukushima facility in Japan.

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 fourth edition of *The Energy Regulation and Markets Review*.

**David L Schwartz**

Latham & Watkins LLP

Washington, DC

June 2015

## Chapter 28

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# POLAND

*Krzysztof Cichocki and Tomasz Młodawski<sup>1</sup>*

### I OVERVIEW

Demand for primary energy sources in Poland is currently estimated at 97.1 million tonnes of oil equivalent (Mtoe) per annum. It is satisfied primarily by coal (41 per cent), oil (23 per cent), natural gas (14 per cent), lignite (12 per cent) and renewable energy sources (9.1 per cent). According to the information published by the Polish Main Statistical Office with respect to 2013, the renewable energy sources (RES) included in the Polish primary energy mix comprised solid biomass (80.03 per cent); biofuels (8.2 per cent); water (2.46 per cent); wind (6.05 per cent); biogas (2.12 per cent); and smaller shares of other sources (municipal waste as well as geothermal and solar heat), with an increasing installed capacity of wind farms.

Local production satisfies the entire hard coal demand and approximately 30 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 66.6 Mtoe per annum and it is based on energy demand of: industry (28 per cent); transport (25 per cent); residential (29 per cent); services (18 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

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<sup>1</sup> Krzysztof Cichocki is a partner and Tomasz Młodawski is a senior associate at Sołtysiński Kawecki & Szlęzak.

cent), and nuclear energy (6.3 per cent). At the same time, final energy consumption should increase to 84.4 Mtoe.

In line with EU policies for the reduction of greenhouse gas emissions, the Polish government continues to take measures aimed at reducing the share of high emission resources (in particular, hard coal) in primary energy consumption in Poland and 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; as well as (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., Sejm and Senat) and thereafter approved by the President of the Republic of Poland:

- a* the 2011 Geological and Mining Law, which provides for general legal framework governing exploration for and exploitation of fossil fuels within Poland (including coal, lignite, hydrocarbons, uranium, etc.) as well as the use of underground reservoirs for storage of hydrocarbons, liquid fuels as well as the carbon dioxide handled within the carbon capture and storage projects;
- b* the 2014 Act on Special Hydrocarbon Tax as well as the 2012 Act on Tax on Extraction of Certain Minerals, which provide for additional tax burdens imposed on entities involved in production of hydrocarbons;
- c* the 1997 Energy Law, which provides for regulation of the entire electricity and district heating sectors as well as 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 case of Emergency in Security of Fuel Supply and Disturbance on Oil Market (Act on Reserves), which provides for certain obligations imposed on entrepreneurs involved in the natural gas and oil sectors, such 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 the 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 Economy as well as 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 the general energy policy of Poland setting general goals to be achieved by, *inter alia*, enforcement of the existing statutes as well as adoption of new legislation.

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

- a* the Minister of Environment, vested with power to grant authorisations for exploration for and exploitation of fossil fuels within Poland as well as for the use of underground reservoirs for storage of hydrocarbons, liquid fuels as well as the carbon dioxide;
- b* directors of mining offices, responsible for supervision over exploration and exploitation of fossil fuels as well as over the use of underground reservoirs for storage of hydrocarbons, liquid fuels as well as the carbon dioxide;
- c* the President of the Energy Regulatory Office, 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) as well as liquefaction and regasification of LNG, (2) approve tariffs, (3) grant exemptions from tariff obligation, (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 as well as the combined heat and power plants, (9) organise 'auctions' selecting the RES installations eligible to benefit from the new support system as in force from 1 January 2016 and (10) control compliance with a number of obligations imposed on energy market participants (including those related compulsory stocks of natural gas, coal and lignite as well as public sale of electricity and gas) and to enforce financial penalties for non-fulfilment of such obligations;
- d* the Minister of Economy and the President of the Material Reserves Agency, responsible for enforcement of compulsory stocks of crude oil and liquid fuels;
- e* the President of the Office for the Competition and Consumers Protection, responsible for enforcement of antitrust regulations (control of mergers and acquisitions, investigation and punishment for conclusion of anti-competitive agreements or abuses of dominant position, etc.); as well as
- 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 CHP installation is always subject to 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, as well as 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 ordered 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 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 as well as the related licence granted by the Minister of Environment, such licences being in each case 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', such procedure being aimed at preselection of entities which do not pose a threat to national security and – in the case of entrepreneurs intending to hold the status of license-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, as well as the best method for the prospection or

exploration and production of the 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 as well as sampling; and
- e* the best remuneration for the mining usufruct right offered by the bidder within the tender process.

The entrepreneur holding the hydrocarbon exploration and production licence is also obliged to establish the security instrument assuring future performance of obligations and duties related to such 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 such 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, such restrictions stemming 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 security of the Republic of Poland.

#### iv Transfers of control and assignments

##### *Transfer of title to energy assets*

As regards transfer of title to the regulated energy assets, such transactions 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, as well as 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 as well as to provide the Minister of the State Treasury with all the legal acts made and resolutions adopted in the course of exercising of their powers as owners or operators of critical infrastructure, including: disposal, alienation, decommissioning, lease or establishment encumbrances over critical infrastructure, as well as adoption of investment, financial or strategic plans or dissolution of company. The Minister of the State Treasury has power to raise objection to and hence invalidate such legal acts or resolutions if performance or enforcement of such act or resolution would pose an actual threat to the functioning, continuity of operation or integrity of critical infrastructure.

##### *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 for certain situations indicated below. Therefore, if any entrepreneur would like to acquire the energy assets within the asset deal and ultimately continue business previously conducted by vendor based on those assets, it is generally required to purchase the regulated assets and apply to the respective authority for a new licence.

Nevertheless, it is possible to transfer energy licence 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 transfer is 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 assignment being effected upon prior consent of the Minister of the Environment to be 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 unbundling of electricity and natural gas transmission/distribution systems operators as well as operators of LNG liquefaction/regasification facilities (transmission, distribution and LNG 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 LNG 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 only one electricity and one gas transmission system operator being appointed in Poland.

In practice, within the past 10 years the State Treasury separated the existing transmission assets previously owned by vertically integrated undertakings (such 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 independent transmission system operator with respect to the 'Jamal' pipeline owned by the vertically integrated company named 'EuRoPol GAZ SA' – a joint venture company of the Polish company PGNiG and Russian company GAZPROM. The foregoing transmission system operators are responsible for development of the respective transmission networks within the territory of Poland as well as expansion of transborder interconnectors. OGP Gaz-System also established its wholly-owned subsidiary named '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, such right to provide distribution services being 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 players 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, such tariffs being developed by a given system operator and subject to review and approval of the President of the Energy Regulatory Office. According to Polish law, the rates set forth in tariffs should reflect actual (so-called 'justified') costs incurred by the service provider in the course of provision of respective services as well as reasonable return. 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. Such 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, the rate of such factors being often established by the President of the Energy Regulatory Office in accordance with its own current regulatory policy in order 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 threat to functioning, continuity of operation or integrity of critical infrastructure, as well as (3) numerous obligations imposed on market players, *inter alia*, the obligation to diversify natural gas supplies, maintain compulsory stocks of crude oil, petroleum products, natural gas as well as coal/lignite used for generation of electricity, 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 commodity exchange named 'Polish Power Exchange' allowing for (1) trading in electricity within the the Polish national electricity system as well as in transborder exchanges (market coupling) with the Swedish electricity system (the latter effected via the SWE-POL link developed on the seabed of the Baltic Sea); (2) trading in emission allowances as well as certificates issued under the incentive schemes addressed to RES and CHP installations as well as 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). According to the respective grid codes, the transactions concluded within the Polish Power Exchange have priority when it comes to their physical performance via transmission system.

### 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 as well as internal by-laws developed by the operator of the commodity exchange and subject to 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 as well as grid codes which are binding on market participants upon their approval by the President of the Energy Regulatory Office.

### iii Contracts for sale of energy

In principle, electricity and natural gas may be traded either via commodity exchange or in the 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 abovementioned 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, as well as

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 (in 2014 – 40 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

As of the time being, the main goals of the Polish legislator and regulators include: (1) to strengthen competition within the natural gas market, which is now subject to the actual monopoly of PGNiG, such competition to be fostered by obligation to sell natural gas via commodity exchange as well as by adoption of more transparent and secure provisions facilitating natural gas exploration and production; (2) to support most efficient CHP and RES generation with the aim to limit at the same time the budget allocated for incentive schemes; and (3) to secure long-term profitability of large conventional system power plants by, *inter alia*, organisation of the power supply capacity market auctions.

## 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 players (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 (such 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; as well as (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 will significantly change the RES support system. In particular, the 2015 RES Act will introduce, as of 1 January 2016, the new auction-based support system under which the auctions shall be carried out at least once a year in order 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 case of RES installations below 0.5 MW; 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 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 S.A. to the RES operators selected within the auction either directly or – in case of RES installations below 0.5MW – through obliged purchasers.

The scope of RES operators eligible to benefit from the new auction-based support system shall be limited due to exclusion of the following types of installations commissioned before 1 January 2016:

- a* hydro power installations of total installed electric power exceeding 5MW;
- b* multi-fuel power plants which are not qualified as ‘dedicated multi-fuel power plants’;
- c* non-CHP installations using biomass, biofuels, biogas and agricultural biogas with installed capacity exceeding 50MWe; and
- d* CHP installations using biomass, biofuels, biogas and agricultural biogas with installed capacity exceeding 150MWt.

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

## **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 completed investments related to energy efficiency, such investments selected within tenders organised by the President of the Energy Regulatory Office. According to the 2011 Act on Energy Efficiency, certain market players (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 (such fee working in practice as maximum level of support available to beneficiaries). The foregoing scheme is effectively

designed for the period 2012–2015 (while some of obligations should be performed by 31 March 2016). 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 as well as investments aimed at energy efficiency, 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 so-called ‘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 new auction system from 1 January 2016 (see Section V.i, *supra*) while the 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 for the price equal to 100 per cent of the electricity market price, while electricity generated in micro-installation with installed capacity below 10kW shall be purchased for a fixed price equal to PLN 450–750/MWh (depending on the type of micro-installation).

## VI THE YEAR IN REVIEW

Polish energy policy is subject to discussions and significant changes arising from a need to adopt more transparent and entrepreneur-friendly regulations which would, in particular, foster competition within the energy market, develop application of the smart-grid technology, alleviate administrative restrictions applicable to exploration of shale gas and facilitate exploration works as well as ensure proper level of security within the Polish energy market, including State’s instruments to block potential hostile takeovers of energy companies currently controlled by Polish state. Major developments in the Polish energy market in 2015 include:

- a* the entering into force of the new law on hydrocarbon licences which provides for certain instruments fostering competition and security within the sector as well as allowing for the granting of hydrocarbon licences to more than one licensee; and
- b* the new RES Act adopted by the Polish parliament on 20 February 2015, which is to restrain the costs of the RES support system as well as guarantee stable revenues from RES generation (see Section V.i, *supra*).

## VII CONCLUSIONS & 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. It seems that reconstruction of the regulatory framework has been delayed in recent years (the new Energy Law, the Gas Law have been discussed for more than four years now), which arises from the fact that the government is aware of the costs

related to such 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 seems to be determined currently to complete regulatory reforms so as to ensure the progress of energy investments and competition as well as to avoid disturbances in the energy market.

## Appendix 1

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# ABOUT THE AUTHORS

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Krzysztof Cichocki specialises in significant energy, natural resources, infrastructural and industrial projects. He also represents energy sector companies before courts in regulatory and access rights matters. Recently he has been advising clients on regulatory and contract matters in respect of hydrocarbon licensed activities in Poland (shale gas). He has been with SK&S since 1998, and in 2009 became a partner of the law firm. He is a graduate of the Adam Mickiewicz University in Poznań, where he obtained a Master of Law 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 a Master of Laws (LLM) degree in International Business Law of the University of the State of New York. He is fluent in English.

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

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